



TEIMUN 2021

LEGAL COMMITTEE

TOPIC A: THE QUESTION OF UNIVERSAL JURISDICTION

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Welcome Letter

Dear delegates of the UN General Assembly Sixth Committee (Legal),

We would like to welcome you to TEIMUN 2021 and thank you for choosing our committee! We are very excited you have decided to join this year's Legal UNGA committee, where we will be dealing with two important and pressing issues regarding international law. This study guide focuses on the second of our two topics which is Crimes Without Borders: The Question of Universal Jurisdiction. Before diving deeper into our topic, we would like to introduce ourselves.

Youmna Osama

Hello! Youmna here, a second-year International and European Law student at the University of Groningen. I am originally Egyptian but I have lived for most of my life in Saudi Arabia (I would still say I am 100% Egyptian though). I am really passionate about what I study (at least the international law part, ahem) and I am really excited to show you how interesting international law can be. Trust me, debating legal topics can be just as lively as debating political ones!

Maria Podzegunova

Hello there! My name is Maria and I will be one of the chairs for the Legal Committee. Currently, I'm in my second year of the International and European Law LLB programme at the University of Groningen. One of my inspirations for choosing my degree programme was actually MUN, along with my passion for history and international politics. This will be my first TEIMUN conference, however, and I'm very much looking forward to it!

Natalie Viktoria Bichler

Hi, my name is Natalie. I'm currently in my first year of the International and European Law degree at the University of Groningen. I am half Slovak and half German, but I grew up in Jamaica, Egypt and the UAE. I chose my degree because of my international background and interest in various legal areas such as human rights law, environmental law and more. I look forward to seeing how you will approach these issues and cannot wait to see the resolutions you will create together!

We are looking forward to meeting you all and truly believe our committee will be full of productive debates and fruitful discussions. This study guide is meant to prepare you, but we expect you to do your own research as well. If you have any

questions, feel free to contact us. Good luck with your preparation, and see you soon!

1 | Introduction

The UN is composed of 6 primary organs, the General Assembly (also known as the UNGA or GA). It is a forum comprising all 193 UN members. The GA is unlike any other UN organ as it ensures equal power and representation of each member state.¹ The first GA session was held on the 10th of January 1946.² The resolutions which the GA adopts are non-binding and serve as recommendations rather than commands. Chapter IV of the UN Charter sets out the composition, functions, powers, voting, and procedure of the General Assembly.³

The General Assembly is composed of 5 categories. One of these categories are the committees, of which there are 30. The six main committees are numbered from 1 to 6.⁴ The Sixth Committee, or the Legal Committee, deals with legal matters. The Legal Committee is a key actor in the negotiations and the adoption of new international treaties. The Legal Committee assists the GA in "encouraging the progressive development of international law and its codification;" (Article 13(1)(a) of the UN Charter), which is part of an article relating to one of the functions and powers of the GA.

The Legal Committee is the primary forum for any legal questions, mainly concerning public international law. This committee generally discusses common topics regarding:

- The promotion of justice and international law
- Organizational, administrative and other matters
- Drug control
- Crime prevention
- Combating international terrorism⁵

¹ United Nations, 'Role of the General Assembly' (United Nations Peacekeeping, n.d.) <<https://peacekeeping.un.org/en/role-of-general-assembly>> accessed 27 February 2021.

² The Editors of Encyclopaedia Britannica, 'United Nations General Assembly' (Britannica, n.d.) <<https://www.britannica.com/topic/United-Nations-General-Assembly>> accessed 27 February 2021.

³ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

⁴ The Editors of Encyclopaedia Britannica, 'United Nations General Assembly' (Britannica, n.d.) <<https://www.britannica.com/topic/United-Nations-General-Assembly>> accessed 27 February 2021.

⁵ United Nations, 'Sixth Committee (Legal)' (General Assembly of the United Nations, n.d.) <<https://www.un.org/en/ga/sixth/>> accessed 27 February 2021.

The second issue that will be dealt with in this committee is that of the Question of Universal Jurisdiction. The issue here is to make sure all criminal offences are being prosecuted, no matter where the individual is located, while still respecting state sovereignty. We must discuss the scope and applicability of this principle. With this issue, so many new questions arise. To what extent is this principle applicable? Is there absolutely no requirement for a territorial link? To what crimes should it apply? When should it apply? Is the principle in accordance with state sovereignty? These are all questions that lead to controversial answers, and will be the questions the debate in this committee revolves around.

2 | Problem Specification

Ensuring the prosecution or punishment of violators of international crimes has its intricacies. However, the main caveat is, and has always been, the principle of universal jurisdiction. Put simply, it is the only principle under international law which requires no jurisdictional nexus between the State invoking jurisdiction and the affected State.⁶ Instead, its basis has roots in the very nature of the prosecuted crime.⁷ In other words, the gravity of the offence in question is so abhorrent that virtually every State has a legitimate interest in repressing it.⁸

However, in applying the principle of universal jurisdiction, other concepts inevitably seem to create conflict. Can this principle be utilised in such a way as to circumvent immunity, for instance? As a symbol of State sovereignty, immunity is a complex concept in itself, which has not been set aside legally very often. Case law depicts that there are only a handful of prominent cases where immunity could not be invoked, as will be discussed further. The cases of Pinochet and Eichmann, in particular, put into perspective the extent to which universal jurisdiction may be utilised when no obstacles exist in its application. However, with other cases, such as the Arrest Warrant, this has not always been successful.

Moreover, to what extent is this principle effective in prosecuting perpetrators of crimes and ensuring there is no impunity? Perhaps there are other more effective means to ensure that the perpetrators do not go unpunished, such as the Universal Periodic Review (UPR) and the Responsibility to Protect (R2P) Doctrine? Both mechanisms have been largely contested by the international community, and it is no surprise that both have also received a substantial amount of criticism as well.

⁶ Cedric Ryngaert, Jurisdiction in International Law (Oxford Scholarship Online, 2008), 101.

⁷ *ibid.*

⁸ Gleider Hernández, International Law (OUP 2019).

Thus, it remains inevitable to ponder over how can the international community ensure that the violators of such heinous offences do not remain unpunished.

These are the questions which your Resolution should focus on. By defining the principle of universal jurisdiction, as well as its scope and implementation in practice, this Background Paper will aim to provide an overall insight into the topic. It is advisable that you, as Delegates, go beyond the scope of this paper to research the topic and particularly the implementation of universal jurisdiction nationally.

3 | Universal Jurisdiction in Theory

3.1 | What is Universal Jurisdiction?

Universal jurisdiction is a principle of extraterritorial criminal jurisdiction that is based on the idea that some crimes are so abhorrent that they engender jurisdiction for any state regardless of a territorial or national link to the crime.⁹ This principle is justified by the idea that there should be no safe haven for those who commit the most violent crimes.¹⁰ This base for jurisdiction is generally only invoked when no other bases for criminal jurisdiction are available, that is the case when the accused is not a national of the State and when the crime was not committed on the state's territory or against its nationals.¹¹

This principle was originally used for piracy crimes. Since pirates operated on the high seas, outside of State territories and were often composed of nationalities from many states, it was very easy for them to escape jurisdiction of any state and thus jurisdiction by all states was necessary. Now, the principle applies to a wide variety of crimes and can be found in both international agreements such as notably the Geneva Conventions¹² and is a well-established principle in customary international

⁹ Human Rights Watch, 'Basic Facts on Universal Jurisdiction' (Human Rights Watch, 19 October 2009) <<https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>> accessed 27 April 2021.

¹⁰ Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity, how do the two principles intermesh?' (2006) 88 International Review of the Red Cross <www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf> accessed 28 April 2021.

¹¹ International Justice Resource Center, 'Universal Jurisdiction' (International Justice Resource Center, 1 May 2015) <[https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-](https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#:~:text=The%20term%20%E2%80%9Cuniversal%20jurisdiction%E2%80%9D%20refers,community%20or%20international%20order%20itself%2C)

[jurisdiction/#:~:text=The%20term%20%E2%80%9Cuniversal%20jurisdiction%E2%80%9D%20refers,community%20or%20international%20order%20itself%2C](https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#:~:text=The%20term%20%E2%80%9Cuniversal%20jurisdiction%E2%80%9D%20refers,community%20or%20international%20order%20itself%2C)> accessed 27 April 2021.

¹² For example, Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 2 November 1950) 75 UNTS 135 (Geneva Convention) art 146. Also see: common articles GC I, Article 49; GC II, Article 50; GC III, Article 129.

law. A 2012 Amnesty International report shows that a total of 147 States have utilised universal jurisdiction over one or more crimes.¹³

3.2 | When do Problems Start Arising?

Scope

While States recognize the principle of Universal Jurisdiction, it is a difficult principle to implement as it is not only an international law issue but also a national law one. States are entitled to grant their own courts universal jurisdiction over certain crimes on the basis of a national decision. Since national decisions differ from state to state, the principle is not uniformly applied, and its scope is vague.

For instance national law differs regarding whether the principle could be exercised in absentia of the accused. This would mean that the accused does not need to be on the state's territory in order to be prosecuted. National law rules on this differ and many do not say anything about this issue. In addition, one can only speculate the extent of recognition of universal jurisdiction in absentia under international law as the International Court of Justice has, in many cases, chosen to avoid the question of its presence. This was the case in the Arrest Warrant case, the issue was discussed in the Separate Opinions of the judges. The opinions of Judge Guilleme and the joint opinions of Judges Higgins, Kooijmans & Buergenthal are good reference points for this issue.

Immunities

Furthermore the issue clashes with immunities under international law. While immunities are of integral importance for state relations, if the whole point of universal jurisdiction is to ensure that no one gets away with such heinous crimes then does it not clash to say that higher officials are able to get away with them? In that sense, this is an immunities vs human rights dilemma. The answer to this dilemma is not uniform as will be illustrated.

A classic example of this can be found in the Pinochet case.¹⁴ The case concerned General Augustus Pinochet who was accused of human rights abuses committed against Spanish citizens in Chile during the military regime as well as the murder, torture, taking of hostages and genocide of Chileans.

¹³Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012' (Report) (2012) IOR 53/019/2012.

¹⁴ Pinochet v Bartle and ors, Appeal, [1999] UKHL 17.

The British courts chose to prosecute Pinochet under the principle of universal jurisdiction. In the rulings, they distinguished between state immunities and personal immunity of Heads of States and stated that state immunities do not apply to Heads of States in the context of criminal proceedings. Personal immunities from criminal proceedings could only be invoked for acts done in official capacity and since such heinous crimes could not be done as official acts, Pinochet could not benefit from immunity.¹⁵

Another case is the Arrest Warrant case before the International Court of Justice.¹⁶ The case concerned an international arrest warrant issued on the basis of universal jurisdiction by a Belgian Magistrate against the former Foreign Minister of the Congo. The warrant alleged that the minister had committed grave breaches of the Geneva Convention of 1949 and its Additional Protocols as well as crimes against humanity and asked States to arrest, detain and extradite Yerodia to Belgium. The question in this was whether Belgium acted contrary to the principles of customary international law concerning the absolute inviolability and immunity from criminal proceedings. The Court held that it is an established principle of international law that Heads of States and Governments as well as Foreign ministers and Diplomatic and Consular (i.e. 'the Big 3') agents enjoy immunity from civil and criminal jurisdictions of other States.

4 | What does Universal Jurisdiction Look Like in Practice?

The Lotus case underlines the necessity of consent from the territorial state to another state when it wants to "exercise its power in any form in the territory".¹⁷ Suppose there is a specific legal justification in place. In that case, this allows the state to disregard the necessity of consent of the other state.¹⁸ Whereas there is no consent and no rationale for an exercise of power in another state, this is a breach of sovereignty.

4.1 | Extradition

¹⁵ *ibid* paras 47,49,56.

¹⁶ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgement) [2002] ICJ Rep 75.

¹⁷ The Case of the SS Lotus (France v. Turkey) (Judgement) [1927] PCIJ Series A No. 10, 18-19.

¹⁸ Such as an authorization from the UNSC.

Extradition is the most used method to solve cases in which two countries deal with jurisdiction enforcement.¹⁹ For instance, when an individual is located in a state (the extraditing state) but is wanted for criminal prosecution in another state (the receiving state), the extraditing state hands over the individual to the receiving state. Then again, many states are reluctant to extradite their citizens.²⁰ Variety principles and obligations govern extraditions. The most important ones are the principles of double criminality²¹ and double jeopardy²²; and the obligations²³ that bound extraditing states by Human Rights Conventions.²⁴ The Model of extradition, by the UNGA in 1990, established the SOFA²⁵. SOFA allows states to consent to other state's enforcing their jurisdiction in their territory. For instance, a host state consenting to the presence of foreign troops on its territory.²⁶

4.2 | Cases Concerning Universal Jurisdiction

Ever since World War II, the principle of universal jurisdiction has developed and been codified. Following the Nuremberg trials, the question of accountability was enshrined in the idea of universal jurisdiction. As such, the Geneva Convention of 1949 further defines this principle.²⁷ The following cases are meant to further help you understand how universal jurisdiction works in practice.

¹⁹ Anders Henriksen, *International Law* (2nd edn, Oxford University Press 2019) 94.

²⁰ *ibid* 94.

²¹ The offence that the individual is being prosecuted for is a criminal offence in both the extraditing and receiving state.

²² The individual shouldn't be punished twice for the same offence.

²³ These obligations can be found in:

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art. 3.

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art. 7.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 3.

²⁴ Henriksen (n 3) 94.

²⁵ Status of Forces Agreement.

²⁶ Henriksen (n 3) 95.

²⁷ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (date of conclusion 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art. 49.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (date of conclusion 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art. 50.

Convention (III) relative to the Treatment of Prisoners of War (date of conclusion 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art. 129.

Convention (IV) relative to the Protection of Civilian Persons in Time of War (date of conclusion 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art. 146.

4.2.1 / Eichmann Case

In 1962 when the Adolf Eichmann, a former German Nazi who had implemented the extermination of Jews (titled the “Final Solution” by Nazi-propaganda), was convicted and executed on the grounds of war crimes, crimes against humanity and the genocide of Jewish people.²⁸ After escaping and evading criminal prosecution for more than a decade, he was found, captured and smuggled out of Argentina by the Israeli secret service in 1961. Argentina argued that a treaty had been agreed on. Still, there had been no ratification of it and, as such, was not in force at the time of Eichmann’s abduction. Argentina claimed this was a breach of international law. At the UNSC, Argentina raised this concern. It declared the abduction had been a violation of their sovereignty, demanding Eichmann to be returned. The UNSC had ruled the case as Israel breaching international law, being a case of enforcement jurisdiction. The two countries settled the issue, and Eichmann was tried before a District Court in Jerusalem.²⁹ This judgement was, and continues to be, a very controversial case.

4.2.2 / Rohingya Genocide

The case of the Rohingya genocide deals with the alleged crimes of genocide and crimes against humanity against the Rohingya people, an ethnic Muslim minority, in Myanmar.³⁰ These people are stateless and have been discriminated against, abused and persecuted in Myanmar for many years. The UN declared the necessity of the generals and head of the country’s army to be held accountable.³¹ In November 2019, the Burmese Rohingya Organisation UK (BROUK) filed a lawsuit before the Argentinian Judiciary. It requested this case be opened under universal jurisdiction.³² The ICC followed suit and started investigating crimes against humanity against the Rohingya. State Counsellor Aung San Suu Kyi, among other military and civilian leaders, is now a suspect in crimes against humanity and possible genocide.³³ This

²⁸ Michael Berenbaum, ‘Adolf Eichmann’ (Britannica, n.d.)

<<https://www.britannica.com/biography/Adolf-Eichmann>> accessed 27 April 2021.

²⁹ Vanni E. Treves, ‘Jurisdictional Aspects of the Eichmann case’ (1963) Minnesota Law Review, 559.

³⁰ ‘Universal Jurisdiction Annual Review 2021’ [2021] Trial International 19.

³¹ *ibid.*

³² Tun Khin, ‘Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide’ (OpinioJuris, 23 October 2020) <<http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>> accessed 2 May 2021.

³³ Marlise Simons and Hannah Beech, ‘Aung San Suu Kyi Defends Myanmar Against Rohingya Genocide Accusations’ (The New York Times, 1 February 2021)

ongoing case has gathered a lot of attention and continues to collect evidence and open investigations.

4.2.3 / Syria Crimes Against Humanity

The Syrian civil war began in 2011. Allegedly the Syrian intelligence services had been arresting, sexually assaulting, torturing and killing those who had opposed the regime and continued to do so.³⁴ Syrian nationals, former and present Syrian intelligence services, are facing charges of crimes against humanity.³⁵ Despite this occurring in Syria, the principle of universal jurisdiction allows for any state to prosecute crimes, even if they are not being committed in their territory. In September of 2011, an investigation opened into war crimes and crimes against humanity committed by the Syrian regime.³⁶ The currently ongoing case has managed to arrest many suspects and convict them. As the civil war continues, there is still hope that many war criminals will be held accountable for their actions.

5 | Alternatives to Universal Jurisdiction

5.1 | What Options Exist Besides Universal Jurisdiction?

Apart from the principle of universal jurisdiction, other mechanisms, including the Human Rights Council's system of UPR and the R2P doctrine have proven to be particularly useful in holding the violators accountable.

The UPR procedure has been renowned for catching the most heinous violators, and is a mechanism which consists of three main steps.³⁷ Firstly, the UN Member States offers an assessment of its human rights record to the UPR Working Group. Secondly, the other UN Member States engage in a collective dialogue and offer suggestions on improvement. The UPR Working Group then submits an "Outcome Report" to the Human Rights Council for a formal decision.³⁸ This procedure takes

<<https://www.nytimes.com/2019/12/11/world/asia/aung-san-su-kyi-rohingya-myanmar-genocide-hague.html>> accessed 2 May 2021.

³⁴ Trial International (n 30) 46.

³⁵ Craig Hershowitz, 'With Syrian prosecutions, a rare case of universal jurisdiction' (The Interpreter, 11 June 2020) <<https://www.lowyinstitute.org/the-interpreter/syrian-prosecutions-rare-case-universal-jurisdiction>> accessed 2 May 2021.

³⁶ Trial International (n 30) 46.

³⁷ The Economist, 'No Time to Give Up: Laws to catch human rights abusers are growing teeth' (International, 2021) 5; Elvira Dominguez-Redondo, 'The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation' (2012) 2012(4) NZ L Rev 673, 676.

³⁸ Dominguez-Redondo (n 37) 677.

place on a four year basis and is seen as a cooperative opportunity by States, which ensures full involvement of the State in question.³⁹ While it provides for a high degree of State control, it simultaneously creates less room for the independent human rights experts and non-governmental organisations (NGOs): it is in fact a requirement that during the interactive dialogue with the State under review, neither one may participate.⁴⁰ Nonetheless, it is an opportunity to address the situation of human rights in all 192 UN Member States.⁴¹

The UPR mechanism could be said to fall under a broader category of measures implemented on an international level, namely that of “naming and shaming”.⁴² For international bodies with monitoring competences but practically no enforcement powers, this tool provides a source of strength by publicising the violating country’s actions (i.e. “shaming”).⁴³ Other confrontational mechanisms include retortion, countermeasures and sanctions.⁴⁴ In particular, another alternative option for universal jurisdiction is the so-called R2P Doctrine.

The R2P Doctrine is an obligation on behalf of the UN Member States to intervene in another State in order to put an end to one of the four international crimes: genocide, war crimes, ethnic cleansing and crimes against humanity, when the latter grossly fails to do so itself.⁴⁵ In contrast to humanitarian intervention, which has been perceived as somewhat controversial, the R2P mechanism functions primarily through the UN Security Council.⁴⁶ The first step of the R2P is to resort to diplomatic and peaceful means under Chapter VII of the UN Charter.⁴⁷ However, in a situation where this fails, the UN Member States have a responsibility to take collective action through the Security Council.⁴⁸ What is important to note is that this concept resorts to the use of armed force as a last resort measure. Yet, the R2P has also been a

³⁹ ‘The Universal Periodic Review of the UN Human Rights Council – An NGO Perspective on Opportunities and Shortcomings’ (2008) 26(3) *Netherlands Quarterly of Human Rights* 311, 311.

⁴⁰ (n 3) 311.

⁴¹ *ibid.*

⁴² Dominguez-Redondo (n 37) 687.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Ivan Šimonović, ‘The Responsibility to Protect’ (UN Chronicle)

<<https://www.un.org/en/chronicle/article/responsibility-protect>> accessed 2 May 2021.

⁴⁶ Peter Hilpold, ‘From Humanitarian Intervention to the Responsibility to Protect’ in Peter Hilpold, *Responsibility to Protect (R2P): A New Paradigm of International Law?* (Koninklijke Brill NV 2014) 22.

⁴⁷ 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138.

⁴⁸ *ibid* para 139.

controversial topic, as it allows for the use of armed force, subject to certain conditions.⁴⁹

Nonetheless, it cannot go without saying that the use of the R2P Doctrine may inevitably give a wrong message to the State being intervened, causing an insurgency or escalating a conflict. One prominent example of this is the current conflict in Syria: would the insurrection have occurred, had there been no intervention in Libya in the Arab Spring of 2011?⁵⁰

Another point of contention concerning the R2P Doctrine is its ethical aspect: can an armed intervention be justified morally?⁵¹ Would it not be better or sufficient to resort to solving the conflict through more diplomatic means?

Overall, the alternatives to the principle of universal jurisdiction seem to be located on two polar opposites: while the UPR mechanism may appear less effective, the R2P Doctrine is, on the contrary, interventionist and aggressive. One may even argue that all of these mechanisms come at a different stage of violations: while the UPR mechanism could be used to detect the beginning phases of human rights violations, the R2P Doctrine is used when the problem is conspicuous, while the principle of universal jurisdiction is enforced to punish the perpetrators of crimes when the crime has already occurred. Inevitably, one may wonder: are these mechanisms even connected? Throughout the Conference, it will be up to you, the Delegates, to discuss the extent of effectiveness of universal jurisdiction, and the options currently available under international law to target the perpetrators of such mass atrocities and avoid impunity altogether.

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4. Gleider Hernández, International Law (OUP 2019).

⁴⁹ Oliver Diggelmann, 'Ethical Dilemmas Connected with the "Responsibility to Protect"' in Peter Hilpold, Responsibility to Protect (R2P): A New Paradigm of International Law? (Koninklijke Brill NV 2014) 408.

⁵⁰ *ibid* 411.

⁵¹ *ibid* 412.

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