

Violation of Laws and Customs of War: Criminal-Legal and Procedural Aspect

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Abstract

The article aims to study the grounds for the criminal-legal qualification of war crimes and prosecution for their commission. The methodological basis of the study was the dialectical and comparative methods, concrete search methods, methods of system-structural and logical analysis, and the method of generalization. The main results of the study were the determination of the content of the concepts "armed conflict", "war", "war crime", and "laws and customs of war"; consideration of regulatory and legal support in the field of war crimes; establishment of actions or omissions that are violations of the laws and customs of war; clarifying the procedure for prosecution for committing war crimes; summarizing the possibilities of improving legal and regulatory provisions regarding war crimes and criminal punishments for their commission.

Keywords: Military conflicts, Rights Violations, War Crimes, Criminal Liability, Legislation.

Introduction

To date, military operations, including those taking place in Ukraine, prove the importance of observing the principles of the rule of law and recognizing the human being and the citizen as the highest value during armed conflicts and the conduct of hostilities. That is why relevant rules of warfare are considered universally recognized worldwide, some of which are enshrined both at the international level and in the national legislative acts of most states. Considering war crimes in the context of

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violations of the laws and customs of war as a criminal phenomenon, it is worth noting that due to the ambiguity of the practice of their investigation and the limited number (compared to other types of criminal offenses), the issue of prosecution for the commission of these crimes remains debatable. O.V. Vasylenko (2020), analyzing some features of responsibility for violations of international law in military conflicts, emphasized that such responsibility should be considered the collective or individual responsibility of specific offenders. At the same time, D. Akande et al. (2022), studying the issue of individualization of war, noted that states' priorities should be focused on bringing to justice specific persons involved in such crimes. The particular form of responsibility should prevail over the collective one. After all, the practice of applying punishment measures for violations of the norms of waging war only to the state as a participant in a war event shows its ineffectiveness.

R. Bartels (2020), while studying the classification of armed conflicts by international courts, established that to increase the effectiveness of prosecution opportunities for violations of the laws and customs of war, states must, first of all, ensure in their own legislation the principle of certainty of legal norms, which requires that the law was clear and understandable. At the same time, O.V. Chervyakova (2020), researching the mechanisms of responsibility for war crimes, determines that prosecution for war crimes as a component of intermediate justice consists of the following stages: finding out the truth; compensation for damages; directly bringing to responsibility; institutional reformation; creating the latest judicial and extrajudicial mechanisms of a national, international, and mixed nature. Individuals and states that commit violations of the laws and customs of war often escape responsibility, which is due to the lack of evidence base or appropriate regulatory and legal support (Taran, Tarasenko & Cherniavskiy, 2023).

Therefore, the purpose of the study was a comprehensive criminal-legal characterization of the essence of violations of the rules of war, in particular, war crimes, the features of detection and the procedure for bringing responsibility for the commission of war crimes, determining the prospects for improving legislation and practice in the specified area based on the study of relevant legal acts and scientific works.

Materials and Methods

The methods of system-structural and logical analysis played a decisive role in the research work, with the help of which it was possible to study the international

sources of law in the field of war crimes and prosecution for their commission, as well as to analyze the legal basis of a trial for war crimes in Ukraine. In addition, thanks to the dialectical method, it became possible to establish the essence of armed conflict and war, consider the existing definitions of the concept of war crimes, and characterize the legal nature of the laws and customs of war. With the help of the comparative method, it was possible to contrast war crimes with military offenses. In addition, the work used a specific search method and a generalization method, which made it possible to systematize the types of violations of the rules of warfare to find out the specifics of bringing criminal responsibility for war crimes.

The theoretical basis of the research work is the scientific works of Ukrainian, European and American scientists and practitioners in the field of various branches of law, in particular international and criminal, within the limits of the necessity of studying the essence of violations of laws, customs of war and problems of responsibility for such abuses, through the prism of criminal legislation. The provisions of individual works were translated into Ukrainian for an objective understanding of the content of the researched issues. The normative basis of the research is current and prospective legislation in the field of war crimes and criminal liability for their commission, including the Rome Statute of the International Criminal Court (1998), Brussels Declaration on the Laws and Customs of War (1874), Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (2022), Convention (IX) concerning Bombardment by Naval Forces in Time of War (2022), Geneva Convention on the Treatment of Prisoners of War (2022), Criminal Code of Ukraine (2022). The presented scientific research was carried out in three main stages.

A theoretical base was prepared at the first stage of the research, which became the basis for further scientific analysis. In addition, the authors established the legal nature of the concepts of "armed conflict" and "war". Circumstances regarding the state of influence of international agreements and customary law on the formation of states' national legislation in the field of criminal responsibility during military conflicts are determined. The second research stage clarifies the forms and types of criminal liability for war crimes.

At the final stage of the scientific study, based on the results obtained during its conduct, the sweeping conclusions of the study were displayed, which are a summary embodiment of such effects and provide general directions for improving the

regulatory and legal support for war crimes, their qualification, and prosecution for the related war crimes. In general, the results obtained in the course of this scientific research work and the conclusions and recommendations made on their basis can be used in the future when considering problematic issues of responsibility for violations of the customs and laws of war.

Results

General provisions on the rules of war

In general, a military conflict is considered a form of resolution of international or domestic disputes using military forces from both sides. Types of military conflicts include war and armed conflicts. Today, scientists and practitioners often face the question of classifying armed conflicts as international or non-international. At the same time, the importance of determining the type of conflict lies in the possibility of applying specific norms of international law, ensuring the protection of the civilian population, and justifying the use of lethal military means and collateral damage (Bartels, 2020). In turn, the laws and customs of war are considered to be the system of norms of military conduct and the principles of international law, which establish the rights and obligations of parties participating in a military conflict, as well as states that maintain neutrality (Kostruba & Hyliaka, 2020). Moreover, laws are a set of norms that have found their legal reflection in the relevant regulatory legal acts. Instead, customs include established rules that have arisen through their application over time.

Such norms establish the procedure for starting, conducting, and stopping hostilities; the legal status of the civilian population, sick and wounded, prisoners of war; the legal regime of ownership; responsibility for violating the laws and customs of war (Blank, 2017; Iashchenko & Balynska, 2022). In addition, the rules and customs of war provide obligations for the parties to the conflict, among them, the main ones can be identified (Daly, Paler & Cyrus, 2020):

- taboo regarding attacks on civilians, the sick, and the wounded;
- the duty of humane treatment of prisoners of war;
- prohibition of looting, theft of objects of cultural heritage and national values;
- prohibition of damage to critical infrastructure facilities (hospitals, dams, nuclear power plants);

- prohibition of using weapons of mass destruction (for example, nuclear weapons), etc.

Violations of the laws and customs of war should be defined as violations by states, military personnel, officials, or third parties of the overt and unspoken hostilities rules. The relevant authorities are fixed, particularly in international acts and treaties. International humanitarian law, or the law of armed conflicts, is a branch of international law whose norms and principles limit the use of violence during armed conflicts, putting forward the following requirements: to spare those who do not take or have stopped taking direct part in hostilities; limit violence, using it only to the extent necessary to achieve the conflict's goal and weaken the opposing side's military potential (Cyrus Sassoli, 2011).

Thus, United Nations Charter (UN)(1945) defines any acts of aggression, open or closed, both with the use of weapons and without such. By the provisions of the Brussels Declaration on the Laws and Customs of War (1874) which as a result was not ratified, the facts of the seizure, destruction, or deliberate looting of religious, artistic, and scientific institutions, historical monuments, were subject to prosecution by the competent authorities. Artistic and scientific works. The norms of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1899), provide that during a siege and artillery shelling, all necessary measures for the preservation of religious, artistic and scientific buildings if they are not used for military purposes. Convention (IX) concerning Bombardment by Naval Forces in Time of War (1907) introduced a norm according to which the right of belligerents to use means of destroying the enemy is not unlimited.

According to the Geneva Convention on the Treatment of Prisoners of War d(1949) as well as additional protocols to it, the use of poisons, the killing or wounding of an incapacitated enemy, the use of weapons of mass destruction, etc., is prohibited during hostilities. The Rome Statute of the International Criminal Court⁸ established the concept of a war crime as a violation of the norms of international humanitarian law. It is worth noting that at the international level, according to the Rome Statute of the International Criminal Court (1998), the following crimes are distinguished: crimes of genocide; crimes against humanity; war crimes; crimes of aggression. Within the scope of the study, authors provide own classification of types of violations of the laws and customs of war and those related to them (Table 1), based on Rome Statute of the International Criminal Court (1998).

Table 1. Classification of types of violations of the laws and customs of war and related to them

<i>Type of violations</i>	<i>Signs of violations</i>	<i>Violations that belong to a specific type</i>
Genocide	<p>1) are carried out against a specific social group (national, ethnic, racial, or religious);</p> <p>2) their goal is to wholly or partially destroy such a social group.</p>	<ul style="list-style-type: none"> – murder; – causing severe bodily harm or mental disorders; – the creation of conditions for complete or partial physical destruction of the group; – measures to prevent childbirth; – forcible transfer of children.
Crimes against humanity	<p>1) can only be committed against the civilian population;</p> <p>2) scale and systematicity of violations;</p> <p>3) the performer is aware of the scale and systematicity of his actions.</p>	<ul style="list-style-type: none"> – murder; – extermination; – enslavement; – deportation or forced displacement of the population; – imprisonment or other cruel deprivation of physical freedom; – torture; – rape or any other form of sexual violence; – persecution of any social group; – enforced disappearance of people; – the crimes of apartheid; – other inhuman acts of a similar nature.

War crimes	1) can be committed only during a murderous conflict (international or domestic);	<ul style="list-style-type: none">– premeditated murder;– torture;– intentional infliction of severe suffering, serious bodily injury, maiming, or harm to health;
	2) are multi-objective crimes;	<ul style="list-style-type: none">– large-scale destruction or appropriation of property;
	3) there is a gross violation of international law;	<ul style="list-style-type: none">– the compulsion to serve in the armed forces of an enemy state;– intentional deprivation of the right to a fair trial;
	4) presence of intention and awareness of the consequences of one's actions.	<ul style="list-style-type: none">– illegal deportation, transfer, or deprivation of liberty;– taking hostages;– deliberate attacks on the civilian population;– deliberate attacks on civilian objects;– attack or shelling of unprotected cities, villages, or buildings (including educational, religious institutions, etc.);– killing or wounding military personnel who have laid down their arms or have no means of protection;– improper use of the flag or military insignia, enemy or UN uniform;– moving its own civilian population to the occupied territories;– statements that there will be no mercy;

- destruction or capture of enemy property;
- looting of settlements;
- use of prohibited weapons, ammunition, gases, liquids, etc.;
- insulting and humiliating addresses;
- rape or other sexual violence;
- intentionally starving the population or depriving them of items for survival;
- recruiting children into their own armed forces;
- passing judgments and their execution without a trial.

- Aggression**
- 1) has an interstate character;
 - 2) is a gross violation of the United Nations Charter;
 - 3) does not apply to self-defense;
 - 4) can be done without using a weapon.
- the appointment, preparation, initiation, or commission of an act of aggression by the head of one state against the sovereignty, territorial integrity, or political independence of another state through the use of military means;
 - declaration of war;
 - bombing;
 - temporary occupation;
 - invasion or attack using military force;
 - sending armed mercenaries;
 - blockade of ports or coasts.

Therefore, in the context of the codification of the laws and customs of war, it is appropriate to state that the states of the civilized world should focus not only on the development of new rules in the field of military conflicts (treatment of the sick

and wounded, treatment of prisoners of war, means of warfare) but also that it is necessary to promote prohibition of war as a way to resolve the conflict in general (Graditzky, 2018).

War crimes and features of their qualification

Analyzing the development of such a criminal-legal phenomenon as war crimes, it should be noted that most scientists concluded that the definition of a war crime appeared only in the second half of the 19th century. The term was first enshrined in The Charter of the International Court of Justice of 1945, which recognized as violations of the laws and customs of war murders, ill-treatment or deportation of civilians in occupied territories, killing or ill-treatment of prisoners of war, killing of hostages, theft of property, unjustified destruction of settlements, etc. (United Nations Charter, 1945). Despite the significant number of types of war crimes, there are standard features of such crimes, among which the following can be distinguished:

- can be committed only in the presence of an armed conflict;
- committing acts that are significant violations of the provisions of international law;
- the specified actions, in most cases, are committed by military leaders or military personnel;
- persons who are under the protection of international norms are the object of war crimes;
- committed intentionally or out of gross negligence.

In the sense of the Rome Statute of the International Criminal Court (1998), war crimes include significant violations of the Geneva Convention on the Treatment of Prisoners of War (1949) and other violations of laws and customs during international armed conflicts. Therefore, war crimes are serious non-observance of prohibitions enshrined in the treaty and customary law. It is necessary to realize that, first of all, every service member, military unit, and all military leaders must know the rules and requirements for legal and practical actions during an armed conflict (Yara, 2022). At the same time, responsibility for violations of the laws of war – individual criminal or state – is an equally important tool for enforcing legal norms (Blank, 2017). Meanwhile, there is an opinion that the international community's efforts to raise awareness at the international level through the normative definition of the crimes of "genocide", "against humanity", "war crimes", and "aggression" cannot always contribute to the prosecution of alleged war criminals. Still, sometimes they can even cause new manifestations of criminality (Kastner, 2015). Thus, in this context, the

United Nations and the International Court of Justice spoke out against the use of nuclear weapons, as such use violates the principles of international law. At the same time, as long as there are atomic stocks, there will always be a desire to use nuclear weapons in wartime. In addition, all international crimes are united by standard mandatory features:

- the presence of a clear threat of harm to international norms;
- the illegality of the committed action, presence of guilt;
- a unique approach to establishing the type and limits of responsibility.

As for the properties of a war crime, they include:

- committing a crime in the context of an international or non-international armed conflict;
- understanding by the subject of the crime of the presence of the crime itself;
- the relationship between illegal actions and the armed conflict must be established using an analysis of the methods of execution or assistance to individual armed structures and the direction of the action against objects or persons unrelated to the conflict (Chervyakova, 2020).

In connection with the peculiarities of the composition of a war crime and the concept of this category, the legal regulation of aspects of responsibility for the commission of war crimes, provided in particular by international laws and customs of war turns out to be specific. It follows from this that war crimes are significant violations of contractual or customary norms that are criminalized at the national and international levels and are the most serious in terms of their consequences, which encroach on the issues of international law and order, human security, and peace, and are committed because of an existing armed conflict of a global or non-international scale (Chervyakova, 2020). It is also worth considering the prerequisites for committing war crimes. In particular, complex ethnopolitical conflicts, where the killing of members of another ethnic group may be "normal" behavior, are the exception rather than the rule. Still, in such cases, the usual observance of the laws and customs of war is impossible. One of the most immoral manifestations of a war crime is sexual violence. Thus, the Rome Statute of the International Criminal Court (1998) includes, in particular, rape. These cases are characterized by their stealth. Qualifying signs of rape as a war crime are:

- committing such violence in the conditions of a military conflict;
- the injured persons belong to the civilian population;

- the subject of the crime is a military serviceman or a person participating in the military or other military operations;
- carried out through physical or psychological coercion;
- often, the crime's purpose is to obtain information related to the military conflict from civilians.

The issue of criminal responsibility for committing war crimes

Legal responsibility is understood as a form of social responsibility, which manifests itself in the state's use of specific coercive measures against the guilty person, provided for by the sanctions of legal norms in the presence of all the elements of a particular offense (Tacij, Tjutjugin & Grodeckij, 2014). In the latest international law, a regime of responsibility for violations of the rules and customs of war has emerged, which will prevent crimes and strengthen the protection of human rights (Vasylenko, 2020; Barabash, Serdiuk & Steshenko, 2020). Moreover, although the elements of transitional justice include common names and concepts, forming a holistic idea of responsibility in each state, mechanisms and processes still differ in content, which is also influenced by the type of conflict (international or non-international), cultural identity (Daly, Paler & CyrusSamii, 2020). As can be seen from African countries' experience regarding implementing the concept of transitional justice, it is initially necessary to identify means of assessing the viability of the norms of international criminal law (Beresford & Wand, 2020). Meanwhile, most violations of the rules and customs of war are carried out because non-state actors are often belligerents, particularly during irregular conflicts. The specified circumstances determine the difficulty of bringing such subjects to justice for committing war crimes.

Identifying those responsible for war crimes can sometimes be too difficult to open criminal proceedings. What reveals unacceptable risks: the risk of impunity or prosecution of innocent persons (Halajova, 2020). Often after specific military conflicts, evidence of falsification of events or facts to cover up crimes or to create the false impression that civilian deaths occurred only when justified by hostilities rules is revealed. Therefore, international law imposes responsibility on commanders who, given the circumstances, should have known about the commission of war crimes (Guilfoyle, Kyriakakis & O'Brien, 2022). The International Criminal Court considers violations of international laws and customs of war in The Hague, which has been operating since 2002. The Court may consider a specific case based on a state complaint, as well as at the initiative of the Prosecutor of the Court or an international

body. The trial at the International Criminal Court consists of the following stages: preliminary processing; conducting an investigation; initial review; trial; appellate review; enforcement of a court decision (Lapkin et al., 2019). The tribunals are empowered not only to prosecute individuals suspected of criminal conduct, which at the same time is part of the violations of the state to which such a person's behavior relates. Courts can also seek damages from victims of war crimes. In addition, the qualification of violations as war crimes implies several other consequences (Steshenko, 2023). Thus, for example, restitution serves as the only remedy against the unlawful act of looting or confiscation of cultural property during the war, as long as the stolen property is identified or in custody. Even further peace negotiations do not cancel the right to restitution, which has been repeatedly confirmed in practice.

The functioning of effective procedures and mechanisms of responsibility for crimes during military conflicts in the state contributes to increasing the effectiveness of the use of the military forces of this state. Moreover, the fact that the state strives to fulfil its international legal obligations contribute to general trust in the law (Lubell, Pejic & Simmons, 2019). The International Criminal Court, during the qualification of war crimes, establishes mental, material, and essential elements of crimes. Instead, the criminal legislation of Ukraine considers war crimes using such elements as the object, the objective side, the subject, and the subjective side. It is worth paying attention to the fact that the current Ukrainian legislation does not establish responsibility for crimes against humanity at all.

The disposition of Art. 436 Criminal Code of Ukraine (2001) (war propaganda) should contain not only the simple composition of the criminal offense but also include other essential circumstances in modern conditions, for example: committing an illegal act using mass media or communication networks; committing an action by an official who occupies a responsible position, as well as an official who occupies a mainly responsible position (Boyd-Barrett, 2023). Also, the composition of criminal offenses provided for by Art. 416, "Violation of flight rules or preparation for them", Art. 417, "Violation of the rules of navigation", Art. 427, "Surrendering or leaving the means of war to the enemy", Art. 429 "Unwillingly leaving the battlefield or refusing to act with weapons", Art. 430 "Voluntary surrender", Art. 432 "Looting" (2001). The above determines the need to quickly bring criminal sanctions for the commission of war crimes in Ukraine into compliance with the norms of international law, considering the military actions in this state.

Discussion

The study of sources of legal literature allows us to assert the absence of complex special studies devoted to the problem of violation of the laws and customs of war in the context of criminal law. To date, the provisions on the partial regulation of the legal nature of war crimes, the specifics of their qualifications, and prosecution for the commission of these crimes are enshrined in The United Nations Charter (1945), Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1899), Convention (IX) concerning Bombardment by Naval Forces in Time of War (1907), Geneva Convention on the Treatment of Prisoners of War (1949), Rome Statute of the International Criminal Court (1998) and national legislative acts in the specified area, in particular the Criminal Code of Ukraine (2001).

Here one can agree with O.V. Vasylenko (2020), who proves that international legal acts in the field of military conflicts, by the mere fact of their existence, reveal their own specific meaning in the system of international relations because they are applied, in most cases, in the case when the parties have not reached a peaceful agreement on the resolution of the conflict. At the same time, there are violations of the laws and customs of war. V.P. Pylypenko (2021) divides scientific positions on war crimes into two categories: today, any armed conflict involves a significant public danger for all states, which requires the improvement of the mechanisms of legislative regulation of such disputes; the development of the relations of individual countries with the International Criminal Court only under the condition of temporary usefulness for the satisfaction of several appeals and simultaneous exclusion from full cooperation with the Court contributes to the emergence of double standards in the field of criminal prosecution for war crimes.

Regarding the activities of the International Criminal Court, it is necessary to recognize the mandatory ratification of the Rome Statute of the International Criminal Court (1998) for every state that intends to submit an appeal to this Court and to simplify the procedure for such ratification, including in conditions of martial law. These circumstances can become the most effective method of avoiding state and individual responsibility for war crimes. Regarding prosecution in international criminal law, N. Lubell et al. (2019) define them as an integral component of the obligation to prosecute crimes under international law.

G. Paola & G. J. Abhimanyu (2019), studying the issue of responsibility for war crimes, concluded that non-state actors who must forcibly comply with international

norms should also be subject to criminal prosecution. This will make it possible to individualize criminal responsibility for war crimes and bring justice in this area to a new level. As noted by K.Br. Carlson (2018), a decision on individual responsibility in war crimes must be preceded by a thorough and fair consideration of all the circumstances of the commission of the crime. Otherwise, it will lead to unbalanced individual punishments that will not be legal and socially fair.

X.J.R. García de León (2021) proves that the automation of military processes (use of special equipment), which is gaining rapid development, can become a problem of responsibility for war crimes. This will enable potential war criminals to hide their violations of the rules of warfare qualitatively. Therefore, the need to develop new methods of documenting war crimes is evident. O. Steshenko (2023) claims that rationalizing such a legal phenomenon as responsibility for war crimes on the international plane will contribute to developing effective international legal mechanisms to protect the population from the consequences of military conflicts. At the same time, it should be noted that the improvement of the institution of responsibility for war crimes is possible with the participation of both international bodies and each of the states. In addition, other issues remain unresolved, including the possibility of refuting evidence; ensuring the right of suspects to defense; notification of criminal prosecution; review of the court decision in case of its adoption without the participation of the accused person or the state; guarantees of the rights of the accused. One can also support the opinion of O.V. Chervyakova (2020) that the improvement of the prosecution procedure for war crimes in Ukraine should include the following:

- implementation of relevant legislative changes;
- the end of the ratification process of the Rome Statute of the International Criminal Court (1998);
- professional development of officials;
- taking informational measures regarding clarifying the principles of international law, the content and signs of war crimes, their composition, and the procedure for documentation and investigation (Billah, 2021).

Therefore, analyzing the available scientific positions regarding violations of the laws and customs of war, as well as regarding responsibility for war crimes, it can be seen that compelling attraction to both individual and collective responsibility is possible only in the case of national legal consciousness of each individual state and the presence of high-quality interstate cooperation.

Conclusions

As a result of the conducted research, it was established that, unlike an armed conflict (any armed conflict with the use of military resources), war is a broader legal concept and is a direct way of resolving a dispute between certain social formations by conducting hostilities between the respective armed forces formations, to take other people's material or human resources. It was determined that the laws and customs of war are the systems of norms of military conduct and principles of international law that define the rights and obligations of warring parties and third parties, which are established, in particular, in international acts and treaties. It was found that violations of the laws and customs of war include violations by states, military personnel, and officials of public and private rules of conduct of hostilities. A separate classification of types of violations of the laws and customs of war and those related to them was developed, thanks to which it was possible to establish that war crimes are criminalized serious violations of contractual or customary norms that encroach on issues of the international legal order, human security, and peace, committed against the background of armed hostilities conflict. Instead, it is determined that war crimes include criminal acts dangerous to a society dedicated during military service by relevant officials.

It was revealed that the International Criminal Court and national courts apply different rules to qualify war crimes. Thus, the Court establishes mental, material, and essential elements of crimes, and federal courts, including in Ukraine, are the object, objective side, subject, and subjective side of the crime. Moreover, the International Criminal Court process consists of preliminary processing, investigation, initial review, trial, appellate review, and enforcement of the decision. The need to bring national legislation on sanctions for war crimes into compliance with the provisions of international humanitarian and criminal law and ratification by states of the R Rome Statute of the International Criminal Court is considered. The materials of this article can be used when introducing changes and additions to existing international acts in the field of military conflicts and the Criminal Code of Ukraine, as well as when prosecuting war crimes.

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