

Fulfillment of Human Rights By Transnational Corporations In Indonesia: Perspective of International Norms

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ABSTRACT

Leniency in the implementation of rules on the fulfillment of human rights by the Government to TNC as an entity in Indonesia. This research aims to describe the fulfillment of human rights by transnational corporations in International Norms. This research used normative research methods, focusing on the differences that occur in the field (das sein) namely the policy of the Government of Indonesia in realizing the fulfillment of human rights by TNC, with legal norms that should be implemented (das sollen) namely international norms. The data source used is a primary and secondary data source with a deductive thinking pattern. The results showed that the State as a duty holder for citizens, is authorized to issue regulations on human rights respect by TNC in order to minimize human rights violations. Domestic regulations are necessary to be the attachment of TNC operating within the territory of the country to be subject to the applicable constitutional rules, so that respect, protection, and rehabilitation of human rights can run optimally.

Keywords : International Norms, Human Rights, Transnational Corporations

1. INTRODUCTION

International business activities have existed since the era of today's ancient kingdom (R. A. Ajami, 2020). This is evident from various historical scratches about Chinese traders, Indian traders, Arabs, even Europeans who sailed to various parts of the world to trade cloth, and spices, until then the Silk Road was known (Koller, 2004; Reid, 2014).

The first business entity to conduct business activities on a restructured basis was *Vereengde Oostindische Compagnie* (VOC) (Kuruppath, 2019). VOC itself is a Dutch company founded in 1602 with the main purpose of trading in the Asian region. The VOC itself is headquartered in Amsterdam, and has subsidiaries in at least 3 countries, namely Indonesia, India and China, each of which is controlled by the Governor-General as the highest leader of the VOC in one region (Sgourev & Van Lent, 2015; Solar & de Zwart, 2017). VOC became the first multinational company to be recognized by the international community and also became the first company to have a share sharing system (Bruijn, 2011; Gelderblom et al., 2013; Weststeijn, 2014). In today's international association, companies like VOC are numerous and easy to find. Almost all large companies now have subsidiaries or affiliated companies abroad, for example, such as fast food restaurant giant McDonald's, or companies with Starbucks coffee outlets, and Citibank banking giants such as *McDonald's*, *Starbucks*, and *Citibank* in this day and age are referred to as

transnational corporations (TNC)(Folke et al., 2019; Galhera et al., 2020; Negus, 2019). John and K. Praveen state that sometimes *TNC* is also interpreted as *Multinational Corporation*, even though both have different characteristics(Carrascoso, 2012; Grewal et al., 2020; Morschett et al., 2010).

In international association, most international organizations such as, the United Nations (UN) more often use the terms *Transnational Enterprise* and *Transnational Corporation* than *multinational corporation*(Centeno, 2021; Kühnel & Nickel, 2014; Wildman, 2021). While in Indonesia, ELSAM as a community study and adVOCacy institution translates the OECD *Guidelines for Transnational Enterprises* as Multinational Companies or MNCs (Nugroho & Suryarini, 2018; “PENGARUH INTELLECTUAL CAPITAL TERHADAP KINERJA KEUANGAN,” 2016; Wijaya, 2019). This was also confirmed by Juajir Suardi where Juajir mentioned that although the United Nations (UN) and the *Organisation for Economic Co-operation and Development* (OECD) use the phrase transnational corporations, there is still no difference between TNC and MNC(Sumardi, 2021).

Pis basically, all business entities have a responsibility to maintain the environment in which they conduct business activities,considering their presence is real in the community. The accountability committed by companies has been affirmed in the OECD Guidelines to transnational corporations. According to the OECD, companies are said to be responsible for at least upholding the human rights of both workers and communities, committed to safeguarding the environment, and committed to combating bribery(OECD, 2015, 2018). Not only the OECD, which also shelters under the UN flag, *the Global Compact* (UNGC), also affirms the same in the 10 Global Compact *Principles*(Mattera & Alba Ruiz-Morales, 2021; Orzes et al., 2020). If viewed carefully, both the OECD guidelines and the ten principles of UNGC have one common goal, which is to ensure all business entities strive to increasingly respect human rights and society, both individually and in groups, both directly and indirectly.

Aside from the OECD and UNGC, guidance for transnational corporations is also issued by the UNITED NATIONS itself through *the UN Norms on Responsibilities of Trnasnational Corporation with Regarding on Human Rights* (UN Norms). In *UN Norms*,all transnational corporations and all other cross-border business entities are required to respect human rights(Andrews, 2019; Miretski & Bachmann, 2012). UN Norms is an international customary law used as a reference in the regulation of TNC governance. Although UN Norms do not have clauses governing sanctions, they have morally binding powers due to their nature as customary laws. TNC's obligations and responsibilities in respecting human rights, such as those mandated in the UN Norms, OECD Guidelines and UNGC Guidelines, should not be difficultto do, considering

that the target of human rights fulfillment in question is the community around TNC's own business activities(Buhmann, 2018; Halpern, 2008).

Indonesia as a state actor, has made several efforts to fulfill the basic rights of the people, or human rights Initial efforts were made by passing Law No. 39 of 1999 on Human Rights, which also became a turning point in human rights enforcement in Indonesia. After 2000,there were several articles that regulated the behavior of companies, especially foreign companies in Indonesia. As in Law No. 25 of 2007 tentangInvestment (UUPM), and Law No. 40 of 2007 on Limited Liability Companies (UUPT)(- et al., 2016; Siregar, 2020). Unfortunately this only applies with the note, that TNC operating in Indonesia has qualified as a company according to UUPT and UUPM. In Article 15 of uupm there is a clause that requires foreign companies to carry out social and environmental responsibilities. Also in Article 74 of the UUPT also requires foreign companies to carry out Social and Environmental Responsibility.

In 2012, the Government supplemented the rules by passing Government Regulation No. 47 of 2012 on Social and Environmental Responsibility. But again corporate Social Responsibility is only referred to as Pemerintah as a moral burden of the company as a form of human activities in the field of business and is a mandatory thing that must be carried out by limited liability companies.(Adamus, 2020; Hendrawan et al., 2020; Travis, 2019) There is no further explanation of the practical limitations of the implementation of social responsibility. Nor was it found about the breach clause on the implementation of the fulfillment of social responsibilities in the company's daily operations. Even in government regulations there are no sanctions for violations of the implementation of social responsibility.

2. RESEARCH METHODS

This research is studied with normative research methods, focusing on the differences that occur on the ground(*das sein*)which is the policy of theGovernment of Indonesia in realizing the fulfillment of human rights by TNC, with legal norms that should be implemented (*dassollen*)namely international norms. The data source used is a primary and secondary data source with a deductive thinking pattern(Binney, 2012; Charney, 1983; R. Suleymanov & A. Valeeva, 2019).

Primary data sources are taken from several international norm such as *United Nation Norms on Responsibility of Transnational Enterprises with Regards on Human Rights*, *OECD Guidelines on Multinational Enterprises*, *Code of Conduct for Multinational Enterprises*, *10 Principles of United Nation for Gblal Compact*. As well as laws and regulations such as, Law No. 39 of 1999 on Human Rights, Law No. 25 of 2007 on Investment, Law 40 of 2007 on Limited Liability Companies, and Government Regulation No. 47 of 2012 on Corporate Social and

Environmental Responsibility(Hadi & Setyawati, 2020). While secondary data will be taken from legal and non-legal opinions obtained from Library materials to provide guidance and explanation of primary legal materials obtained from literature, articles / papers, legal research, and expert opinions related to the fulfillment of human rights by transnational corporations in Indonesia.

Primary and secondary data are collected by conducting literature studies, which are then analyzed qualitatively to be able to answer the problems that are the subject of research. The shortness used is the approach of international norms and Indonesian laws and regulations. The results of the study are presented in an analytical descriptive explanation to facilitate comprehensive understanding.

3. RESULT AND DISCUSSION

In uii's book Human RightsLaw, subjects in human rights can be divided into 3, namely, States as stakeholders, Non-State Actors as stakeholders, and Non-State Actors as recipients of rights. Both States and Non-State actors have their respective roles in conducting efforts to protect, fulfill, and uphold human rights. In addition, each actor also has their own accountability in terms of human rights(Andrey Sujatmoko, 2009).

The state is a major international subject in international association. It is also the basic logic of why the state becomes a major actor in Human RightsLaw(Prameswari, 2019). The role of the State is concerned with human rights, not far from the efforts of respect, protection and fulfillment of human rights itself (Roesli et al., 2017). The obligation to respect, protect and fulfil human rights by the most basic state is addressed to its citizens. Indonesia, as a state actor, in its implementation passed Law UndangNumber 39 of 1999 on Human Rights which became the basis of human rights arrangements in Indonesia. In addition to placing human rights specifically in the Constitution and its implementing regulations, the State is also present in fulfilling its obligations by presenting the Human Rights Court and the National Human Rights Commission (Komnas HAM). The establishment of these two institutions aims to guarantee the human rights of Indonesian citizens for human rights violations for possible human rights violations that will occur.

Non-state actors include international organizations that do not actually play a direct role in the establishment of human rights regulations, however, *NGOs* encourage the birth of various regulations on the protection of human rights. *NGOs* can offer a variety of regulatory options to the government through other points of view from the government. In everyday life, *NGOs* move independently to provide education to the public about the rights they have and provide assistance to the community to facilitate the rights they should get(Moerland & Nelen, 2018). *NGOs* can also be a mass mover to be able to supervise the running of the government to stay on track, in other

words avoiding corrupt behavior. The presence of *NGOs* is expected to bring benefits such as being able to provide scientific opinions from experts about the field pursued, and *NGOs* are expected to voice the aspirations and interests of a group of people or countries in large numbers.

The debate takes place when non-state actors are added transnational corporations to it. There is a sense of discontent from the international community over human rights violations that are directly or indirectly committed by transnational corporations. This insistence is also due to the limitations of the state regulating the behavior of transnational corporations. In addition, the uncertainty of the legal position of transnational corporations to speak in court is also an obstacle in the enforcement of human rights. In fact, in the *Universal Declaration of Human Rights* in 1948 it has been stated that every entity in society has a role to uphold human rights. It is fitting that transnational corporations are fully responsible for fulfilling the human rights of the citizens in which they operate..

Transnational Corporation itself is a company that has a position in a country but operates and runs its company based on the laws and customs of other countries. *TNC* can also be said to be a company that has one nationality by operating in various countries (Holzer, 2020). Riad A. Ajami said in defining *TNC* it will be difficult to find a suitable order, this is because the understanding of *TNC* will depend on the type of *TNC* itself (R. Ajami, 2021). In the Investment Act of 2007 will not be found about the understanding of *TNC*. *TNC* can be found by looking at the understanding of Foreign Investors. According to Article 1 point 6 of the Investment Law of 2007, those referred to as Foreign Investors are individuals of foreign nationals, foreign business entities and/or foreign governments that invest in the territory of the Republic of Indonesia. While in Article 1 point 3 of the Investment Law, Foreign Investment is the activity of foreign investment to do business in the territory of the Republic of Indonesia conducted by Foreign Investors both using foreign capital fully and in connection with Domestic Investors. The second statement of the foreign Investment Law above can be a reference to equate *TNC* with Foreign Investors. This is because *TNC* invests in Indonesia to open its subsidiaries, and the capital brought by *TNC* mostly brings capital from outside Indonesia. Thus *TNC* engaged in Indonesia must maintain the rules of the game in the Investment Law.

At this time *the TNC* does not have certainty whether it can be said to be the holder of obligations in terms of Human Rights. The experts have their own views. According to Denis G. Arnolds, *TNC* deserves to be called a corporate *morale agent* who is able to be a master of duties and responsibilities (morally) for its activities because multinational companies have internal decisions that states (Arnold & Valentin, 2013). In addition, if indeed the corporation is able to reassess past decisions and current practices and strategies, determining which corporate needs still

have to be implemented or overhauled or reduced as an alternative plan, it means that this *TNC* has been able to assume responsibility as a stakeholder in human rights obligations.

Another case with Patricia H. Werhane, who provides an objective view of the presence of *TNC* as an entity that has responsibility for human rights. Werhane stated that it could actually be that a *TNC* could be burdened with responsibility for human rights, but not because it is governed by applicable law or its position that is equated with legally capable individuals, but because of the formation of social expectations (Werhane et al., 2006). Social expectations can occur due to the reciprocal relationships created when *TNC* is allowed to operate in the community. And in return for allowing *TNC* to operate, the company can provide local community jobs, build public facilities either for the local community or for its workers and others. John Ruggie explained that there is a strong relationship between business activities carried out by multinational companies and the fulfillment of public rights. Ruggie said there are three important things, namely the obligation of the state to protect, the obligation of the corporation to respect, and the obligation to provide access to rehabilitation of the condition (McCorquodale, 2009; Ruggie, 2008). His statements are based on truths in which aspects of human rights are often sidelined or even ignored in the policy-making that shapes business behavior. In 2011, the *OECD* published its guidance to *TNC* in order to conduct its business activities responsibly globally. The *OECD* in its Guidelines calls on *TNC* to pay more attention in the areas of labor and industrial relations, the environment, preventing bribery, consumer interests, science and technology, business competition, and taxation (Buchholtz, 2020). This is done by *the OECD* to ensure *TNC's* business activities are in line with government public policy and strengthen the relationship between *TNC* and local communities, as well as help the investment climate and increase *TNC* contributions to achieve sustainable development..

Another rule addressed to *TNC* is the United Nations Norms on *The Responsibility of Transnational Corporation and Other Business Enterprises with Regard to Human Rights* (UN Norms), with document number E/CN.4/Sub.2/2003/12/Rev.2 dated August 26, 2003. In the opening section it is explained that in reality *TNC* has the capacity to help the economy, development, technological progress, and income as well as transnational corporations have the ability to cause great influence in terms of human rights, as well as the lives of many people through business activities such as work systematics, policies related to the environment, relations with consumers and suppliers, relations with governments, and other things. At the next point, it is mentioned that international human rights issues always arise, and in fact *TNC* is often involved in the problem, causing the need for standardization arrangements for now and in the future. Based on the two considerations, the United Nations finally stated that *the TNC* along with all parties

involved in it have an obligation to be responsible for human rights as stipulated in *the UN Norms*, and *un norms* will contribute to creating and developing international law.

Despite the refusal to be adopted into the applicable rules, UN Norms became a reference to assess whether TNC's behavior has respected human rights. In general, *un norms* affirm that every country has an obligation and even responsibility to ensure and ensure the fulfillment of respect for, and protection of human rights of its citizens as stipulated in international law, including ensuring that *TNC* activities in its jurisdiction carry out the same. In addition, the *TNC* also affirms that it has the same obligation and even responsibility in ensuring and ensuring the fulfillment, respect, and protection of human rights as stipulated in international law and national law including the rights of indigenous peoples..

Not only did the United Nations and the OECD issue *TNC* behavioral recommendations, the *United Nations for Global Compact*, which is one of the UN organs, also issued *TNC* behavioral recommendations. This recommendation is called *The Ten Principles* (Bäumlisberger, 2019; Gilbert & Behnam, 2013). In these principles there are four main things listed, namely Human Rights, standardization of workers, the environment and anti-corruption regulations. *TNC* has not officially become a subject of law that has a state-like position in international law. But morally *the TNC* must respect human rights for the sake of a sustainable economy..

As a country, Indonesia has not officially tied itself to an international norm governing human rights and business. But it should be remembered that by passing Law No. 11 of 2005 on the Ratification of the *International Covenant on Economic, Social, and Cultural Rights* and Law No. 12 of 2005 on the Ratification of the *International Covenant on Civil and Political Rights*, Indonesia has been bound to implement respect, protection, and enforcement of human rights for its citizens. States, executive and legislative together, have a responsibility to ensure respect, protection, and enforcement of human rights on their territory remains in place. Implementing the ratification of the two covenants urgently requires practical policy policies that place clear limits on good and bad behavior that could risk causing human rights violations. It does not rule out the possibility that human rights violations themselves are committed by business entities.

Constitutionally, the Law of the Republic of Indonesia after amendments has comprehensively protected the human rights of citizens through Article 28. In addition, normatively, Indonesia has protected human rights with the issuance of the Human Rights Act of 1999, as well as other laws as ratification of international instruments on human rights. The Human Rights Act has explicitly written that states have a responsibility to respect, protect, and uphold human rights throughout Indonesia (Qudus, 2020; Yuniarti, 2019). Although normatively Indonesia already has many rules on human rights, in terms of implementation Indonesia still has

shortcomings. Indonesia still lacks implementation instruments, so in terms of implementation of human rights protection is still less than optimal..

This is felt when the implementation of human rights enforcement can only be felt by the presence of Law No. 26 of 2000 concerning the Human Rights Court. The rest is just a basic rule of description of rights. This lack of operational rules led to a lack of structured institutions, and a lack of an administrative policy to ensure the provisions of the Basic Law were implemented, particularly in this case Chapter X A, consistently. The presence of Komnas HAM which is predicted as an enforcer of Human Rights itself has weaknesses, namely its duties and functions only revolve around investigation, monitoring of the implementation of human rights and providing studies and advice to state bodies on the implementation of human rights.

Even by the United Nations, human rights protection obligations are still imposed on states, even in the event of violations caused by third parties, which in this case are companies.

In carrying out its obligations, states may take steps by issuing discretionary measures to grant obligations to the Company to respect human rights. Other implementations of the role of the state are exemplified by issuing various laws aimed at the Company to respect and protect the human rights of the community as workers (Juwita, 2018). The laws include Law No. 39 of 1999 on Human Rights, Law No. 13 of 2003 on Employment, Law No. 21 of 2000 on Trade Unions/Trade Unions, UUPT, UUPMA, Law No. 32 of 2009 on Environmental Protection and Management, Law No. 40 of 2004 on National Social Security System. This is intended so that there are no violations of human rights by the company, there is no marginalization of the community due to the presence of the company, and so that the community continues to actively participate in the economy, even with the presence of the company. In 2020 the Government has also passed Law No. 11 of 2020 on Copyright Work which also has an implementation for the protection of Human Rights from the State to Its Citizens..

Attributed to the activities of companies, especially *TNC*, the greatest role in the protection and fulfillment of human rights is still in the hands of the State through its administration of any business entity cannot be solely charged the responsibility of protecting human rights in the absence of clear implementing rules. With its power, the government should be able to take advantage of it by issuing rules that can give responsibility to businesses, including *TNC*, to respect human rights. What's more, internationally the UNITED NATIONS has issued a guide aimed at all countries to uphold human rights in their respective regions. The guidelines are the *United Nations Guiding Principles on Business and Human Rights* or *UNGP*.

UNGP itself is divided into 3 parts, namely the first part contains the obligation of the State to protect Human Rights, the second part on the obligations of the government, both *TNC* and domestic companies, to respect human rights, and the third part is the obligation of the company

and the state to ensure the availability of access to recovery to victims of human rights. The second and third pillars that should be utilized by the government to impose the responsibility of respecting human rights to companies, especially *TNC*. Although the form of *UNGP* itself is still a guide, but if the government implements it into domestic rules, then the company can no longer avoid that Human Rights is one thing that must be considered.

In *UNGP* the role of the company is limited to respect only, because when the company respects human rights. Broadly speaking, *UNGP* expects companies to be able to respect human rights while avoiding any possible human rights violations that can occur in the future, regardless of the magnitude or smallness of the company..

The United Nations also states that the role of States and companies simultaneously is important in terms of the recovery of circumstances due to human rights violations. This includes seeking access to victims of human rights violations legally and non-legally. In the early part of *UNGP*, the United Nations had stated that human rights violations due to the business activities of a company are not solely the responsibility of the State to improve. But it would be wrong when the State is negligent in ensuring the rights of its citizens are not fulfilled and even violated.

From the above exposure that needs to be underlined is about how the State and the company run together and balanced in ensuring the community, especially the local community. The company is active, fulfilled its rights and not violated. Exemplified, the government has issued regulations on employment through Law No. 13 of 2003 on Employment. So in order to run simultaneously, the company can issue company rules on the age limit of workers as an effort to eliminate the form of work for children (Juwita, 2020). Which is an effort by the government to protect the human rights of children, and the company's efforts to respect the rights of children..

There are many rules both internationally and nationally on how *TNC* should act without harming human rights, especially the local communities they operate. But in reality, the fulfillment of human rights is still not maximal. In this case there are three things that should be highlighted about the constraints of lack of the role of states and companies in protecting, respecting human rights.

The first is that all existing international rules are guided only, so that States have no obligation to implement them into a domestic implementing rule. The awareness and willingness of each country is indispensable to taking the international Guidelines as the rules that live within its territory. In addition, although the International Guidelines on norms of corporate conduct are issued by official UN bodies, they do not come with rules of implementation that also include sanctions and clauses stating such agreements or rules are binding on the parties as appropriate. In

other words, the nature of these norms is the maximum obstacle to the protection of human rights over business activities.

The second thing that stands in the way is the lack of regional rules that explicitly govern the role and responsibility of *the TNC* in relation to human rights. Because the nature of these Guidelines is the awareness and willingness of each State. Very few States consciously and voluntarily adapt the Guiding Principles into their regional rules. The lack of firm mention of the position of TNC in terms of Human Rights is also related to the ability of the company to carry out obligations. This is because the main purpose of *TNC* is to seek to benefit from natural resources, not to protect human rights..

In Indonesia, there is no law that specifically regulates the obligations or responsibilities of companies to human rights. The rules on respect for human rights are discussed only a little in the UUPMA and UUPA, even as it is only limited to the statement that companies must carry out Social and Environmental Responsibilities, and respect the traditions of the local community. There is actually an implementing rule on Social and Environmental Responsibility, namely Government Regulation No. 47 of 2012 on Social and Environmental Responsibility (PPTJSL). In PPTJSL Corporate Social Responsibility is also referred to by the government as a moral burden of the company as a form of human activities in the field of business and is a mandatory thing that must be carried out by limited liability companies. But when observed, in PPTJSL there is no definite definition of what social and environmental responsibility is, and to what extent responsibility should be implemented. The purpose of Tanggung Social Answer is stated in the General Explanation of Government Regulations, to realize sustainable economic development to improve the quality of life and the environment.

The Employment Act of 2003 and the Copyright Act can also be indicators of whether the State has seriously taken human rights in the employment sector. The Employment Act of 2003 has been considered propositional, especially since the Employment Act of 2003 recognizes the tripartite system. The tripartite system itself is advocated by the ILO to encourage a balance of roles between government, employers and workers in the establishment of work regulations to create a healthy working environment. But unfortunately in Article 81 of the Copyright Act of 2011, the tripartite system is minimized so that the role of workers is no longer central in the making of regulations, such as the establishment of a regional minimum wage (Suntoro, 2021). The Work Copyright Law that the public hopes can cover the weaknesses of the Labor Law actually increasingly protects the interests of the Company and protects the interests of workers. This can be a factor in the difficulty of workers, employers and governments difficult to consolidate, and can trigger human rights violations in practice later.

The lack of optimal domestic arrangements on the responsibilities of *TNC* in relation to human rights due to the country's fear of the prolonged effects of the sentencing of companies. One of them is the fear of facing negative economic impacts, such as the decline in state foreign exchange from corporate taxes. Whereas companies in particular *TNC* have the obligation to submit to applicable national laws. There is a loophole in this regional rule that makes companies, especially *TNC* commit various violations, including human rights violations.

The third is the disparity in society. Disparities in society cause differences in treating one society with another. Although the company is only responsible for the surrounding community, it does not rule out the possibility that there will be a difference in the treatment carried out by the company in fulfilling its obligations in fulfilling human rights. In the face of disparities, the government must also be present, because the presence of the state through its government becomes a marker of the country is a sovereign state. The presence of the state is not always about the state taking part in the implementation of human rights, but it can be the reach of national laws and national policies that guarantee the human rights of citizens..

In Indonesia itself, the country still has to fight hard to prove the government's presence in protecting the human rights of its citizens. This is because there are still many victims who are far apart due to the lack of maximum efforts of the Indonesian government in protecting human rights. The victims referred to here are not only fatalities that must be lost, but also environmental damage, forest loss, extinction of several types of animals and plants due to business activities. The victim will always be there when there is a violation. Protection from the state is an obligation..

4. CONCLUSION

International norms related to human rights and business activities are only *soft laws* that are only in the form of behavioral guidelines, and have no provisions on violations. The application by each country is also not a necessity. Although it has been explicitly written about the practical limits of good and bad behavior, in the absence of enforcement instruments, international norms cannot be strictly applied.

The State as a member of the obligation to protect human rights (*duty holder*) for citizens, is authorized to issue regulations on human rights respect by *the TNC* in order to minimize the occurrence of human rights violations. Domestic regulations are necessary to be the attachment of *TNC* operating within the territory of the country to be subject to the applicable constitutional rules, so that respect, protection, and rehabilitation of human rights can run optimally..

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