



# African Regional Economic Communities and Human Rights

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## Abstract

The post-colonial period was characterized by the birth of several regional economic blocs in an effort to create a free trade area to meet the challenges left by the colonial ordeal. It is within this framework that the East African Community was created. With a view to ensuring the effective implementation of their objectives, these communities set up judicial bodies responsible for interpreting and applying the legal texts that created them. In the East African Community, the East African Court of Justice has been put in place to carry out this task. Although established to deal with commercial matters - given that the community had a commercial purpose - this judicial body of the East African Community shifted towards the promotion and protection of human rights, thus contributing to the development of this branch of law in the region.

**Keywords:** Judicial body, African community, Court of Justice, Branch of law

## Introduction

In this article, we analyse the methodological approach that was adopted by this judicial body to make such a shift. The article shows that despite the indifference of the authorities empowered to confer upon this jurisdiction, the East African Court of Justice did not hesitate to take it over even if was not part of its original jurisdiction. At this point, a range of questions call for attention.

The first one is to know how this shift towards a human rights jurisdiction could be justified. In other words, what are the political stakes that were at the root of this spectacular interest of the Court to human rights affairs? Which context might have contributed to this behaviour? To answer these questions, this article starts from the idea that the regional economic communities were born within the overall framework of an awareness of the colonised peoples who felt the need to come together to overcome the problem of economic balkanisation of the many parts of the African Continent [1]. At the same time, however, the emergence of economic communities coincided with a global context of insecurity that prevailed in many African countries in the 1990s. It had become impossible to ignore political crises, which normally involved human rights issues, and at the same time, pretended to overcome economic development issues. Thus, there is an observation of a revolution in the courts of justice of these regional economic communities which, apart from their vocation to promote trade or economic relations of its components, created jurisprudential principles in order to make themselves responsible for the protection of human rights. For example, the principle of non-exhaustion of domestic remedies was established by the Court of Justice of the West African Community (ECOWAS) in the field of human rights, [2] whereas exhaustion of domestic remedies constitutes "a customary rule of public international law" [3]. The Tribunal of the Southern Africa Development Community (SADC), for its part, used an extensive interpretation of the general principles of the community as a starting point to assume jurisdiction over human rights [4]. This article will further show that this attitude of the courts of the regional economic communities influenced the East African Court of Justice which followed their practice by attributing to itself a jurisdiction over human rights matters through an extensive interpretation of the general principles [5]. Indeed, this court indicated that, though it was established to deal with trade matters, it is not possible to ignore human rights.

All these aspects will be analysed in detail in this article. Indeed, it first provides a general overview on the African Regional Economic Communities and human rights (I) before analysing the role of the East

African Court of Justice in the protection of human rights -following the general methodology of other regional economic communities through their courts of justice (II). A conclusion will follow (III).

## Overview of the African Regional Economic Communities and Human Rights

### African Regional Economic Communities as a solution to combat neo-colonialism

The effort of bringing together economies of the developing regions in the 1990s [6] did not ignore African countries which, therefore, grouped themselves into regional organizations. Since the beginning of the post-colonial period, African leaders made regional integration an integral part of the strategy for the economic development of the African continent [7]. Indeed, they understood that colonisation had instituted an economic balkanisation of the African continent [8]. This balkanization has resulted in Africa being made up of small economic entities, which, as a result, would limit the business market [9]. For example, the first Ghanaian President, NkwameMkrumah, saw the division of Africa into small pieces of countries - which he called political balkanisation - as an instrument of neo-colonialism to keep Africa in a weak and exploitative state [9]. Post-colonial Africa has had to face newly independent states that initially did not take into account the realities of geographical and economic coherence.

In order to face this problem- born from colonization, African leaders resolved to unify Africa, which, consequently, required the economic integration of African states [10]. Subsequently, the states organised themselves into economic blocs. Thus, economic communities like the Community of West African States (ECOWAS), the Southern Africa Development Community (SADC); the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) were established. These regional communities had a common goal of promoting and developing economic stability in their space [11].

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Received May 03, 2021; Accepted May 07, 2021; Published May 18, 2021

Citation: Hagabimana G (2021) African Regional Economic Communities and Human Rights. J Civil Legal Sci 10: 270.

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Nevertheless, the security situation in which they were born could not allow ignorance of human rights, as noted by one author speaking of the birth of human rights on the ECOWAS agenda:

"The socio-political situation was conducive to the introduction of human rights at the end of the twentieth century, which turned out to be a nightmare, with the birth and entrenchment of many internal wars that threaten peace and stability in the entire sub-region [12].

In East Africa, inter-ethnic conflicts broke out in Rwanda and Burundi in the early 1990s, costing the lives of hundreds of thousands of people [13]. Thus, aware of the interdependence of the economic development and respect of human rights, regional economic communities- initially conceived for economic purposes- found themselves obliged to create a legal framework for the realization of human rights. The courts of law of these economic communities have been the important tool to ensure this realization.

### **The Courts of Justice of the Regional Economic Communities and Human Rights: Interpretation in favour of the protection of Human Rights**

Established to interpret and apply the treaties establishing the regional economic communities they belong to; regional courts of justice revolutionized their field of interest in favour of human rights through the creation of jurisprudential principles. This is the case of the ECOWAS court which indicated that the internationally recognised principle of local remedies is not a requirement for one to file a case to it. Indeed, in the case of Dame Hadijatou Mani Koraou v. the Republic of Niger [14], the defendant - the Republic of Niger - raised a preliminary objection of inadmissibility of the case before the ECOWAS Court of Justice arguing that the applicant had not yet exhausted domestic remedies [15] as the case was still pending before national courts of Niger [16]. Despite its constant position that the protection of human rights, by international mechanisms, is a subsidiary protection which intervenes only if a State has failed to ensure respect for them. The ECOWAS Court of Justice concluded that this "subsidiarity has undergone a remarkable evolution which results in a very flexible interpretation of the rule of exhaustion of domestic remedies" [17]. This way, the ECOWAS Court of Justice introduced a significant change with regard to the interpretation of this sacrosanct principle of international law. Indeed, the doctrine considers exhaustion of domestic remedies as a customary rule of public international law [18]. Generally, it is known as to constitute a prerequisite condition for referral to international jurisdictions for the protection of human rights. This is the case, for instance, of the African Commission on Human and Peoples' Rights [19], the African Court on Human and Peoples' Rights [20] and the European Court of Human Rights [21].

In the same way, the SADC Tribunal to hear human rights cases even though the Treaty establishing the economic community did not confer such jurisdiction on it. Indeed, in the Campbell case [22], the defendant considered that in the absence of the human rights protocol conferring jurisdiction on it, the SADC Tribunal could not hear the case [23]. Referring to Article 4 of the Treaty which sets out the general principles of the Community, one of which refers to human rights, democracy and the rule of law [24], the SADC Tribunal concluded that there is no need for a human rights protocol in order for [it] to deal with human rights cases [25].

### **The East African Community and Human Rights**

To carry out a well-rounded study, it is important to understand

the East African Community.

### **The East African Community**

The East African Community (EAC) is a regional economic community whose aim is to promote economic, social and political integration amongst its member states, which are namely: Burundi, Kenya, Rwanda, Uganda, Tanzania and Southern Sudan. The history of the creation of this community finds its origins in the colonial period. Indeed, writers agree that the East African Community is one of the oldest structures of regional integration in Africa. However, important features of an East African Community organised in a way of a regional economic community were developed in 1967 with the adoption of the Treaty for East African Cooperation. Unfortunately, because of political interests of the Partner States at that time, this community did not last long and fell apart 10 years later. It was finally revived in 1999 after a tripartite commission set up to study modalities of its revival [26] produced a new draft treaty. In order to achieve the objectives set out in the Treaty, the Partner States undertook to establish among themselves, in accordance with the provisions of the Treaty, a customs union, a common market, a monetary union and ultimately a political federation. To ensure that all these undertakings are implemented, the Treaty further set up different institutions, namely: the Summit; the Council; the Coordinating Committee; the Sectoral Committees; the East African Court of Justice; the Legislative Assembly; the Secretariat and others which may be established at a later stage, if necessary, by decision of the Summit. In its work as a judicial body in charge of interpreting and applying the Treaty, the East African Court of Justice influenced the development of human rights in the East African Community.

### **Understanding the East African Court of Justice**

As mentioned in the above paragraph, the East African Court of Justice is one of the institutional organs of the East African Community. It became operational on 30th November 2001 after the first judges and the Registrar were sworn in [27]. Like other organs of this community, the East African Court of Justice has its own powers to contribute to the smooth running of regional integration. Its role can be summed up in a single sentence, as stated in Article 23 (1) of the Treaty: "the Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty". In order to ensure that this task is carried out, this Court has a number of channels at its disposal. Firstly, it may be referred to for a preliminary ruling. Indeed, if a national court has doubts as to the interpretation of the validity of a Community legislative act, it can request an interpretative opinion from the East African Court of Justice. As explained in Tom Kyahurwenda case, decisions rendered in the context of preliminary rulings are binding not only on the court or tribunal that referred the matter to the East African Court, but also on all other courts of law of the Member States of the community. This way, the preliminary reference procedure plays an important role in the development of Community law. Preliminary rulings enable the Treaty to retain its Community character, to be interpreted uniformly in all the Partner States and, above all, to produce the same effects in all corners of the Community .

The action for failure to fulfil obligations is also another means of referral which enables the Court to fulfil its role of interpreting and applying the law. In fact, under this procedure "a Partner State which considers that another Partner State- or an organ or institution of the Community- has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court for adjudication" [28]. The Court can also be seized in the context of an

action for annulment by the Secretary General. Under this procedure, where the Secretary General considers that a Partner State has failed to fulfil an obligation under the Treaty or has infringed a provision of the Treaty, he can refer the matter to the court". Finally, any individual resident in a Partner State "may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful, or is an infringement of the provisions of the Treaty".

Within the framework of its general competence to interpret and apply the Treaty, the East African Court of Justice has a broader competence to hear different kind of disputes. In this sense, it can be seized to settle disputes between the community and its employees concerning the terms and conditions of employment so that it can, *inter alia*, interpret and apply the law governing them. The East African Court of Justice also has jurisdiction over arbitration between the community and one or other of its institutions, and disputes between the Partner States concerning the Treaty if it is seized of the dispute pursuant to a special agreement concluded between the concerned States.

It is important to underline the difference between the East African Court of Justice and the former East African Court of Appeal. The two judicial institutions are different in competence and structure. The East African Court of Appeal no longer exists. It was one of the institutions of the former East African Community established in 1967 by the Treaty for East African Cooperation which collapsed in 1977. This court was an appellate instance to the decisions rendered by the courts of the Member States of the then Community.

### **The East African Court of Justice and Human Rights according to the instruments governing the East African Community**

Established to interpret the treaty and ensure the application of the Treaty for the Establishment of the East African Community, the East African Court of Justice does not have jurisdiction to deal with human rights cases. Not only does the Treaty not confer this competence to the East African Community, but also, the leadership has always shown a lack of willingness to codify this competence.

**Lack of human rights jurisdiction:** The Treaty establishing the East African Community does not confer jurisdiction on the East African Court of Justice to hear and judge cases on human rights violations. However, it does state that this competence will be attributed to it later in the following words:

"Other competences, such as appeal, human rights, etc., are decided by the Council at an appropriate later date. To this end, Member States shall conclude a Protocol to give effect to the other competences.

This provision implies that the field of human rights is not amongst the areas of intervention of the East African Court of Justice. In fact, it is a field that was placed in a subsidiary category of competences which could be attributed to it later at the will of the Council of Ministers. Moreover, such an attribution will be the subject of another convention concluded in the form of a special protocol. It is worth mentioning that protocols duly adopted in the framework of the East African Community are an integral part of the Treaty [29]. Consequently, their adoption and entry into force must follow the classic procedure for the adoption of treaties. All this implies that, even if the Partner States were to initiate the procedure for the adoption of this Protocol on human rights, it is not certain that it would obtain the majority necessary for its adoption.

It is also important to point out that not only the Treaty establishing the East African Community does not give the Court jurisdiction to deal with human rights cases, but also human rights are not among the objectives of the East African Community. Indeed, article 6 of the Treaty focuses only on the fundamental principles which guide the Member States in the achievement of the objectives of the Community. The promotion and the protection of human rights is briefly mentioned under this category of principles, the fundamental principles. As article 6 indicates, some of the principles guiding the achievement of the objectives of the Community are, *inter alia*: "good governance-including adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunities; gender equality; as well as the recognition, promotion and protection of human and people's rights, in accordance with the provisions of the African Charter on Human and Peoples' Rights". Although the respect for human rights is laid down in the treaty, it is not established as a primary objective of the community, but rather as a principle that guides the implementation of the objectives of the community. There are other disparate references to human rights in the Treaty, but these are not part of the objectives of the East African Community.

**Lack of willingness to adopt the protocol to operationalise the human rights jurisdiction of the East African Court of Justice:** As already mentioned, the Treaty provides for the establishment of a protocol to confer jurisdiction in human rights matters to the East African Court of Justice at a suitable date upon the decision of the Council of Ministers. However, this protocol has not yet been adopted. The Partner States have always been opposed to its adoption. Indeed, States have not been able to put in place this instrument which is important for the protection and promotion of human rights within the Community, although they have had the opportunity to do so. For instance, one of the objectives of the 3rd Strategic Development Plan of the East African Community for the period 2005-2010, was the adoption of this protocol conferring the competence to the East African Court of Justice to judge and hear cases on human rights violations [30]. Yet, in the same period of implementation of this plan, the meeting of the Sectoral Council of the East African Community on 22nd January 2009 concluded that with the introduction of the Customs Union and the Common Market, a new environment has been created for cross-border trade, movement and investment, and that it was, therefore, necessary to extend the jurisdiction of the East African Court of Justice. Paradoxically, in the same meeting, the Council decided that this extension of the Court's jurisdiction could not concern human rights matters, arguing that all Partner States were signatories to the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights. Concretely, the general philosophy on which the Council based itself to justify the non-importance of the protocol that would confer human rights to the East African Court of Justice, is that there is another regional court at the African level that could deal with human rights matters.

However, in my view, this is could not be a reason for the council of ministers not to establish a human rights protection system at the East African Community level. Firstly, the establishment of regional legal systems for the protection of human rights is driven by the shared history and socio-cultural values of the societies and peoples of which they belong. Certainly, norms of a regional system may be specific and relevant to a particular region and to the people of that region. In a broader regional system like the African continent where many States are brought together, consensus on a legal system that is suitable for all is difficult to achieve. As a result, it becomes difficult to establish standards of human rights protection which are convenient



for all. Generally, standards established at the smaller regional level-like the East African Community- are more expressive of the daily life of the people living within it. Secondly, the regional human rights protection system established at the lower level is more effective in terms of accessibility by the litigants, compared to ones at the higher level. Additionally, conditions of accessibility of the African Court on Human and Peoples' Rights are more difficult to meet compared to those required to bring cases before the East African Court of Justice. For example, whereas the exhaustion of local remedies is a prerequisite to file a case before the African Court on Human and Peoples' Rights, this requirement does not exist in the case of the East African Court of Justice. Finally, the system of human rights protection at a small region has a lot of chances to be effective. Indeed, the population would be more confident in a local/regional jurisdiction than it would be for a jurisdiction of another level -international- working in a broader framework. Concretely, the judicial system becomes effective if it is established in a more restricted framework with a very small group of member countries. Thus, by relying on the existence of the African Court on Human and Peoples' Rights to refuse to grant this jurisdiction to the East African Court of Justice, the Council has shown itself to be an obstacle to the implementation of a strategic development plan that it had put in place. It is a clear manifestation of the lack of will among the East African Community member states to create this jurisdiction to the East African Court of Justice.

The 4th Strategic Development Plan came back to this failure in the adoption of this protocol and this Strategic Development Plan showed again their willingness to adopt this protocol [31]. However, this protocol was not adopted. Until now, the East African Court of Justice has no explicit competence to hear human rights cases and, there is no provision in the African Charter on Human and Peoples' Rights that mandates judicial organs of Regional Economic Communities to interpret or use this Charter as a legal basis to ensure the protection of human rights. As a result, the East African Court of Justice has no legal basis to deal with human rights cases.

#### **Position of the Court: Methodology of the East African Court of Justice to ensure the promotion of human rights in the community:**

of a judicial decision by invoking the violation of Articles 7(2), 8(1) (C) and 6 of the Treaty establishing the East African Community. Before this Court, the Representative of the Ugandan Government raised an objection that the East African Court of Justice could not take up this case as it contains elements of human rights violations. While acknowledging that it does not actually have such jurisdiction, the East African Court of Justice stated that it could not refrain from interpreting Article 27(1) of the treaty - which provides that the Court shall have jurisdiction to interpret and apply this treaty - for the sole reason that the case contains allegations of human rights violations. In other words, the Court considered that even if it does not have such jurisdiction, it cannot relinquish its role of interpreting the provisions of the Treaty, including those relating to respect for the law, human rights and democracy.

**Post Katabazi case:** The Katabazi case marked an important starting point for the East African Community in the field of human rights. Indeed, since this decision, the East African Court of Justice saw a remarkable influx of cases on human rights violations that it decided on with reference to the precedent established in the Katabazi case. Similar to the Katabazi case, the Court always considered that it cannot remain silent to violations of human rights, purely for the reason that it does not have yet jurisdiction to hear such matters.

For example, in the case of Independent Medico Legal Unit v Attorney General of Kenya, the First Division of the East African Court of Justice used the Katabazi case as a reference to support the applicants who complained of massive human rights violations by State agents. Indeed, in the period between 2006 and 2008, more than 3000 people residing in Mt Elgon District were victims of extra-judicial executions and torture by Kenyan government services. This case was brought to the East African Court of Justice. Before this Court, the Representative of the Kenyan Government raised an objection to denounce the lack of jurisdiction of the Court to hear human rights cases. In its reply, the Court reiterated its interpretation in the Katabazi case, stating that even if it does not have jurisdiction in human rights matters, it has the competence to interpret the treaty. According to the Court, as long as the allegations before the Court involve an interpretation of the Treaty, their relationship to human rights does not prevail, the Court must uphold the law.

The Plaxeda Rugumba case is another human rights case where the East African Court of Justice used reference to the precedent it had established in the Katabazi case. In this case, Rugumba complained against the Government of Rwanda for violating the rights of his brother Lieutenant Colonel Severine Rugigana Ngabo who was arrested and imprisoned without trial. He was imprisoned from 20th August 2010 to 28th January 2011 without justification and his family had no right to information about his conditions of detention. His wife's efforts to plead for his release had subjected her to harassment which led her to live in hiding. Therefore, his sister filed a complaint to the East African Court of Justice to complain against the detention of her brother, Rugigana Ngabo, arguing a violation of the fundamental principles of the Community as set out in the Treaty, in particular articles 6(d) and 7(2), which require Partner States to respect the principles of good governance and international human rights standards. In his argument, the representative of the Government raised an objection that the East African Court of Justice had no jurisdiction to hear human rights cases. According to him, as long as the protocol granting jurisdiction to this Court to extend this category of cases to it, has not yet been adopted, this regional court can in no way receive the Rugumba case because it contains accusations of human rights violations [33]. In response to this objection, the East African Court of Justice once again referred to the Katabazi case. In particular, it stated that it is not disputed that it does not yet have broad jurisdiction as provided for in Article 27(2), but that in the case of Katabazi and 21 others Vs. Secretary General of the East African Community and Attorney General of Uganda, it decided that it cannot stand idly by in the face of human rights violations. In the end, it considered that nothing could prevent her from saying the law in this case.

In conclusion, the Katabazi case was a key to opening doors for the East African Court of Justice to protect human rights. Through this decision, this Court found a good solution that allows it to hear cases which contain elements of human rights violations.

### Weaknesses and strengths of the Court for the realization of human rights

Notwithstanding its remarkable progress in the protection and the promotion of human rights, the East African Court of Justice faces a series of weaknesses. Firstly, despite its important role in the protection of human rights through its jurisprudence, the decisions of the East African Court of Justice are declaratory. Indeed, they are limited to declaring that there has been a violation of the Treaty without however pronouncing accompanying measures to put the person left behind in his rights. For example, even though in the Rugumba case the plaintiff had asked the Court to take any other measures it sees necessary to take, the Court did nothing more than simply declaring the existence of the violation of the Treaty in these terms:

" A declaration is hereby issued that the detention of the Subject, Lieutenant Colonel

Seveline Rugigana Ngabo by the agents of the Government of the Republic of Rwanda from 20th August 2010 to 28th January 2011 was in breach of the fundamental and operational principles of the East African Community as enunciated in Articles 6(d) and 7(2) of the Treaty which demands that Partner States shall be bound by principles of inter alia, good governance and the rule of Law. .

In asking the Court to take any further action it deemed necessary, the complainant had certainly intended to refer to measures regarding compensation. But the Court remained silent to this question. Similarly, in the case of the Union of Journalists of Burundi against the Government of Burundi, the East African Court of Justice ordered the Republic of Burundi to take measures, to implement its judgment in accordance with Article 38 para 3 of the Treaty without giving details with regard to the nature of those measures.

However, this is not the case for other human rights bodies. The texts governing them determine that any declaration of violation of rights will be followed by "just satisfaction" if necessary. This is the case of the European Convention on Human Rights. Article 41 states that "if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Moreover, even if the East African Court of Justice were to order such measures, it has no enforcement mechanisms to require Partner States to comply with its judgments. Without doubt, the execution of its decisions depends on the good faith of its Member States. This may constitute a major obstacle relative to the efforts of the East African Court justice to contribute to the promotion of human rights in the region. This may even lead to its collapse as was the case for the Southern Africa Development Community (SADC) Tribunal. In Mike Campbell case of 2008, the SADC tribunal declared that the expropriation of white farmers' land by the Government of Zimbabwe was a violation of the principles of non-discrimination and the rule of law established in the SADC Treaty. As a result of this decision, the court demanded that all expropriation be stopped, and that compensation be paid to restore the aggrieved persons in their rights. The government refused to implement all these orders of the Tribunal but, instead, intensified the acts of harassment against these farmers.

Afraid of the negative consequences that could follow, the Summit of Heads of State decided to suspend the Tribunal in 2011 rather than enforce the Treaty.

Another important weakness faced by the East African Court of Justice is certainly the lack of a legal basis on which it bases its role as a protector of human rights. Indeed, human rights is a sensitive area that should not be built on mere case law.

As for strengths, the East African Court of Justice has the advantage of being flexible in its accessibility. Contrary to other regional courts, this Court does not require the exhaustion of domestic remedies. The Treaty for the Establishment of the East African Community does not provide for this requirement. The Court made the same observation in the Rugumba case when it stated that "there is no doubt that there is no express provision prohibiting the Court from ruling on any question otherwise before it, simply because the applicant has not exhausted local remedies". This is not the case for other regional courts. For example, the exhaustion of domestic remedies is one of the conditions that must be met in order for any application to be heard by the African Court on Human and Peoples' Rights. The same applies to the referral to the African Commission on Human and Peoples' Rights

### Conclusion

This article underlines a spectacular development of a branch of law - human rights - in the East African Community through a precedent established by the East African Court of Justice. Indeed, although the promotion and protection of human rights was not part of its original jurisdiction, the East African Court of Justice attributed to itself this competence through its jurisprudence. On the other hand, it put pressure on the competent bodies to require that they adopt the protocol conferring on it the competence to hear and judge cases involving human rights. Thus, rather than serving as a tribunal to resolve trade disputes as its original designers envisioned, the Court turned into a tribunal that seeks to hold member governments accountable for human rights violations and to promote good governance and the rule of law. This is the result of a revolution in the courts of justice of the regional economic communities which, through jurisprudential principles that they developed, considered that they cannot ignore human rights, irrespective of the fact that this was not part of the objectives of the communities to which they belong.

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