Accountability for violations of International Humanitarian Law:

An introduction to the legal consequences stemming from violations of international humanitarian law
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1. Introduction

When violations of international humanitarian law (IHL) occur, victims often suffer serious consequences including infringements upon their human dignity. In the wake of such violations, attention turns to accountability. Important questions include the following ones. At a general level, what are the legal consequences when rules of international law are broken? More specifically, what legal consequences flow from serious violations of IHL? Which violations of IHL constitute international crimes? In which legal forums can perpetrators be held accountable for committing such crimes?

In the context of the Occupied Palestinian Territory (oPt), all sides are frequently accused of violating IHL as well as international human rights law (IHRL).¹ Israeli Forces have been accused of, amongst other things: causing extensive and unnecessary destruction of civilian property in Area C of the West Bank; building a wall in violation of international law; transferring the Israeli population into the Occupied West Bank (settlements); forcibly transferring the protected Palestinian population; impeding humanitarian access and failing to provide for the basic needs of the occupied population; as well as committing a range of violations of IHL during military operations in Gaza and the West Bank. Meanwhile Palestinian militants in Gaza have been accused of making no attempt to comply with the principle of distinction by launching indiscriminate rocket attacks at civilian areas.²

When violations of international law are consistently reported, it is more important than ever to move beyond merely identifying violations. It is necessary to address the legal consequences of those violations for all actors involved (including third states). This short document provides an overview of legal obligations and consequences for violations of IHL. It specifically addresses state level consequences for grave breaches of the Geneva Convictions. Consequences flowing from violations of peremptory norms of international law are also highlighted. Attention is paid to both the responsibilities of the primary violator and obligations of third states.

² For specific examples, see the International Court of Justice advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, available online at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4; For an analysis of the conduct of hostilities during Operation Cast Lead see Fact Finding Mission on the Gaza Conflict (Goldstone Commission).
a. Duty to Respect and Ensure Respect

Respect for IHL is one of the most important obligations of the parties to an armed conflict. IHL applies at all times during armed conflict (which includes situations of occupation). The parties to the Israeli–Palestinian conflict are therefore strictly bound to respect every applicable rule of IHL without exception or derogation. In particular Israel as the occupying power has extensive obligations.

It is a self-evident principle of international law that obligations must be respected. Without respect, rules become meaningless. The notion of respect for international obligations finds expression in the Vienna Convention on Law of Treaties. Under Common Article One of the Geneva Conventions, which codifies the notion of respect, parties to a conflict must respect all applicable rules of IHL in all circumstances. These rules include those found in the Geneva Conventions, their Additional Protocols, The Hague Regulations as well as rules of Customary IHL.

b. Scope of respect notion: secure and ensure

The notion of respect extends beyond the basic obligation to refrain from illegal conduct. Many international treaties include obligations to ensure and secure respect for the law. Put differently, the obligation to respect the law demands positive protective steps.

For example, “(t)he terms ‘ensure’ and secure’ have been interpreted to “require governments to take positive action so that respect actually occurs.” In this way, the notion of respect can afford genuine legal protection. Relevant “positive action” by States could include ensuring domestic law provides for independent and credible review (e.g., criminal investigation or some form of administrative review) of claims of violations of applicable international law. Affording legal protection is essential to ensuring and securing genuine respect for the law.

A commonly asked question is whether there is a legal duty to investigate all violations of IHL? While there is no obligation under IHL to investigate every violation, all grave breaches and serious violations of IHL must be investigated. That said, investigating all violations could be an important way to ensure genuine respect for the law.

c. Lack of respect: common examples

IHL binds all parties to armed conflict. Yet too often in today’s conflicts the warring parties do not respect the basic tenants of IHL. Claims that IHL has been violated are often disputed. Parties often challenge allegations leveled against them by doing the following things:

- Questioning the applicability of the law.
- Disputing the facts (denying that an event or specific elements of it occurred).
- Interpreting the law in a different manner to those asserting a clear violation.
- Arguing that the law does not appropriately regulate the specific situation and context in question.
- Stating that they lacked the ‘intent’ to violate the law.

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4 Terms used in the Geneva Conventions (Common Article One), European Convention on Human Rights (Article 1), ICCPR (Article 2). See also General Comment 31 of the UN Human Rights Committee.
6 See Louise Doswald Beck, ‘Human Rights in Times of Armed Conflict and Terrorism’ (Oxford University Press; Oxford 2013) at 31: “The interpretation of the obligation to properly respect international human rights obligations has been undertaken by treaty bodies by considering a number of different aspects. These aspects include the need for the legal protection to be genuine, an analysis of the steps need to take in order to properly respect any particular right, the duty to protect persons from abuses by private individuals, and legal procedures to deter future violations.”
Often such arguments are not made in good faith but instead advanced to protect a party’s image, circumvent international condemnation, and avoid consequences. Some claim that those who have never fought in an armed conflict have little insight into the realities of war or the practical application of IHL. Ultimately, so the argument goes, the warring parties are the ones best placed to know when a violation has occurred. While the latter point may be true, the essentially self-regulatory nature of international law’s approach to enforcement of IHL means that punishment of serious violations has often been found wanting. For the victims’ point of view, leaving accountability to the parties often leads to impunity.

Such statements offer little comfort to victims of violations of IHL. However, international law contains other mechanisms for addressing violations, including third state obligations arising from Common Article One of the 1949 Geneva Conventions. These mechanisms are discussed below.

d. Common Article One: Embracing a shared legal responsibility

Common Article One of the 1949 Geneva Conventions does not only oblige the parties to an armed conflict to respect the law. It also imposes an obligation on all High Contracting Parties (HCP) to ensure respect of the Geneva Conventions in all circumstances. Hence both during times of armed conflict and at other times, all states must take steps to ensure respect for (and refrain from taking any measure to undermine respect for) these cornerstone conventions of modern IHL. The nature of this obligation has been summarized by the ICRC as follows:

Common Article 1 is now generally interpreted as enunciating a responsibility on third States not involved in an armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict by means of positive action. Third States have a responsibility, therefore, to take appropriate steps — unilaterally or collectively— against parties to a conflict who are violating international humanitarian law, in particular to intervene with states or armed groups over which they might have some influence to stop the violations.

The duty in CA1 is an obligation of means, meaning that States cannot be legally obligated to take steps which they do not have the means to undertake. Importantly obligations under CA1 go well beyond the mere fact of putting a stop to violations, the preventative aspect remains just as important.

While Common Article 1 is tantamount to a constitutional pillar of IHL, practical application is often limited due to the general nature of the obligation and challenges involved in its implementation (in certain contexts). Yet it is important to emphasize both the legal nature of this obligation and its broad scope of application. Not only does it demand that states directly involved in armed conflict provide genuine legal protection of the rights of war victims, the obligation to ensure respect for IHL in all circumstances obliges all states to take necessary measures to ensure legal protection where parties to an armed conflict do not comply with IHL. An important example is the obligation to cease providing weapons to States that are committing war crimes. Put differently, in order to meet their treaty obligations to ensure respect for IHL, third States may need to take lawful measures including halting arms trade with the State or armed group violating IHL, joining an international arms embargo, and imposing economic sanctions against the offending State or armed group. While such steps may be regarded by some as political in nature, failure to take lawful measures to ensure respect for IHL by a party engaged in ongoing serious violations can also be seen as political. Put differently, the legal obligation to respect and ensure respect for IHL should transcend political considerations.

The EU Guidelines on Promoting Compliance with International Humanitarian Law represents an important step towards fulfillment of this legal obligation. However, it is importantly to

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7 IHL was not only written by legal experts and diplomats but also by representatives from the military.
8 High Contracting Parties are States that have ratified or acceded to a treaty, in this case the 1949 Geneva Conventions.
emphasize that fulfillment of the obligation by EU member States depends on implementation. It goes without saying that the legal obligation to ensure respect cannot be met by a textual commitment alone.

e. Grave breaches

In addition to Common Article One, legal accountability for violations of IHL requires implementation of the obligations to search for and prosecute those who have committed grave breaches of the Geneva Conventions. As we will see in the next section, all grave breaches constitute war crimes and can be prosecuted as such. Under customary law, States have an obligation to search for and prosecute perpetrators of all serious violations of IHL (not merely grave breaches of the Geneva Conventions.)10 These IHL obligations are not restricted to the parties to the conflict. All States party to the Geneva Conventions must cooperate in the search for and prosecution of those who commit such violations.

List of main grave breaches under Geneva Conventions of 1949:

(i) Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;
(iii) Wilfully causing great suffering, or serious injury to body or health;
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii) Unlawful deportation or transfer or unlawful confinement;
(viii) Taking of hostages.

List of grave breaches under Additional Protocol One:

(a) making the civilian population or individual civilians the object of attack;
(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects
(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects
(d) making non–defended localities and demilitarized zones the object of attack;
(e) making a person the object of attack in the knowledge that he is hors de combat;
(f) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
(g) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
(h) unjustifiable delay in the repatriation of prisoners of war or civilians;
(i) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
(j) making the clearly–recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement.

2. Legal Consequences: from state responsibility to international criminal liability

When international rules and obligations are broken there are legal consequences. Under public international law, of which international humanitarian law is a branch of, legal consequences can be broadly divided into state responsibility and individual responsibility.

a. State Responsibility

When a rule of international law is violated there are clear consequences for violating state. The rationale for this principle is that states are responsible for such violations, hence the term state responsibility. The Articles on State Responsibility for Internationally Wrongful Acts identify two levels of obligation owed by States responsible for violating any rule of international law:

1. The obligation to take steps to cease the action or omission which results in a violation of international law; and
2. The obligation to make appropriate reparation.

When a state violates a rule IHL, these obligations are automatically triggered. A state may violate the law directly or by aiding or assisting other actors to do so. In terms of IHL a third States failure to adhere to their legal obligation to ensure respect of Common Article One may also constitute a wrongful act. For example, a State providing assistance, knowing that the latter is used for violations, is certainly not complying with their Common Article 1 obligation.

i. Consequences for Serious Breaches for Violations of Obligations Owed to the International Community

State responsibility for internationally wrongful acts extends to all states violating or assisting in the violation of a legal obligation. International law also sets out obligations that arise where a State commits a serious breach. These obligations are triggered where the serious breach arises under what is known as a peremptory norm (jus cogens norm) of general international law. Peremptory norms are fundamental norms accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. They can be described as the fundamental pillars of international law. There is no defined list of peremptory norms, but examples of peremptory norms can be said to include:

- Prohibition of torture and other cruel, inhumane or degrading treatment or punishment
- Prohibition of Genocide
- The right to self determination
- The prohibition of racial discrimination and apartheid
- Basic principles of international humanitarian law.

One central aspect concerning jus cogens norms is that third states have specific obligations when such peremptory norms are breached. These obligations include:

- Non-recognition
- Non-assistance

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11 For example if Israel was to violate IHL, and Sweden was also failing in its duty to ensure respect for IHL under CA1, both would face the consequences stated under 3.1

12 “In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as “intransgressible” in character, it would also seem justified to treat these as peremptory”. ILC Commentary, at 84. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
The rationale for these special obligations is the gravity of breaches of peremptory norms which affect the international community as a whole. The seriousness of violating a norm of a peremptory character necessitates a collective response to counteract its effects.

ii. Non-Recognition

States have an obligation not to recognize as lawful a situation created by a serious breach of international law arising under a peremptory norm. This obligation applies to “situations” created by these serious breaches. For example, where a state attempts to acquire sovereignty over territory through the denial of the right of self-determination of peoples, other States have an obligation to refrain from affording formal recognition of the situation and also to refrain from taking steps that would imply such recognition.

Dawidowicz has summarized the rationale for the obligation of non-recognition in the following way:

…..the rationale .. is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a fait accompli resulting from serious illegalities do not consolidate and crystalize over time into situations recognized by the international legal order– a concern expressed by the ICJ in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory...In such circumstances, the function of non-recognition is to vindicate the ‘legal character of international law against the “law creating effect of facts”'.

The obligation to all states not to recognize as lawful a situation created by a serious breach of international law is confirmed by Article 41(2) of ASRIWA. This obligation arises from substantive rules of conduct that prohibit what has come to be seen as intolerable, because of the threat it presents to the survival of States and their peoples and the most basic human values.

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Examples of Non-recognition in Practice
There are many examples of non-recognition that can be found in State practice. Two important examples follow:

**Southern Rhodesia: The day after Southern Rhodesia unilaterally declared independence, the United Nations Security Council adopted a resolution under Chapter VI which called upon all States 'not to recognize this illegal racist minority regime'. A week later the Security Council adopted another resolution which added that States were obliged 'not to entertain any diplomatic or other relations with it.'**

**South West Africa (now Namibia): In 1966 the United Nations General Assembly declared that South Africa had failed to fulfill its obligations in respect of the administration of its mandate in South West Africa, mainly through the application of an illegal policy of apartheid. The continued illegal South African presence in South West Africa prompted the Security Council to call on all states to refrain from all dealings with the government of South Africa and its administration of South West Africa (SC Res. 269). Additionally through SC Res 283 the Council prohibited acts which would imply recognition of the authority of the Government of South Africa over South West Africa.**

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13 There are 3 elements which should be considered and recalled when assessing the issue of non-recognition:

i. All preemptory norms may in principle give rise to an obligation of non-recognition

ii. Only a serious breach of a preemptory norm is subject to the obligation of non-recognition

iii. The principle of non-recognition is only applicable where a serious breach results in the assertion of a legal claim to status or rights by the wrongdoing State– ‘a situation’ all states are obliged not to recognize ‘as lawful’.

14 Article 41, Articles of State Responsibility.


16 ILC Commentary
IV. Non-recognition in the oPt/Israel Context?

When assessing whether States have an obligation of non-recognition in the context of the oPt, it must be first established whether breaches of peremptory norms of international law have occurred. For example, has there been conduct which has: infringed upon the prohibition on the acquisition of territory by force; undermined the right to self-determination; amounted to racial discrimination and apartheid; and/or violated basic principles of international humanitarian law?

Several examples have already been recognized by the United Nations. Following the 1967 War in the Middle East, the United Nations General Assembly expressed deep concern at the situation prevailing in Jerusalem, following Israel’s decision to place the city under a common civil administration. It considered these measures invalid and called upon Israel ‘to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem’. The United Nations Security Council also refuted Israel’s purported annexation of East Jerusalem, declared it ‘null and void’ and called upon States not to recognize it (a similar call was made regarding Israel’s extension of Israeli law to the occupied Golan Heights).

These illustrations demonstrate that the obligation of non-recognition has been accepted by States and applied in international practice, including in the oPt. States have an ongoing obligation to comply with UN calls for non-recognition of Israeli serious violations of peremptory norms for as long as they continue. It is therefore important to continuously review State conduct to ensure that no state has taken any actions to recognize or render aid or assistance in maintaining these unlawful situations.

Other conduct by Israel in the context of the oPt may also call for non-recognition. Examples include infringement of Palestinians right of self-determination and denial of basic principles of IHL (discussed below). In May 2012, the Committee of the Elimination of Racial Discrimination raised concerns that some Israel practices in the oPt may be tantamount to apartheid.

V. The content of the obligation of non-recognition

It is important to assess what the obligation of non-recognition actually entails in practical terms for third states. While Article 41(2) of the ARSIWA does not elaborate the precise content of the obligation, the commentary to this article does. The obligation “not only refers to the formal recognition” [of situations created by the relevant breaches], but also prohibits “acts which would imply such recognition.” Practice also supports this broad approach to the obligation. In this respect, commentators have noted that:

“Where the Security Council and the General Assembly have elaborated upon the content of the obligation of non-recognition, they have generally defined it broadly to include any dealings with the responsible state that could imply formal recognition of an unlawful situation…”

17 General Assembly Resolution 2253, 4 July 1967.
20 The Committee of the Elimination of Racial Discrimination (CERD) drew State party’s attention to its General Recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid. It urged the State party (Israel) “to take immediate measures to prohibit and eradicate any such policies or practices which severely and disproportionately affect the Palestinian population in the Occupied Palestinian Territory and which violate the provisions of article 3 of the Convention.” Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel. UN Doc CERD/C/ISR/CO14–16 at para 24. See also John Dugard, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council” Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (“Israel’s laws and practices in the OPT certainly resemble aspects of apartheid”, para 63).
21 Commentary to Article 41, para 5. Extracted from Dawidowicz, supra note 4, at 684.
22 Crawford, Pellet, Olleson, The law of international responsibility, p684.
In addition to this generalized obligation of non-recognition, the Security Council and General Assembly have referred to the following obligations:

- Not to recognize passports or travel documents issued by a regime
- To withdraw consular representation
- To withdraw diplomatic missions
- To deny the legal validity of any public or official acts of the regime, and
- To refuse any membership of an international organization

In the Wall Advisory Opinion the International Court of Justice (ICJ) held that all States were "under an obligation not to recognize the illegal situation resulting from the construction of the wall in the OPT, including in and around East Jerusalem." Yet again the specific steps were not elaborated, although the Court called upon the United Nations to formulate what further action it needs to take to bring an end to the illegal situation resulting from the construction of the Wall. Eight years on, the question needs to be asked of the United Nations: what formulations has the UN provided?

VI. Non-assistance

A second obligation, owed by third states when addressing a serious breach is to "not render aid or assistance to the responsible state in maintaining the situation so created."  

The obligation to not assist "is limited to actions that would assist in preserving the situation created by the breach. It does not cover international cooperation with the responsible state in unrelated fields. In other words, it does not require the complete isolation of the responsible State. However, a State may legitimately avoid all types of international cooperation with the responsible state." 

VII. Examples of non-assistance in judicial practice

- Namibia Case: The ICJ found that United Nations member States were under an obligation to 'recognize the illegality and invalidity of South Africa's continued presence in Namibia' and 'to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia'.
- Wall Case: the ICJ found that States were under an obligation not to recognize the illegal situation resulting from the construction of the wall by Israel, and not to render aid and assistance in maintaining that situation.

3. Individual Criminal Responsibility: War Crimes

Legal consequences of violations of IHL are not limited to those under the law of State responsibility. Such behavior can lead to individual criminal responsibility. Persons who aid, abet, order, supervise and jointly perpetrate international crimes involving violations of IHL can be held individually responsible.
Under the *Rome Statute of the International Criminal Court*, serious violations of IHL and grave breaches of the Geneva Conventions are classified as war crimes. Put differently, not every violation of IHL falls within the war crimes regime of the Rome Statute, (only serious violations of IHL and grave breaches of the Geneva Conventions). Put differently, for every war crime there must first be a violation of IHL of this kind. Non-serious violations of IHL do not qualify as war crimes. A classic example is where a soldier steals a loaf of bread in an occupied village.

There is no fixed list of what does and does not constitute a war crime. However, the Statute of the International Criminal Court codifies the most widely accepted regime: a non-exhaustive list of 38 war crimes. The reason why this list is non-exhaustive is because international law is constantly evolving. In time, certain conduct may become a war crime if it meets the essential criteria (a serious breach of international, having grave consequences for the victim, and one which has been criminalized under treaty or customary law).

War crimes are most often prosecuted through domestic systems of law enforcement such as Court Martial hearings. In addition, various international forums prosecute war crimes. Recent examples include the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

4. Conclusion

IHL contains a set of basic rules designed to protect basic human dignity in the most difficult of circumstances: war. When addressing violations of IHL, it is important to ask “what are the legal consequences when these important rules are broken?” International law remains less developed than domestic legal systems with respect to enforcement of the law. However, it is important to remember that under international law, both states and individuals can be held accountable in different ways for violations of IHL. While primary responsibility for the enforcement of IHL during armed conflict rests with the warring parties themselves, third states also have obligations under international law. This includes the obligation to takes measures to ensure respect of the law. In the case of violations reaching the threshold of serious violations of IHL and grave breaches of the Geneva Conventions, third States have an obligation to search for and prosecute the perpetrators. In addition to the third state responsibility regime under the Geneva Conventions, general rules on state responsibility also apply during armed conflict. These rules are particularly important when dealing with behavior that offends peremptory norms of international law because international obligations of non-assistance and non-recognition may apply.

Finally it should be remembered that crimes are ultimately committed by individuals. Those who commit serious violations of IHL and grave breaches of the Geneva Conventions may be held individually responsible in criminal trials.

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30 Article 8. As this article makes clear, war crimes are not limited to the grave breaches regime of the Geneva Conventions.
What is Diakonia?
Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli–Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website ‘An Easy Guide to International Humanitarian Law in the occupied Palestinian territory’ at: http://www.diakonia.se/ihl – or contact us to set up a general or specialised legal briefing by our legal advisors.

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