

## **Theoretical Legal Assumptions for the United Nations Security Council Reform**

**Jorge Luis Silva González**

Faculty of Social Sciences and Humanities, University of Pinar del Río, Cuba  
[silva@upr.edu.cu](mailto:silva@upr.edu.cu)

**Orelvis Gener Crespo**

Trinidad Municipal People's Court, Sancti Spíritus, Cuba  
[orelvis.gener@gamil.com](mailto:orelvis.gener@gamil.com)

**Pedro Alejandro Vigil García**

Faculty of Social Sciences and Humanities, University of Pinar del Río, Cuba  
[pedrovigil30@gamil.com](mailto:pedrovigil30@gamil.com)

**Abstract.** The United Nation Security Council, although it has been the most reformed organ of the Organization, does not currently respond to the claims of democracy of the international community. In this regard, this article proposes four theoretical legal assumptions that should underpin the democratization of the aforementioned organ, regarding the structure and operation established by the UN Charter. The use of applicable methods in the Legal Sciences allowed the formulation of the postulates, among them: the recognition of the perspective of democracy in the UN Charter, and the transformation of the voting system into non-procedural matters and in relation to the processes of reform and revision of the UN Charter.

**Keywords.** Security Council, United Nation, Public International Law

### **Introduction**

The United Nations (UN), as a representative of Public International Law, is structured by different organs, which fulfill certain functions and contribute to the development of the smooth development of multifaceted relationships on a global scale. Its main organs, as stated in UN Charter, specifically in Article 7 are: the General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; and the UN Secretariat.

The Security Council (UNSC) is particularly regulated under chapter V, Articles 23 to 38, although under chapters II, IV, VII, VIII, X, XII, XIV, XV, XVIII, references are also made. The Security Council consists of 15 members, five of them permanent and ten non-permanent, charged with the ensuring international peace and security. UNSC has been the most reformed body of UN since the 1960s, as for the number of non-permanent members and for their voting system, with essential prerogatives regarding the veto power.

Correspondingly, the constant demand exerted by a group of UN Member States, enabled a movement to take place since 2008, whose objective would be to achieve consensus through the hearings made to the same States, for their participation in the debate on the possible aspects to be reformed. In correspondence with decision 62/557, approved on September 15<sup>th</sup> of the same year, intergovernmental negotiations began on the reform of the Security Council, in informal plenary sessions of the General Assembly, during its Sixty-third Session (UN, 2018).

The efforts made by the representatives of the States that have taken part of the movement have not been sufficient, despite the fact that ten years have gone since the establishment of this informal plenary session, there are currently differences regarding the aspects the UN Reform should contain, that is to say, they have not reached a resolution.

In response, the present study *aims to*: argue the theoretical legal assumptions that should underpin the democratization of the UNSC regarding the structure and operation established by the UN Charter from the perspective of the democracy. A relevant issue for the need to pay tribute to the aforementioned reform process and the relevance for the Cuban Society of International Law under the Jurists National Union of Cuba for 2019, referring to the United Nations reform process.

For the fulfillment of the proposed goal, methods such as the bibliography review on the subject, the historical-legal for the gross development of the category democracy and its impact on the International Law, as well as the legal-doctrinal on the basis of the perspective of the assumed democracy to develop the argument of the legal interrelated theoretical assumptions, in hard and soft books, scientific articles and pronouncements of representatives of States within the Organization.

### **Considerations on democracy: its significance for the reform of the UN Security Council**

Democracy has been associated with the possibility of popular participation in political decisions within states. However, research has been carried out to prove that not only at the state level should democracy be considered, but that it should also be recognized as a starting point for the operation of other institutions overseas.

Public International Law, as a branch of Law in charge of regulating international multifaceted relations, has precisely been one of the disciplines where the category democracy has acquired in theory and practice (especially in the UN field of action) a considerable importance, given the existence of international bodies and organizations that need to be democratized.

The term democracy was first used in ancient Greece between the fourth and fifth centuries BC. "For the first time this term is booked in the history of humanity. Power for the demos, for this new enriched class but excluded from the Gerusia, the Areopago or the Arcontado or the Bulé in Athens" (Colectivo de Autores, 2004, p.157).

The contributions made to the Law by Rome stand out, although they did not expressly refer to democracy as a term to catalog it, but they erected an iuspublicistic model founded on res publicae, what they called the thing of everyone, that is, the public thing (Fernández, 1999, p.16). This model on Fernández's consideration (1999) "implemented a mechanism of power and was based on a series of values and concepts that allowed a true, genuine and authentic participation, a true power of that populus" (p.17).

Although in Rome the use of the term democracy was not considered, it was linked to the possibility of participation of the populus in the development of the Roman Empire, that is, the possibility of intervening in decision making. However, both in Greece and Rome, there was a class concept of people, which clearly represented their true nature.

Democracy, strictly understood as a manifestation of an organizational form of government, as people's government, served perfectly to typify the ancient slave democracies.

regardless, the concept of the people was reduced to the smallest slave minorities, and excluded the great masses of the population. (Gros, 1989, p.199)

Later, with the course of the centuries and the flourishing of the liberal bourgeoisie, other patterns that sustained democracy were erected, especially because they abandoned the centenary paths of feudalism. Two patterns were instituted, the Lobrano's consideration (1990) "to such an interpretative scheme the doctrines of Montesquieu and Rousseau are also referred, and precisely in what most markedly characterizes them, the proposition of two different and antagonistic constitutional models" (p.28). Such is the case of Montesquieu (referred in Fernández, 2000) that he considered: Democracy is that form of state in which the government is in the hands of the masses; the aristocracy that is the best form of government because society is led by an elite of capable people and, finally, the monarchy or government of a single person. These forms oppose, as an absolutely opposite, the despotic government that is based on terror and repression of the people. (p.114)

Democracy is contextualized with the political systems and the ways to elect their representatives by voters, so (Brody, 1982) indicates that "democracy is everyone's right to participate in voting" (p .5). This criterion is shared by Puppo (2012), Dahl (referred in García, 2012) and Ramaccioti (2016), who consider that democracy has as a fundamental premise a legitimacy based on free, multiparty and periodic elections, as a guarantee of any citizen to be able to participate electorally, choose and be elected, regardless of race, gender, creed, or political affiliation.

The election of the rulers by the citizens, according to other authors, does not fully cover the term, which is why Lobera (2011), indicates that democracy "raises the right to participate in decision making about those aspects that directly affect the life of the people (isegoria, equality in the use of the word)" (p.10). Likewise, Bobbio (1997) agrees that "it is the set of procedural rules for collective decision making in which the widest possible participation of stakeholders is foreseen and encouraged" (p.152).

In accordance with the above considerations Guzmán (2015), appreciates that the people participate in the main decision making of the nation as sovereign, which is an evidence of legitimacy, for him an example of this, are the constitutional reform processes. Meanwhile, Garcini (1976), Luján and Vázquez (2014), Gimbernat (2014) and Álvarez (2015) agree that democracy belongs to the people, who participates not only in the elections, but also in the main decisions of the nation.

Levine and Molina (2007) say that "the quality of democracy is then influenced by the level of citizen participation in political life, both in decision making, as in partisan and social organizations" (p.25). This criterion is also shared by Hernández (2013) when he indicates that "sovereignty resides in the people, which guarantees through a wide range of participatory mechanisms that give rise to democracy" (498).

The term democracy is also used by other authors who associate it with issues such as: the possibility of expression, the right to political participation, human rights and as a principle of negotiation within the framework of the world community, recognizing it as a pillar of cultural life. Like Montaña (2003), González, Romero and Urrea (2007) and Rasilla (2010).

Democracy is also considered as the government of the people, a criterion shared by Kelsen (1980) and Webster (referred in Lijphart, 2000), when they express that democracy is characterized by being the government of the people, by the people and for the people. There are scholars who even catalog it as cooperating with the development of states, such as Bummel (2010) when it states that "democracy is not limited to the holding of democratic elections. National democracy is more than this. It is an essential means for economic and social development, which contributes to overcoming the struggle of interests at national and international level" (p.39).

in this regard, Resolution 00/1 approved on October 24<sup>th</sup>, 2005 by the UN General Assembly, according to García (2006) states: The Heads of State and Government reaffirm that democracy is a universal value based on the freely expressed will of the peoples to determine their own political, economic, social and cultural system and their full participation in all aspects of their lives. We also reaffirm that, although democracies share common characteristics, there is no single model of democracy and that it does not belong to any country or region, and we reaffirm the need to duly respect sovereignty and the right to self-determination. We emphasize that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing. (p.68)

On the other hand, for Ramaccioti (2016) democracy does not culminate with the election of representatives by voters, but is classified as a democracy in exercise. In this regard it indicates that: A government, democratically elected, represents the will of all citizens and has as essential obligations to respect and enforce the Rule of Law, as well as maintain control and direction of the external relations of the State on behalf of the entire nation. (p.4)

In this sense it is where the criteria of the authors that protect the perception of democracy from International Law are supported, but associated with what they consider as Rule of Law, both terms, according to the criteria set forth should be linked, an issue analyzed by Sánchez (2013) when it states that: The Rule of Law occupies a central place in the concept of democracy accepted today by the international community as a whole (States and international organizations). If any public institution manifestly disregards this principle, it moves away from democracy in its contemporary sense. (p.1)

Another of the authors that maintains the association between the Rule of Law and democracy is Fernández (2005), expressing that "if there is a true democracy, no matter what its form, the existence of a Rule of Law should be agreed, and in turn, every Rule of Law must be democratic, but it would lack its essential legitimacy to qualify" (p. 310). Carpizo (2007) shares this premise when he believes that "democracy presupposes a legal order, a Constitution and a Rule of Law that guarantee the fundamental freedoms and rights of people" (p. 358). Sánchez (1957) also coincides with the criteria set forth by stating that: For the democratic republic there is not and cannot be more internal or external sovereignty than the popular one, so that, from the political point of view, sovereignty is the will of the majority. But since the democratic republic is the Rule of Law, that is, subject to the law in its entire existence and manifestation, the validity of that expression of majority will depends on its conformity with the legal system. In that way the necessary subordination of political sovereignty to legal sovereignty occurs, which is confused with the problem of constitutional validity and the supremacy of the Constitution. (p.58)

Puppo (2012) also, referring to these terms indicates that "democracy is perhaps taken as a constituent element of the Rule of Law or the Rule of Law as a constituent element of democracy" (p.6); and Gros (1989) is another author who defends the relationship between democracy and the Rule of Law, notes that "the idea of democracy is inevitably linked to what is the Rule of Law, the legal equality of all men, the recognition of the human rights of all individuals and the recognition of all minorities" (p.200).

This phrase - State of Law - is used by Puppo (2012) to indicate that governments base their actions, the development of their functions in accordance with the law, according to the cases provided for in a pre-existing legal norm, and in accordance with the procedures provided by the same right. Not far from the previous statement Sánchez (2013) indicates that: The rule of law is a principle of government according to which all persons, that is, public institutions (state, federal or local, legislative, executive or judicial powers) and private entities (individuals, associations and companies) are subject without distinction to state laws that are publicly promulgated. In this way, arbitrariness is avoided, an objective that is especially relevant in the exercise of public powers. (p.1)

Democracy is then considered in the present study, based on the exposed approaches, such as the faculty that the people have as sovereign, to participate in the elections and elect their representatives, determining their own political-economic system, power that does not conclude with the election, because it actively participates in decision making, having the possibility of expressing their opinions, ensuring compliance with the legality of their representatives.

In correspondence with the previous definition, an analogy is established between what is assumed as democracy for the Rule of Law and what could be recognized as democracy for Public International Law, taking into account that this category lacks its own definition to operate in the branch of law mentioned.

It will be understood and applied as a perspective of democracy for the analysis of it in the UN Security Council and the creation of assumptions for its reform: as the possibility for permanent and non-permanent members to decide on all issues that they are responsible for knowing, with equal prerogatives, rights, powers or faculties, that is, without favoring some members because of their status in relation to others.

### **Assumptions for the democratization of the UN Security Council**

Related to the purpose of the authors whose criteria have been set out in the study for the determination of the perspective of democracy, anti-democratic regulations were identified regarding the composition of the UNSC, the voting system, the ratification of the processes of reform and revision, and the formation of the UN Military Staff Committee in case of threats to peace emphasized later.

Correspondingly, four theoretical assumptions are proposed and founded to take into account for the current reform process of the UN Charter, aimed at the democratization of the UNSC from its own legal regulation, they are: *1) recognition of the perspective of democracy in the UN Charter; 2) The exclusion of the indefinite permanence of members in the UNSC; 3) The integration into the UN Military Staff Committee of non-permanent members of the Council; and 4) The transformation of the voting system into non-procedural matters and in relation to the reform and revision processes of the UN Charter.*

In the case of the first assumption, aimed at recognizing the perspective of democracy in the UN Charter, it is necessary to refer to the fact that, from the formal point of view, the legal text of the Organization does not establish in its preamble, the expository and operative part of the term. In this regard, it is considered necessary for it to be guaranteed within the Organization and specifically in the UNSC, the UN Charter establishes the foundation of democracy within its objectives and aims, although in the preamble of the text, it effectively states that the UN peoples join forces to save the succeeding generations from the scourge of war, reaffirm faith in the fundamental human rights, equal rights of men and women, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, to promote social progress and better standards of life in larger freedom, the ideal of democracy is not contemplated.

It also happens with the purposes and aims of the organization (accepted and subsequently ratified by the UN founding nations, and by the states that adhered afterwards), which are routed roughly, to ensure international peace and security, to carry out international cooperation in the economic, social, cultural or humanitarian fields, to practice tolerance and live in peace as good neighbors, not to use armed force but in the service of common interest, and to use an international mechanism to promote the economic and social progress of all the peoples.

It is also considered, that the UN Charter should expressly include under Chapter V: *The Security Council*, the recognition of the perspective of democracy as a general rule, an issue that will require the fulfillment of the same to all members of the Council, because in this way, before the existence of violations of the articulated by any member of the organ, to defend anti-democratic positions, measures could be taken against it, because it would be

breaking not only one of the objectives or aims included in the UN Charter, but also in the specific regulation of the same.

Considering that UNSC is one of the most important organs due to its functions, the primary responsibility to ensure international peace and security, it is extremely necessary to *recognize the perspective of democracy*, because in compliance with such a high responsibility if it has not been incorporated. If an issue referred to an international conflict is submitted for consideration, it will probably act preserving the individual interests of its members and those of its allies. Therefore, the decisions of the organ should be taken by consensus of the majority of its members, on equal terms and without privileges, otherwise, the organization would not fulfill its objectives and aims, providing the possibility of an arm conflict, reason that led to the creation of the UN in the first place.

Based on the above, it is believed that the implementation of *the recognition of the perspective of democracy in the UN Charter, can be incorporated in the preamble in a fifth point that could be written as follows: Participation is reaffirmed of all Member states of the United Nations, in accordance with democracy, in the decision making process of the Organization, where the opinion of the majority and on equal terms, without privileges in favor of any member, ensuring respect for the provisions of the UN Charter.*

Likewise, the following text should be included in Article 24, Chapter V of the UN Charter referring to the functions of the Council, which requires the fulfillment of all its members: *The permanent and non-permanent members of the Security Council, decide without privilege, on all the issues that they have to know, they have equal prerogatives, rights, powers or faculties, without favoring their condition.*

The second assumption considered as *the exclusion of indefinite permanence of the members in the UNSC* is closely related to the former. It is based on the prerogatives in favor of the members of the UNSC that have been indefinitely in this organ for 73 years, and that created this right in the Conferences developed before the creation of the UN, such as: the Declaration of the St. James' Palace and the Atlantic Charter in 1941, the Declaration of the Nations in 1942, the Moscow and Tehran Agreements in 1943, the Conference Dumbarton Oaks in 1944, the Yalta Conference in 1945 and finally the San Francisco Conference that same year, whose main objective was the creation of the UN.

The UN Charter regulates in Article 23 that the Republic of China, France, the Union of Soviet Socialist Republics (nowadays Russia), the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. They have powers in their favor that allow them a privileged position in relation to the non-permanent, since the former do not have to be reelected, however, the latter are reelected every two years.

From the analysis carried out, the existence of a right that goes against democracy is determined, coinciding with the scholars of International Law, Arias (1999), Rey (2014) and Sainz (2016), in which the status of permanent members is not consistent with the good development of this organ. In this sense, it is also agreed with Ricardes (1994), Pino (2012), Rey (2014), Prado (2015), Sainz (2016), and Romero (2017) in which the five permanent, maintain a lifetime seat in the Council perpetuating their supremacy over the other members of the Organization.

It is considered that the UNSC immediately needs a reform for the functioning as a democratic organ, because as Roldán (2009) states, the precepts of the UN Charter regarding the composition of the aforementioned UNSC are precarious. It is believed that all members to be part of the Council should be elected by the international community, either for their participation to ensure the international peace and security or for their work against the scourge of war, on equal terms; without prevailing one member over another for their power, truly reflecting equality between nations.

It is proposed that the UN Charter regulates the exclusion of the permanent members, which would result in the existence of only non-permanent members in the Organization. This

claim could be conceived as follows in Article 23 according to the composition: *The Security Council shall consist of fifteen members of the United Nations who will be elected on the basis of their contribution to ensure the international peace and security, the other purposes of the Organization, and to an equitable geographical distribution. They will be re-elected for a period of two years. Outgoing members will not be re-eligible for the subsequent period.*

The third assumption concerning the integration of the non-permanent members of the UNSC into the Military Staff Committee is relevant for the international community, since it is established in Article 46, which in the case of threats to international peace and security, the permanent members of the UNSC will integrate the Committee, which is responsible for directing all actions aimed at preserving peace: the main function of the Council. It is necessary to highlight that it is composed only of permanent members, privileging them for having unlimited permanence, and for being economic and military powers on a global scale.

The powers granted in their favor are based on the fact that these international powers were successful in World War II. It is not logical to understand that for 73 years, they still maintain prerogatives in their favor, allowing them a privileged position with respect to non-permanent members who have their seat on the Council. The UN Charter maintains equal rights as one of its aims, but within the Organization, there is an inequality of its members. In the specific case, it is absurd that the Military Staff Committee be made up only of permanent members of the Council, when the function of preserving international peace and security corresponds to all members of this organ, without distinction among them.

A correlation of forces continues to be manifested in the UN, where the powerful (the permanent members) maintain rights over other states, being favored by privileges protected by the provisions of the UN Charter. The integration of this Committee by the five great powers is an example.

It is considered that the article analyzed by virtue of the assumption that is proposed from the perspective of democracy should be reflected in the following way in Article 47:

*A Military Staff Committee will be established to advise and assist the UNSC in all matters relating to the military needs of the Council to ensure international peace and security, the employment and command of the forces made available to it, to the regulation of armaments and possible disarmament. The Military Staff Committee shall consist of the Chiefs of Staff of the members of the UNSC or their representatives. Any member of the UN that is not permanently represented on the Committee will be invited by him to join his work when the efficient performance of the functions of the Committee requires his participation.*

At the UN, the idea of its transformation is currently reinforced, and starting with the democratization of the UNSC, it would be a fundamental step to achieve the final aim, being one of the most questioned organs in its actions and in the distinctions it makes to the inside of the membership. To this end, one of the assumptions for its democratization, it is precisely the regulation in the UN Charter that non-permanent members of the UNSC can also integrate the Military Staff Committee, so that no distinction would be made, there were no privileges to favor of the permanent members, without favoring any member by its condition.

The fourth assumption is aimed *at transforming the voting system into non-procedural matters and in relation to the reform and revision processes of the UN Charter.* It is aimed at modifying the voting system within the organ, since Article 27 establishes that for non-procedural matters the affirmative vote of nine members will be taken into account, including the affirmative votes of all permanent members. This article is where the so-called veto power is instituted in favor of the five major powers within the UNSC, which has been the focus of criticism around the non-existence of democracy in this organ, as it is established a privilege in favor of permanent members, who may veto a decision or resolution of the UNSC, even if it is approved by all non-permanent members of the Council.

The veto power is “a vestige of the principle of unlimited sovereignty, a principle that prevents progress towards a system where the common interest is prime” (García, 2018, p. 6).

in this regard, Flajo (2015) and Ricaurtes (1994) agree that the veto power contravenes the principle of sovereign equality, which infers that it is a violation of International Law. It also agrees with Arias (1999), Rey (2014) and Sainz (2016) when they express that this privilege has influenced the search for proposals by the States, aimed at its elimination or at least its reduction.

It is believed that the reform of the UN, aimed at the democratization of its UNSC, should be aimed at the elimination of the veto power in favor of permanent members, which allows them to be in a position of privilege in relation to non-permanent members.

The aforementioned elimination of this privilege is in correspondence with the other assumptions set forth, since as it was based on the second one, *referring to the exclusion of the indefinite permanence of members in the organ*, the prerogatives established in the UN Charter to its favor, and as an example of one of these privileges, the veto power regulated in favor of permanent members would be eliminated.

It is considered that the article analyzed by virtue of the assumption that is proposed from the perspective of democracy should be expressed in Article 27 as follows: *Each member of the UNSC shall have one vote. The decisions of the UNSC on all issues shall be taken by the affirmative vote of nine members, but in decisions taken under Chapter VI and Article 52.3, the party to a dispute shall refrain from voting.*

The veto power in favor of the big five is not only manifested in Article 27, but also in the processes of reform and revision of the UN Charter. The first of them, it is established in Article 108, that in order to carry out any modification, the affirmative vote of two thirds of the members of the General Assembly is required, and ratified by all permanent members of the UNSC. Similarly, in Article 109 referring to the review process, the power of permanent members to ratify, for its entry into force, any modification to the UN Charter according to the recommendation decided by the General Conference is regulated.

In the preceding articles, the veto power in favor of the five great powers is also revealed. This condition that permanent members possess positions them in hierarchy in relation to non-permanent members, despite the fact that in the reform and revision processes, they are accepted and ratified by the majority of the members of the UN, that is, by the 66.6% of the Member states, the veto power allows to invalidate a decision or resolution to modify the UN Charter.

Taking into account the above, it can be affirmed that the proceeding for the ratification of the reform and revision processes detracts from democracy, since the possibility of vetoing a decision approved by the majority of the members of the UN. It also coincides with the criteria expressed by Conforti and Focarelli (referred in Sainz, 2016, p. 18), when they indicate that:

Although the Member states through their representatives in the General Assembly have an important mechanism for participation, which is reflected in the majorities required to achieve both the reform of Article 108, as well as the revision provided in Article 109, the UNSC has an outstanding power, which is impossible to ignore.

It is necessary to highlight from the analysis carried out, the need to modify what is regulated in Articles 108 and 109 to contribute to the democratization of the UNSC. It coincides with the criteria expressed by García (2012) when he states that “the UN Charter reform procedure is a slave to the Organization's architecture and, in that sense, includes the veto power of the permanent members of the Security Council” (García, 2012, p. 388).

This transformation is in correspondence with the aforementioned, because if the veto power is eliminated, as it is proposed above, it is logical that as a consequence, its established analogy for the ratification of the reform and revision processes be eliminated of the UN Charter. In this regard, it is considered that the articles analyzed under the assumption that is proposed from the perspective of democracy, should be reflected in the following way in Article 108: *The reforms to the UN Charter will come into force for all Members of the United Nations when they have been adopted by the vote of two thirds of the members of the*

General Assembly and ratified, in accordance with their respective constitutional procedures, by two thirds of the Members of the United Nations.

On the other hand, Article 109 could express: *Any modification of the UN Charter recommended by the vote of two thirds of the Conference shall enter into force upon ratification in accordance with their respective constitutional procedures, by two thirds of the Members of the United Nations.*

The previously assumptions are necessary to contribute to the current UN reform process, as they constitute a proposal or starting point for the States that make up the commission in charge of the discussion for the democratization of the Security Council.

### Conclusions

Having as reference that the UNSC is not a democratic organ, it is considered that to reform it from its own legal regulation, it is necessary that the following legal theoretical assumptions be materialized: the recognition of the perspective of democracy in the UN Charter constituting the Organization (both in its preamble as under Chapter V addressed to the Security Council), the exclusion of indefinite permanence of members in the organ (so that the Council is only composed of non-permanent members), the integration to the Military Staff Committee of non-permanent members of the Council (on the basis that the permanent nature of the Organization disappears) and the transformation of the voting system into non-procedural matters (where all matters will be approved by the affirmative vote of nine members) and in relation to the processes of reform and revision of the UN Charter, where modifications to it will be recommended and ratified by the vote of two thirds of the General Assembly of the United Nations.

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