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Office of the United Nations  
High Commissioner for Human Rights  
Geneva

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**RE: SUBMISSIONS ON ARBITRARY DEPRIVATION OF NATIONALITY**

1. We refer to your call for comment on the impact of arbitrary deprivation of nationality on children. We hereby humbly submit our comments on the draft indicators.

**INTRODUCTION TO THE LEGAL RESOURCES CENTRE**

2. The Legal Resources Centre (hereinafter referred to as the "LRC") is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised persons to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
3. The LRC has since its inception operated throughout South Africa from its offices situated in the cities of Johannesburg, Cape Town, Durban and Grahamstown.

4. The LRC, through its Equality and Non-Discrimination project ("the project"), focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons including sexual minorities, women, children, refugees and sex workers as being integral to the pursuit of social justice. It is in this context that we seek to ensure that the existing legal apparatus available and in development are appropriately cognisant of the rights and realities of vulnerable and marginalised groups. We believe that this will ensure that their experiences of discrimination and prejudice are reduced and eventually diminished. Furthermore, we believe that the national, regional and international laws are collaboratively an instrumental tool in securing substantive equality for vulnerable individuals.
5. Through strategic litigation, the LRC has played a pivotal role in developing a strong jurisprudence for equality and non-discrimination.
6. We are grateful for, and welcome this opportunity to contribute to the report to be developed by the Office of the High Commission for Human Rights on the impact that arbitrary deprivation of nationality has on the enjoyment of the rights of children concerned.
7. Our submissions are structured as following:
  - 7.1 Statelessness legal framework in South Africa;
  - 7.2 Secondly, we will highlight the existing laws and practices in South Africa on accessibility for children to acquire nationality of the country in which they are born, if they otherwise would be stateless; and
  - 7.3 Lastly, we will highlight the impact that arbitrary deprivation of nationality has on the enjoyment of the rights of children concerned.

8. Before we proceed with our submissions it is important to note that the terms 'citizenship' and 'nationality' are used interchangeably in this submission. We believe that both these terms designate and describe a legal connexion between an individual person and a country. This legal connexion "*provides the individual certain rights such as the right to enter, leave and reside in a state, to vote, to be elected or appointed to public office, to access public services, to diplomatic protection when outside the country and to other rights that are not available to noncitizens. Each state has set out laws regulating the granting of citizenship and nationality to people who qualify and explaining the procedures for people to obtain state recognition as a citizen/national.*"<sup>4</sup>
9. Additionally, it must be noted that the reference to undocumented children or persons in this submissions refers to the status of not being in possession of any identification documents issued by any government. This term refers to a person whose birth is not registered or does not hold a birth certificate, passport and/or documents that would confirm his/her identity. It should be noted further that in this submissions this term does not refer to "undocumented migrants" who are persons who would ordinarily have identification documents, birth certificates and/or passports from their country of origin but do not have permission to reside in the country where they currently reside.

### **STATELESSNESS LEGAL FRAMEWORK IN SOUTH AFRICA**

10. The rights of stateless persons are established in two international conventions: the 1954 Convention relating to the Status of Stateless Persons, which establishes basic rights; and the 1961 Convention on the Reduction of Statelessness, which endeavours to prevent statelessness. In terms of the 1961 Convention a State is obliged to grant nationality to persons born in its territory in order to prevent statelessness. A contracting State is also obliged to presume, in the absence of

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<sup>1</sup> Promoting Citizenship and Preventing Statelessness in South Africa: A PRACTITIONER'S GUIDE by Jessica P. George and Rosalind Elphick with additional updates and editing by Kaajal Ramjathan-Keogh and Liesl Muller at pg 6 at [http://www.pulp.up.ac.za/pdf/2014\\_13/2014\\_13.pdf](http://www.pulp.up.ac.za/pdf/2014_13/2014_13.pdf) [Accessed on 10 June 2015].

evidence to the contrary, that an orphan be considered to have been born within its territory to parents possessing the nationality of that State. The State is not permitted to deprive a person of its nationality if that deprivation would render him stateless.

11. Still, States are permitted to condition the granting of its nationality to an individual. A State may, for instance, stipulate that a stateless person's application for citizenship be lodged before a certain age. There are also a number of exceptions to the general protections contained in the Convention; any individuals who acquired their nationality through misrepresentation or fraud are not entitled to these same rights. In spite of these provisions, the treaty serves as a "*universal instrument that elaborates clear, detailed and concrete safeguards to ensure a fair and appropriate response to the threat of statelessness.*"
12. The 1961 Convention entered into force in December 1975. Unfortunately, as noted South Africa has not signed or ratified either of the conventions on statelessness and is therefore not automatically subject to the obligations enumerated above. This does not mean, however, that South Africa has no legal obligations to any of the undocumented minors who are classified as stateless persons or those who may be at risk of being stateless.
13. There are three reasonable arguments supporting South Africa's duty to protect stateless persons under international and domestic law.
  - i. Duty to reduce statelessness
14. The first argument is that South Africa is subject to a binding obligation under international law to reduce statelessness by granting nationality to these stateless undocumented minors. This obligation is articulated in the 1961 Convention on the Reduction of Statelessness.
15. While South Africa is not a party to the 1961 Convention and is therefore not bound by its terms, it may still carry a duty to reduce statelessness under customary

international law. According to the statute of the International Court of Justice (ICJ), treaty and custom are two equal sources of binding international law. The ICJ has defined customary international law as widespread and representative state practice with corresponding *opinio juris*. A particular state practice that is carried out by a variety of representative states and is undertaken out of a sense of legal obligation may therefore become a binding norm of customary international law.

16. There is some evidence to suggest that the reduction of statelessness through the grant of nationality has crystallized into a customary norm. While the relatively low number of signatories to the 1961 Convention is somewhat discouraging, the practice of States confirms the general principle. The 1969 American Convention of Human Rights, for instance, includes a provision that guarantees the granting of nationality to individuals born in a particular territory if they would otherwise be stateless. The obligation to prevent statelessness by granting nationality is also incorporated in the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession and was affirmed by the United Nations General Assembly in a resolution adopted in 2001.

17. If the reduction of statelessness through the grant of nationality is found to be a customary norm, as the evidence above suggests, South Africa would be in violation of international law by failing to grant nationality to the stateless children currently residing within its territory.

ii. Right to nationality

18. Beyond the specific obligations and provisions of the 1961 Convention on the Reduction of Statelessness, South Africa is bound by international instruments protecting basic human rights. Several of these instruments affirm the right to nationality.

19. Under Article 15 of the Universal Declaration of Human Rights (UDHR), "*everyone has the right to a nationality.*" Furthermore the UDHR states that "*no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*"

The International Covenant on Civil and Political Rights, to which South Africa is a party, asserts that "*every child has the right to acquire a nationality.*" The right to acquire a nationality is likewise upheld in Article 7 of the Convention on the Rights of the Child, Article 6 of the African Charter on the Rights and Welfare of the Child, and in numerous other regional international instruments.

20. In depriving the undocumented minors currently residing in South Africa of the opportunity to acquire nationality, South Africa is arguably violating this basic human right. This right could be vindicated before South African Courts as well as through international bodies, including the International Court of Justice and the African Court on Human and Peoples' Rights.
21. International law is not the only source that protects the right to nationality in South Africa. Article 28 of the South African Constitution affirms that "*every child has the right to a name and a nationality from birth.*" It is a constitutional imperative that South Africa has a duty to respect, protect, promote and fulfil. However, the right to nationality is subject to the provisions of domestic citizenship law as provided for in the Citizenship Act 88 of 1995 which will be discussed below.

iii. Equality and non - discrimination

22. There is a strong argument that the existing citizenship framework violates the basic principle of freedom from discrimination articulated in section 9 of the South African Constitution. This argument stems from the same logic as does the argument above, which demonstrates the way in which South African citizenship law infringes upon the right to nationality.
23. Section 9 of the Constitution forbids the state from unfairly discriminating indirectly or directly against anyone on the basis of ethnic or social origin or birth among other grounds. Yet the South African Citizenship Act prevents the undocumented minors as discussed from acquiring either nationality or legal protection from the Government of South Africa. There is therefore an argument that the cumulative effect of the Citizenship Act as it is applied to this group of persons is discriminatory.

24. The provisions of South African citizenship law and their application in practice discriminate against children in these circumstances. As discussed above, many of the undocumented minors are unable to successfully acquire the nationality in South African, regardless of their place of birth. Many of them would qualify as de jure stateless persons. South Africa, however, has no established protection regime for such individuals. It is true that the Citizenship Act purports to provide for stateless individuals; it allows for the acquisition of citizenship by any person who either does not have the citizenship or nationality of another country, or has no right to such citizenship or nationality.
25. As will be discussed below, attached to this provision, however, are two general requirements that serve to disqualify many stateless persons who would otherwise benefit from it. First, the individual must have been born in the Republic of South Africa. Secondly, his or her birth must have been registered in South Africa in accordance with the Births and Deaths Registration Act. However, the Citizenship Act does not specify what legal status the child may acquire while still a minor as the requirements are only once they are a major.
26. Given the challenges experienced by stateless persons to register their birth as will be explained below, and the impossibility of documentation through the temporary residence permit regime, it is argued that this regime makes it unnecessarily difficult and prejudicial for children at risk of being stateless to register their births and remain lawfully present in South Africa. In light of the fact that many stateless children are born to undocumented parents, foreign parents, or are abandoned, they are among the least likely to have their births properly registered under South African law. Unfortunately, very little data on the plight of these “shadow populations” is available. In light of these circumstances above, we argue that South African nationality law unfairly discriminates against stateless minor children in its application and practice.
27. In summary, while South Africa is not bound by the terms of the 1954 or 1961 conventions on statelessness, there are a number of legal arguments for the protection of the stateless minors currently residing in South Africa.

**EXISTING LAWS AND PRACTICES IN SOUTH AFRICA ON  
ACCESSIBILITY FOR CHILDREN WHO WOULD OTHERWISE BE  
STATELESS TO ACQUIRE NATIONALITY**

South African Citizenship Act, 88 of 1995 ("hereinafter Citizenship Act")

28. Citizenship in South Africa can be acquired either through birth, descent, or naturalisation which is provided for in the Citizenship Act. We will discuss each of the grounds individually in order to explain what they each entail. We will not discuss descent as this would normally apply to persons born to South African parents whether in or outside of South Africa. This provision also applies to adopted children.

**Birth:**

29. Citizenship by birth is regulated by Section 2 of the Citizenship Act, which provides for three categories of persons who qualify for citizenship by virtue of being in South Africa.

30. The three categories are as following:

 Category 1:

30.1 Section 2(1) Citizenship Act guarantees citizenship to anyone born in or out of South Africa with at least one South African parent. It also guarantees citizenship to persons who were citizens at the commencement of the Citizenship Act.

 Category 2:

30.2 Section 2(2) of the Citizenship Act guarantees citizenship to children born in South Africa but do not have citizenship or nationality of any other country and whose births are registered in terms of the Births and Deaths Registration Act, 51 of 1992.

 Category 3:

30.3 Section 2(3) of the Citizenship Act allows for anyone born from parents with permanent residence status, has resided in South Africa since birth until being a major, and his/her birth is registered in South Africa in terms of Births and Deaths Registration Act.

**Naturalisation:**

31. They are two categories of persons who qualify for citizenship through naturalisation in terms of the Citizenship Act. Section 4 of the Citizenship Act provides for two categories of persons that qualify for citizenship. The first category relates to persons who were immediately South Africa or granted citizenship in terms of Section 5 of the Citizenship Act prior to the commencement of the Citizenship Act of 2010. Section 5 will be discussed below.

32. For the purpose of this submission, the second category of naturalisation is important. This category is regulated by Section 4(3) of the Citizenship Act which states that:

*(3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if—*

*(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and*

*(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).*

33. Section 4(3) of the Citizenship Act allows children born and have lived in South Africa until they turn 18 and whose birth is registered in South Africa to apply for citizenship, but fails to address their status while they remain minors as already stated above.

34. Section 5 of the Citizenship Act regulates who the Minister of Home Affairs may grant a certificate of naturalisation to. Section 5(1) states that the Minister may upon

receiving an application grant a certificate of naturalisation to any “foreigner” who satisfied the following conditions:

- a. he or she is not a minor; **and***
- b. he or she has been admitted to the Republic for permanent residence therein; **and***
- c. he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; **and***
- d. he or she is of good character; **and***
- e. he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; **and***
- f. he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; **and***
- g. he or she has adequate knowledge of the responsibilities and privileges of South African citizenship; **and***
- h. he or she is a citizen of a country that allows dual citizenship: Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation. (Own emphasis)*

35. As can be noted above, minor children cannot apply for naturalisation in terms section 5(1) because it specifically excludes them in subsection (a) above. The wording of Section 5(1) of the Citizenship Act clearly obligates potential applicants to satisfy all the listed requirements because of the use of the “and” that follows each requirement. However, section 5(4) of the Citizenship Act attempts to cure this defect by authorising the Minister to consider granting South African citizenship to a minor child who is **permanently and lawfully** resident in South Africa. For many children we have worked with, permanent residence in South Africa is not a problem as it is difficult for them to leave South Africa because of lack of identification

documents and passports. However, the lawfully resident requirements will most certainly make it extremely difficult for them to apply for citizenship in terms of section 5(4) as most stateless minor children remain undocumented precisely because they are stateless. Stateless generally means that the children in South Africa will not be lawfully resident because being born within its territory does not automatically grant you citizenship. It is therefore our submission that while section 5(4) is aimed at enabling minor children to apply for citizenship, it fails to consider the difficulty of lawful resident for them rendering South African citizenship a challenging and demanding, if not impossible, status to obtain for minor stateless children.

### **Practical Application of the Citizenship Laws to minor children in South Africa**

36. In both the sections providing for citizenship by birth and naturalisation, the Citizenship Act does not define what living in South Africa until attaining majority means. It is also unclear whether there are any provisions on what form of documentation is available to children who would be able to apply for citizenship as explained above. One has to assume that these children would have to apply for temporary residence and eventually permanent residence. However, the problem with this is that all the temporary residence visa regulation requires a valid passport which stateless children and persons usually do not possess forcing them to live without any documentation to confirm their identity or their age.
37. The issue of statelessness is not only a problem that affects children born to non-South Africans in South Africa. There are cases of children who are born to South African parents but, for various reasons, their birth was not registered or it was registered but they are not in possession of their birth certificates and unable to retrieve these from the Department of Home Affairs. More examples of stateless cases can be found in the report drafted by Lawyers for Human Rights and United Nations High Commission for Human Rights.<sup>2</sup>

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<sup>2</sup> This report can be found at [https://www.scribd.com/fullscreen/131615558?access\\_key=key-19ebq5w2m2m3caw25p7y&allow\\_share=true&escape=false&view\\_mode=scroll](https://www.scribd.com/fullscreen/131615558?access_key=key-19ebq5w2m2m3caw25p7y&allow_share=true&escape=false&view_mode=scroll)

38. We will provide some cases that LRC has worked on as well other similar organisation working with stateless children to highlight these problems. Please note that as the cases pertain to children as well as the privileged nature of information, we have not mentioned any identifying details like names or countries of origin.

Case A:

39. Child A was born in South Africa to a parent who was a recognised refugee. Her birth was accordingly registered in South Africa but with only the name and details of the mother with father recorded as unknown. A few years after the birth of child A her mother abandoned her with neighbours and lives in another country without much contact with the minor child. Attempts to adopt the child have been unfruitful as the mother has refused to sign the adoption papers. As a result child A is in foster care with only a birth certificate as her primary identification document. She cannot sustain the refugee claim as she does not know why her mother left her country of origin given that she was born in South Africa.

40. In South Africa, like many countries, most services require picture identification. These services include banks, university application, and drivers licence among many other services. Child A has managed to attend primary and secondary school on her birth certificate alone however once she completes secondary school she will not be able to apply successfully for tertiary education as one of the primary documents required is a picture identification document. This will place a cap on education and her ability to attend tertiary education and positively contribute to her society when she has potential to thrive given her past results.

41. In addition, she is unable to travel domestically and internationally – domestically because to board an aircraft every passenger must produce a valid identification document for safety and internationally because she does not have a passport. Additionally, as she is not yet a South African citizen South Africa will not issue her with a passport or travel document. She is deprived of her right to freedom of movement which is a right granted to her by the South African Constitution amongst other rights which is deprived.

42. Additionally, her birth is not registered in her mother's country of origin and she does not have any of her mother's documentation that would indeed confirm the mother's ties to that country. She will not therefore be able to receive a passport from that country. Consequently without the passport she will not be able to apply for temporary residence permits in South Africa as a passport is necessary component of that application, without which the application cannot be successful. It is therefore impossible for child A to regularise her stay in South Africa.

Case B:

43. The facts of child B related to a case that was litigated by Lawyers for Human Rights in South Africa. Briefly the facts of the case are following: Child B was born to parents from Cuba who were recorded as permanent emigrants in the population of that country. As such, child B could not access Cuban citizenship through her relationship with her parents so the Cuban embassy refused to register her birth. She was officially recognised as a foreign child of Cuban national.

44. Once this was confirmed by the Cuban officials in writing, child B's parents attempted to apply for citizenship in terms of section 2(3) of the Citizenship Act. The application was rejected because the parents received their permanent residence status after the B was already born.

45. The Lawyers for Human argued that the child must be granted South Africa citizenship because the child was born in South Africa, did not have her birth registered in any other country nor did she have citizenship of another country therefore child B was a stateless person.

46. The department of Home Affairs argued that child B did not qualify as stateless persons because she was eligible for permanent residence through her parents. This argument by the Department of Home Affairs obviously conflates permanent residence status with citizenship/nationality as the former does not give a child without citizenship any more rights than being able to reside in South Africa

indefinitely. It however does not confer citizenship which means the minor child would still be stateless.

47. This case had to be litigated to force the Department of Home Affairs to confer child B with citizenship as she was stateless person, which the Lawyers for Human Rights successfully managed. However, litigation cannot be the solution in each and every case and a more reasonable and less restrictive method needs to be developed and applied.

### **IMPACT THAT ARBITRARY DEPRIVATION OF NATIONALITY**

48. Like many countries, identification documents are the gateway to accessing services and ultimately human rights.

49. Without identification documents children are unable to register and attend school because the primary document required to register for schools is a birth certificate that at very least will confirm the age of the child in question. A stateless man was quoted saying *"I was constantly going to Home Affairs back and forth and my applications were just being thrown away because to them I was a nobody since I never had the citizenship they were looking for. That was killing the goals I had before because I was looking forward to [furthering] my studies and have a better life for myself but it was very tough."*<sup>3</sup>

50. It has been internationally accepted that education is one of the effective ways to challenge and reduce poverty. As such without education, these children are condemned to perpetual poverty as they will not be able to compete successfully for formal jobs without being educated. Most undocumented persons have to live on charity and kindness of their neighbours and community without secure accommodation and food security.

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<sup>3</sup> <http://www.enca.com/south-africa/stateless-south-africa>

51. Additionally, without documentation certain day to day benefits that all documented persons enjoy will not be accessible to children like A and B above. These services include access to bank accounts, apply and receive social security, attend hospitals and apply for driving licences.
52. Without documentation, these children once they are adults will also not be able to get married legally and receive a marriage certificate. They may be forced to cohabit with a partner. This does not give much protection in South Africa as there is no recognition of a common law spouse. They would therefore not be able to enjoy the protections available in law. Additionally, undocumented persons are not able to own any property in their own name. For those few that have fought the odds and able to "own" small business or houses, they have to register them in someone else's name. One such person was quoted noting that *"[W]ithout the correct documents I cannot buy anything in my name, so everything I own actually belongs to someone else," he said. "I must always be careful how I conduct myself because the wrong move could mean my property being taken away from me."*<sup>4</sup>
53. Additionally if children like A and B above are not registered and granted citizenship in their country of birth to ensure that they do not continue to be stateless, they themselves would not be able to register the births of their own children once they become parents themselves. This initial failure to curb statelessness means that statelessness becomes something that parents pass onto their children consequently multiplying the number of children and persons who are stateless.
54. As evident in the cases above particularly child B's, currently litigation is the only option that ensures that children at risk of being stateless are able to apply successfully for the right to birth registration and citizenship. It is no secret that litigation is not a cheap exercise and as poverty is struggle that children in these circumstances face access to justice is also a luxury that they can only dream of. Moreover, in South African government sponsored legal aid for civil litigation is only guaranteed for South Africans and it is impossible for undocumented children. In

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<sup>4</sup> <http://www.unhcr.org/4e92e8bd9.html>

South Africa there are a few civil society organisations that offer free legal advice and representation to such cases and not all undocumented children have access to them.

55. More worryingly in cases where undocumented children are abused and/or in need of care and protection the guarantees in the South African constitution and the Children's Act are not always available to them. This is also because in some cases social workers are unable or unwilling to help them because they themselves have been threatened with arrest by the Department of Home Affairs for assisting these children. In some instances the social workers themselves believe that their services are only for South African children and documented children.
56. Perhaps the most concerning violation of the rights of undocumented persons is the constant risk and fear of arrest. It was recently reported that an undocumented man has never left the only South African town he knows because of fear of arrest. He is quoted to saying *"[I]f I get arrested on my way to Johannesburg or any other place with no documentation, where will I end up? I would rather be safe than sorry."*<sup>5</sup> As an undocumented person his freedom of movement is completely non-existent as are any of his rights as explained above, he lives in a world where these guarantees mean nothing to his reality. Additionally, with detention of stateless persons there is no country to deport them to so they are detained for longer periods until they are released. This was confirmed by a stateless man who noted that *"You can be repeatedly arrested and detained for the purpose of deportation but you can't be deported so you can spend prolonged periods in detention"*<sup>6</sup>
57. Lastly, the fact that a stateless persons does not exist in any country on paper, they are not counted in national populations where they reside, they cannot own anything, cannot travel and no country can claim them as their own, which means that they "do not exist." These persons "do not exist" anywhere but they have lives, children, needs, rights and vulnerabilities that must be catered for. While human

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<sup>5</sup> <http://www.unhcr.org/4e92e8bd9.html>

<sup>6</sup> <http://www.enca.com/south-africa/stateless-south-africa>

rights are guaranteed for all human beings regardless of status, for stateless persons their experiences and their status has condemned them to lives without rights and without legal existence, simply an undignified existence.

58. We trust that these submissions will be helpful in the compilation of the report to the Human Rights Council by the Office of High Commissioner for Human Rights. We thank you again for the opportunity to make submissions on this issue.

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*ENDS*