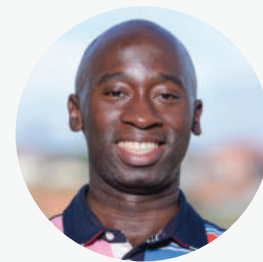


# From Periphery to the Foreground: A Case for Economic, Social and Cultural Rights in Uganda's Transitional Justice Policy Framework<sup>1\*</sup>



Jesse Mugero

This policy brief argues for the need to prioritise economic, social and cultural rights (ESCRs) violations or address economic violence in transitional justice frameworks in Uganda. Uganda has a long history of military conflicts which are underlined by high degrees of ESCRs violations. This research finds that while ESCRs enjoy the same status with civil and political rights (CPRs) under international law, the former is often accorded a peripheral position in transitional justice mechanisms. This has meant that inadequate solutions are provided to deal with the violations committed during conflict.

## 1. Introduction

Uganda's history of military conflicts is underlined by massive human rights violations that are registered in times of conflict. During the 20-year insurgency by the Lord's Resistance Army (LRA) alone, more than 1.3 million people are estimated to have been displaced from their homes alongside corresponding loss of property and livelihoods. The social cost of losing loved ones, trauma etc. is not to be underestimated. At least 56% of families in northern Uganda lost a family member or relative owing to the conflict.<sup>2</sup>

According to successive figures from the Uganda Bureau of Statistics (UBOS), poverty levels in northern Uganda were among the highest in the country, which can be attributed to the insurgency.<sup>3</sup> For example, the number of poor people in northern Uganda increased from 2.9 million in 2002/03 to 3.3 million in 2005/06, and only decreased to 2.9 million in 2009/10. Between 2013/14 and 2015/16, 24% of the poorest Ugandans were found in northern Uganda.<sup>4</sup>

In a report submitted to the United Nations General Assembly pursuant to General Assembly resolution 48/141, the United Nations High Commissioner for

Human Rights considered the protection of economic, social and cultural rights (ESCRs) in situations of armed conflict.<sup>5</sup> The report found that during conflict, ESCRs are very much violated because access to education, work, health care and other services necessary for livelihood is greatly undermined. The report further argued that even during conflict, a state's duty to ensure that its citizens enjoy ESCRs remains.

ESCRs enjoy the same status as civil and political rights (CPRs) under international law. In a world conference on human rights held in Vienna in 1993, the Vienna Declaration on the Indivisibility of Human Rights was adopted emphasising that all human rights are indivisible, interdependent and interrelated. It sought to end the division between ESCRs and CPRs.<sup>6</sup> However, in reality the CPRs enjoy more prominence in several countries and are, in most cases, expressly provided for in the constitutions. In Uganda, CPRs are comprehensively provided for in the 1995 Constitution. On the other hand, crucial ESCRs, such as the right to health, are not emphasised in the constitution relative to the emphasis of CPRs.<sup>7</sup>

<sup>1\*</sup> Mugero Jesse, Youth 4 Policy Fellow 2018, Advocate of the High Court of Uganda, LLB (UCU), Dip. LP (LDC), LLM (UWC & Humboldt). The author is thankful for comments and feedback made on earlier versions of this policy brief by Sarah Kasande Kihika.

<sup>2</sup> Justice and Reconciliation Project 'UG Reconciliation Barometer; a 2012 Transitional Justice Monitoring Survey' (2012). Available at [http://justiceandreconciliation.com/wp-content/uploads/2012/11/UG\\_Barometer\\_Report\\_Final-2012-11-16.pdf](http://justiceandreconciliation.com/wp-content/uploads/2012/11/UG_Barometer_Report_Final-2012-11-16.pdf) (Accessed on 4 September 2018).

<sup>3</sup> Uganda Bureau of Statistics (UBOS), *Uganda National Household Survey, The Socio-Economic Module (2003, 2006 and 2010)*.

<sup>4</sup> Government of Uganda, *Statistical Abstract (2017)*.

<sup>5</sup> United Nations High Commissioner for Human Rights, *Protection of Economic, Social and Cultural Rights in Conflict (2015)*.

<sup>6</sup> Office of the High Commissioner for Human Rights (OHCHR) *Vienna Convention on the Indivisibility of Rights (1993)*.

<sup>7</sup> Despite the silence of the Constitution of Uganda on ESCRs, progressive jurisprudence has helped in having ESCRs realised. For example, on the right to health, the 2011 constitutional petition filed by the Centre for Health, Human Rights and Development (CEHURD), which sought the court's interpretation of the constitution regarding government responsibility to ensure that maternal deaths in public facilities do not occur owing to preventable causes. *CEHURD v Attorney General, Constitutional Petition 16 of 2011*.

The dichotomy in the view of CPRs and ESCRs has prevented a more complete account in narratives about conflict. Violations of ESCRs are often ignored because it is an indivisible part of crimes committed during conflict yet violations of CPRs usually constitute violations of ESCRs.<sup>8</sup> It is, therefore, unfortunate that mechanisms are usually proposed that deal majorly with CPRs violations. As a result, a host of transitional justice mechanisms implemented after conflict have focused on addressing violations of CPRs and left issues of ESCRs at the periphery.<sup>9</sup> As a result, the measures proposed in the draft National Transitional Justice are as a result of incomplete information, leading to insufficient remedies in the implementation of transitional justice measures. In the case of *The Prosecutor v Dominic Ongwen*, which at the time of writing was ongoing before the

International Criminal Court, the Feinstein International Centre presented evidence in the court in a report entitled *The Effect of the Lord's Resistance Army's Violence on Victims from Northern Uganda*. In the report, several economic violations in the areas of Abok, Lokodi and Odek in northern Uganda were identified, such as the loss of asset wealth, food insecurity, limited access to school and potable water, and limited access to livelihoods and social protection services. The report found that 89% of the population in that area had their property looted and destroyed. In its conclusion, the report found that the most pressing justice need for the victims and survivors of conflict was reparations and improvement of their livelihoods.<sup>10</sup>

## 2. Overview of the Transitional Justice Process in Uganda

After the end of the over two-decade-long conflict between the Government of the Republic of Uganda and the Lord's Resistance Army (LRA) and several other armed groups in northern Uganda, there was massive infringement on ESCRs.<sup>11</sup> Traditionally, much attention and research have been devoted to showing the violations of CPRs and physical violence such as torture, abduction, forced recruitment, slavery and forced marriage, mutilation and war injuries, and crimes of sexual violence, to mention but a few. However, less or little attention has been paid to economic violence (majorly violations of ESCRs) such as pillaging, looting, destruction of property and land seizures in the context of the conflict. This policy brief will partly fill that gap.

At the Juba peace talks, the parties agreed to a set of transitional justice (TJ) measures that would enhance redress to victims and survivors of the conflict, lay the foundation for reconciliation and foster sustainable peace. One of the key outcomes was the development of a transitional justice working group under the

Justice, Law and Order Sector (JLOS). This working group has developed a transitional justice policy which, if adopted, would lead to a series of legislation aimed at dealing with the effects of the conflict.<sup>12</sup> This policy brief assesses how the transitional justice measures envisaged under the policy can adequately respond to violations of ESCRs that occurred during the conflict.

This paper is divided into three parts. The first part will assess the patterns of violations of ESCRs that happened during the conflict as well as their long-term impact. The second part will analyse the importance of dealing with violations of ESCRs in the transitional justice policy and discourse within Uganda as a means of guaranteeing the non-recurrence of the conflict. The third part will suggest recommendations on how violations of ESCRs can be dealt with within the policy design in Uganda basing on comparative analyses of relevant case studies of post-conflict contexts in which ESCRs have been addressed as part of the TJ process.

<sup>8</sup> Duthie R *Transitional justice, development and economic violence in Justice and Economic Violence in Transition* (2014) D Sharp (ed.).

<sup>9</sup> Carranza R *Plunder and pain: Should transitional justice engage with corruption and economic crimes?* *International Journal of Transitional Justice* (2008).

<sup>10</sup> Feinstein International Centre, *The effect of the Lord's Resistance Army's violence on victims from northern Uganda, in the Prosecutor v Dominic Ongwen* (2018).

<sup>11</sup> Some of the armed groups include the Uganda National Liberation Army, the Uganda People's Democratic Movement, the insurgencies by the Cilil splinter group, the Cel-ibong splinter group, the Agoyo Ayaro splinter group, the Karimojong/NRA raids, Trinity wars, the Holy Spirit mobile forces and the Lord's Resistance Army.

<sup>12</sup> The Government of Uganda, Justice, Law and Order Sector, The National Transitional Justice Working Group, *The Transitional Justice Policy (Final Draft, September 2014)*.

### 3. The Violations

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During the over two-decade-long conflict in northern Uganda, at least 1.3 million people were displaced from their homes and forced into the camps for internally displaced persons (IDPs).<sup>13</sup> Living in the camps for decades led to the erosion of cultural values, and because there were hardly any opportunities for advancement in education, many of the inhabitants engaged in heavy drinking and this, coupled with poor health facilities, also led to massive spread of sexually transmitted infections and diseases like HIV/AIDs, gonorrhoea etc. The living conditions in the camps actually led to deaths similar to those caused by direct violence.<sup>15</sup>

A joint report by the Uganda Human Rights Commission (UHRC) and the United Nations Human Rights High Commissioner revealed that personal and commercial goods were looted during the conflict, and these included key assets and livestock. According to the same report, the victims suspected that the looting was committed by the LRA, the Uganda People's Defence Forces (UPDF) and other armed militia.<sup>16</sup> There were incidents reported of the LRA destroying homes, burning granaries and cutting down fruit and shea nut trees, thereby destroying the livelihood of people and worsening the already difficult economic situation of most families. Aerial bombardments by the UPDF also destroyed homes.<sup>17</sup>

At the community level, critical infrastructure such as hospitals, medical clinics, schools and roads was destroyed by both the LRA and the UPDF. The insecurity and direct targeting of schools led to massive dropouts from school, hence depriving the young of opportunities to advance in formal knowledge and education. The situation also led to early marriages, especially for girls.<sup>18</sup> There were land seizures by the state for the purpose

of setting up internally displaced persons' (IDP) camps and military barracks. Unfortunately, almost all this land has not been returned to the original owners and some of it is damaged and no longer viable for agriculture or housing as per the findings of the report. Most of the victims have never been compensated for the use of their land and the land has never been returned to others, especially land on which a military barracks was set up.<sup>19</sup>

Traditional and cultural values were eroded during the conflict and the time spent in the IDP camps. For example, the traditional kin-based systems were unable to support the vulnerable populations because family members in the camps were destitute. Respect for elders waned owing to the extremely destitute conditions in the camps. The quality of life in the camps, such as curfews, limited opportunities for storytelling to pass on values and traditions partly explains why today most of the cultural values, such as caring for the old, have greatly reduced.<sup>20</sup>

Spiritual harm was also experienced by many people who had witnessed the horrors and destitution resulting from the conflict.<sup>21</sup> The people complain of being haunted by spirits of the dead and being subjected to their attacks. This has greatly impacted the development of young children who get so overwhelmed by these flashbacks that they become unable to participate in normal life. They, therefore, fail to perform well in school and resort to substance abuse.<sup>22</sup> Further, some of the spiritual harm could arise from the way the dead had been treated. For example, if one was not properly buried but just thrown into a bush or into a mass grave or, as it happened sometimes, when people were forced to just put the dead bodies together in a pile.<sup>23</sup>

<sup>13</sup> Esuruku S R *The Peace, Recovery and Development Plan for Northern Uganda 151 in Where Law Meets Reality, Forging African Transitional Justice* Okello C M, Dolan C, Whande U, Mncwabe N, Onegi L and Oola S (eds.) (2012).

<sup>14</sup> This time period is usually referred to as the lost generation of the Acholi.

<sup>15</sup> Ibid.

<sup>16</sup> Uganda Human Rights Commission and United Nations High Commissioner for Human Rights, *The Dust has not yet settled Victims' views on the right to remedy and reparation A report from the Greater North of Uganda* 52 (2011).

<sup>17</sup> Uganda Human Rights Commission and United Nations High Commissioner for Human Rights, *The Dust has not yet settled Victims' views on the right to remedy and reparation A report from the Greater North of Uganda* 53 (2011).

<sup>18</sup> Ibid.

<sup>19</sup> Uganda Human Rights Commission and United Nations High Commissioner for Human Rights, *The Dust has not yet settled Victims' views on the right to remedy and reparation A report from the Greater North of Uganda* 54 (2011).

<sup>20</sup> Ibid.

<sup>21</sup> Uganda Human Rights Commission and United Nations High Commissioner for Human Rights, *The Dust has not yet settled Victims' views on the right to remedy and reparation A report from the Greater North of Uganda* 55 (2011).

<sup>22</sup> Ibid.

<sup>23</sup> Feinstein International Centre, *The effect of the Lord's resistance Army's violence on victims from northern Uganda in the Prosecutor v Dominic Ongwen* (2018).

To further understand the impact the conflict had on the development of northern Uganda, the extent to which pre-primary education opportunities are available is another indicator. Early childhood education and care are critical to a child's development.

## 4. Policy Critique

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The Transitional Justice Policy 2014 of Uganda is a sign of commitment by the Government of Uganda to ensure that there is healing from conflict to lead to peace and to foster economic development. It is also a fulfilment of the state's obligation to provide an effective remedy to victims of human rights violations.<sup>26</sup> It is an ambitious project that intends to use intra-linkages and interlinkages between transitional mechanisms, such as formal justice and traditional justice, and to make use of reintegration, provide reparations and enable truth-telling.

According to the Office of the United Nations High Commissioner for Human Rights, ESCRs are defined as human rights relating to the workplace, social security, family life, participating in cultural life, access to housing, food, water, health care and education.<sup>27</sup> A critique of the Transitional Justice Policy 2014 of Uganda will be based on the extent to which it responds to addressing ESCRs violations (economic violence) after the conflict in northern Uganda. The violations included loss of lives, loss of property such as land, loss of education opportunities, loss of livelihood and degradation of culture, among others.

From the policy, it can be observed that the government intends to ensure that the victims' right to know what happened during the conflict is established. This will be through trials in courts of law and possibly a truth commission. Further, it can also be noted that reconciliation among formerly warring parties and restoration of respect to traditional leaders is promoted. This would be through the use of amnesty and giving formal recognition to the mandate of local leaders in conflict resolution. As a result of the formal trials, reparations may be awarded and, in addition, the government intends to have a special fund set aside for reparation purposes. These attempts to deal with ESCRs violations through the Transitional Justice Policy 2014 of Uganda are explained below.

An examination of the education statistical abstracts from the Ministry of Education and Sports from 2009 to 2015 reveals that there are very few opportunities for pre-primary education in northern Uganda compared to the rest of the country.<sup>25</sup>

Within the Transitional Justice Policy 2014, the government intends to use the formal justice system. Some legislation has already been established to this end, such as the International Criminal Court Act of 2010 and the Amnesty Act of 2000. These are in line with the outcomes of the discussions during the Juba peace talks. However, there are challenges to prosecution, such as the grant of a blanket amnesty that currently makes it difficult to try those alleged to have committed international crimes, and the fear that formal justice mechanisms do not promote reconciliation. Formal justice mechanisms have an advantage of helping to establish a historical record of what happened and this also helps to fulfil the victims' right to know what happened during the conflict. It is commendable that the government has established some legislation to enable victim participation in the proceedings, such as the International Crimes Division (ICD) Rules of Procedure 2016. However, there still remains a big lacuna in legislation to provide for witness protection. It is also imperative that funds are provided to the lawyers representing the victims in the cases before the ICD. Currently, although they are entitled to it under the law, the practice has been that it is not given to them and this further delays the trials.<sup>28</sup>

The government, through the Transitional Justice Policy 2014, intends to also use and promote the usage of traditional justice mechanisms. This is because they are easily accessible by community members and are cost-effective in comparison to the formal courts. However, there are some challenges. Traditional justice mechanisms lack formal recognition and this makes it difficult for them to be regulated. They also often ignore women's views and opinions since they are mainly male-dominated. As a result, they miss out on valuable information. The traditional justice mechanisms hardly observe the human rights principles enshrined in much of the international legislation to which Uganda is a signatory.

<sup>24</sup> This is encouraged in the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the Dakar Framework for Action.

<sup>25</sup> Government of the Republic of Uganda, Ministry of Education and Sports, *The Education Statistical Abstract (2009, 2010, 2011, 2012, 2013, 2014, 2015)*.

<sup>26</sup> The Government of Uganda, Justice, Law and Order Sector, *The National Transitional Justice Working Group, The Transitional Justice Policy (Final Draft, September 2014)*.

<sup>27</sup> United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights (2008)*.

<sup>28</sup> Interview with Kilama Komakech, victims' lawyer in the Kwoyelo case at ICD on 22 July 2018.

This the government intends to cure by formally recognising the importance of traditional justice mechanisms, making them complementary to other transitional justice measures and training them in how to apply human rights principles, such as equality of all persons before the law. It is hoped that this will be addressed soon because the transitional justice policy aspires to be victim-centred. Also, the majority of victims and low-level perpetrators and alleged perpetrators are found at the grass-roots level where the traditional justice mechanisms might be their only hope for justice.

The government, through the Transitional Justice Policy 2014, also intends to use truth-telling mechanisms. The major challenge here is the legacy of the previous truth commissions established in 1971 and 1986, whose reports have never been made public. As a result, many Ugandans are unaware that the first truth commission in the world was set up in Uganda. There is also a challenge that the truth commission will limit its search to certain violations and ignore economic violations. It is, therefore, proposed that the previous reports be made publicly available and the National Reconciliation Bill, which also proposed the establishment of a truth commission, be compared with the potential Transitional Justice Bill before one is adopted. It is recommended that the time limit for the truth commission's work be narrowed down to one that is reasonable. It is also recommended that this be set up soon as most of the victims of the conflict are likely to die of old age or loss of memory so that they would be unable to testify effectively before such bodies.

The government, through the Transitional Justice Policy 2014, acknowledges that reparations are an integral part of the efforts to reintegrate victims and survivors of conflict into society. The government intends to have a reparations programme that will help victims, such as those who were abducted, children born while their mothers were in captivity and children whose parents are unknown, to overcome the trauma and stigma faced in their society. Through reparation programmes, the policy intends to further achieve three things, namely: to mainstream the participation of beneficiaries in the reparations programmes specifically tailored for them; to deal with unaddressed medical, physical and psychological problems resulting from the conflict; and to deal with land injustices which are currently a major contributor to conflict in northern Uganda.

A major obstacle to the successful and impactful implementation of reparation programmes is that

they are often confused with development aid. Government efforts to have specific development programmes aimed at northern Uganda are commendable. Examples are the Northern Uganda Social Action Fund (NUSAF) and Peace, Recovery and Development Plan for Uganda (PRDP). However, the aim of these development programmes is to improve the welfare of many citizens generally. On the other hand, reparations arise from a legal entitlement based on an obligation to repair harm.<sup>29</sup> Reparations also involve an element of recognition of wrongdoing as well as harm, and of atonement. Reparations address individual harm whereas development aid is targeted at all citizens in a particular geographical location.

The government, through the Transitional Justice Policy 2014, intends to carry out mapping exercises to identify the various types of violations and work with civil society organisations (CSOs) to identify how to help the victims of the conflict. The funds for reparations will be drawn from the consolidated fund. While this is laudable, it is also recommended that relationships with leadership and anti-corruption agencies be improved to ensure that there lower chances of loss of funds.

The government, through the Transitional Justice Policy 2014, also intends to make use of amnesty with conditions that the person amnestied should be encouraged to participate in truth-telling and other transitional justice processes. However, the current challenges with the amnesty legislation is that it is more focused on the needs of the perpetrator and has largely ignored the victims of conflict as well as the special needs of women and children in the reintegration process. In granting amnesty, no consideration was given to the nature of crimes committed by the perpetrators, and the perpetrators were not required to confess, admit or apologise for their actions. It has also not been aligned with the transitional justice process and this makes it an impediment to communal reconciliation.

The government, through the Transitional Justice Policy 2014, intends to cure these defects by using amnesty as an accountability tool. This will be done through ensuring that there is no blanket amnesty. Currently, the amnesty law is still in the same state and has been extended until May 2019.<sup>30</sup> It is recommended that the conditional amnesty be implemented as soon as possible in order to reduce the impunity gap that had already been created by the blanket amnesty.

<sup>29</sup> International Centre for Transitional Justice (ICTJ) *Reparations for Northern Uganda, Addressing the Needs of Victims and Affected Communities* (2012).

<sup>30</sup> Government of the Republic of Uganda *The Amnesty Act (Extension of Expiry Period) Instrument* (2017).

## 5. Conclusion

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The transitional justice field developed primarily as a toolbox for victims to seek redress in the wake of conflict. However, because of the dichotomy in CPRs and ESCRs, most states have given more attention to CPRs violations and largely ignored the ESCRs violations. From the transitional justice mechanisms implemented in Uganda, such as the criminal trial of Thomas Kwoyelo, and the granting of amnesty, it can be observed that there is a preference for addressing physical violations (CPRs) over economic violations (ESCRs) since no mechanism has been put in place for the restitution of lost property, such as land, as a result of the conflict. A survey of victims' justice needs in northern Uganda shows that the victims and survivors are more interested in economic livelihoods, property

rights and education opportunities as justice to them.

It is worth noting that one of the causes of the conflict in northern Uganda was the massive socio-economic inequalities between the people in northern Uganda and the rest of the country. It is, therefore, of utmost importance that the transitional justice policy and discourse include redress for economic violence (violations of ESCRs) and move them from the periphery to the foreground. This will give a fuller account of causes of the conflict and a more accurate account of how to propose wholesome solutions in the transitional justice measures that will prevent possibilities of recurrence.

## 6. Recommendations

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**ESCRs violations (economic violence) should be addressed as a matter of priority.** Findings of a survey done in the aftermath of the conflict revealed that the immediate needs of the victims of the conflict in northern Uganda were peace and food. This shows the importance of putting ESCRs at the forefront and moving them from the background.<sup>31</sup>

Peace and justice are both desired by the victims and survivors of the conflict.<sup>32</sup> The peace referred to is not only the absence of war (negative peace) but a peace which allows economic activity to thrive and social life to be improved (positive peace).

**Violations of CPRs and ESCRs should be thoroughly investigated.** Should Uganda ever set up a truth-seeking body, as envisaged under the Transitional Justice Policy 2014, its mandate should broadly examine violations of CPRs and ESCRs. The truth commission should examine the causes, impact and consequences of the harm endured by victims. Lessons on how to do this could be drawn from the experiences of the

Sierra Leone, East Timor and Peru truth commissions.

**Reparations should be made available in both the short term and the long term.** Currently, it can be observed that there are many survivors and victims of conflict who have been suffering the aftermath of the conflict such as physical wounds or destroyed livelihoods since the end of the war in 2006. Many fear that they will die before they receive any reparations. It is, therefore, further recommended that documentation of victims of the conflict be sped up and that reparations address the full spectrum of harm suffered by the victims of the human rights violations, including the consequences of the harm. Currently, all efforts have been directed towards retributive justice in the Dominic Ongwen case at the ICC and that of Thomas Kwoyelo at the ICD. However, steps are yet to be taken towards delivering restorative justice to victims who continue to live with untreated physical and psychosocial wounds and the social, economic consequences of the violations they suffered.

<sup>31</sup> ICTJ and Human Rights Centre, University of California Berkeley *Forgotten Voices, A Population Based Survey on Attitudes about Peace and Justice in Northern Uganda (2005)*.

<sup>32</sup> *Ibid*

**All parties that committed crimes should be held accountable.**

Regarding the formal justice mechanisms, the victims and survivors of conflict desire that all sides be held accountable for their actions.<sup>33</sup> It is encouraged that investigations be effectively and efficiently carried out in order to have those suspected tried in the courts. Also, the legislative provisions allowing victims to participate in trials at the ICD should be actualised to make it a reality. This can be done through making available more resources and support to the judiciary for it to facilitate victim participation in the trials and establish a reparations fund.

**There is need to reform the existing amnesty law.**

The amnesty law should be reformed to be conditional in order to make it more just.<sup>34</sup> Since 2005, victims and survivors of conflict have complained about the blanket amnesty because it has been more supportive of perpetrators and largely ignored the victims.

The traditional justice mechanisms require formal recognition from the government and regulation in order to be more effective.

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