EUROPEAN CENTRE FOR LAW AND JUSTICE

14 April 2016

VIA OVERNIGHT DELIVERY SERVICE

[redacted]

RE: Proposed Security Council Resolution Condemning Israeli Settlements

Your Excellency:

By way of introduction, the European Centre for Law and Justice ("ECLJ") is an international, Non-Governmental Organisation ("NGO"), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007[1].

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It has been widely reported that Palestinian officials are circulating a draft resolution to the United Nations Security Council (UNSC) "condemning West Bank settlements"[2]. This is troubling for a variety of reasons not the least of which is that the Palestinians, yet again, are attempting to circumvent their resolving outstanding issues with Israel via negotiations—*as they had solemnly agreed to do*—by seeking to get the UNSC to rule in the Palestinians' favour without resort to negotiations.

In light of the following legal and historical analysis, we urge you and all Members of the Security Council to reject any attempt by Palestinian authorities to break their solemn commitment to resolve all outstanding issues with the Israelis via good-faith, face-to-face negotiations without preconditions.

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[1]NGO Branch, U.N. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007), http://esango.un.org/civilsociety/ (accessed by searching "European Centre for Law and Justice" in the iCSO Database).

[2]Tovah Lazaroff, Herb Keinon & Danielle Ziri, *US Undecided on Veto of UNSC Resolution Against West Bank Settlements*, THE JERUSALEM POST (Apr. 10, 2016), http://www.jpost.com/Israel-News/Politics-And-Diplomacy/US-might-support-UN-resolution-against-West-Bank-settlements-450734.

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I. LEGAL JUSTIFICATION FOR JEWISH SETTLEMENTS IN THE WEST BANK UNDER INTERNATIONAL LAW

The issue of Jewish settlements in the West Bank[3] is hardly new—in fact, it is over forty years old. Further, the underlying premise of the UN whereby Israeli settlements are in so-called "occupied Palestinian territory" is both factually inaccurate and legally unsound. The main argument repeatedly raised against Jewish "settlements" is that they violate Article 49(6) of the Fourth Geneva Convention of 1949, which states: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies"[4]. The cited provision presupposes an "occupation". However, Israel claims that the Convention is not applicable, since Israel has legitimate claims to (at least) portions of the West Bank and, thus, is not and cannot be an "occupier" in the sense of the Convention. The Israeli view is that the territories in question are not "occupied", but rather "disputed"—a position Israel has continuously asserted since 1967. This position remains unaffected by the Israeli government's decision, *as a matter of government policy*, to use the humanitarian provisions of the Fourth Geneva Convention as its guide to governing the West Bank following its capture in the Six-Day War until the disputed claims to the territory are resolved between the parties. The following buttresses the Israeli position further.

First, one must note that Article 6 of the British Mandate, which was implemented following World War I, permitted Jewish settlement throughout the territory of the Mandate for Palestine[5], territory that, at the time, encompassed the modern state of Jordan, the current State of Israel, a slice of the Golan Heights (ceded by Great Britain to the French Mandate of Syria in 1923)[6], the West Bank, and the Gaza Strip. Prior to World War I, these territories were all part of the Ottoman Empire. As part of the Treaty of Sèvres[7] and, later, the Treaty of Lausanne[8], the Turks renounced all prior claims to non-Turkish territories in the Middle East, including Palestine. Importantly, the Mandate for Palestine "implicitly denies *Arab* claims to national political rights to the area *in favor* [sic] *of* the Jews: the mandated territory was in

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[3]Since Israel has completely withdrawn from the Gaza Strip, the issue of settlements there has become moot.

[4]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, para. 6, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. It is also questionable whether Article 49 applies when a government takes no action to move its population, but the population moves itself based on individual choices. The words "deport" and "transfer" imply affirmative governmental action, not mere acquiescence.

[5]*Mandate for Palestine*, League of Nations Doc. C.529.M.314.1922.VI (1922) (providing for the facilitation of Jewish settlement of the territory covered by the Mandate).

[6]MARTIN GILBERT, THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT 8 (9th ed. 2008).

[7]Treaty Between the Allied and Associated Powers and Turkey Signed at Sèvres, 10 Aug. 1920, *reprinted in* 1 THE TREATIES OF PEACE, 1919–1923, at 789 (The Lawbook Exch. 2007) (Lawrence Martin ed., 1924). Of special note is how the Treaty referred to the territories of Syria, Mesopotamia (Iraq), and Palestine. Article 94 of the Treaty stated that the High Contracting parties agreed "that Syria and Mesopotamia shall . . . be provisionally recognised as *independent States* . . . until such time as they are able to stand alone". *Id.* at 816 (emphasis added). Article 95, on the other hand, refers solely to Palestine and makes no mention of the word "state" at all. *Id.* at 816–17. Instead, the emphasis is on the Mandatory's responsibility to put into effect "the declaration originally made on November 2, 1917, by the British Government . . . in favour of the establishment in Palestine of a national home for the Jewish people" (to wit, the Balfour Declaration). *Id.* Similarly, when referring to the Hedjaz (today known as Saudi Arabia), the Treaty recognizes the Hedjaz "as a *free and independent State*". *Id.* at 817 (emphasis added). Therefore, even the Treaty of Sèvres does not provide a historical basis for claiming Palestinian statehood, since nowhere is the word "state" associated with Palestine in that Treaty.

[8]Treaty of Peace with Turkey Signed at Lausanne, 24 July 1923, *reprinted in* 1 THE TREATIES OF PEACE, *supra* note 7, at 957. The Treaty of Lausanne ultimately replaced the Treaty of Sèvres. In Article 16 of the Treaty, Turkey renounced its claims to all territories "outside the frontiers [for Turkey] laid down in the present Treaty". *Id.* at 966.

effect reserved to the Jewish people for their self-determination and political development, in acknowledgement of the historic connection of the Jewish people to the land"[9].

As such, Jewish citizens of the territory of the Palestine Mandate have at least as much claim to such territories as anyone else. Moreover, nothing has extinguished the terms of the Mandate for Palestine over the West Bank; *its terms are still valid under international law*[10]. Hence, to label Israel as "occupying" *Palestinian* (by which is meant *Arab*) territory is questionable at best.

Following World War II, when Great Britain informed the UN in 1947 that it was going to withdraw its forces from Palestine in 1948, the UN General Assembly adopted Resolution 181 in November of 1947, setting forth a partition plan that called for establishing an Arab State, *a Jewish State*, and an area around Jerusalem to be under international control[11]. While Jewish Palestinians accepted the plan, Arab Palestinians rejected it[12].

Interestingly, although Palestinians periodically cite Resolution 181 today in support of their claim for statehood, the following must be kept in mind: (1) all Arab states rejected outright Resolution 181 at the time of its promulgation; (2) the Palestinians continue to reject recognising Israel as the *Jewish* state called for by the resolution; and (3) the Palestinians simply ignore the fact that Resolution 181 placed Jerusalem and its environs under international control, not Arab Palestinian control. Since the UN partition plan was contingent upon acceptance by both parties, its rejection by Arab Palestinians—coupled with the Arab attack on the new-born State of Israel in May 1948—effectively nullified the Resolution and its provisions.

Immediately following the British withdrawal in 1948, the newly proclaimed Jewish State of Israel was attacked by its Arab neighbours. The war raged into 1949, when a series

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[9]Eugene V. Rostow, *The Future of Palestine*, INSTITUTE FOR NATIONAL STRATEGIC STUDIES, Nov. 1993, at 1, 11. In the Mandate for Palestine, only judicial and religious rights of non-Jews were protected, *not political rights*, thereby suggesting that it was understood that Jews were to exercise political control over Palestine. This is further buttressed by the fact that Britain had given the eastern 78% of the original Mandate for Palestine to the Arabs, prohibiting Jewish settlements there, and creating a purely Arab state (i.e., the present day Kingdom of Jordan) out of Palestinian territory. *Mandate for Palestine*, League of Nations Doc. C.529.M.314.1922.XI (1922).

[10]This principle is confirmed by the ICJ Advisory Opinion on Namibia of 21 June 1971:

> When the League of Nations was dissolved, the *raison d'être* and original object of these obligations remained. Since their fulfillment did not depend on the existence of the League, they could not be brought to an end merely because the supervisory organ had ceased to exist. . . . *The International Court of Justice has consistently recognized that the Mandate survived the demise of the League* [of Nations].

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ, Advisory Opinion, paras 42–86 (emphasis added).

Further, Professor Eugene Rostow agreed with the ICJ's opinion regarding the "sacredness" of trusts like the Mandate for Palestine: "A trust does not end because the trustee dies. . . . [T]he Jewish right of settlement in the whole of western Palestine—the area west of the Jordan—survived the British withdrawal in 1948". Rostow, *supra* note 9, at 10.

[11]Future Government of Palestine, G.A. Res. 181 (II), U.N. Doc. A/RES/181 (Nov. 29, 1947).

[12]United Nations Palestine Commission Communication from the Representative of the Arab Higher Committee for Palestine, U.N. Doc. A/AC.21/6 (Jan. 19, 1948); *see* G.A. Res. 181(II), U.N. Doc. A/RES/181 (29 Nov. 1947).

of armistice agreements was signed[13]. The resulting 1949 armistice lines which delimit the so-called West Bank and Gaza Strip (often referred to as the pre-'67 lines) *have never been regarded as international boundaries*. In fact, it was at *Arab* insistence that the 1949 lines be designated as mere armistice lines, *not international boundaries*, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State, which recognised borders would have done.

From 1949 until 1967, the West Bank and Gaza Strip remained under belligerent military occupation by Jordanian and Egyptian armed forces, respectively. But, as a result of the 1967 Arab-Israeli war, Egyptian forces withdrew from the Gaza Strip, Jordanian forces withdrew from the West Bank, and Israel acquired control of both territories. Neither of the occupying states, Jordan or Egypt, had any right to claim sovereignty over the respective territories they had been occupying. Further, no Palestinian successor state existed anywhere in the territories of the former Mandate for Palestine other than Israel, the *Jewish* Palestinian successor state.

As such, when Israel acquired the West Bank and the Gaza Strip as a result of winning a defensive war against neighbouring Arab states bent on Israel's destruction, it acquired territories *with no prior sovereign* other than the people of Palestine, which consisted of both Jewish and Arab citizens, each of whom has a colourable claim to the territory. Because both Jews and Arabs can advance colourable claims to the West Bank and the Gaza Strip, the ownership of such territories is disputed. The Israeli government made this clear to the international community when it announced its intention to implement Fourth Geneva Convention humanitarian measures, *despite having no legal duty to do so*[14], since a State cannot "occupy" territory (in the sense of the Fourth Geneva Convention) over which it

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[13]General Armistice Agreement art. 5, para. 1, Isr.-Syria, 20 July 1949, 42 U.N.T.S. 327 (noting that the armistice line does not enshrine an "ultimate territorial arrangement[]"); General Armistice Agreement art. 6, para. 9, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); General Armistice Agreement art. 4, para. 2, Isr.-Leb., 23 March 1949, 42 U.N.T.S. 287 (noting that the "basic purpose" of the armistice line is to "delineate the line beyond which the armed forces of the respective Parties shall not move"); General Armistice Agreement art. 5, para. 2, Isr.-Egypt, 24 Feb. 1949, 42 U.N.T.S. 251 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

[14]Avinoam Sharon, *Keeping Occupied: The Evolving Law of Occupation*, 1 REGENT J. L. & PUB. POL'Y, 153–54 (2009). Sharon continues:

> Upon assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of "occupation" inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.
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> Israel's argument concerning de jure application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provisions of the Fourth Geneva Convention . . . . This intention seems consistent with the view of [Yehuda Z.] Blum:
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> > The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.

Id (quoting Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 294 (1968)).

has colourable "sovereign" claims and which had no legitimate prior sovereign[15] (or, alternatively, whose prior sovereignty lay with the Palestinian people, which include both Jewish and Arab Palestinians). Resolving the conflicting claims must take place via good-faith bilateral negotiations between the parties. It cannot be accomplished via a UNSC resolution that unfairly takes sides in the ongoing territorial dispute.

II. THE SIGNIFICANCE OF UNSC RESOLUTIONS 242 AND 338

Following the 1967 Arab-Israeli war, the UNSC adopted Resolution 242[16]. Palestinians claim that UNSC Resolution 242 supports their notion that the boundaries of a future Palestinian State are already fixed and that Israel must return all lands occupied as a result of the Six-Day War. First, one must note that the Resolution makes no mention whatsoever of "Palestinians" or their cause (no Arab Palestinian political or national entity existed at the time—hence, Resolution 242 was aimed solely at Israel, Egypt, Jordan, and Syria).

Moreover, the language in that Resolution requires that Israel withdraw "from territories"[17] it captured—not from "the" territories or "all the" territories it captured. We know from historical record that these were *intentional omissions from the language of the Resolution.* In this regard, Lord Caradon, Permanent Representative of the United Kingdom to the United Nations from 1964–1970 and chief drafter of Resolution 242, has noted the following:

> Much play has been made of the fact that we didn't say "the" territories or "all the" territories. *But that was deliberate.* I myself knew very well the 1967 boundaries and if we had put in the "the" or "all the" that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend[18].

Also, the Resolution requires "secure . . . boundaries"[19]—something that did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from adjacent Arab-controlled territory and would not exist today if the status quo ante were reinstated (i.e., the 1949 armistice lines were recognised as international borders).

Finally, the Resolution calls for the termination of all "states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political

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[15]The last internationally recognised sovereign over the territory of the Mandate for Palestine had been the Ottoman sultan, but Turkey, the successor state to the Ottoman Empire, renounced all claims to territories not part of the modern-day State of Turkey. The British were appointed as the Mandatory power over the Mandate for Palestine, but that appointment did not convey sovereignty to the British. Instead, Britain served as Trustee for the people of Palestine, which included both Jews and Arabs in Palestine. When the 1948-1949 Arab-Israeli war ended, Israel (made up primarily of *Jewish* Palestinians) ruled portions of Palestine, and the rest remained under belligerent military occupation of foreign Arab armies, which could assert no legitimate sovereign claims. Hence, when Israel captured the West Bank and Gaza Strip in 1967, it could assert a sovereign claim to such territory. Admittedly, so could Arab Palestinians. Since both could assert colourable claims, negotiations are required to resolve who gets what territory from the West Bank and Gaza Strip.

[16]S.C. Res. 242, U.N. Doc. S/RES/242 (22 Nov. 1967).

[17]*Id.* at 1(i).

[18]YORAM MEITAL, EGYPT'S STRUGGLE FOR PEACE: CONTINUITY AND CHANGE, 1967–1977 49 (1997) (emphasis added).

[19]S.C. Res. 242, *supra* note 16, at 1(ii).

independence of every State in the area . . ."[20]—which are a *sine qua non* for any territorial withdrawal. Pursuant to its peace treaty with Egypt, Israel withdrew from the Sinai and removed its settlements. This demonstrates Israel's willingness to make difficult compromises for peace. One searches in vain to find analogous examples of Palestinian compromises.

Following the 1973 Arab-Israeli war, the UNSC adopted Resolution 338, which essentially reiterates the call to implement the terms of Resolution 242[21]. Given pre-existing Israeli claims to the territory and given that Resolutions 242 and 338 anticipate negotiated territorial adjustments, it is clear that Israel has a valid, internationally-sanctioned claim to (at least) parts of the territories in question[22]. Thus, it cannot be asserted by the UN or others—either logically or legally—that Jewish settlements in these territories are *a priori* illegal. Until ownership of the land is determined via negotiations, it is premature to say that Israeli settlements are unlawful.

III. THE IMPORTANCE OF GOOD-FAITH BILATERAL NEGOTIATIONS

The Oslo Accords and follow-on agreements sanctioned by the international community called for the Palestinian-Israeli conflict to be resolved by direct negotiations between the parties based on the principles found in UNSC Resolutions 242 and 338. Such bilateral negotiations were to take place without preconditions. The Palestinian Authority was created to be the Palestinian political entity to implement the Palestinian obligations. *In defiance of its commitment to resolve all areas of conflict between the parties via bilateral negotiations, including the parties' future borders, the status of east Jerusalem, and the status of Jewish settlements, the Palestinian Authority continues to look to the UN and elsewhere to avoid having to make the difficult compromises that face-to-face negotiations require.* Despite the fact that no negotiations have been held regarding final borders between the parties pursuant to UNSC Resolutions 242 and 338, the Palestinian Authority has claimed the 1949 armistice lines as its boundaries and sought international support for its claims. Despite the fact that no negotiations have been held regarding the future status of east Jerusalem, the Palestinian Authority has claimed east Jerusalem as its capital and sought international support for that claim as well. When the Palestinian Authority cannot obtain what it wants via face-to-face talks, the Palestinian Authority simply disregards its solemn treaty obligations to resolve outstanding issues via negotiations and seeks to achieve its ends by other means, thereby establishing its untrustworthiness as a negotiations partner and making final resolution of the conflict more difficult.

Meaningful negotiations must proceed without preconditions, and no preconditions means what it says. Saying that Palestinian officials will enter into negotiations *only if* Israeli authorities agree in advance that no more settlements will be established in the West Bank is a precondition, just as saying that Israeli officials will enter into negotiations *only if* Palestinian authorities agree in advance to recognise Israel to be a Jewish state is a precondition. Other examples of non-helpful preconditions are the requirement to recognise the 1949 armistice lines as the presumptive default point for determining the future borders

[20] *Id.* Note also that the language does not refer at all to the Palestinians, since there was no Palestinian "state" at the time, and no Palestinian "state" currently exists.
[21] S.C. Res. 338, ¶ 2, U.N. Doc. S/RES/338 (22 Oct. 1973).
[22] It should also be noted that in March of 1979, Israel and Egypt signed a peace treaty whereby Israel agreed to "withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine". Peace Treaty Between Israel and Egypt, Isr-Egypt, art. I, Mar. 26, 1979, 32 U.S.T. 2146.

between Israel and a future Palestinian state or the requirement that Israel's annexation of east Jerusalem must be disavowed before negotiations may begin or the requirement that Palestinians must disavow the right of return before negotiations may begin.

If negotiations are to proceed *without preconditions*, then each side must recognise and accept that it may not impose preconditions on the other. Preconditions are, in effect, illegitimate attempts by one side to achieve a desired goal *prior to* entering into negotiations with the other side. Preconditions poison the well and destroy the likelihood of success by causing one party to doubt the other party's sincerity to resolve remaining contentious issues. Lasting peace will only occur when both sides are ready to compromise. The UNSC must not become complicit in Palestinian attempts to circumvent the negotiation process—direct bilateral negotiations without preconditions—that can resolve the conflict, lead to the creation of an Arab Palestinian State, and establish peace.

CONCLUSION

In conclusion, Israel's settlements in the West Bank and east Jerusalem are fully consistent with Israel's rights in international law. Each area came under Israeli control as the result of defensive warfare against serial aggressors. Further, under the Palestine Mandate, Jews have long-standing internationally-recognised rights to settle throughout Palestine, including in the West Bank and east Jerusalem. As such, Israel does not "occupy" the West Bank and east Jerusalem (for one cannot occupy, in the sense of the Fourth Geneva Convention, territory to which one asserts and possesses a legitimate claim of sovereignty). Thus, the likely premise of the UN resolution concerning Israeli settlements—to wit, that they exist on "occupied Palestinian territory"—wrongly assumes *as true* what has yet to be established under law in light of the facts. To state otherwise is a misrepresentation of international law.

Moreover, Israel understands and agrees that an Arab Palestinian state must be established to fulfill the national aspirations of Arab Palestinians, but the establishment of such an Arab state must result from good-faith bilateral negotiations between the parties. To that end, Israelis and Palestinians have periodically engaged in negotiations to resolve the outstanding issues between them, one of which is the eventual establishment of a viable, independent Arab Palestinian state. The negotiations process has led to two real opportunities for Arab Palestinian statehood that were rejected by the Palestinians—to wit, negotiations at the end of the Clinton Administration where Prime Minister Ehud Barak was willing to make significant compromises for peace[23] as well as during the Premiership of Ehud Olmert, who was also willing to make significant compromises[24].

The major problem appears to be the Palestinian negotiation tactic, i.e., that its negotiators reject Israeli concessions, provide no alternative proposals of their own, and then wait for additional Israeli concessions. Hence, in reality, the Israelis are left to negotiate with themselves. This exposes the fundamental lack of good faith on the Palestinians' part. Both parties need to be prepared to make painful compromises. The Israelis cannot be expected to continually yield in the face of Palestinian intransigence. Until the Palestinians are prepared

[23]Ari Shavit, *Barak to Haaretz: Israel Ready to Cede Parts of Jerusalem in Peace Deal*, HAARETZ (1 Sept. 2010), http://www.haaretz.com/barak-to-haaretz-israel-ready-to-cede-parts-of-jerusalem-in-peace-deal-1.311356.

[24]Avi Isacharoff, *Revealed: Olmert's 2008 Peace Offer to Palestinians*, JERUSALEM POST (24 May 2013), http://www.jpost.com/Diplomacy-and-Politics/Details-of-Olmerts-peace-offer-to-Palestinians-exposed-314261.

to negotiate in good faith, negotiations will go nowhere and achieve nothing, despite the best of intentions of those who support the two-state solution.

In light of the foregoing, we strongly urge you to reject any such resolution since it clearly misapprehends both the historical and legal status of the settlements. Moreover, in its peace treaty with Egypt, Israel freely removed settlements it had established in the Sinai. Accordingly, one can rely on Israel to comply with the terms of any peace treaty it negotiates with the Palestinians. Adopting the Palestinian-backed resolution will make it less likely that meaningful negotiations can be held. If you desire the conflict to be resolved, reject the resolution and encourage the immediate resumption of negotiations without preconditions instead.

Respectfully submitted,

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