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Introduction

Anatomy of Empire from Rome to Washington

I

Le droit a ses époques
"Pascal"

Of all the terms in the political lexicon, "empire" is one of the most elusive and among the most contentious. Achaemenid Persia, Ancient Macedonia, Rome, Parthia Byzantium, Ottoman Turkey, China, Vishanagar, Assyria, Elam, Urartu, Benin, Maori New Zealand, Peru and Mexico, Nazi Germany, the Soviet Union – even the United States, and the European Union (EU) – to name but a few, have all been described as "empires".[1] What all of these – other than either the United States or the EU – share in common with one another, apart from the obvious fact that they no longer exist, are four things: they were all (relatively) large; they were all believed to be, either actually or potentially, universal; they were all states in which one ethnic or tribal group, by one means or another, ruled over several others; and for the most part, most of them have been acquired by conquest.[2] The belief that a people has an inalienable right to be governed by one of its own own kind, whether real or imagined, – what the anthropologist Marshall Sahlins once called the "quaint Western concept that domination is a spontaneous expression of the nature of society" – is relatively recent and exclusively of European origin. "Eat-me" says the Fijian commoner in deference to his chief, because he knows that all rulership is a form of cannibalism and that the first rule of cannibalism is that no one eats his own kind.[3]

Empires are now no more. But they have always been a more frequent, more extensive, human experience than tribal territories or modern nations have ever been. Rome lasted for some 600 years in the west and for over a millennium longer in the East. The Ottoman Empire lasted for more than 600 years, and the Chinese, although governed by successive dynasties, for more than 2,000.[4] And endurance was not all. Empires also covered far

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larger areas and included far larger populations than any previous or subsequent state forms. By the time he died in 323 BCE, Alexander the Great was the ruler of an empire – ramshackle and transitory though it was – which reached from the Adriatic to the Indus, from the Punjab to the Sudan. At its height in the second century CE the Roman Empire reached all the way from the Atlas Mountains in the south to Scotland in the north, and from the Indus valley in the east to the Atlantic in the west, a territory of about 5 million square miles (the continental United States is a little more than 3.5 million) with a population which has been estimated at about 55 million. In 1400, the empire of "Timur the Lame" – Christopher Marlowe's Tamburlaine – ran from the Black Sea to the gates of Kashgar. The lands of the Ottoman Sultanate, which in the thirteenth century had been a small Anatolian province of *ghazi* ("holy") warriors sandwiched between the Byzantine Empire and the Seljuk Turks, had by the beginning of the sixteenth century extended itself to more than 10,000 kilometers from Hungary to Central Asia. By the time the armies of Francisco Pizarro reached Peru in 1532, the domain of the Inka, which in the late fifteenth century had been limited to the region around Cuzco, stretched north though what are today Peru, Ecuador, and Columbia and south into Bolivia, northern Chile, and northwest Argentina. In 1923 the British Empire, territorially the most extensive ever, occupied some 21 million square miles.[5] By comparison most of the world's nation states are barely more than a century old and, with the exception of post-Soviet Russia and the United States, relatively small; most of them have also emerged out of the ruins of one kind of empire or another.

Yet, while large, multiethnic states may have been the common experience of much of mankind, the concept of an "empire", and of something which in the nineteenth century came to be called "imperialism", is largely confined to Europe and Asia. The word "empire" itself, and all its variants – "emperor", "imperialism", and so on – derive from the Latin word *imperium*, which originally described nothing more than the sphere of executive authority exercised by the Roman magistrates. *Imperator* "emperor" was originally a generic term for all Roman commanders, and it was not until the second century CE, and not consistently even then, that it became restricted to the supreme ruler of the Roman world – who also had other equally significant titles, *Augustus* "Revered One", *Princeps*, "Chief man of the state" *Pater Patriae*, "Father of the State", and *Caesar*, which was originally a family name and from which both the German Kaiser and the Russian Czar derive.

The conception of an "empire" in Western Europe, and all that that subsequently came to imply, was essentially Roman creation. As the English historian J. R. Seeley remarked in 1883, with characteristic nineteenth-century hyperbole, "this great phenomenon [the Roman Empire] stands out in the very centre of human history, and may be called the foundation of the present civilization of mankind".[6] Roman history offered a model (although in practice it was often very poorly understood)

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for all the later empires of Western Europe with which the essays in this volume are concerned. This is most obvious in the grandiose allusions to Roman imperial architecture with which the capital cities of Europe, London, Madrid, Vienna, Berlin, and, of course, Washington are filled; and in the adoption of romanticized Roman dress on the statutes of nineteenth-century imperial functionaries. However, it went far deeper than that. Above all the term empire designated an extended polity bound by a body of law. When in 1788, the great Indologist, linguist, and jurist Sir William Jones began the Herculean task of harmonizing the various legal systems which prevailed in India, he told the governor-general Lord Cornwallis that his new code would give to the people of the British Raj "security for the due administration of justice among them", and he compared this to the great codes of the Roman Law, which in the sixth century CE the Roman – Byzantine – Emperor Justinian "gave to his Greek and Roman subjects".[7] For Jones, and for most of its servants, the "British Empire" was, like its Roman antecedent, above all, a legal order.

The law was the central component of what the first–second century theologian Tertullian called *Romanitas*, "Romaness", something which was more or less coterminous with what, ever since the eighteenth century, has been called "civilization": the lure of a more desirable, more comfortable, more stable, as well as a more just, way of life than any which the "barbarians" who came under Roman rule could have enjoyed beyond the limits of the Roman world. To survive for long, all empires have had to win over their conquered populations. The Romans had learned this very early in their history.[8] "An empire", declared the Roman historian Livy at the end of the first century BCE, "remains powerful so long as its subjects rejoice in it."[9] And rejoice in it they very largely did. When the Western Empire fell, it was destroyed by recently arrived Gothic tribes from its northern and eastern borders. None of those who lived at the core of the Empire – the Gauls, the Dacians, the Iberians, and even the more distant Britons – chose rebellion as the Asians and Africans under later European rulers would do. And even the Goths did not wish to bring an end to Roman rule so much as to appropriate it for themselves. "An able Goth wants to be like a Roman", Theodoric king of the Ostrogoths once remarked. "only a poor Roman would want to be like a Goth."[10] Rome had had a lot to offer its conquered populations: architecture, baths, and the ability to bring fresh water from distant hills or to heat the rooms of marble-lined rooms in villas in the wilds of Northumberland. The most desirable of all, however, was citizenship – a concept which, in its recognizably modern form, the Romans had invented and which, ever since the early days of the Republic, had been the main ideological prop of Roman world. Not all of Rome's subject peoples wished for these things; but if a substantial number had not done so, the empire could not have survived as long as it did. The Romans, admitted the English liberal John Stuart Mill in 1859, "were not the most clean-handed of

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conquerors". Yet, he went on to ask, "Would it have been better for Gaul and Spain, Numidia and Dacia never to have formed part of the Roman Empire?"[11] For Mill, as for the generations of apologists for empire who preceded – and succeeded – him, the clear answer was no.

Rome was, as all successful empires have had to be, an essentially open society. She had, observed an admiring Niccolò Machiavelli, created a world empire precisely by "freely admitting strangers to her privileges and honours".[12] He was echoing a vision of the empire which the Romans themselves had carefully cultivated since the days of the late Republic. When in 212 CE the emperor Caracalla granted citizenship to all the free inhabitants of the empire, a common bond was created, at least in theory, which extended the Roman *civitas* to all the many peoples of which the empire was composed. "Those within the Roman World", declared the "Antonine Constitution" as it is known, "have become Roman citizens". This was, however, far from being an unmixed blessing. In his great treatise on the laws of war, *De iure belli ac pacis* of 1625, the seventeenth-century Dutch humanist Hugo Grotius (whom we shall meet again in Chapter 5) offered a rather less benign view of the ideal of Roman citizenship. There were, he argued, two forms of what he called "moderation in obtaining empire". The first – the Roman – was to attempt to make a "common county of all that were under its dominion". The second, "the method favoured by Cyrus and Alexander the Great" was "to leave the conquered, either kings or people, their own government".[13]

In Grotius' account, what Caracalla had intended was that all those males who "lived under the dominion of the Roman empire" should be "made capable of receiving the Honours and enjoying the privileges of real citizens of Rome". What, however, it had *not* meant was that the "spring and original of empire was in any other people except the people of Rome". Or, as the historian Edmund Gibbon later remarked, what he called sarcastically, "the prodigality of Caracalla" had created a situation in which "reluctant provincials were compelled to assume the vain title and the real obligations of Roman citizens".[14] Whereas Alexander and Cyrus had supposedly divided sovereignty, *imperium*, with the peoples they conquered, the Antonine Constitution had simply imposed citizenship without consent, thus transforming what, under the Republic had been the guarantor of individual freedoms, into the extension of the unquestioned imperium of the Caesars. From there it was but a brief step to declaring that Rome was the "common homeland" of the entire world. Citizenship, however, had also performed the miracle of transforming all those who came under its law into Romans while at the same time leaving them in full possession of their previous ethnic, religious, and cultural identities. Tertullian warned those Christians who might have been tempted to see their new faith as a reason for political dissent: "This empire of which you are servants is a lordship over citizens, not a tyranny."[15]

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Modern law derives ultimately from Roman law, and Roman law was created, in large part, to serve the needs of a multiethnic empire. The very vocabulary of citizenship itself carried with it the idea of a society which was always ready to accept outsiders.[16] The Latin word *civis* ("citizen") derives from an Indo-European root connoting the idea of the family and, in particular, of an outsider admitted into the family – in other words, a guest. It is perhaps, therefore, best translated not as "citizen" but as "fellow citizen". A *civis* was a member of the *civitas*, and although this was also a term used to describe the whole Roman world, it was not so much a place as a body of rights and duties: a construct of law. It was in the formulation of the great Roman poet of the first century CE Virgil – Dante's "poet of Empire" – the place where the "wild races have been gathered together by Saturn and given laws".[17] As such it could only ever be available to the whole of mankind. "In all your empire all paths are open to all", the Greek orator Aelius Aristides told the people of Rome in CE 143 or 144. "No one worthy of rule or trust remains an alien, but a civil community of the World has been established as a Free Republic under one, the best, ruler and teacher of order; and all come together as into a common civic centre; in order to receive each man his due."[18] The emperor Antoninus Pius – whom Aristides may have been addressing – was not only "Lord of all the World", *Dominus totius orbis* – a title he was the first to adopt – he was also, as he said of himself, "guardian (*custos*) of the world".

All the later European empires did the best they could to follow at least part of the example Rome had set them. The French and even the Spanish – who for most Europeans had, by the late sixteenth century, emerged as the paradigm example of all that a true empire should *not* be – had attempted to create something resembling a single society governed by a single body of law.

Rome may have been exceptional, and Aelius himself was surely exaggerating. But although the Romans were the only ones to have developed a legal concept of citizenship as we understand it today, they were by no means unique in their inclusiveness. Most of the early empires were similarly multicultural. All made attempts to incorporate the various groups of which their empires were made into some larger cosmopolitan whole. The Achaemenid Persians governed through local rulers, called Satraps ("holders of power") – a system also adopted by Alexander – and they commanded armies made up of conscripts from all across Asia. The Ottomans, although there was never a Sultan who was not descended from Osman, the founder of the dynasty, relied heavily on non-Turcoman, and sometimes even non-Muslim, subjects; and although, in accordance with Islamic law, all those who refused to convert to Islam had to pay special taxes and wear distinctive clothing, they were generally free, under what was called the *millet* system, to live by their own laws and held responsible to their own religious communities.

Those empires, or would-be empires, which made no attempt to involve their subject peoples into some kind of larger political community, could not

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hope to last for long. The Third Reich – possibly the shortest-lived empire in history – is a case in point. Had Hitler been willing to involve the "collaborators" throughout Europe – of which there were many – into positions of power, had he chosen to rule through, rather than over, his conquered peoples, the outcome of the Second World War might have been very different.

Contrary to popular image, most empires were, in fact, for most of their histories, fragile structures, always dependent on their subject peoples for survival. Universal citizenship was not created out of generosity. It was created out of need. "What else proved fatal to Sparta and Athens in spite of their power in arms," the emperor Claudius asked the Roman Senate when it attempted to deny citizenship to the Gauls in Italy, "but their policy of holding the conquered aloof as alien-born?"[19] When Hernán Cortés besieged the Aztec capital Tenochtitlan in 1521, he did so at the head of a small ragtag army of Europeans and of a very large force of indigenous "allies", mostly Tlaxcalans, without whose assistance it is unlikely that he would have been successful. The British in India could never have been able to seize control of the former Mughal Empire without the active, and sometimes enthusiastic, assistance of the emperor's former subjects. Without Indian bureaucrats, Indian judges, and above all Indian soldiers, the British Raj would have remained a private trading company. At the battle of Plassey in 1757, which marked the beginning of the East-India Company's political ascendancy over the Mughals, twice as many Indians as Europeans fought on the British side.

This is not to diminish the very high level of violence which any form of imperial expansion has always necessarily involved. Nor is it meant to disguise the fact that, although the British, for instance, elevated a select number of Indians to positions of high administrative responsibility and even graciously bestowed titles on some of them, men like Satyendra Prasanno Sinha, who in 1919 became Baron Sinha of Raipur and went on to be the governor of Bihar and Odisha, were very much the exception rather than the rule. No Indian was ever given any position which might have conferred on him any degree of political authority within the metropolis itself. There was never any equivalent, nor could there be, of the first–second century Roman emperor Septimius Severus, a recently Romanized man of Punic origin from Leptis Magna (in what is now Libya) and who, on all accounts, spoke Latin with a strong regional accent, or of the great reforming emperor of the third century, Diocletian, the son of a freedman from Dalmatia, or of his successor, Galerius, who had begun life herding cattle in the Carpathians. And no African, Native American, Polynesian, or Australian Aboriginal was ever given any formal role in any European colonial government.

It remains the case, however, that the once commonplace portrayal of empire as an uncomplicated struggle between unbridled and unprincipled European exploiters and defenseless indigenes, although it certainly applied to some regions of the world (Australia, for instance, and parts of Africa) is, if only for simple logistical reasons, a vast and crude

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oversimplification. Even the Spanish Empire in America, which is frequently represented as bloody tyranny aimed at annihilating, or enslaving, the Amerindian populations, could not, in fact, have survived the first three decades after the initial conquest without the active participation of native rulers. In 1664, the French had followed Caracalla's example by decreeing that all the indigenous populations of New France who had converted to Christianity should "be registered and counted as denizens and French natives, and as such entitled for all rights of succession, goods, laws and other dispositions".[20] (No non-Europeans, however, were ever promoted into even the lowest ranks of the French aristocracy, nor did any of them choose to settle in metropolitan France.)

Claims to be providing the conquered peoples with an ordered law-governed society, which they lacked and should desire, inevitably involved an appeal to a set of universal values, and frequently an assertion of the right to universal rule. This, too, is by no means limited to Rome, or to Europe. Universalism, like the institution of monarchy with which it has always been closely associated, was probably first brought into Europe from Asia by Alexander the Great. The Roman, and subsequently European, conception of empire was unusual, however, in that the legal formulation of imperium was, from early on, merged with a late Stoic notion of a single human race – united, to use the phrase of the great Roman jurist Cicero – into "a single joint community of gods and men". On this account the Roman Empire became not merely a political authority; it became the embodiment of the Stoic notion of the *koinos nomous*, the universal law for all mankind.

Stoicism, and by implication cosmopolitanism, was therefore always closely, if uncomfortably, associated with the idea of empire. The founder of Stoicism, Zeno of Citium, in the third century BCE, is said to have told his followers: "We should all live not in cities and demes [tribal groups], each distinguished by separate rules of justice, but should regard all men as members of the same tribe and fellow citizens; and ... there should be one life and order (*koinos*) as of a single flock feeding together on a common pasture." Over the centuries this remark has been much quoted in defence of a cosmopolitan world. However, the context from which it comes is rarely mentioned. That is perhaps because Zeno's words have survived for us only because they were recorded by the first-century Graeco-Roman philosopher and biographer Plutarch, and Plutarch bothered to repeat them only because what he saw as embodying Zeno's "dream or, as it were shadowy picture, of a well-ordered and philosophical community" was the empire of Alexander the Great.[21] For Plutarch, cosmopolitanism did not so much mean making each man a citizen of the world as it meant making the world into a single body of citizens. If all humanity was to be one, then humanity should belong to one community, one city, one *polis*. For Zeno possibly, and for Plutarch certainly, that city had been Alexander's empire. For the Romans it could clearly only be Rome, or more precisely, the Roman *civitas*. The common

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law for all humanity, the *koinos nomos*, insofar as it had any content at all, was originally conceived as a Greek law, not the happy multicultural amalgam which has so often been made of it. Similarly, what Cicero and his successors understood by the "common law of humanity" was, in effect (as we shall see in Chapter 2), the law of the Roman *civitas* – the *ius civile* – extended to non-Romans.[22]

The reputation of Rome as the bearer of a new kind of universal order was greatly enhanced, in the minds of later generations at least, under the Antonines – the "Five Good Emperors" as they have come to be known – from Nerva (reigned 96–8 CE) to Marcus Aurelius (161–80), the last of whom was a self-declared Stoic cosmopolitan. They seemed to have erased the memory of their famously reprobate predecessors, Nero, Tiberius, and Caligula, and could indeed have been said to have brought peace, prosperity, order, and justice to what most of its citizens thought of as the "world". Centuries later, Edward Gibbon, looking back from well beyond the disasters which were soon to befall this Eden, declared: "If a man were called upon to fix the period in the history of the world, during which the condition of the human race was the most happy and prosperous, he would, without hesitation, name that which elapsed from the death of Domitian to the accession of Commodus." It was, he added, a time when "the Roman Empire comprehended the fairest part of the earth and the most civilized portion of mankind".[23]

The Christians, who embraced another type of cosmopolitanism, had similarly seen in the Roman Empire the embodiment of their own aspirations. God, it was said, had chosen Rome to unite the cosmos so that the birth of Christ might reach into – if not quite every part, then certainly most of – what the Greeks called the *oikoumene*, the "inhabited world". For the pagan Pliny it had been the *numen* of the gods which had been responsible for Rome's bid to "give humanity to man". For the Christians it had been the will, *voluntas*, of their God.

"God taught nations everywhere," wrote the fourth-century Christian panegyrist Aurelius Prudentius, "to bow their heads beneath the same laws and all to become Roman. . . . A common law made then equals, bound them by a single name, and brought them, though conquered, into bonds of brotherhood. We live in every conceivable region scarcely different than if a single city and fatherland enclosed fellow citizens with a single wall."[24]

Such a state could, of course, only be a world one. Already by the end of the first century BCE, Cicero had spoken confidently of "our own people whose empire now holds the whole world".[25] This did not mean that the Romans ignored the actual existence of the rest of the globe. Indeed they possessed a lively and sophisticated ethnographical curiosity in the peoples who inhabited the lands beyond the frontiers of the empire. It was that these other worlds had no separate identity as communities – much less as political powers – and that, in the course of history, they

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would one day be absorbed into the *Imperium*, the world, itself. This is why Virgil makes Jupiter bestow on the new city of Rome an empire without limits in either space or time: "For these [Romans] I set neither bounds nor periods: *Imperium* without end I give."[26] By the time the Emperor Justinian drew up his codification of Roman law in the sixth century, the world (*mundus*) over which he ruled (although in reality it was now confined to the lands east of the Dardanelles) was seen as constituting a *universitas* which required one lord to provide it with the ratio "of protection and jurisdiction".[27] It was, as the great nineteenth-century German classicist, jurist, and historian Theodore Mommsen in his massive history of Roman public law put it, "a familiar concept to the Romans that they were not only the first power on earth, they were also in a sense, the only one".[28]

The ideology of universalism and the powerful political *imaginaire* which sustained the Roman conception of the civitas relied not only on a system of civil law governing all the citizens of the empire. It also gave rise to a transnational system of laws – the *ius gentium*, the law of nations – which would prove to be the context in which all subsequent debates over the nature, the legitimacy, and the possible future of empire in Europe would evolve until the nineteenth century. The law of nations had originally been only a law governing the relationship between Roman citizens and non-Roman citizens. It was, in effect, a body of international *private* law. In the sixth century, however, the Roman jurists had made it a secondary natural law – that is, a law which, or so it was supposed, all rational peoples could be brought to accept, had they been in a position to be consulted as to its content; and in this form it became the basis for a law *between* peoples. It was this which allowed Hugo Grotius to argue that for the Roman jurists, "the *ius gentium* and *naturalis ratio* [natural reason] are the same thing".[29] In the account provided by Henry Sumner Maine, jurist, historian, early anthropologist, and Law Member of the Viceroy of India's Council, in his immensely influential study, *Ancient Law* of 1861, it had in fact been Grotius and his successors, from Samuel Pufendorf in the mid-seventeenth century to Emer de Vattel in the late eighteenth, who had misconceived the true, and far more limited, meaning of the "the ancient Jus gentium" so as to provide "them [with] a system of laws for the adjustment of international transactions."[30] And it was this move – although Grotius was not, in fact, the first to make it – which was to provide the theoretical foundations on the which nineteenth-century, and all subsequent, conceptions of "international law" was to be based.

II

Grotius, his successors, and a number of his significant predecessors (who formed no part of Maine's history) were living in a world which had been dramatically transformed in 1492 by the discovery of a hitherto unknown

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content. The discovery of America – and for Europe it really *was* a discovery – had the effect of unsettling many of the hitherto unquestioned European assumptions about not only geography but also, as we shall see in Chapter 3, human history and anthropology. It also opened up the possibility for the acquisition of new territories overseas – what the twentieth-century German jurist Carl Schmitt described as a "land-appropriation" (*Landnahme*) – which, with the dubious exception of the Crusader States, had effectively ceased to exist more than a millennium earlier.[31] In 1494, the pope Alexander VI "donated" to the Spanish monarchs Ferdinand and Isabel a form of sovereignty over all those lands "as you have discovered or are about to discover", which were not already occupied by another Christian prince. When in 1519, Charles V, who was not only King of Spain and much of central Europe and Italy but also now, in name at least, the sovereign of the entire western hemisphere, was elected Holy Roman Emperor, the claim that the emperor of Rome was "Lord of the World" would seem at last to have been fulfilled. Charles himself, wary of the impression such assertions might make on other European rulers, in particular the French, and on the Papacy, protested to Pope Paul III in 1536 that "some say that I wish to be Monarch of the world, but my thoughts and deeds prove that the contrary is true". His councilors, however, were not so reticent, and Charles V became, in the political imagination of his subjects, if nowhere else, the "last world emperor" supposedly foretold in the Book of Daniel who would bring peace stability and, in various Christian commentaries, Christian unity, to the entire world. (One contemporary image shows Daniel explaining all this in person to the seated figure of Emperor.)[32] As the Neapolitan magus Tommaso Campanella informed the princes of Europe in 1600 in a messianic proposal for a Christian World Empire ruled from Spain: "The monarchy of Spain, which embraces all nations and encircles the world is that of the Messiah, and thus shows itself to be the heir of the universe." (When, however he fled Naples for France, in 1635 Campanella changed his mind and named France as the future world empire.)[33]

It was in this context, and the context of the horror stories of the enslavement and butchery which followed the Spanish occupation of the Antilles, and the brutal conquests of Mexico between 1519 and 1521 and that of Peru between 1532 and 1572, that a group of Spanish theologians at the University of Salamanca – now widely referred to as the "School of Salamanca" – began to question, in the words of the earliest of them, Francisco de Vitoria, "by what right (*ius*) were the barbarians subjected to Spanish rule?" It is with what Vitoria himself called the "Affair of the Indies" and the subsequent attempts to re-work the ancient understanding of the law of nations that Chapter 1 is concerned.

The existence, and subsequent attempt, to occupy America presented Europeans with a wholly new legal challenge. The "donation" by which the entire western hemisphere had been ceded to the Spanish monarchs in

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