

February 3, 2017

To the Chief Executive Officers and Legal Counsel of European Air Carriers:

We write now on behalf of the undersigned human rights law experts<sup>1</sup> to urge you to take immediate action to ensure that the rights of refugees, asylum seekers and other travelers who plan to travel with your airline are not prejudiced as a result of recent limitations on air travel imposed by United States executive authorities. In particular, as a result of the Executive Order issued last Friday, January 27, significant numbers of refugees, asylum seekers and other travelers have been subjected to undue detention, denial of entry and return against their will. Your airline is bound by the law in your home state as well as international law to ensure that the rights of all travelers, including asylum seekers or refugees, are protected. We urge you to not have your airline participate in the discriminatory Order that has been both [condemned internationally](#)<sup>2</sup> and challenged domestically. Many portions of the Order have been successfully stayed by multiple courts in the United States,<sup>3</sup> based on a determination that it is likely to be held unlawful.<sup>4</sup> Even the U.S. Government has provided conflicting guidance about the scope of the Order's application. Given the Order's discriminatory nature and its violation of refugee protections, airlines cannot rely on it in determining the rights of those seeking to travel. Moreover, as corporate entities, your airlines have a responsibility under the UN Guiding Principles on Business and Human Rights to not contribute to, and to mitigate and prevent human rights impacts related to your business.<sup>5</sup> Specifically, we recommend that your airlines allow those with valid travel documents and facially valid unexpired visas to board their flights if they choose to do so, and inform all passengers traveling to the United States and those who may be booking flights with your airlines of the risks posed by the Order. Additionally, your airlines should affirmatively collaborate with advocates and attorneys to ensure that travelers from the countries targeted by the Executive Order make an

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<sup>1</sup> Institutional affiliations provided for identification purposes only.

<sup>2</sup> Press Release, Org. of American States: Inter-American Comm'n on Human Rights, IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States (Feb. 1, 2017), [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/008.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/008.asp); Press Release, U.N. High Comm'r for Refugees, US travel ban: "New policy breaches Washington's human rights obligations," (Feb. 1, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21136&LangID=E>.

<sup>3</sup> See *infra* section titled "The Legal Status of the January 27 Executive Order" for a detailed explanation of the stays issued.

<sup>4</sup> In issuing a stay, a judge has to find that a plaintiff is "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 10 (2008). Thus, these stays suggest that further legal challenges to the Order may also succeed.

<sup>5</sup> U.N. Human Rights Office of the High Comm'r, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/14/3 (2014), [http://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf).

informed decision about their travel choice. Finally, airlines should ensure refugees reach safe harbor.

[The Executive Order](#) bars citizens from seven countries - Iran, Syria, Iraq, Yemen, Somalia, Sudan, and Libya - from entering the United States for the next 90 days and suspends the acceptance of all refugees for 120 days.<sup>6</sup> The Order provoked significant travel disruptions, inconsistent and arbitrary enforcement, and widespread confusion. U.S. immigration authorities [denied entry](#) to scores of travelers, detained dozens despite their being in possession of valid visas as of hours before the Executive Order, left many stranded, and forced the return of others to their points of origin or other destinations outside of the United States.<sup>7</sup>

The numbers are difficult to gauge, but high by all accounts. The U.S. Department of Homeland Security [asserts that on the weekend following the announcement](#), government agents or airline employees denied entry to 109 such travelers, detaining them temporarily, while preventing 173 travelers from boarding their U.S.-bound flights.<sup>8</sup> Attorneys with the [American Civil Liberties Union assert](#) that it is “impossible” to get a complete list of people detained.<sup>9</sup> Families of those detained waited at airports for hours, left wondering over the fate of their loved ones.<sup>10</sup>

U.S. authorities estimate that this ban will affect between [150 and 175 travelers](#) each day,<sup>11</sup> and prevent approximately [20,000 refugees](#) from resettling in the United States over the 120 day period covered by the order.<sup>12</sup> We note the grave refugee crisis the world currently faces. The UNHCR reports [the highest number of displaced persons](#) on record and 21.3 million refugees are without a home, over half of them children.<sup>13</sup> Six [million](#) of these refugees come from Somalia

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<sup>6</sup> Note that the travel ban applies indefinitely to Syrian nationals. Press Release, Office of the Press Sec’y, The White House, Executive Order: Protecting The Nation From Foreign Terrorist Entry Into The United States (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>7</sup> Thomas Erdbrink, *Unable to Enter U.S., and Still Stranded Abroad*, N.Y. TIMES, Jan. 31, 2017, <https://www.nytimes.com/2017/01/31/world/travelers-stranded-abroad.html>.

<sup>8</sup> Evan Perez, Pamela Brown & Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, Jan. 30, 2017, <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/>; Tess Owen, *Waiting for Answers*, VICE NEWS, Jan. 30, 2017, <https://news.vice.com/story/we-still-dont-know-how-many-people-are-being-detained-at-us-airports>.

<sup>9</sup> Tess Owen, *supra* note 8.

<sup>10</sup> *Lives Rewritten With the Stroke of a Pen*, N.Y. TIMES, Jan. 29, 2017, <https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html>.

<sup>11</sup> Robert Wall & Susan Carey, *Travelers Stopped in Transit to U.S. After Trump Order*, WALL STREET JOURNAL, Jan. 28, 2017, <https://www.wsj.com/articles/migrants-prevented-from-boarding-flights-to-the-u-s-in-wake-of-trump-order-1485611598>.

<sup>12</sup> Press Release, U.N. High Comm’r for Refugees, UNHCR Alarmed at Impact of U.S. Refugee Program Suspension (Jan. 30, 2017), <http://www.unhcr.org/en-us/news/press/2017/1/588f78ee4/unhcr-alarmed-impact-refugee-program-suspension.html>.

<sup>13</sup> U.N. High Comm’r for Refugees, *Figures at a Glance*, <http://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Feb. 3, 2017).

and Syria, two countries targeted by the January 27 Executive Order.<sup>14</sup> This year, at least 377 migrants have [already died](#).<sup>15</sup> The death toll of migrants in 2016 [exceeds 7,500](#), almost double figures for 2015.<sup>16</sup> These refugees, forced out of their home countries are fleeing from [torture](#),<sup>17</sup> [murder](#),<sup>18</sup> [systemic persecution](#),<sup>19</sup> [war](#),<sup>20</sup> [death](#),<sup>21</sup> [conflict](#),<sup>22</sup> [famine](#),<sup>23</sup> [airstrikes](#),<sup>24</sup> [rape and arson](#).<sup>25</sup> Refugee resettlement and related visa programs already contain numerous credibility and security checks and are designed to provide some relief and security to those refugees.

### **The Legal Status of the January 27 Executive Order**

At the time of this writing, several federal courts have granted stays to prohibit the application of aspects of the January 27 Executive Order based on their determination that challenges to the Order have a high likelihood of success on the merits. Just this afternoon, U.S. District Judge Robart in Seattle issued [a temporary restraining order](#) halting application of key sections of the Order, nationwide.<sup>26</sup> Earlier this morning, a judge in Michigan issued a nationwide injunction blocking the Order from being applied to all lawful permanent residents.<sup>27</sup> The first stay was issued by another court on January 28, when a U.S. Federal District Court judge in New York, Ann M. Donnelly, [issued a ruling](#) blocking part of the Order preventing the government from deporting certain individuals.<sup>28</sup> The ruling stated the government was “enjoined and restrained

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<sup>14</sup> *Id.*

<sup>15</sup> Int’l Org. for Migration, *Latest Data*, <https://missingmigrants.iom.int/> (last visited Feb. 3, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> HUMAN RIGHTS WATCH, THE MEDITERRANEAN MIGRATION CRISIS (June 19, 2015), <https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>.

<sup>18</sup> U.N. HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN (2015), <http://www.acnur.org/t3/fileadmin/Documentos/Publicaciones/2015/10228.pdf>.

<sup>19</sup> THE MEDITERRANEAN MIGRATION CRISIS, *supra* note 17.

<sup>20</sup> *Somali Refugees Flee to Ethiopia to Escape Famine, Violence*, P.B.S. Newshour (Nov. 14, 2011), [http://www.pbs.org/newshour/bb/world-july-dec11-somalirefugees\\_11-14/](http://www.pbs.org/newshour/bb/world-july-dec11-somalirefugees_11-14/).

<sup>21</sup> Judith Sunderland, *The Death of a Small Syrian Boy*, HUMAN RIGHTS WATCH, Sept. 2, 2016, <https://www.hrw.org/news/2016/09/02/death-small-syrian-boy>.

<sup>22</sup> Brigit Schwarz, *Nothing to Go Back to—From Kenya’s Vast Refugee Camp*, HUMAN RIGHTS WATCH, May 26, 2016, <https://www.hrw.org/news/2016/05/26/nothing-go-back-kenyas-vast-refugee-camp>.  
<https://www.hrw.org/news/2016/05/26/nothing-go-back-kenyas-vast-refugee-camp>.

<sup>23</sup> *Somali Refugees*, *supra* note 20.

<sup>24</sup> *US, Russia: Investigate Attacks on Civilians*, HUMAN RIGHTS WATCH, May 16, 2016, <https://www.hrw.org/news/2016/05/16/us-russia-investigate-attacks-civilians>.

<sup>25</sup> *Burma: Rohingya Recount Killings, Rape, and Arson*, HUMAN RIGHTS WATCH, Dec. 21, 2016, <https://www.hrw.org/news/2016/12/21/burma-rohingya-recount-killings-rape-and-arson>.

<sup>26</sup> Seattle judge grants nationwide temporary restraining order on Trump immigration ban, REUTERS.COM, Feb. 3, 2017, <http://www.reuters.com/article/us-usa-trump-immigration-seattle-idUSKBN15I32G>

<sup>27</sup> Judge orders temporary ban on Trump immigration restrictions, REUTERS.COM, Feb. 3, 2017 <http://www.post-gazette.com/news/nation/2017/02/03/Federal-judge-in-Detroit-blocks-Trump-immigration-restrictions/stories/201702030199>.

<sup>28</sup> Michael D. Shear, Nicholas Kulish, & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES, Jan. 28, 2017, <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>.

from, in any manner and by any means, removing individuals” who arrived in the U.S. with valid visas or refugee status.<sup>29</sup> The ruling is estimated to affect 100-200 people who were detained at American airports.<sup>30</sup> Moments after the ruling in New York, U.S. Federal District Court judge in Virginia, Leonie M. Brinkema, issued a week-long temporary restraining order prohibiting the removal of any Lawful Permanent Residents detained at Dulles International Airport.<sup>31</sup><sup>32</sup> On January 31, U.S. District Judge Andre Birotte Jr. from Los Angeles also issued a stay, ordering that those who had valid immigrant visas be allowed entry, noting that they were “[likely to suffer irreparable harm](#)” if he did not take action.<sup>33</sup>

Customs and Border Patrol’s website states that, in light of the Executive Order, family reunification visas, Special Immigrant Visas, or those with emergency requests will be considered on a case by case basis.<sup>34</sup> Given this possibility of a case-by-case assessment, individuals believed to possess valid travel documents - and particularly refugees and asylum seekers - should not be turned away at the airport gate without an opportunity to contest their entry restrictions into the United States.

### **International Legal Obligations**

International law, and implementing state and European Union directives, prohibit discrimination and impose special protections on refugees. On February 1, United Nations human rights [experts denounced](#) this policy as a breach of the United States’ international human rights obligations, specifically those prohibiting discrimination based on race, nationality, or religion as well as obligations to not forcibly return refugees to countries where they are likely to be subjected to persecution.<sup>35</sup>

#### *The Prohibition on Discrimination:*

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> On January 30, acting Attorney General at the time, Sally Yates, issued a letter to top lawyers at the Justice Department, directing them not to defend the Executive Order. Within hours, President Trump removed her from office and appointed Dana Boente Acting Attorney General. Mr. Boente immediately reversed Ms. Yates’ decision and directed the Department of Justice to defend the January 27 Executive Order.

*Letter From Sally Yates*, N.Y. TIMES, Jan. 30, 2017, <https://www.nytimes.com/interactive/2017/01/30/us/document-Letter-From-Sally-Yates.html>.

<sup>33</sup> Joel Rubin, *L.A. federal judge orders a temporary halt to Trump’s travel ban*, L.A. TIMES, Feb. 1, 2017, <http://www.latimes.com/local/lanow/la-me-ln-federal-order-travel-ban-20170201-story.html>.

<sup>34</sup> U.S. Customs & Border Patrol, *Protecting the Nation from Foreign Terrorist Entry into the United States*, <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states> (last visited Feb. 3, 2017).

<sup>35</sup> Press release: New policy breaches Washington’s human rights obligations, *supra* note 1.

The United States and all Member States of the European Union have ratified the International Covenant on Civil and Political Rights. [The Covenant](#) commits states to the promotion, observance, and universal respect for human rights and freedoms.<sup>36</sup> Among these rights are the right of the individual to “leave any country, including his own” and to not be “arbitrarily deprived of the right to enter his own country.”<sup>37</sup> International travelers are particularly vulnerable to violations of their civil and political rights. Airlines are given a special trust commensurate with the obligation to ensure the physical wellbeing and safety of passengers.

Several additional international obligations protect the rights of people to travel and the right to do so free from discrimination. [Article 5 of the International Convention on the Elimination of All Forms of Racism](#) provides a right to “leave any country, including one’s own, and to return to one’s country.” The Charter of Fundamental Rights of the European Union begins by affirming the principle that “[h]uman dignity is inviolable. It must be respected and protected.”<sup>38</sup> Article 21 prohibits *any* discrimination including discrimination based on race, ethnic or social origin, and religion or belief amongst many other factors. The Charter constitutes binding law in Europe and is applicable to businesses - small and large - operating in the European Union. As the Preamble notes, “[e]njoyment of these rights entails responsibilities and duties with regard to other persons, to the human community, and to future generations.”<sup>39</sup> As many observers [have noted](#), including most recently the UN Special Rapporteurs on migrants, on racism, on human rights and counter-terrorism, on torture, and on freedom of religion, “[s]uch an order is clearly discriminatory based on one’s nationality and leads to increased stigmatization of Muslim communities.”<sup>40</sup>

Not doing so risks violation of EU Directives against discrimination and domestic law obligations against discrimination. [EU directive 2000/43/EC](#) prohibits discrimination in access to and provision of goods and services.<sup>41</sup> Pursuant to this guideline, and also through other

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<sup>36</sup> International Covenant on Civil and Political Rights preamble, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>37</sup> *Id.* at art. 12(2), (4).

<sup>38</sup> Charter of Fundamental Rights of the European Union art. 1, 2012 O.J. C 326/02, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

<sup>39</sup> *Id.*

<sup>40</sup> *US Travel Ban a ‘Significant Setback’ for Those Needing International Protection*, UN NEWS CENTRE, Feb. 1, 2017, <http://www.un.org/apps/news/story.asp?NewsID=56082#.WJOOhbYrJYg>.

<sup>41</sup> Council Directive 2000/43/EC, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin 2000 O.J. L 19/07, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0043> (The relevant section includes language both prohibiting discrimination in general and recognizing national governments’ prerogative to regulate entry and exit into their territory. “To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.”).

provisions, domestic discrimination law throughout Europe prohibits denial of services based on suspect criteria. Thus, for example, [under German anti-discrimination law](#), discrimination on the basis of race, ethnic origin, or religion or belief is prohibited with regards to access to and supply of goods and services which are available to the public.<sup>42</sup> In France, [Law 2008-496](#) of 28 May 2008 prohibits discrimination based on ethnic and racial origin in access to or furnishing of goods and services.<sup>43</sup> [Under Swedish anti-discrimination law](#), discrimination on the basis of ethnicity, religion or belief is prohibited with regard to access to and supply of goods and services.<sup>44</sup>

Finally, we urge you to consider the protection of the rights of travelers in light of the UN Guiding Principles on Business and Human Rights, which set a global standard to address the adverse impacts of business activity on human rights. States have a duty to protect from harms caused by third parties, and businesses have a corporate responsibility to redress business-related human rights abuses.<sup>45</sup> Businesses must “avoid causing or contributing to adverse human rights impacts” and must “seek to prevent or mitigate human rights impacts that are directly linked to their operation . . . even if they have not contributed to those impacts.”<sup>46</sup>

### *Special Protections for Refugees*

International law requires States to protect refugees from being returned to a country where they fear persecution. This principle, known as non-refoulement, is expressed in Article 33 of the 1951 Refugee Convention and is universally recognized as part of customary international law.<sup>47</sup> The European Union implemented this principle in 2004 through Article 21 of EU Directive 2004/83/EC. The Directive applies to Member States imposing obligations with regard to their treatment of refugees and all those in need of international protection.

Non-refoulement requires more than the mere obligation to prevent the return of individuals to their home countries. It is a key principle in a broader body of human rights law that requires States to protect the dignity of refugees and asylum seekers, and afford them minimum standards of treatment. It also requires that those fearing return because of persecution,

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<sup>42</sup> Federal Anti-Discrimination Agency, *Act Implementing European Directives Putting into Effect the Principle of Equal Treatment* (Aug. 2009), [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg\\_in\\_englischer\\_Sprache.pdf?\\_\\_blob=publicationFile&v=1](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile&v=1).

<sup>43</sup> French Anti-Discrimination Act, LOI n° 2008-496 du 27 mai 2008, (*Law No. 2008-496 Of May 27, 2008*), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783&fastPos=1&fastReqId=780500433&categorieLien=cid&oldAction=rechTexte>.

<sup>44</sup> Swedish Parliament, *Discrimination Act* (2008: 567), [http://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen\\_eng.pdf](http://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf).

<sup>45</sup> U.N. Human Rights Office of the High Comm’r, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/14/3 (2014).

<sup>46</sup> *Id.*

<sup>47</sup> United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137.

torture, or grave ill-treatment be provided an opportunity to make out a claim for protection to a state agent capable of preventing return. Moreover, Article 3 of the Refugee Convention makes clear that all signatory states "apply the provisions . . . to refugees without discrimination as to race, religion or country of origin."<sup>48</sup>

The United States, as a signatory to the Refugee Convention, is in breach of its international obligations. Specifically, the January 27 Executive Order violates the principles of non-discrimination (restricting refugees based on race, religion, or country of origin), exemption from exceptional measures (applying exceptional measures on a refugee solely on account of nationality), and likely non-refoulement. These breaches are both an affront to the 1951 Refugee Convention and a serious challenge to fundamental principles of human rights and human dignity.

### **Recommendations**

European airlines should adhere to international human rights standards. While airlines are clearly subject to the laws and regulations of countries whose airspace they enter, they must take no actions contrary to international human rights standards or that violate European Union law. This responsibility extends to taking positive action to protect travelers.

Additionally, we believe that denying passengers the right to board a flight for which they have a valid ticket and a valid claim to entry in the country of destination on the basis of religion or national origin or ethnicity could lead to liability and monetary damages under EU and national law of European states.

Finally, given the actions of United States authorities to date, airlines should take every possible measure to ensure full access to counsel for these travelers. To do so, we suggest close coordination with attorneys at both departure and arrival locations.

### **Proactively Ensure Refugees and Asylum Seekers Reach Safe Harbor**

Airlines must ensure that refugees and asylum seekers are able to present their claims to a border official. Given limited availability of direct flight routes, particularly from volatile conflict zones, airlines should coordinate to ensure that refugees reach their desired destination. In an instance which a receiving country bars entry, airlines must take responsibility for ensuring that refugees are rerouted to an alternate country that will provide safe harbor. Airlines should work with that individual and her legal representatives (if retained) to identify alternative destinations for travel and possible resettlement. As outlined below, airlines should work with refugee advocacy organizations to ensure that all asylum seekers have access to legal counsel.

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<sup>48</sup> *Id.* at art. 3.

## **Collaboration With Refugee and Asylum Seekers Advocates**

Airlines should be in regular contact with international and domestic organizations who work to resettle refugees and asylum seekers to ensure full protection of their rights. Airlines should play a proactive role in ensuring all asylum seekers have access to legal counsel. Airlines, for example, should be able to provide refugees seeking legal counsel with a short list of local referrals in an instance where such a request is made. The undersigned are willing to help connect airlines with relevant advocates.

## **Advance Refugee and Asylum Seekers Rights**

Given the role that airlines play in ensuring safe travel, airlines should both publicly affirm their commitment to upholding international human rights law and speak out against policies that arbitrarily discriminate against refugees, a population that is deeply vulnerable.

We thank you for your consideration. Please do not hesitate to contact us if we may be of assistance as your airline addresses the challenges presented by the events of the past week.

Sincerely,

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