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PRE-TRIAL CHAMBER I

Before: **Judge Iulia Antoanella Motoc, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public

***Amicus Curiae* Observations Pursuant to Rule 103**

Source: **The Centre for European Legal Studies on Macro-Crime (MACROCRIMES)**

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I. INTRODUCTION

1. Following Pre-Trial Chamber's Order of 22 July 2024,[1] the Centre for European Legal Studies on Macro-Crime ("MACROCRIMES") welcomes the opportunity to submit this *amicus curiae* pursuant to Rule 103 of the Rules of Procedure and Evidence ("RPE"), on the issue of whether the International Criminal Court ("Court") can exercise jurisdiction over Israeli nationals.

2. In its request for leave to submit written observations filed on 10 June 2024, the United Kingdom raised doubts as to '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords'.[2] The reasoning of the State seems to be based on two assumptions: A) the scope of the Court's jurisdiction may be restricted by way of a bilateral agreement concluded between the territorial State and the State of nationality of the alleged perpetrator; B) the Declaration of Principles on Interim Self-Government Arrangements ("Oslo I") of 1993, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo II") of 1995, and the subsequent agreements between the Palestinian Liberation Organization ("PLO") and Israel (hereinafter jointly referred to as the Oslo Accords) prevent Palestinian courts from

[1] ICC-01/18-249, para 11.
[2] ICC-01/18-171.

exercising criminal jurisdiction over Israeli nationals. In these Observations, which are filed *pro veritate*, MACROCRIMES challenges both assumptions, and submits that the Oslo Accords do not bar the exercise of the Court's jurisdiction over Israeli nationals, based on arguments that relate, *firstly*, to the impossibility to restrict the Court's jurisdiction through a bilateral agreement; and, *secondly*, to an interpretation of the Oslo accords in light of the appropriate international legal criteria.

II. OBSERVATIONS

A. The scope of the Court's jurisdiction cannot be restricted by way of a bilateral agreement concluded between the territorial State and the State of nationality of the alleged perpetrator

1. The *nemo dat quod non habet doctrine* is irrelevant in this case

1.1. Article 12 of the ICC Statute does not imply a delegation of jurisdiction to the Court

3. The jurisdiction of the Court has sometimes been qualified as "delegated" or "derivative" or "transferred" or "conferred".[3] This characterisation implies that the Court has jurisdiction over a given territory or person only to the extent that a State with a valid title of jurisdiction delegates it to adjudicate on its behalf. Conversely, we argue that Member States do not transfer their jurisdiction to the Court. Instead, the Court exercises an entirely autonomous jurisdiction, distinct and independent from that of its Member States.

4. In the context of the law of international organisations, the concept of "delegation" refers to States conferring powers on an international organisation established for the pursuit of a common purpose, to which they become members. However, these conferred powers must always be interpreted in accordance with the relevant provisions of the treaty establishing the international organisation.[4] As highlighted by Sarooshi, moreover, States may collectively confer on organisations powers that they do not possess in their individual capacity.[5]

5. The concept of delegation outlined above applies to the relationship between States Parties to the Rome Statute and the Court, with the latter being empowered by the States Parties to exercise judicial functions in accordance with the Rome Statute. As observed by Riccardi, 'delegation [of the judicial functions] does not entail that State Parties and the ICC exercise the

[3] For an overview of the theories on the source of the Court's jurisdiction, see A Riccardi, *The Palestine Decision and the Territorial Jurisdiction of the ICC: Is the Court Finding its Inner Voice?*, 'QIL, Zoom-in', 2021, 23-42.
[4] See *ex multis* D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, OUP, 2005; H G Schermers and N M Blokker, *International Institutional Law*, Nijhoff, 2011.
[5] D Sarooshi, *Conferrals by States of Powers on International Organizations: The Case of Agency*, 'The British Yearbook of International Law', 2004, 291-332 at 297, citing the case of the UN Charter, which confers to the Security Council enforcement powers that individual UN Member States arguably do not possess.

same jurisdiction [….]. [D]elegation regards the *manner* in which powers are conferred on the international organisation, not their *scope*, which is to be found in the organisation's constitutive treaty'.[6]

6. The Court is an independent institution with its own international legal personality, acting on its own behalf and not as an instrument of its member States.[7] As underlined by prominent scholars, it enforces the *ius puniendi* of the international community concerning crimes defined in the Statute.[8] In the Al-Bashir Jordan decision, the Appeals Chamber appeared to endorse this approach, highlighting:

> 'the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, […] the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole'.[9]

In even clearer terms, Judges Eboe-Osuji, Morrison, Hofmański and Bossa, stated, in their joint concurring opinion, that:

> 'judges in *national* courts exercise jurisdiction in the national forum, in their capacity as delegates for purposes of exercise of sovereign authority within the national forum. In contrast, judges of *international* courts operate on an entirely different footing of delegated jurisdiction. They are not delegates of any *national* sovereign […]. They exercise jurisdiction on behalf of the *international* community, such as is represented by the aggregation of States who have authorised those international judges to exercise the jurisdiction in question'.[10]

7. In this perspective, by ratifying the ICC Statute, States do not transfer to the Court their jurisdiction. Instead, they enable it to exercise "its own" inherent jurisdiction, which is grounded in the collective consent of the founding States.[11] Article 12 of the ICC Statute clearly

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[6] Riccardi, *supra*, n. 3, at 31.
[7] A A Haque, *The International Criminal Court's Jurisdiction in Palestine and the 'Oslo Accords Issue*' 'Just-Security', July 9, 2024.
[8] C Kreß, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in K Ambos (eds.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th eds), Beck, Hart and Nomos, 2022, at 2650; K Ambos, *Punishment Without a Sovereign? The* Ius Puniendi *Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law,* 'Oxford Journal of Legal Studies', 2013, 293-315.
[9] ICC- 02/05-01/09-397, para. 115.
[10] ICC-02/05-01/09-397-Anx1, para. 53.
[11] See C Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet *Doctrine–A Reply to Michael Newton*, 'Vanderbilt Journal of Transnational Law', 2016, 443-454, at 448-449.

reflects this understanding: paragraph 1 holds that 'A State which becomes a Party to this Statute thereby *accepts* the jurisdiction of the Court with respect to the crimes referred to in article 5'; paragraph 2, which requires the consent of the State on whose territory the alleged crime was committed or of the State of nationality of the alleged perpetrator, expressly defines this consent as a "precondition" to the exercise of the Court's jurisdiction in the absence of a referral by the Security Council, rather than as the "source" of such jurisdiction.

8. Given that the jurisdiction of the Court with respect to the crimes referred to in Article 5 of the Statute is inherent, and not delegated by Member States, the *nemo dat quod non habet* doctrine has no relevance in this case, and cannot be invoked to limit the Court's jurisdiction over international crimes perpetrated in the Palestinian territory.

1.2. *The difference between the State's sovereign right to adjudicate crimes perpetrated on its territory and its ability to exercise such a right*

9. The right of a State to adjudicate crimes perpetrated on its territory is one of the fundamental corollaries of State sovereignty. Customary international law or treaties binding on the territorial State may set limits to the exercise of this right by domestic courts: for instance, States are prevented from exercising their adjudicatory jurisdiction over foreign officials enjoying immunity under customary international law,[12] and Status of Forces Agreements (SOFAs) usually grant the sending State either exclusive or primary jurisdiction over its personnel stationed abroad. While these international rules limit the territorial State's ability to lawfully exercise jurisdiction, they do not affect the existence of that jurisdiction as such.[13]

10. The distinction between a State's sovereign right to adjudicate crimes perpetrated on its territory and its ability to exercise such a right is even clearer in times of belligerent occupation. Under the law of occupation, the occupying power does not acquire sovereign rights over the occupied territory. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter is however entitled to temporarily exercise certain governmental powers over the occupied territory. This includes a limited possibility to interfere with the exercise of jurisdiction by the criminal tribunals of the occupied territory, to the extent necessary to ensure the effective administration of justice and the application of the provisions of the IV

[12] International Law Commission ("ILC"), Draft articles on immunity of State officials from foreign criminal jurisdiction, adopted on first reading, UN Doc. A/77/10, 188-194.
[13] On the distinction between sovereignty and the exercise of sovereign rights see J Crawford, *The Creation of States in International Law* (2nd edn), OUP, 2007, at 33.

Geneva Convention (GC).[14] Furthermore, according to a general rule of international law, military and civilian personnel of the occupying forces and occupation administration, as well as persons accompanying them, are not subject to the jurisdiction of the criminal courts of the occupied territory but remain under that of their own military authorities.[15]

11. Even if the Court were found to exercise jurisdictional powers delegated by States Parties, the test to determine the capacity of a State to perform such a delegation would be whether it possesses the sovereign right to adjudicate international crimes perpetrated on a given territory. The ability of its domestic courts to fully exercise such jurisdiction is irrelevant. As observed by O'Keefe, 'while a state may undertake […] to refrain from exercising one or more of [its sovereign rights], it still retains them and is competent to confer them in their plenitude on the ICC'[16]. The opposite view would be difficult to reconcile with the principle of complementarity, which is one of the cornerstones of the Rome Statute system[17]. According to this principle, the State's unwillingness or inability to exercise jurisdiction in any given situation, far from hindering the Court's action, is a condition for criminal proceedings to be held in The Hague.

12. Moreover, the wording of Article 12 of the ICC Statute seems to confirm that the scope of the Court's jurisdictional powers may be greater than that of the domestic courts of the territorial State. Paragraph 2(a) authorises the Court to exercise its jurisdiction if the State 'on the territory of which the conduct in question occurred' is a Party to the Statute or has accepted the jurisdiction of the Court. Had the negotiators intended to tie the jurisdiction of the Court to that of domestic courts, they would have opted for different wording, such as requiring ratification by the State 'on the territory of which the conduct in question occurred, *and whose courts are entitled to exercise jurisdiction over the crime*'.[18] Similarly, paragraph 2(b)'s wording would have been more specific, requiring the consent of the 'State of which the person accused of the crime is a national *who is subject to the jurisdiction of local courts*'.

13. The practice of the Court also supports the conclusion that any jurisdictional constraints imposed by international law on a Member State's ability to exercise its criminal jurisdiction

[14] Article 64(1) IV GC. See also Article 66 IV GC, which allows the Occupying Power to enact penal provisions which are essential to ensure its own security and to fulfil its obligations under the Convention, and to hand over individuals accused of a breach of such provisions to its properly constituted, non-political military courts.
[15] Permanent Court of Arbitration, 22 May 1909, *Affaire de Casablanca (France c. Allemagne)*, 'RSA', vol. XI, p. 128. See also *Joint Service Manual of the Law of Armed Conflict* (UK), para. 11.26 and Department of Defense Law of War Manual (USA), para. 11.8.5.
[16] R O'Keefe, *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, 'Vanderbilt Journal of Transnational Law', 2001, 433-441, at 434.
[17] L N Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 'Notre Dame Law Review', 2023, 549-610, at 582.
[18] See ICC-01/18-71, para. 25.

have no impact on the scope of the Court's own competence. On 5 March 2020, the Appeals Chamber authorised the Prosecutor to commence an investigation in relation to alleged crimes committed on the territory of Afghanistan since 1 May 2003.[19] This investigation includes crimes allegedly committed by U.S. nationals who were operating in Afghanistan as part of the International Security Assistance Force ("ISAF"), notwithstanding the fact that ISAF had concluded a SOFA with the host State, which prevented Afghan domestic courts from exercising criminal jurisdiction over foreign personnel involved in or supporting the mission.[20] The investigation into the situation in the Democratic Republic of the Congo (DRC) is also interesting, insofar as it focuses on crimes allegedly committed in occupied Ituri. The customary international rule that grants the occupying State exclusive jurisdiction over members of the occupying administration has never been invoked to challenge or restrict the scope of the Court's jurisdiction. Similarly, to the best of our knowledge, no objection has ever been raised regarding the Court's competence to adjudicate crimes committed by members of the Russian armed forces in Crimea and other occupied Ukrainian territories,[21] nor with reference to the possible impact on the scope of the Court's jurisdiction of a SOFA concluded in 1997, which grants Russian courts exclusive jurisdiction over crimes committed in their official capacity by members of the Russian Federation Black Sea Fleet located on Ukrainian territory.[22]

2. Any bilateral agreement concluded by a State party, whether before or after it ratified the ICC Statute, with a State who is not a Member of the ICC, would not be opposable to other Parties to the Statute, nor to the Court itself

14. When a State party to the ICC Statute, by entering into a bilateral treaty with another State, accepts to refrain from exercising criminal jurisdiction over crimes perpetrated on its own territory by nationals of its counterpart, the relevant treaty provisions only have effects *inter partes*.[23] Even if such a bilateral treaty were found to restrict the possibility for the State party

[19] ICC-02/17 OA4. The scope of the investigation extends to crimes committed on the territory of other States Parties since 1 July 2002 and that have a nexus to the armed conflict in Afghanistan.
[20] Ibid., para. 44.
[21] OTP, *Report on Preliminary Examination Activities 2020*, 14 December 2020, paras. 267 ff., www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf.
[22] Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black See Fleet's Stay on Ukrainian territory (28 May 1997). The text in Ukrainian is available at https://zakon.rada.gov.ua/laws/show/643_076#Text. Ukraine considers the treaty to be still in force (https://zakon.rada.gov.ua/laws/card/643_076), notwithstanding the fact that on 31 March 2014 the Russian Duma decided to denounce it (*State Duma approves denunciation of Russian-Ukrainian agreements on Black Sea Fleet*, 'Tass – Russian News Agency', 31 March 2014, https://web.archive.org/web/20141017094622/http://en.itar-tass.com/russia/725964).
[23] See Article 30(4)(b) of the Vienna Convention on the Law of Treaties (VCLT), according to which, when two conflicting treaties are concluded by different States, the treaty to which both States are parties governs their mutual rights and obligations.

to subsequently delegate its criminal jurisdiction to an international criminal tribunal, this limitation would not be opposable to the other parties to the ICC Statute, nor to the Court itself.[24] If requested by the Court to surrender an Israeli suspect, Palestine would encounter a conflict between its obligations under Oslo II and its obligations under the Rome Statute, but 'that would be Palestine's problem, not the Court's problem'.[25] As highlighted in the *Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*:

> 'if a State has conferred jurisdiction to the Court, [...] the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction. Rather, it may become an issue of cooperation or complementarity during the investigation and prosecution stages'.[26]

This is consistent with what the Pre-Trial Chamber affirmed in the same case, holding that:

> '[b]y becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it'.[27]

B. The Oslo Accords do not prevent Palestine from exercising criminal jurisdiction over Israeli nationals

1. The Oslo Accords are not the main source of Palestine's obligation to refrain from exercising criminal jurisdiction over Israeli nationals

15. As explained above (para 10), the limitations on the ability of Palestinian courts to exercise jurisdiction over crimes committed by members of the Israel Defense Forces ("IDF") and the Israeli Civil Administration arise directly from the law of occupation. Article 1 of Annex IV to Oslo II, which states that '[t]he criminal jurisdiction of the Palestinian Council covers all offences committed by Palestinians and/or non-Israelis in the Territory', at most extends these limitations to settlers and other Israeli nationals who are not members of the occupying forces or occupation administration. Contrary to what appeared to be the opinion of the United Kingdom, the Oslo Accords do not entail any transfer of jurisdiction from Palestine to Israel. Rather, they govern the gradual and partial transfer of powers and responsibilities from the occupying

[24] See *mutatis mutandis* International Court of Justice ("ICJ"), *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *ICJ Reports* 2012, 624-720, para 95; *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)*, Judgment of 22 July 1952, *ICJ Reports* 1952, 93-115, at 109.
[25] Haque, *supra,* n. 7.
[26] ICC-01/18-12, para. 185.
[27] ICC-01/18-143, para. 102.

authority to the Interim Self-Government Authority established under Oslo II, pending the outcome of the permanent status negotiations and the restoration of full jurisdiction over Palestinian territory to the State that holds sovereignty over it — namely, the State of Palestine.

2. The Oslo accords cannot deprive Palestinians of the benefits of the IV GC

16. The Oslo Accords were concluded between Israel, as the Occupying Power, and the PLO, as the authority representing the population of the occupied territory at that time. Consequently, they are subject to the limits established by Article 47 IV CG, which stipulates that such agreements cannot, in any way or under any circumstances, deprive protected persons in the occupied territory of the benefits provided by the Convention.

17. One of these benefits clearly derives from Article 146 IV GC, which obliges States Parties to search for individuals alleged to have committed, or ordered to be committed, grave breaches of the Convention, and to bring such individuals, regardless of their nationality, before their own courts. The provision allows for an exception to these obligations, permitting States Parties to hand over the alleged perpetrators for trial to another concerned State, provided that State has established a *prima facie* case.

18. The relevance of the exception provided under Article 146 IV CG in this specific case, however, appears to be very limited, given that Israeli authorities have been reluctant to investigate war crimes allegedly committed in Palestine by Israeli soldiers or settlers.[28] As a consequence thereto, and to remain consistent with Article 47 IV GC, Annex IV of Oslo II would need to be interpreted as excluding the jurisdiction of Palestinian courts over Israeli citizens only when they are accused of crimes not listed as grave breaches under Article 147 of the Convention.[29]

3. The Oslo Accords should be interpreted in light of their object and purpose and applied in a manner consistent with other relevant rules of international law

19. According to Article 31(3)(c) VCLT, treaties should be interpreted by taking into account 'any relevant rules of international law applicable in the relations between the parties'. An interpretation of the Oslo Accords that prevents Palestine from exercising its criminal jurisdiction

[28] See A/HRC/56/CRP.4, 10 June 2024, paras. 217 and 507; CAT/C/ISR/CO/5, 3 June 2016, para. 30. See also B'Tselem, *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, September 2016, https://www.btselem.org/download/201609_whitewash_protocol_eng.pdf.

[29] In its advisory opinion of 19 July 2024 on *Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ appeared to favour an even broader interpretation of Article 47 IV CG. The Court stated that 'the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory' (para. 102).

over Israeli nationals accused of international crimes, and from allowing the Court to adjudicate such cases, would hinder Palestine from fulfilling its international obligation to ensure accountability for international crimes perpetrated on its territory. This obligation is firmly established under international law[30]. Both Israel and Palestine are parties to several international treaties — including the CGs,[31] the 1977 I Additional Protocol to the GCs,[32] and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[33] — which mandate the prosecution of alleged perpetrators of war crimes and genocide before a competent domestic or international court. Although there are no specific treaties dedicated to punishing crimes against humanity, the duty to ensure respect for human rights, as defined in the various human rights conventions ratified by Israel and Palestine, includes the obligation for States Parties to prosecute international crimes involving severe human rights violations when committed on their territory.[34]

20. Arguably, the obligation for States to make every effort to ensure accountability for international crimes perpetrated on their territory is also part of customary international law.[35] It could also be contended that since the prohibition of international crimes has attained the level of *jus cogens*, the corresponding obligation to ensure accountability for perpetrators holds the same status[36]. As the ILC has clarified, when there is a conflict between a peremptory norm of general international law and another rule of international law, the latter is, as far as possible, to be interpreted and applied in a manner consistent with the former[37].

21. It is also worth highlighting that, in its advisory opinion of 19 July 2024 on *Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the ICJ found that Israel's policies and practices in the Occupied Palestinian Territory constitute serious breaches of several peremptory norms of international law imposing *erga omnes* obligations, and render Israel's continued presence in the Occupied

[30] G Werle and F Jeßberger, *Principles of International Criminal Law* (4th edn), OUP, 2020, at 104-105.
[31] Articles 49 I GC, 50 II CG, 129 III GC and 146 IV CG.
[32] Article 85.
[33] Article I.
[34] C Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 'Leiden Journal of International Law', 1994, 5-21.
[35] ICRC, *Customary IHL Database*, Rule 158 (concerning war crimes). See also M Kearney, *Palestine and the International Criminal Court: Asking the Right Question*, in R H Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, Nijhoff, 2020, 25-38, at 34-35.The 'duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' is also recalled in the preamble of the Rome Statute.
[36] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Dissenting opinion of Judge Al-Khasawneh, *ICJ Reports* 2002, 95-99, para 7. See also High Court of Kenya, *The Kenya Section of the International Commission of Jurists v. The Attorney-General and Others*, 28 November 2011, [2011] eKLR, at 17, affirming that 'the duty to prosecute international crimes has developed into jus-cogens'.
[37] ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), 2022, conclusion 20.

Palestinian Territory unlawful. Consequently, Israeli forces must withdraw as rapidly as possible, settlers must be evacuated, and all States and international organisations have an obligation not to recognise as legal the situation arising from the unlawful Israeli presence and not to render aid or assistance in maintaining that situation. Any interpretation of the treaties in force that excludes the competence of Palestinian courts and of the Court to adjudicate international crimes allegedly committed in Palestine by the IDF and by settlers, thus fostering their sense of impunity, would be in clear contradiction with these obligations.

22. Based on these considerations, the Oslo Accords should not be interpreted as preventing Palestine from exercising its domestic jurisdiction over *any* international crime allegedly perpetrated by an Israeli citizen in Palestinian territory. Such a restrictive interpretation of the Oslo Accords is also consistent with their object and purpose, which is to remove Israeli citizens from undue interference by the courts of the occupied territory – and *not* to shield those suspected of international crimes from any form of prosecution other than by their state of nationality.

III. CONCLUSION

23. In light of the foregoing, MACROCRIMES respectfully submits that nothing in the Oslo Accords precludes the issuance of arrest warrants against Israeli citizens for crimes allegedly committed in Palestine.

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Dated this 5 August 2024

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