



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

TRANSCRIPT OF PROCEEDINGS - "DUCH" TRIAL

CONFIDENTIAL

Case File N° 001/18-07-2007-ECCC/TC

18 February 2009, 0900H

Initial Hearing, Day 2

Before the Judges:

NIL Nonn, Presiding
Silvia CARTWRIGHT
YA Sokhan
Jean-Marc LAVERGNE
THOU Mony
YOU Ottara (Reserve)

For the Civil Parties:

HONG Kimsuon
KONG Pisey
TY Srinna
MOCH Sovannary
KIM Mengkhy
Silke STUDZINSKY
Martine JACQUIN
Alain WERNER
Karim KHAN
Annie DELAHAIE
Pierre-Olivier SUR
Brienne McGONIGLE

For the Trial Chamber:

DUCH Phary
SE Kolvuthy
LIM Suy-Hong
Matteo CRIPPA
Natacha WEXELS-RISER

For the Office of the Co-Prosecutors:

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Jurgen ASSMANN
PAK Chanlino
SAMBATH Pich

For Court Management Section:

SANN Rada

For the Accused Person KAING GUEK EAV

KAR Savuth
François ROUX

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1 P R O C E E D I N G S

2 (Judges enter the courtroom)

3 MR. PRESIDENT:

4 The Trial Chamber declares open the continuity of our Initial
5 Hearing. Yesterday the Initial Hearing was conducted according
6 to the agenda and they reached the witness list issue, and it
7 came to the time that the private session needs to be conducted,
8 and it's going to be done this morning.

9 The Trial Chamber declares open the proceedings of our Initial
10 Hearing. Yesterday the Initial Hearing was conducted according
11 to the planned agenda. We reached the witness list, and where
12 the Trial Chamber needs to conduct a private session, and I would
13 request Judge Cartwright to lead the discussion on this morning
14 issue. I give the floor to Judge Cartwright to lead the
15 discussion. The floor is yours.

16 JUDGE CARTWRIGHT:

17 Thank you, President. As the President has noted, we are now in
18 Closed Session. The audio visual unit has cut the sound channels
19 to the public part of the courtroom. The translation is
20 available in Khmer on channel 7, English on channel 8 and French
21 on channel 9. The civil parties who were in the public part of
22 the courtroom yesterday have been given a facility which will
23 enable them to continue to participate in the Initial Hearing
24 during this Closed Session.

25 The Trial Chamber now has questions concerning various witness

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1 lists that have been filed. First, in relation to the defence
2 witness list. The Trial Chamber notes that in respect to witness
3 Christopher Lapel and Witness D8, these witnesses know the
4 accused in their capacity as pastor and priest of the accused.
5 The Chamber wishes confirmation that the principles of
6 professional privilege and secrecy will be observed. The Chamber
7 would like information on the scope of the testimonies that are
8 proposed, and in particular if those testimonies will relate to
9 confidential exchanges between the accused and the two intended
10 witnesses. If this is the case, the Chamber would like to know
11 if the accused expressly releases these witnesses from their duty
12 of confidentiality. Mr. Roux, do you wish to reply?

13 MR. ROUX:

14 Thank you, Your Honour. It is true that the two witnesses you
15 have mentioned are both a pastor and a priest. They are also
16 bound by professional secrecy as in the confessional. It is
17 obvious that they will only discuss matters that the accused will
18 allow them to discuss. That is absolutely clear.

19 JUDGE CARTWRIGHT:

20 Thank you, Mr. Roux. The next matter relating to the defence
21 witness list is this: Witness D9 and Witnesses Richard J.
22 Goldstone, Stéphane Hessel and Marie-Claude Tjibaou, the Trial
23 Chamber notes that these intended witnesses do not appear to have
24 any personal knowledge of the accused or of the facts at trial.
25 I appreciate that you touched on these matters briefly yesterday,

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1 but the Chamber would like to know if, and how, the testimony of
2 each of these intended witnesses will assist it with its mandate,
3 which is limited to the determination of the guilt or innocence
4 of the accused, and if appropriate, to his sentencing. Mr. Roux,
5 do you wish to respond?

6 [9.08.15]

7 MR. ROUX:

8 Thank you, Your Honour, as you indicated, witnesses King, Richard
9 Goldstone, Stéphane Hessel and Marie-Claude Tjibaou are witnesses
10 who do not know the accused personally. They are not being
11 called to testify as to the facts or the events, they are big
12 witnesses, as one might say, and the defence would like to call
13 them not with regard to the guilt or innocence of the accused but
14 with regard to mitigating circumstances.

15 JUDGE CARTWRIGHT:

16 And a further question in relation to those witnesses, is it
17 intended to summon them to come to Phnom Penh or are you
18 intending some other means of their giving testimony?

19 MR. ROUX:

20 Thank you for giving me the opportunity to provide clarification.
21 With regard to witness Henry King, in view of his age, he prefers
22 to give testimony through video conferencing. With regard to
23 Richard Goldstone, he indicated that he would be prepared to
24 appear but if his schedule allows him to. Otherwise, he would
25 suggest also giving testimony via video conferencing. Concerning

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1 Stéphane Hessel, I said this yesterday: he too is old, he is 91
2 years of age, but he is able to move about quite easily. He has
3 been very much in the public eye, on the occasion of the 60th
4 anniversary of the Universal Declaration of Human Rights, and he
5 indicated that he was prepared to travel to Phnom Penh if his
6 health allows him to do so, and at this time his health is good,
7 and would allow him to travel.

8 [9.11.16]

9 He also indicated, however, that if any difficulties were to
10 arise at the time of the testimony, he too might also give
11 testimony via video conference if necessary, and without any
12 difficulty. Concerning Ms Tjibaou, she is willing to travel
13 from New Caledonia to Phnom Penh. She is either in Paris or New
14 Caledonia, it's about the same distance to Phnom Penh. I know
15 both parts of the world. Thank you.

16 JUDGE CARTWRIGHT:

17 Merci. The Trial Chamber now wishes to turn to the matter raised
18 yesterday by the defence relating to the three witnesses on the
19 Co-Prosecutors' list, KW-30, 31 and 32. The President has asked
20 me to announce in this Closed Session the Trial Chamber's
21 decision concerning the application by the defence that these
22 witnesses not be summoned. The decision will be announced also
23 in open court.

24 The Trial Chamber considers that the practices at, and the
25 development of S21 are pivotal to this trial. The President and

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1 the Trial Chamber Judges have decided that the three witnesses on
2 the Co-Prosecutors' list, KW-30, 31 and 32 may well assist them
3 to ascertain the truth concerning the allegations against the
4 accused by giving testimony about the degree of the accused's
5 knowledge of the development of security systems in Democratic
6 Kampuchea and at S21 in particular.

7 Having indicated the Trial Chamber's decision concerning those
8 three witnesses, I now move to the question of what witnesses the
9 Trial Chamber might wish to call. Having examined the list of
10 witnesses proposed by all the parties filed thus far, the Chamber
11 announces that it has identified one witness that it would like
12 to hear during the trial. This witness is François Bizot. He
13 will be referred to by pseudonym "Witness TC1" until a risk
14 assessment has been performed by Witness Expert Support Unit.
15 The Chamber reserves its right to add further witnesses at a
16 later stage.

17 [9.14.50]

18 I will now give the parties the opportunity to make any
19 comments with concerning this additional witness. Do the
20 Co-Prosecutors have any comments?

21 MR. PETIT:

22 Good morning, Mr. President and Your Honour. No comments at
23 this time.

24 JUDGE CARTWRIGHT:

25 Thank you.

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1 MR. PETIT:

2 But we reserve the right to make them at trial, of course.

3 JUDGE CARTWRIGHT:

4 Thank you, Mr. Petit. Do any of the civil party lawyers have any
5 comments that they wish to make? Mr. Khan?

6 MR. KHAN:

7 Good morning, Mr. President, Your Honours. On behalf of
8 civil party one, we welcome the Trial Chamber's initiative in
9 seeking to call this witness.

10 JUDGE CARTWRIGHT:

11 Thank you, Mr. Khan. Any other civil party lawyers who wish to
12 comment? Yes, thank you Mr. Hong.

13 HONG KIMSUON:

14 Thank you, Judge Cartwright, and thank you the President to the
15 Trial Chamber. I myself, in the group four of the civil parties,
16 I myself would like to have the witnesses that the Trial Chamber
17 decides to allow them, for those witnesses to attend the
18 courtrooms on the trial dates, because in relation to the
19 testimony or the conferencings by video, if any other parties
20 would like to prefer this option, and if the Trial Chamber have
21 the ability to do it, that is fine. However, what we want is, if
22 some parties can only do this and other parties cannot do it,
23 then it would be better to have all the witnesses to appear
24 before the Chamber. That is my opinion. Thank you.

25 [9.16.52]

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1 JUDGE CARTWRIGHT:

2 Thank you, Mr. Hong. Any other comments? Thank you. Does the
3 defence have any comments that it wishes to make --

4 MS. JACQUIN:

5 Yes.

6 JUDGE CARTWRIGHT:

7 You wish to speak, Madame Jacquin?

8 MS. JACQUIN:

9 Yes, Your Honour. I'd like to bring to the Chamber's attention
10 the fact that we were approached by Mr. Bizot as a witness before
11 the Court and we did not select this -- we did not agree to this
12 because we considered that Mr. François Bizot's testimony would
13 raise too much controversy on both sides of the courtroom. That
14 is the only information I wish to provide. Thank you.

15 JUDGE CARTWRIGHT:

16 Does the defence wish to make any comments?

17 MR. ROUX:

18 Thank you, Your Honour. I mentioned yesterday that if the
19 Prosecutor wished to call witnesses of M13 he obviously should
20 also call François Bizot. The Co-Prosecutors did not find it
21 necessary to do so. The defence is pleased that the Chamber has
22 decided to set things to rights. Thank you.

23 JUDGE CARTWRIGHT:

24 Thank you, Mr. Roux. Now, there is one further matter that I
25 want to raise before the Chamber retires to deliberate on the

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1 composition of the witness list. Yesterday, Mr. Khan, you
2 referred to the witness list that has been filed by civil party
3 group one to date, and you asked -- at least, you appeared to ask
4 that the Trial Chamber call those witnesses as experts under Rule
5 31. Is that still what you have in mind?

6 [9.19.13]

7 MR. KHAN:

8 Mr. President, Your Honours, indeed it was. What I was seeking
9 to articulate was that the motion be considered under two heads:
10 both -- under both rules. And so the primary rule would be that
11 the Trial Chamber consider calling the witnesses listed,
12 primarily and in all candour, because we think -- it's our
13 submission that these witnesses will assist the Trial Chamber,
14 but also because it's very clear, in the Rules, that under one
15 particular provision, it is particularly stipulated that the
16 costs would be borne by this institution, whereas under 80bis,
17 that is not so clear.

18 It may well still be the case as an administrative practice, that
19 the Victims Unit may provide assistance, however in the inquiries
20 that we have made to date we have not received the reassurance
21 for any clear commitment in that regard. So I am submitting the
22 application under both heads, the 80bis being an alternative. I
23 hope that clarifies the position, Your Honour.

24 JUDGE CARTWRIGHT:

25 Mr. Khan, you will appreciate that the system under which we are

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1 working is rather different from the one that you and I are
2 accustomed to, and you will have noted that under Rule 81,
3 experts have a particular role to play, that they are mandated by
4 the Court, that they must undertake an assessment and provide a
5 report to the Court. On a preliminary reading of the witness
6 list that you have submitted, this may not prove to be a good
7 match.

8 MR. KHAN:

9 Well, Your Honour, in that case, of course, one would rest upon
10 80bis, but I do submit the application under both heads, as I
11 articulated yesterday.

12 JUDGE CARTWRIGHT:

13 Well, thank you, Mr. Khan, and I suggest that you discuss the
14 financial issues with the Administration, the Director and/or the
15 Deputy Director of Administration.

16 MR. KHAN:

17 Your Honour, I am grateful for that guidance. We have been
18 endeavouring to obtain some clarity, but perhaps we should go
19 higher up and make further endeavours. So I am grateful to the
20 Bench.

21 JUDGE CARTWRIGHT:

22 Thank you, Mr. Khan. I won't give -- the defence wishes to
23 comment. I'm just indicating at this stage that this list of
24 witnesses was filed such a short time ago that very few of the
25 parties will have had an opportunity to read it. These are just

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1 preliminary comments that I wanted to make to counsel for this
2 particular group, but Mr. Roux you wish to comment?

3 [9.22.32]

4 MR. ROUX:

5 Yes, Your Honour, for preliminary remarks, because the defence
6 received yesterday afternoon notification of this witness list
7 for civil party group one, and was able to go through it very
8 quickly in the Khmer and the English version, which is what is
9 available for the time being. I said yesterday that the defence
10 would like to make observations with regard to the lists. I
11 would like to add that the defence would like to discuss and even
12 challenge some applications which will be submitted. So I'd like
13 to draw the Chamber's attention to paragraph 14 of the
14 application, and since we are in closed session, I can give the
15 name of the witness that is to be called, that is Dr Christopher
16 Staker, and says in English: "Can assist the Court in its
17 determination of an appropriate sentence should the Court decide
18 to convict the accused." End of quote.

19 I am sorry, but the defence will challenge determinedly civil
20 parties if they wish to call witnesses who will come to plead on
21 the sentence that the accused might receive. That is not the
22 role of the civil parties. I think we have to come to an
23 agreement to define the role of the civil parties. We have an
24 Office of Co-Prosecutors, which represents the interests of the
25 public. It is through the Office of the Co-Prosecutors that

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1 society will require or request a sentence. On no account, in a
2 civil law system, can civil party lawyers be allowed to make any
3 submissions with regard to the sentence. This is a fundamental
4 principle of civil law, and I do not think exceptions should be
5 made thereto.

6 [9.25.25]

7 The civil parties can assist or support the Prosecutor with
8 regard to determining the guilt. That is normal, because their
9 own interests will depend upon the guilt or otherwise of the
10 accused. I have no quarrel with that so far. But sentencing is
11 a matter of public order, and public order is in the hands of the
12 Office of Co-Prosecutors, and not on any account in the hands of
13 the civil parties, otherwise our law will include the system of
14 private vengeance.

15 MR. KHAN:

16 Your Honour, perhaps we could go into public session when I seek
17 to respond very briefly to my learned friend's submissions. He
18 has raised important issues in Court, and it's only correct, for
19 the record, and for the transcript that is going to be created,
20 that I have an opportunity to respond to this broad brush
21 approach that's being put forward. So I do ask the Bench to
22 perhaps, if they're so minded, move into public session, and
23 there's no need for confidentiality in relation to any aspect of
24 my proposed submissions in response.

25 JUDGE CARTWRIGHT:

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1 Thank you, Mr. Khan. The Trial Chamber will shortly be retiring
2 to deliberation on the witness lists, and we will consider that
3 application at that point. But, I reiterate that these are
4 preliminary matters only. The defence and other parties will
5 have the opportunity to respond to the witness list filed by
6 civil party group one, and the Trial Chamber will not be making
7 any determination witnesses or experts of those most recently
8 filed lists at this stage. Mr. Sur?

9 MR. SUR:

10 Thank you, Your Honour. To tell you the truth, I didn't sleep
11 well. Yesterday, amongst the civil parties, you may have sensed
12 a degree of disunity, and I think that things must be clarified.
13 The civil parties are completely united in their goal, which is
14 to represent victims. That raises no questions in all. In
15 Latin, a lawyer means *advocare*, to advocate, to work for the
16 victims. We are aware of the honour conferred upon us, and we
17 are equally aware of the fact that we shall be creating a
18 milestone in international criminal law, because we know that
19 this is the first time since Nuremberg that victims can apply to
20 be civil parties and be vested in that situation with the rights
21 of parties in proceedings.

22 [9.29.17]

23 The issue which is causing dissention amongst the civil parties
24 is that their various or differing ideas as to what civil parties
25 are. If we take it from a purely French standpoint, we get the

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1 impression anyway that the Court as constituted is both United
2 Nations common law and Cambodian, and therefore based on the
3 French system. So if we were to follow the French system, it is
4 certain, Mr. President, Your Honours, that the civil parties rule
5 would be as set out yesterday, that is support, but in the
6 background of the prosecution.

7 The civil parties is not a main party, but a secondary party.
8 That is what is said in the French criminal code. So we support
9 the Prosecution. The second thing I wish to point out is that
10 we're seeking reparation, civil reparation. But under no
11 circumstances, and in this regard I support the defence counsel
12 on this, because we come from the same legal system. As I was
13 saying, on no account, in the French system, would the civil
14 party take part in proceedings regarding the sentence.

15 There are reasons for this. It is because the sentence is
16 issued, or handed down, for reasons of public order. The second
17 reason is that the sentence is quantifiable, and for victims it
18 is not possible to quantify what they experienced, which is why,
19 in my view, I am strongly in support of what my learned friend of
20 the defence has said, but I do not wish it to be considered that
21 we are in serious disagreement on the civil party bench. We are
22 writing the law together, we are thinking together, and we're
23 trying to define the role of the civil parties.

24 [9.23.02]

25 Most respectfully, I would just like to recall the basis and the

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1 practice of our view of the civil parties' function in the French
2 system, because this is what stands out in the basic text
3 establishing the Tribunal. If this is the case, the civil party
4 should not play this role.

5 JUDGE CARTWRIGHT:

6 Mr. Khan, before you speak, the exchange that we have just heard
7 is a very interesting one, and one that I believe the public
8 should hear, and so with the President's consent, when we return
9 to public session it might be valuable if Mr. Roux, you repeated
10 your comments, and Mr. Sur, you made your comments, and Mr. Khan,
11 I will give you an opportunity to respond. However, in public
12 session we are still not in a position to identify names, even
13 though confidentiality is not sought.

14 Now, I just want to check if there's anything else before the
15 Chamber retires to deliberate over its witness list thus far.

16 Mr. Khan, do you have another matter?

17 MR. KHAN:

18 Your Honour, no. The only suggestion I was going to make -- of
19 course, it's completely appropriate if the submissions put
20 forward in private session by my learned friends for the defence
21 and for the fourth civil party are repeated verbatim. May I just
22 check if the translation is coming through into -- Mr. President,
23 perhaps -- can you hear me?

24 JUDGE CARTWRIGHT:

25 Yes, yes, we can hear you. I'm sorry, I was dealing with another

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1 matter, Mr. Khan. You're wanting to know if the comments have
2 been recorded verbatim, is that the situation?

3 MR. KHAN:

4 No, Your Honour. What I was saying is that another way which may
5 be more efficient for the use of time is perhaps for Your Honour
6 to summarise the positions of the defence and for the fourth
7 civil party, put the matters quite squarely, and I could respond.
8 I'm in your hands, it was simply a time efficiency that I was
9 proposing. The submissions are in the transcript, and the public
10 interest aspect, perhaps, could be served once we go into open
11 session, into public session, by Your Honour summarising the
12 positions very properly advanced by my learned friend for the
13 defence and for the fourth civil party.

14 [9.34.00]

15 JUDGE CARTWRIGHT:

16 Yes. Thank you, Mr. Khan. I think personally it would be
17 preferable if the counsel concerned articulated their views
18 rather than asking a common law judge to do justice to their
19 arguments. However, I'm sure there are other, better qualified
20 judges than I on the Trial Chamber who could do this. Mr. Petit?

21 MR. PETIT:

22 I would simply ask that the Co-Prosecutor be given
23 opportunity to also respond.

24 JUDGE CARTWRIGHT:

25 Yes. Thank you, Mr. Petit. Now, are there any other matters

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1 before I turn to Ms. Studzinsky, are you about to address us?

2 MS. STUDZINSKY:

3 Yes, good morning Your Honours. Of course, if we discuss here
4 general matters about civil party participation, I also want to
5 announce, to give my statement then on civil party participation
6 in other civil law systems, and of course I also want to get the
7 floor then for the civil parties, but of course in public session
8 then. Thank you.

9 JUDGE CARTWRIGHT:

10 Before you sit down, Ms. Studzinsky, there was a matter from
11 yesterday that I have not finalised yet, and that is concerning
12 two of your proposed witnesses, CP2/8, A-07 in particular, you
13 were going to provide the Court with the information concerning
14 her imprisonment at S21.

15 MS. STUDZINSKY:

16 Yes, Your Honours, I'm sorry I couldn't find until today or this
17 morning any further information than that I have already
18 submitted to you, that I go ahead with investigations to find out
19 more via the former translator during this interview in 1991, and
20 to contact her, which I already tried since yesterday evening.

21 [9.37.29]

22 JUDGE CARTWRIGHT:

23 Yes. Thank you. Are there any other comments? Do you have
24 something else Ms. Studzinsky?

25 MS. STUDZINSKY:

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1 Yes, I only would like to know do you intend to go back to the
2 three first witnesses from our witness list, that was yesterday
3 the reason why proceed now, or as I have understood yesterday,
4 that we are now in closed session, and I only wanted to ask you
5 when you intend to discuss the three witnesses from our witness
6 list. The three first.

7 JUDGE CARTWRIGHT:

8 Yes, well, we'll take a moment to deliberate on that. Thank
9 you.

10 MR. PETIT:

11 If I may, Your Honour, before the deliberation, I apologise
12 --

13 JUDGE CARTWRIGHT:

14 Yes, Mr. Petit.

15 MR. PETIT:

16 But I did indicate to the Chamber yesterday that I thought it
17 would be more appropriate for my observations on these specific
18 witness to be made in Closed Session, and that's why I did not
19 make them yesterday, therefore I would request that opportunity
20 today.

21 [9.40.20]

22 JUDGE CARTWRIGHT:

23 After a brief deliberation the Trial Chamber has decided that it
24 will consider whether it wants to hear the submissions in a
25 continuation of the Closed Session, and it will discuss this

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1 further during our deliberations which we are about to take. We
2 will be retiring from the Bench to consider the witness lists
3 thus far, and at the same time we will decide whether we want to
4 hear further from Ms. Studzinsky and therefore also from Mr.
5 Petit.

6 MR. PETIT:

7 Thank you for that. I also want to point out that I indicated
8 yesterday that we were quite willing to make those submissions in
9 writing for your consideration while deliberating.

10 JUDGE CARTWRIGHT:

11 Thank you. We will take that into account. Are there any other
12 matters before the Trial Chamber retires to consider the witness
13 lists? No?

14 MR. PRESIDENT:

15 Now the Trial Chamber declares a 30 minute break in order for the
16 Judges to retire to deliberate on certain issues related to the
17 issues that have been raised. Thank you.

18 (Court recesses at 0942H)

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