

AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

LOHE ISSA KONATE

v.

BURKINA FASO

APPLICATION 004/2013

JUDGMENT ON REPARATIONS



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The Court composed of: Augustino S. L. RAMADHANI, President, Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ. El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE, Judges; and Robert ENO, Registrar,

In the Matter of:

Lohé Issa Konaté,

represented by:

- 1) Advocate Yakaré-Oulé (Nani) Jansen
- 2) Advocate John R.W.D. Jones QC
- 3) Advocate Steven P. Finizio

v.

Burkina Faso,

represented by:

- 1) Advocate Antoinette Ouedraogo
- 2) Advocate Anicet Some

After deliberations,

delivers the following Judgment

I. Brief Background of the Matter

1. A suit was filed against the Applicant for defamation, public insult and abusive language against a judicial officer, following the publication in the newspaper "L'Ouragan" on 1 August 2012, of an Article written by the said Applicant titled "Counterfeiting and trafficking of fake bank notes – the State Prosecutor of Faso, three Police Officers and a Senior Bank official, godfathers of bandits". The Applicant had published a second Article in the following edition of L'Ouragan on 8 August 2012, titled "Denial of Justice - The State Prosecutor of Faso: a rogue dispenser of justice?"
2. Having been mentioned in the aforesaid Articles, the State Prosecutor of Faso filed a suit against the Applicant for defamation, public insult and use of abusive language against a judicial officer before the Ouagadougou High Court.
3. On 29 October 2012, the Applicant was found guilty of the offences and sentenced to 12 months imprisonment with a fine of 1,500,000 CFA Francs (about US\$ 3,000)¹, 4,500,000 CFA Francs for damages (about US\$ 9,000) and costs put at 250,000 CFA Francs (about US\$ 500).
4. Publication of the Weekly L'Ouragan was also suspended for six months and the Applicant ordered to publish, at his expense, the judgment in three consecutive editions of the newspapers L'Événement, L'observateur Paalga, Le Pays, and in L'Ouragan, right from the first publication of the latter and for four months upon resumption of its activities.
5. On 10 May 2013, the Ouagadougou Court of Appeal upheld the foregoing decision.
6. Seised of this matter, the African Court on Human and Peoples' Rights (hereinafter referred to as "the Court") in a Judgment of 5 December 2014, held that the Respondent State violated Article 9 of the African Charter on Human and Peoples'

¹ Equivalent calculated on the basis of 1US\$ = 500 CFA F

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Rights (hereinafter referred to as "the Charter"), Article 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant"), and Article 66 (2) (c) of the Revised Treaty of the Economic Community of West African States (hereinafter referred to as "The Revised ECOWAS Treaty").

7. The Court unanimously found that the Respondent State violated the aforementioned instruments in four different ways, to wit: (1) the existence of custodial sentence on defamation in its laws; (2) the conviction and sentence of the Applicant to a term of imprisonment for defamation; (3) the conviction of the Applicant to pay an excessive fine, damages and procedural costs; and (4) the suspension of his newspaper for six (6) months.
8. The Court therefore ordered the Respondent State to amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66 (2)(c) of the Revised ECOWAS Treaty. It further ruled that the Applicant was entitled to reparations for the material and moral damage he suffered, and urged him to make a submission to that end.

II. Subject of the Application

9. In his Application for Reparations of 9 January 2015, the Applicant prays the Court to grant him the various forms of reparation set forth hereunder for the damages he suffered as a result of the violation of his fundamental rights by the Respondent State:

- a. Set aside his conviction;
- b. Set aside the Order to pay fines, damages and costs, rendered against him;
- c. Award him pecuniary damages in the amount of 154,123,000 CFA Francs;

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- d. Award him non-pecuniary damages in the amount of US\$ 35,000;
- e. Pay him the entire financial compensation in CFA Francs, taking into consideration the rate of inflation;
- f. Pay him interest at the rate prevailing in the Respondent State as at the date of the Judgment, in the event of delay in payment.

III. Summary of the procedure before the Court

10. The Applicant filed his Application on reparations on 9 January 2015 and thereafter, on 27 January 2015, he submitted a *corrigendum* thereto.
11. By letter dated 11 February 2015, the Registry transmitted a copy of the corrected Application as well as the Annexes to the Respondent State.
12. On 13 May 2015, the Respondent State filed its Response to the Application in which it prayed the Court:

"

1) On the request for restitution, to rule as provided by law;

2) On the request for the award of pecuniary and non-pecuniary damages

- a) **On the loss of income**, to assess on equity basis, the amount of loss incurred and fix the award due to the Applicant at a total amount of 500,000 CFA francs;
- b) **On the loss of property**, to reject as unfounded the request for the award for loss of equipment and for the refund of the cost of new equipment;
- c) **On the expenses listed by the family**, to reject as unfounded requests by the Applicant for the refund of 160,000 CFA francs and 4,000 CFA francs paid to the Prison Guards respectively for visit permits and change of building and to rule on equity basis on the request for the refund of 78,000 CFA francs as travelling expenses and 30,000 CFA francs as cost of medical care;

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3) **On the request for compensation for the non-pecuniary or moral damages**, to assess the moral damages within fair proportions and award the Applicant the sum of 500,000 CFA francs as compensation.”

13. On 29 June 2015, the Applicant filed his Reply in which he reiterated the prayers made in his Application of 9 January 2015 (see paragraph 9 above).

14. At its 38th Ordinary Session held in Arusha, United Republic of Tanzania, from 31 August to 18 September 2015, the Court decided not to hold a public hearing, and commenced deliberations after notifying the Parties.

IV. The Merits

15. As the Court already found in its earlier judgments on reparations², the general principles applicable to reparation are the following:

a) a State found liable of an internationally wrongful act is required to make full reparation for the damage caused;

b) such reparation shall include all the damages suffered by the victim and in particular includes restitution, compensation, rehabilitation of the victim as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account the circumstances of each case;

c) for reparation to accrue, there must be a causal link between the established wrongful act and the alleged prejudice;

d) the burden of proof lies with the Applicant to show justification for the amounts claimed.

² AfCHPR : Application 013/2011 Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso (Judgment on Reparations) 5 June 2015, paras 20-30 and Application 011/2011 Reverend Christopher R. Mtikila v. United Republic of Tanzania (Judgment on Reparations) 13 June 2014, paras. 27-29.

16. In the instant case, the Court, having noted in its aforementioned Judgment of 5 December 2014, violations of the Charter, the Covenant and the Revised ECOWAS Treaty by the Respondent State, the latter is required to make full reparation for the damage it has caused to the Applicant as well as to his family.
17. The Court notes finally that, in the instant case, the internationally wrongful acts which generated the international responsibility of the Respondent State are those referred to in paragraph 6 above. All the reparation claims therefore have to be considered and assessed in relation only to these wrongful acts.
18. In light of the foregoing principles and observations, the Court will now consider the different prayers for reparation made by the Applicant which consist of measures for restitution and repair of the damage, both material and moral, suffered by himself and members of his family.

A) On restitution

19. The Applicant maintains that he grounded his Application on the afore-mentioned principles as well as on the extensive jurisprudence on the issue of compensation in seeking full reparation for all the damage caused to him and to his family by the Respondent State.
20. With regard to restitution in particular, he contended that he had to be restored to the status quo ante prior to the violation of the afore-mentioned international obligations by the Respondent State.
21. As concrete measures of restitution, he prays the Court to order the Respondent State to expunge outright from his judicial records all criminal convictions against him and set aside the other pecuniary sanctions imposed on him.
22. In its Response, the Respondent State indicated that it has no objection to the criminal sentences being expunged from the judicial records of the Applicant, but that the latter has to execute the civil sentences because he had admitted the facts before domestic courts and pleaded guilty to the offense for which he was prosecuted and convicted. The Respondent State however stated that, in this regard, it would defer to the wisdom of the Court.

23. The Court notes from the outset the acceptance by the Respondent State to erase from the judicial record of the Applicant all criminal convictions against him; it therefore sees no reason why it should not endorse this agreement.
24. On the request “to set aside the Order on the payment of fines, damages and costs” issued against the Applicant by the Ouagadougou High Court, the Court wishes to emphasise the point that it is not an appellate jurisdiction to which decisions by national courts are referred and that, for that reason, the request cannot be granted. The Court however recalls its Order in its 5 December 2014 Judgment in this case, requiring the Respondent State to amend its legislation on defamation to make penalties compliant with the criteria of necessity and proportionality (see supra, para 8); the Court therefore urges the Respondent State to review downwards the amount charged as fines, damages and costs.

B) On compensation for material damage

25. The Applicant alleged having lost all his income as a result of his twelve months' imprisonment and the suspension of his weekly newspaper, *L'Ouragan*, for six months; that he lost an average of 6,000,000 CFA Francs per month, making a total of 108,000,000 CFA Francs between 29 October 2012 and 30 April 2014, not counting interest and inflation.
26. He then submits that he lost important equipment, staff and access to distribution networks as a result of his imprisonment and closure of *L'Ouragan*; that several computers and office equipment with an estimated value of 5,000,000 CFA Francs had to be sold; and that to be able to resume publication of *L'Ouragan*, he incurred further expenditure to replace some of the lost equipment, including new computers valued at 3,251,000 CFA Francs.
27. He further submits that it took him over six months after his release on 29 October 2013, to resume publication of his Weekly; that he could publish only seven editions between May and September 2014, and that he was compelled to

reduce the number of copies per edition from 5,000 on the average to just 1,000 copies: that still, as a result of lack of resources, no edition of his newspaper was published in October 2014; that he was able to publish three editions in November 2014, with only 1,000 copies per edition; that because of the reduced number of editions between May and December 2014, he lost income estimated at 37,600,000 CFA Francs during this period, excluding interest and inflation; that according to these estimates, the loss of income recorded as at 29 October 2012 up to the day of seizure of the Court, stands at 147,851,000 CFA Francs, excluding 5,000,000 CFA Francs being the estimated cost of lost equipment.

28. On the expenses incurred by his family during his imprisonment, the Applicant submits that the latter was spending nearly 1,500 CFA Francs each week on transport to visit him, amounting to a total of 78,000 CFA Francs; that his family had to pay between 3,000 and 5,000 CFA Francs to *be able to visit him, which* amounts to about 160,000 CFA Francs (for 40 visits during the year at the rate of 4,000 CFA Francs per permit). According to the Applicant, his family has also spent 30,000 CFA Francs on medication because of the health problems he was experiencing while in prison; that his family further had to pay 4,000 CFA Francs for him to be moved to a more ventilated building; that in total, the Applicant's family spent an amount estimated at 272,000 CFA Francs, excluding meals and other subsidiary expenses.

29. The Applicant in conclusion maintained that by adding up the loss of income as a result of the closure of *L'Ouragan*, estimated at 147,851,000 CFA Francs, the loss of part of his equipment, estimated at 5,000,000 CFA Francs and the financial losses incurred by his family as a result of his imprisonment, estimated at 272,000 CFA Francs, he and his family suffered material damage amounting to 154,123,000 CFA Francs.

30. The Respondent State consistently refutes the claims made by the Applicant.

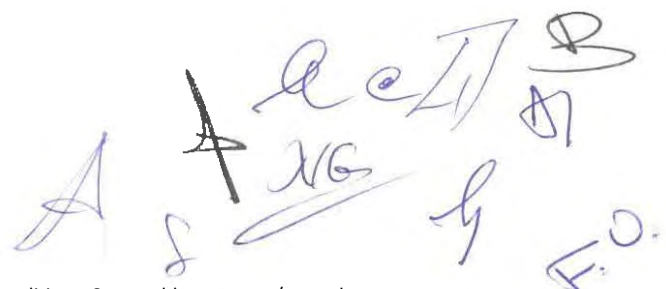
31. On the loss of commercial income and revenue, the Respondent State contests the claim that the Weekly, *L'Ouragan*, was published on a regular basis and that its Director of Publication was able to sell 5,000 copies per week, that is, 20,000

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copies per month; it pointed out that in the absence of evidence on the existence of the said income and its loss, and specific information allowing for evaluation of the amounts thereof, the Court should calculate the said amounts on the basis of equity and scale down the compensation to be paid to the Applicant to 500,000 CFA Francs.

32. On the loss of property, the Respondent State submits that according to international and regional human rights protection mechanisms, the burden of proof lies with the Applicant; that in the complete absence of proof as to the existence of items he alleges to have lost, the purchase of new equipment and the causal link between the loss and the actions of the Respondent State, no compensation should accrue to the Applicant; and that consequently, it prays the Court to dismiss the claim as unfounded.
33. As regards the expenses incurred by his family as a result of his detention, the Respondent State argued that the said expenses are generally not supported by any documents.
34. On the amount of 160,000 CFA Francs, said to have been paid to secure permits for visits by members of the family, the Respondent State argues that the Applicant himself knows that only Legal Officers are empowered to issue permits to visit detainees and not prison wardens; that if the Applicant preferred to bribe the latter for his wife to visit him, he cannot seek reimbursement, and cannot invoke his own flaws as an excuse.
35. The Respondent State made the same observation regarding the payment for the transfer of the Applicant to a more ventilated part of the prison. It argues that this kind of conduct is tantamount to corruption or collusion and therefore that, same as the preceding prayer and for the same reasons, it was requesting the Court to dismiss the claims as manifestly unfounded.
36. After recalling that the Applicant did not adduce any evidence attesting to the expenses incurred by his family, the Respondent State stated in conclusion that it would defer to the wisdom and decision of the Court.

37. The Court notes that the Respondent State does not contest the fact that the Applicant incurred loss of income but regards as excessive the amount claimed by the latter.
38. The Court will only have to consider, at this juncture, the evidence adduced by the Applicant in support of his claims.
39. Regarding the loss of income caused by the suspension of his newspaper, *L'Ouragan*, the Court notes that the Applicant tendered a document to prove that this Weekly was published every Wednesday and that the unit price was 300 CFA Francs, (Annex XX).
40. The Applicant also adduced evidence regarding the publication of four editions of 5,000 copies (editions 257, 258, 259 and 260) of the Weekly, *L'Ouragan*, at the unit price of 110 CFA Francs each, (Annex XVI). However, no evidence was produced as to his ability to sell 5,000 copies per week.
41. The Court therefore holds that the amount of 108,000,000 million CFA Francs claimed by the Applicant is unduly inflated, and ruling on the basis of equity, decides to reduce the amount to 20,000,000 CFA Francs.
42. On the loss of income caused by the reduced number of editions of the weekly, *L'Ouragan* upon its resumption of publication, the Court finds no difficulty in acknowledging the fact that, after his release, the Applicant no longer had sufficient resources to enable him publish his Weekly, *L'Ouragan*, at the same level and volume as was the case before his imprisonment. It however notes that the latter has not produced documentary evidence for the 37,600,000 CFA Francs he is claiming.
43. For these reasons, the Court holds that it is more appropriate to consider the matter in terms of equity and award the Applicant a lump sum of 5,000.000 CFA Francs.



44. In light of the foregoing, the Court deems it reasonable to award the Applicant the total sum of 25,000.000 CFA Francs, in compensation for the loss of income arising from the suspension of his weekly newspaper, *L'Ouragan*, and the reduced number of copies produced after the resumption of publication.
45. On compensation for loss of physical belongings and reimbursement of expenses for the purchase of new equipment, the Court notes that the Applicant did not tender any document in support of his claims and failed to establish the causal link between the wrongful acts committed by the Respondent State and the damage he suffered.
46. As the Court has already underscored *in its Judgment in the Matter of Reverend Christopher Mtikila v United Republic of Tanzania*³, it does not suffice to show that the Respondent State committed a wrongful act to claim compensation; it is equally necessary to produce evidence of the alleged damages and the prejudice suffered.
47. Since the Applicant has failed to meet that requirement, the Court rules that his claims regarding the loss and acquisition of part of the equipment of *L'Ouragan* are unfounded and therefore dismisses the claims.
48. On the claim for reimbursement of expenditure incurred to obtain visit permits and on the transfer of the Applicant to a more ventilated part of the prison, the Court holds that the said payments were not required by law and the Applicant was therefore not supposed to pay the wardens to obtain visit permits or for the transfer.
49. However, the Court finds no difficulty in recognising that the family of the Applicant incurred transport expenses to visit him in prison. It is also of the opinion that the amount of 78.000 CFA Francs, claimed by the Applicant is reasonable, and on the basis of equity, decides to award him the said amount.

³Reverend Christopher R. Mtikila v. United Republic of Tanzania (Réparation), para. 31; see also Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabé Movement on Human Rights v Burkina Faso (Reparations), para.24

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50. Regarding medical expenses, the Applicant claims 30,000 CFA Francs, even though the receipts in the file show a slightly higher amount. Since the Court cannot rule *ultra petita*, it will limit itself to the amount claimed.

51. In light of the foregoing, the Court is of the opinion that the Applicant should be awarded a total sum of 25,108,000 CFA Francs, in reparation for the material damage, that is, 25,000,000 CFA Francs, for loss of income and 108,000 CFA Francs for medical and travel expenses.

C) Compensation for moral prejudice

52. The Applicant summarises the pain and anguish which he and his family endured as a result of his trial, conviction and imprisonment as follows:

53. He alleges in particular that, in his own case, a campaign was mounted against him to portray him as a “fake journalist” and to insult and discredit him; that he was tried, convicted and imprisoned on the same day without allowing him time to organise his business or to make the necessary arrangements for his family before his imprisonment, that he was found guilty and sentenced to a 12-month term of imprisonment (the maximum sentence in such a case), and to pay the heavy fine of 6,250,000 CFA Francs, for damages, which amount was far beyond his resources; that he therefore had no means of complying with the Court's judgment and, for that reason, was faced with the threat of extension of his prison term for default; and that, in addition, he had spent twelve months in a crowded, dirty and unsafe prison yard; that he had to share space with paedophiles, psychopaths and drug addicts, most of whom had previously been convicted; and that the living conditions in the prison yard were horrible to the extent that two detainees died in October 2014 as a result of exhaustion and poor ventilation.

54. As regards his wife, the Applicant avers that she was traumatised by his conviction and imprisonment; that she also had to deploy lots of efforts to be able to cater to the needs of his family after the closure of the Weekly, *L'Ouragan*,

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which was the family's only source of income; that to make ends meet, she was forced to sell pastries on a daily basis.

55. Regarding his children, the Applicant states that they were equally affected by his conviction and imprisonment; that his eldest son who was undergoing training at military academy in Taiwan at the time of the trial was informed of the sad news of his father's conviction through the internet because the latter did not have the courage to convey the information to his son; that since he received the news, he started having severe bouts of headache; that his two younger sons, for their part, were being ridiculed by their school mates after the conviction was broadcast by the media; that his youngest son who was only fourteen at the time of the imprisonment, was so affected that he was ultimately dismissed from school for poor academic performance.

56. Relying on the jurisprudence of international courts and considering all the circumstances of the matter, the attack on his professional reputation, the impact on his career (the physical and psychological torture inflicted on his entire family as a result of the case, then his imprisonment and what the Respondent State intended to achieve by subjecting a journalist to such punishment) – the Applicant prays the Court to award reparation proportionate to the moral prejudice suffered in the amount of 17,500,000 CFA Francs.

57. The Respondent State did not dispute the fact that the Applicant suffered moral prejudice during the criminal trial that resulted in his conviction and imprisonment. It however maintains that the magnitude of the damages and the amount of compensation the Applicant is claiming are disproportionate when compared to the prejudice suffered, considering the context and living standards in Burkina Faso. Consequently, it prays the Court to assess the damages based on reality and context, and award the Applicant the sum of 500,000 CFA Francs as compensation.

58. The Court notes that the Respondent State does not contest the fact that the Applicant suffered moral prejudice. It further observes that such prejudice is often assumed by international courts in cases of human right violations⁴.

59. The Court nevertheless holds that the claim is exaggerated and on the basis of equity, decides to reduce the amount to 10.000,000 CFA.

60. On these grounds,

THE COURT,

(i) Unanimously,

Orders the Respondent State to expunge from the Applicant's judicial records, all the criminal convictions pronounced against him;

(ii) Unanimously,

Orders the Respondent State to revise downwards the amount of fines, damages and costs charged against the Applicant to ensure that it is compliant with the criteria of necessity and proportionality as stated in the Court's judgment on the merits regarding other sanctions;

(iii) Unanimously,

⁴ *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & Burkinabé Human Rights Movement v Burkina Faso* (Reparation), para 61. See also Inter American Court on Human Rights, *Mapiripán massacre v Colombia*, series C, No 134 (2005), para 146. *Lori Berenson-Meija v. Peru*, series C, No 119 (2004) para 237. European Court of Human Rights: *Lepojic v. Serbia*, Application No. 13909/05 (2007), para. 84, *Murat Vural v Turkey*, Application No 9540/07 (2014), para 86

Orders the Respondent State to pay the Applicant the sum of twenty-five million (25,000,000) CFA Francs, (equivalent to US\$ 50,000), as compensation for loss of income;

(iv) Unanimously,

Orders the Respondent State to refund the sum of one hundred and eight thousand (108,000) CFA Francs, (equivalent to US\$ 216), incurred by the Applicant as medical and transport expenses;

(v) Unanimously,

Orders the Respondent State to pay ten million (10,000,000) CFA Francs, (equivalent to US\$ 20,000), to the Applicant as compensation for the moral damage suffered by him and his family;

(vi) Unanimously,

Dismisses the Applicant's claim in respect of loss of goods and purchase of new equipment;

(vii) Unanimously,

Orders the Respondent State to pay all the amounts indicated under subparagraphs (iii), (iv) and (v) of this paragraph within six months, effective from this date, failing which it will also be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of the Community of West African States (BCEAO), throughout the period of delayed payment and until the accrued amount is fully paid;

(viii) Unanimously

Orders the Respondent State to publish within six months, effective from the date of this judgment: (a) the summary in French of this judgment as

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prepared by the Registry of the Court, once in the Official Gazette of Burkina Faso and once in a widely read national Daily; and (b) publish the same summary on an official website of the Respondent State, and maintain the publication for one year;

(ix) Unanimously.

Orders the Respondent State to submit to it within six months from the date of publication of the Judgment, a report on the status of implementation of all the decisions set forth in this Judgment.

Signed:

Augustino S.L. RAMADHANI, President

Elsie N. THOMPSON, Vice-President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORE, Judge

El Hadji GUISSSE, Judge

Ben KIOKO, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge; and

Robert ENO, Registrar.



Done at Arusha, this 3rd Day of June 2016, in French and English, the French version being authoritative.

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