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UPDATES FROM REGIONAL HUMAN RIGHTS SYSTEMS

INTER-AMERICAN SYSTEM

INTER-AMERICAN SYSTEM ENHANCES MONITORING OF LESBIAN, GAY, TRANSGENDER, AND INTERSEX PERSONS

In November 2011, the Inter-American Commission on Human Rights (IACHR, Commission) created a Unit on the Rights of Lesbian, Gay, Transgender and Intersex Persons (Unit) to improve its ability to protect the rights of lesbian, gay, transgender, and intersex (LGBTI) individuals. The IACHR will evaluate the Unit's work after a year and determine whether to create a rapporteur on LGBTI rights. The Unit was created after the Commission held a hearing focusing on the lack of protection of the LGBTI community throughout the Americas and states' failures to prosecute hate crimes against LGBTI persons. Article 1 of the American Convention on Human Rights requires signatories to respect the rights of all persons without discrimination, and Article 24 guarantees all people equal protection.

In establishing the Unit, the Commission cited the legal discrimination and physical violence suffered by LGBTI-identified people in the Americas. The Commission has addressed these human rights violations using precautionary measures, hearings, and other promotional activities. For example, in an April 2011 hearing, the Commission heard from petitioners on the situation of the LGBTI community in Haiti after the earthquake. The petitioners explained that in times of chaos, violence against the LGBTI community increases; in fact, claims that the earthquake was Haiti's punishment for allowing the presence of LGBTI persons are a common justification for renewed violence. In September 2010, the Commission found that Chile had discriminated against a lesbian mother on the basis of her sexual orientation and referred her case to the Inter-American Court of Human Rights (IACtHR, Court). The Court found that Chile had violated her rights to equal protection under the law (Article 24), privacy (Article 11), and her right to a family (Article 17) when it denied her custody of her children based on her sexual orientation.

The development of the Unit is part of a larger LGBTI advocacy movement within Latin America. In July 2010, Argentina became the first Latin American country to legalize same-sex marriage and adoption nationwide. In November 2011, Ecuador's Ministry of Health closed approximately thirty clinics claiming to "cure homosexuality."

Despite these advancements, LGBTI individuals still struggle with a culture that is slow to change and hesitant to recognize LGBTI-identified people equal rights. Additionally, many Latin American leaders balk at passing strong legislation protecting LGBTI rights, and often avoid prosecuting crimes against the LGBTI community as hate crimes due to their conservative cultural backgrounds.

The Unit forms part of the Commission's plan of action to enhance protection of LGBTI rights in the region, and will hopefully counter the pervasive anti-LGBTI sentiment throughout the Americas. One of the Unit's tasks will be to document sexual orientation and gender identity-derived human rights issues and make recommendations on public policy, legislation, and judicial interpretation. Additional responsibilities include ensuring prioritization of discrimination cases against LGBTI persons and further developing the Organization of American States General Assembly's resolutions pertaining to LGBTI rights.

Although many human rights organizations such as the International Gay and Lesbian Human Rights Commission celebrate the creation of the Unit, it has also been met with some criticism from conservative commentators. Professor Ligia M. De Jesus of the Ave Maria School of Law claims that the Unit is an indication that "activists, rather than jurists" control the Commission. Others who have chosen to remain anonymous claim that by protecting the rights of certain groups, the Commission is failing to protect other groups.

The Commission's creation of the Unit on the Rights of LGBTI persons is an indication that LGBTI rights are gaining more attention and protection in Latin America,

even amidst discrimination and conservative social beliefs. The Unit's increases the capacity of the Commission to protect vulnerable people throughout the Americas by focusing attention and resources on LGBTI rights, and will likely be followed by the creation of a rapporteurship.

CONDITIONS IMPROVE AT BRAZILIAN PRISON; COURT LIFTS PROVISIONAL MEASURES

In August 2011, the Inter-American Court of Human Rights (IACtHR, Court) lifted provisional measures it had issued in response to continuous acts of violence perpetrated by both guards and inmates at Urso Branco prison in Brazil. The improvement in conditions at Urso Branco, and the Court's subsequent lifting of the provisional measures, are an indication that the Court can effect change outside the traditional adversarial process. Despite advancements at Urso Branco, however, the Court issued additional provisional measures in December 2010 in response to injuries at Unidade de Integração Socioeducativa (UNIS, Socio-Educational Internment Facility), a correctional facility in Brazil for children and adolescents, which indicates the continued need for systemic prison reform throughout the country.

Article 63.2 of the American Convention on Human Rights (American Convention) grants the Court authority to implement provisional measures in cases of extreme gravity and urgency to prevent irreparable damage to individuals. Provisional measures can be issued either upon submission of a case by the Inter-American Commission on Human Rights (IACHR, Commission) to the Court, or when the Commission itself requests them. The Court's provisional measures are binding on Brazil because it has ratified the American Convention and recognized the jurisdiction of the Court. Articles 4 and 5 require Brazil to protect individuals' rights to life and humane treatment.

The Inter-American System has addressed poor conditions at prisons and juvenile detention centers in Brazil through

reports, hearings, court decisions, and provisional measures since at least 1995. Violence and riots are not uncommon in Brazilian prisons. For example, in 2007, Sao Paulo's most powerful criminal gang attacked prison staff and police officers in retaliation for the death of 111 prisoners who had died when a prison riot was suppressed in 1992. In November 2010, eighteen prisoners were killed in two separate riots in northeastern Brazil over access to water and the rate at which their criminal cases are reviewed.

In response to a fatal prison uprising on the night of January 1, 2002, the Commission requested that provisional measures be issued to protect the inmates at Urso Branco prison. During the uprising, prison guards allowed inmates to attack each other until an assault team entered the prison the next morning to quell the riot. There were between twenty-seven and forty-five casualties. The Court ordered the state to take all measures necessary to protect the lives of the Urso Branco inmates, investigate the circumstances of the uprising, and report back to the Court periodically. Despite the implementation of provisional measures, in April 2004, another riot broke out at Urso Branco, resulting in the deaths of fourteen inmates. The most recent violent deaths at Urso Branco occurred in December 2007, when prison guards shot, but did not kill, four inmates during a two-day period in August 2009.

In August 2011, the Court lifted the Urso Branco provisional measures after prisoners' representatives agreed with national and state government representatives that conditions had improved significantly over the nine-year period. The State had submitted a report to the Court in July 2002 as evidence of improved conditions at Urso Branco, claiming that penitentiary agents were replacing the special police force in charge of security, and that competitive public tests were being conducted to ensure that candidates for penitentiary agent positions were highly qualified. A September 2004 compliance report to the Court indicated that the prison had increased the number of guards and improved the quality of prison health care. In additional statements to the Court, Brazil claimed that 1) the number of Urso Branco prisoners had decreased; 2) the prison had been renovated; 3) free legal advice was now available to the inmates; and 4) steps had been taken to create

a professional training program for the inmates.

Before lifting the provisional measures, federal and state authorities signed an agreement with the prisoners' representatives detailing plans for the improvement of Urso Branco. Brazil agreed to continue improvements in five areas: prison infrastructure, enhanced training for prison personnel, investigations into prison deaths, improvement of social inclusion resources, and finally, research into methods used to combat violent prison culture.

Despite improvements after the Urso Branco violence, recent violence at UNIS is evidence that Brazilian prison conditions continue to be a problem. On January 31, 2011, UNIS agents entered the facility after an escape attempt, and in the ensuing confrontation between the agents and the juveniles, five juveniles were injured. On February 25, 2011, the Court implemented provisional measures to protect UNIS inmates, requiring that Brazil effectively protect the life and personal integrity of the youths in the detention center, and that the methods of punishment adhere to international norms.

Although the UNIS provisional measures indicate that the Brazilian detention system continues to warrant vast reform, the state's efforts to ameliorate conditions in response to the Urso Branco provisional measures is a step in the right direction. The Inter-American System's readiness to compel member states to address poor prison conditions, and the subsequent improvements, are promising movements for prisoner rights in greater Latin America. Time will tell whether advances achieved are systemic or merely reactive to discrete incidents.

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EUROPEAN COURT OF HUMAN RIGHTS

DECISION UPHOLDING IN VITRO FERTILIZATION BAN RELIES ON LACK OF EUROPEAN CONSENSUS

The European Court of Human Rights (ECtHR) ruled on November 3 that no consensus has emerged on the continent to make *in vitro* fertilization a human right that requires protection. The decision

comes only four years after the ECtHR concluded that a couple had the right to the procedure when the man was in prison. The Grand Chamber's decision in *S.H. v. Austria*, however, was not based solely on precedent or the specifics of Austria's governing statute, but sought to discern how fertility treatment fit within Article 8 (respect for private and family life) of the European Convention on Human Rights (ECHR).

There are varying methods of conception outside of copulation, and Austria's law does not ban all forms. The country specifically bans *in vitro* fertilization — conception outside of the female's body — involving third parties, that is, where either the ovum and sperm do not come from the involved couple, who must be married or in a similar situation. Under extreme circumstances, such as where the involved male is sterile, donor sperm can be used, but it must be implanted *in vivo*, meaning the fertilization happens inside the woman's body. By contrast, donor ovum can never be used for *in vivo* fertilization.

S.H. v. Austria was brought before the ECtHR by two couples unable to conceive without the use of banned third party *in vitro* procedures. In a decision on the merits, a chamber of the First Section of the Court found that Austria's law violated Article 8, recognizing "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose." Because the Grand Chamber ruled this right existed, it found a violation of Article 14 (prohibition of discrimination) by not allowing those unable to conceive access to that right. Austria appealed the decision to the higher Grand Chamber and argued that although the right to conceive should be protected, that right must not extend to *all possible means* of conception. In particular, the state was concerned with "selection" of children, exploitation of women, and the dilemmas created by children who would have two women who could claim motherhood.

In its judgment, which is final, the Grand Chamber struck down the lower chamber's ruling, finding no violation of Article 8 of the ECHR, which also had the effect of making Article 14 inapplicable. In particular, the ECtHR found that Austria's laws strike a balance between public and private concerns. That balance was used in the same manner as in what otherwise appears to be a conflicting ECtHR ruling

in favor of a prisoner whose wife was denied access to artificial insemination in *Dickson v. United Kingdom*. In *S.H. v. Austria*, the Grand Chamber cited studies documenting regulation of *in vitro* fertilization across Europe, including bans on ovum donation in several European countries. For the Grand Chamber, a lack of consensus across the continent and an absence of long-standing principles signified that the issue before the court — whether Article 8 encompasses the right of couples to *all possible means* of medically induced conception — is not settled. That conclusion led the Grand Chamber to decline to step in and decide domestic policy, so long as states maintain that balance between public and private concerns.

In the fertilization debate, proponents of expanded access to scientific methods of conception call on Article 8 and similar protections that specifically identify a right to creation of a family as a dominant human right. The dissent in the *Austria* opinion cited a World Health Organization report that concluded that infertility affects 80 million people worldwide. The authors of the report wrote that, “it is a central issue in the lives of the individuals who suffer from it. It is a source of social and psychological suffering for both men and women and can place great pressures on [a couple’s] relationship”. The other side approaches the debate by identifying the “moral and ethical issues,” as the court calls them, emphasizing the creation of life and the concern that fertility treatments often prioritize science over morality. One of the most prominent opponents of *in vitro* and other methods of artificial fertilization is the Catholic Church. In 2008 Pope John Benedict XVI, in reference to fertilization outside of the body, said, “When human beings in the weakest and most defenseless stage of their existence are selected, abandoned, killed or used as pure ‘biological matter’, how can it be denied that they are no longer being treated as ‘someone’ but as ‘something’, thus placing the very concept of human dignity in doubt?”

The ECtHR’s restraint in interfering with fertilization policy reflects the court’s avoidance of choosing between two different issues within the human rights framework: the right to family life and a concern for the law’s interference in deeply entrenched moral issues concerning the creation of life. Like in *A, B, and C v. Ireland* in 2010, when the court ruled that

Ireland could not restrict access to legal abortions but declined to require the country to extend the practice beyond when a woman’s life is at risk due to pregnancy, the court stayed out of the broad moral decision. The court, in avoiding a sweeping ruling in *S.H. v. Austria*, ensured that the moral and religious issues neither overstepped individual protections nor were impugned by other human rights issues.

The ECtHR made it clear with its decision in *S.H. v. Austria* that it is not inclined to decipher the answer to the Pope’s question. The court recognized that there might be changes to the overall trend in Europe and gave notice to the states that the issue “needs to be kept under review.” Unless consensus emerges, the ECtHR is concerned with making sure both sides of a debate are represented in the law instead of choosing between the two.

EUROPEAN COURT SIDESTEPS EXACERBATING UK CONFLICT IN HEARSAY CASE

The Grand Chamber of the European Court of Human Rights (ECtHR) averted a possible conflict with the United Kingdom in December by overturning a lower Chamber ruling that almost completely barred the use of hearsay evidence to convict a criminal and overruled exceptions in British law. The long awaited decision in the combined case of *Al-Khawaja and Tahery v. the United Kingdom*, — arriving more than 18 months after the Grand Chamber hearing — came as the UK assumed the rotating chairmanship of the Committee of Ministers of the Council of Europe, the larger body that oversees the ECtHR. The chairmanship has emboldened critics within the UK government to push for long-sought reforms to the Court and the country’s connection to it.

The Grand Chamber overruled the lower Chamber in the case and held that testimony is admissible where there is good reason a witness cannot testify directly and there are adequate safeguards to comply with Article 6 of the European Convention of Human Rights (ECHR), which provides for the right to a fair trial. In the case of *Al-Khawaja*, a woman who accused the defendant of indecent assault was unable to testify because she had committed suicide, but a number of friends and the complaint of another alleged victim corroborated her affidavit. The Grand Chamber upheld this

use of hearsay evidence. In the case of *Tahery*, however, one witness refused to testify in the trial involving a stabbing during a gang fight and the case hinged critically on that witness’ testimony, which the defense had no other method of challenging. The Grand Chamber of the ECtHR did not object to the barring of this testimony. The approach essentially adopts the British rule of a generally strong restriction on hearsay evidence with an exclusion for only particular circumstances.

Previously, the UK has bristled over ECtHR-imposed restrictions on its ability to deport foreign nationals — including those convicted of violent crimes like rape — and for more than six years has refused to adhere to an ECtHR decision requiring that convicts be allowed to vote. In a January 24, 2012 speech before the Council of Europe Parliamentary Assembly, Cameron staked out the UK’s plans for reform in response to what he called growing unease over the court. “When controversial rulings overshadow the good and patient long-term work that has been done,” he said, “that not only fails to do justice to the work of the court it has a corrosive effect on people’s support for human rights.”

A leaked draft of the UK’s plan for ECtHR reform — called the Brighton Declaration — surfaced in February 2012 and advocates for bold reform in three significant areas. First it recommends inserting into the ECHR explicit recognition of the principles of “subsidiarity” and the “margin of appreciation,” both of which operate to recognize the Court’s deference to national courts. Secondly, the document recommends a system whereby a national court could refer a point of law to the ECtHR. Third, it proposes altering the admissibility requirements under Article 35 to both shrink the time limit under which an application can be filed and make clear that the default is that an application is inadmissible if it is the same in substance as a matter decided by a national court taking into account the convention. The proposals will be debated at a conference in April at the end of the UK’s term at the chairmanship.

The Cameron government has also sought reform on the domestic level, which is controlled by the Human Rights Act of 1998, which *inter alia* committed British courts to give effect to the decisions of the

ECtHR. Political conflict lead one conservative member to resign from the eight-person panel working to draft a British Bill of Rights as a possible replacement for the Human Rights Act. Any progress the panel might make would also be limited by the UK's treaty obligations under the ECHR, which makes all decisions by the ECtHR binding upon member states.

The reforms envisioned by the Brighton Declaration would further the British objectives by affecting what comes out of Strasbourg, not how it is implemented. The recommendations found within the proposal would likely make decisions such as *Al-Khawaja and Tahery* — where the national courts were given deference — a common occurrence. Although this would protect the interests of the states, the reforms would also meet an intended purpose of keeping cases out of the Court. The proposal calls this efficiency, but it would also have the effect of effect of restricting individuals' access to the court as a final refuge.

ECtHR President Nicholas Bratza warned political leaders against using "emotion and exaggeration" to criticize the court in a speech delivered two days after Cameron's address. Bratza — a British lawyer — defended the court and emphasized its importance amidst the European debt crisis. "Human rights, the rule of law and justice seem to be slipping down the political agenda in the current economic climate," he said. "We must continue to ensure that the court remains strong, independent and courageous in its defense of the European Convention on Human Rights."

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AFRICAN HUMAN RIGHTS SYSTEM

THE EAST AFRICAN COURT OF JUSTICE ASSERTS ITS JURISDICTION TO HEAR THE INDEPENDENT MEDICAL LEGAL UNIT'S REFERENCE AGAINST THE KENYAN GOVERNMENT

On June 29, 2011, The Independent Medical Legal Unit (IMLU) achieved a monumental victory in the East African Court of Justice (EACJ) in its case against the Republic of Kenya, when the court denied a motion to dismiss filed by Kenya's Attorney General and ordered the case

to proceed. IMLU is a non-governmental organization with a mandate to protect Kenyans from human rights violations perpetrated by the government. IMLU filed the reference against the Kenyan government seeking to hold it accountable for its failure to investigate and, if necessary, prosecute members of the Kenyan security forces responsible for extrajudicial killings, torture, and other human rights violations committed in Mt. Elgon District during the 2006-2008 violent conflict between Kenyan security forces and the insurgent Sabaot Land Defense Force (SLDF). Human Rights Watch (HRW) estimates that Kenyan security forces carried out hundreds of extrajudicial killings, detained and tortured thousands more, and are responsible for nearly 200 forced disappearances in violations of several international human rights conventions as well as the Kenyan Constitution.

In seeking dismissal, the Attorney General relied on Article 27 of the Treaty for the Establishment of the East African Community (Treaty), which limits the jurisdiction of the EACJ to interpreting and applying the Treaty and expressly restricts the Court from deciding cases related to human rights issues until a protocol — not yet completed — expands the Court's jurisdiction over such cases. In response, the IMLU claimed that a good faith reading of Article 27 of the Treaty pursuant to the Vienna Convention on the Law of Treaties established the jurisdiction of the Court to hear allegations of violations of the fundamental principles of the Treaty. In the present case, these principles are set forth in Articles 6(d) and 7(2) — the obligation of states parties to ensure rule of law and good governance, and to maintain universal human rights standards. The EACJ agreed with IMLU and asserted its jurisdiction despite the Attorney General's objections. According to the Court, IMLU allegations are based on violations of fundamental Treaty principles, and the mere mention of alleged human rights violations in the reference does not purge the Court of its jurisdiction over the case.

The Attorney General also argued that the reference was time barred pursuant to Article 30(2) of the Treaty. According to the Attorney General, IMLU knew about the complaint in 2008 and failed to file the reference to the EACJ within two months thereafter. Yet the EACJ rejected this argument, ruling that the alleged violations

— Kenyan government's failure to investigate alleged human rights violations — are continuous from the time of the incident until IMLU concluded that the Kenyan government was not going to investigate and, where necessary, prosecute for alleged human rights violations.

Though IMLU gained a significant victory with the EACJ ruling against the dismissal of the reference as a whole, the Court dismissed the case against the Minister for Internal Security of the Republic of Kenya, the Chief of General Staff of the Republic of Kenya, and the Commissioner of Police of the Republic of Kenya — all of whom IMLU sought to hold accountable. The EACJ ruled that under Article 30, the individuals named in the lawsuit cannot be joined because they are merely employees of the Kenyan government and are therefore neither a state party nor an institution of the East African Community (EAC) that can be sued in the EACJ. Accordingly, only the Kenyan government can be held accountable by the EACJ for failing to ensure the rule of law, so only the Attorney General may be named in the lawsuit.

The EACJ's rejection of the Attorney General's opposition is significant beyond the case at issue. The decision effectively expands the jurisdiction of the EACJ to cases that detail human rights abuses, provided those cases focus primarily on violations of the Treaty. The failure of the Kenyan government to investigate details of atrocities committed during conflict in the Mt. Elgon region leaves the families of victims in plight with no means of obtaining closure and justice for their loved ones. The reference filed before the EACJ seeks to hold the Kenyan government accountable for this failure, and the court's denial of the respondent's opposition permits the case to move forward.

THE AFRICAN COURT AFFIRMED ITS SOLE JURISDICTION OVER THE INTERPRETATION OF THE EAST AFRICAN COMMUNITY TREATY

On December 1, 2011, the East African Court of Justice (EACJ, Court) held that eligible applicants may file a reference alleging violations of the East African Community Treaty (Treaty) without first exhausting local remedies, and further issued a declaration that Rwanda breached the Treaty when it unlawfully detained

Lieutenant-Colonel Rugigana Ngabo of the Rwanda Patriotic Front (RPF). The case *Plazeda Rugumba v. Attorney General of the Republic of Rwanda* was initially filed by Lt. Col Ngabo's wife in November 2010, urging the Court to declare that the government of Rwanda detained her husband *incommunicado* — without means of communication. Lt. Col Ngabo was not placed in preventive detention under lawful authority until January 2011, more than two months after the reference was filed.

The Court found that Rwanda violated Articles 6(9) and 7(2), which broadly oblige Rwanda as a party to the Treaty to adhere to principles of universal human rights through democracy and good governance. Mrs. Ngabo's reference also sought to hold the Secretary General of the East African Community accountable for breach of Article 29 of the Treaty, specifically for failing to take necessary measures to oversee the compliance of Rwanda with the Treaty regarding the arrest and detention of Lt. Col Ngabo. The Court, however, dismissed the allegation against the Secretary General of the East African Community for lack of notice.

Mrs. Ngabo's reference alleged that her husband was unlawfully detained incommunicado without trial as a threat to national security. According to Mrs. Ngabo's application, her efforts to obtain information about the whereabouts of her husband had been futile to that point, and her husband had been denied his rights to visitation by either a health professional or even the Red Cross. In response, Rwanda denied the allegations, instead arguing that the Lt. Col Ngabo was in "preventive detention" in a military prison where

the government extended him full rights within the perimeters of the Rwandan laws, including visitation rights. The Rwandan government conceded, however, that it did not lawfully move to place Lt. Col Ngabo in preventive detention until January 2011, after Mrs. Ngabo filed the reference before the EACJ. Lt. Col Ngabo's detention from his August 2010 arrest to that point was found by the Military Court of Rwanda to constitute a breach of Articles 90 though 100 of the Rwandan Code of Criminal Procedure, which broadly govern custody pending investigation. More significantly, the Rwandan government challenged the jurisdiction of the Court to interfere with domestic affairs by hearing cases implicating human rights issues that are pending before local courts.

The Court rejected these arguments, holding that the jurisdictional challenge was premised on a mistaken interpretation of Mrs. Ngabo's application to the Court. Mrs. Ngabo has sought a declaration that Rwanda breached its obligation under the Treaty. To that end, the reference implicates the Court's Article 27(1) power to interpret the Treaty and ensure compliance. Significantly, the Treaty does not have an express provision that mandates that applicants exhaust all other remedies before seeking a remedy from the Court for an alleged violation of the Treaty. As such, the Court may entertain the reference even if the matter is pending before the Rwandan courts. The fact that Rwandan courts took action — notably, *after* the reference was filed — does not oblige the Court to then relinquish its exclusive jurisdiction to interpret Treaty and its mandate to ensure compliance.

The Court does not typically interfere with the states' enforcement of its criminal law. However, in light of the absence of an express provision barring the jurisdiction of the Court over cases where applicants did not exhaust local remedies, as well as the Court's exclusive jurisdiction to review alleged violations of the Treaty, the Court decided to entertain the reference. Accordingly, the Court found that Rwanda detained Lt.-Col in violation of Article 6, which restricts deprivation of individual's liberty only in circumstances where the individual has violated established laws of the state, and Article 7, which grants individuals the right to be heard and go before trial within a reasonable time before an impartial court or tribunal.

Consequently, the Court issued a declaration stating the Rwanda breached Articles 6 and 7 of the Treaty. By declaring that applicants do not need to exhaust local remedies, the Court effectively expands the number of individuals who can file applications with the Court, and possibly increase the volume of cases that the Court considers. Furthermore, the decision indicates that although the Court does not directly interfere with domestic criminal matters, it retains jurisdiction to review the actions of states in the enforcement of their domestic in areas where compliance with the Treaty is implicated. As such, the Court's decision in this case indicates a balance between the state's rights to implement its laws and the Court's mandate to ensure compliance with the Treaty.

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