Israel/Occupied Palestinian Territory, House Demolition under Regulation 119

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Regulation 119, Defense (Emergency) Regulations (1945) “Forfeiture and demolition of property, etc.”

[**Source:** Defense (Emergency) Regulations, Regulation 119, *Forfeiture and demolition of property, etc*. (1945) Available at: http://www.israellawresourcecenter.org/websitematerials/mapsg/mapsg1der1945.html]

PART XII - MISCELLANEOUS PENAL PROVISIONS

Regulation 119 - Forfeiture and demolition of property, etc.

119.

(1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military

Court offence ; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land.

(2) Members of His Majesty's forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, without compensation, any property in any such area, town, village, quarter or street as is referred to in subregulation (1), after eviction without compensation, of the previous occupiers, if any.

B. Case of Aliwa v Commander of IDF Forces in the West Bank

[**Source:** *Case of Aliwa v Commander of IDF Forces in the West Bank*, Supreme Court of Israel, Sitting as High Court of Justice, HCJ 7220/15, Session date: 4 November 2015, Judgement given on 1 December 2015, online translation, available at http://www.hamoked.org/files/2015/1159935_eng.pdf (bold text in the original]

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At the Supreme Court Sitting as the High Court of Justice

[…]

Judgment

Justice U. Shoham:

1. This petition concerns a seizure and demolition order which was issued against the home of petitioner 1 (hereinafter: the **petitioner**), located in the city of Nablus, pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**). The order which was issued on October 25, 2015, by General Major Roni Numa, the military commander of IDF Forces in Judea and Samaria, stated, *inter alia*, that "**This order is issued in view of the fact that the inhabitant of the house Rajeb Ahmed Mohammed 'Aliwa, ID No. 905171328 (petitioner's husband – U.S.) acted together with others for the**

execution of a terror attack which took place on October 1, 2015, during which the late Henkin spouses were shot to death."

[…]

The Petition

2. In the petition before us it was argued that on October 20, 2015, the respondent gave notice of his intention to seize and demolish the apartment in which the petitioner and her family members lived (hereinafter: the **apartment** or the **house**), according to Regulation 119. […]

3. The petition clarified that the apartment in which lived the spouses, Rajeb Ahmed Mohammed 'Aliwa (hereinafter: **Rajeb**) and the petitioner together with their two year old son, was located on the floor above the ground floor in a four story building consisting of two wings, while the two upper floors were undergoing construction which was in its final stages. This case concerns an apartment of about 50 sq. meters, after the floor was divided into two apartments, which consists of a bedroom, living room, kitchen and bathroom.

4. The petition argues that the seizure and demolition order (hereinafter: the **order)** was issued hastily without a real hearing and that in fact, the hearing was conducted for the sake of appearance only, whereas respondent's decision "**was made long ago**". […] In addition, Advocate Habib also argued that the suspicions against Rajeb have not been proved, and that as far as he was concerned "**a situation in which sanction is taken against a residential unit before judgment is entered against the suspect by a court of law, is unacceptable**." Therefore, the petitioners argue that we should wait until a judicial decision in Rajeb's case is made, mainly in view of the fact that we are concerned with "**impingement on property and the right to hold property, not only of the suspect but also of his family members**."

5. Beyond the specific arguments, the petition argues that Regulation 119 runs contrary to international humanitarian law, which constitutes the exclusive normative basis for the exercise of the powers of the military commander in an occupied area. Particularly, reference was made by Adv. Habib to Article 33 of the Fourth Geneva Convention which prohibits collective punishment and reprisals against protected persons and their property, and to Article 50 of the Hague Regulations which also prohibits collective punishment, in addition to different provisions in UN conventions such as the Covenant on Civil and Political Rights and the Covenant on Social and Economic Rights which also prohibit, according to Adv. Habib, collective punitive measures of this sort.

6. It was further argued that the seizure and demolition order did not satisfy the proportionality tests in view of the fact that the demolition of petitioner's apartment for deterrence purposes, ostensibly, did not satisfy the rational connection test between the measure and the objective; the "**less injurious measure**" test; as well as the proportionality test in its narrow sense, namely, "**the harm vis-à-vis the gain test**". It was argued in this context that real discretion was not exercised regarding the need to use house demolition, but that we

were rather concerned with the execution of a decision taken by the political level to use house demolition. The discrimination argument between Palestinian residents and Jewish assailants, such as Ami Popper who massacred innocent workers, whose homes were neither demolished nor sealed, was also raised.

[…]

Respondent's response to the petition

9. In his response the respondent noted that from the beginning of 2013 and until these days we witness a continuous escalation in the security situation and a constant increase of terror activity against the state of Israel, its citizens and residents, both within state territory as well as in the Judea and Samaria area (hereinafter: the **Area),** which is expressed in a general increase in the number of attacks, including popular terror attacks, but also severe attacks, in which firearms are used. […] Against the backdrop of the escalation in the security situation, which peaked in the last several weeks, the respondent is of the opinion that the exercise of the authority according to Regulation 119 against the structure in which lived the perpetrator who was involved in the killing of the late Henkin spouses in front of their children "**is crucial for the purpose of deterring additional potential perpetrators from carrying out additional similar attacks."**

10. […] Based on the open and privileged interrogation materials, the respondent is of the opinion that "**he has administrative evidence at a close to certainty probability level concerning the involvement of the perpetrator (Rajeb) in the execution of the attack, which enable and justify the exercise of the authority according to Regulation 119 against the structure in which he lived**." The apartment in which Rajeb lived is located in the Dahiya neighborhood in Nablus. It was noted that the apartment was located on the middle floor in a three story building and that said floor consisted of an additional apartment.

[…]

12. It was further argued [by the respondent] that the underlying objective of the exercise of the authority according to Regulation 119 was to deter rather than to punish, with the premise being that "**a potential perpetrator who knows that his family members may be harmed should he carry out his evil plan – may consequently be deterred from carrying out the attack planned by him**." In addition, deterrence also applies, sometimes, to the family members, when they know of the perpetrator's plans, so as to cause them to take action to prevent the act, for fear of being harmed. According to the respondent it is not a collective punishment against uninvolved persons "**but rather an incidental impingement only to the deterring purpose of the exercise of the authority**". The respondent also argued that having been aware of the difficult consequences arising from the exercise of Regulation 119, he exercised his authority only in severe cases, for the purpose of creating sufficient and proper deterrence against potential perpetrators, while the exercise of the house demolition sanction was "**a derivative of the circumstances of time and place**". Accordingly, in the years in which terror activity declined, the authority was exercised quite rarely, whereas in periods in which acts of terror became a daily routine, it was necessary to exercise the authority

much more frequently "**for the purpose of deterring and uprooting the affliction of terror, so as to prevent it from expanding and spreading even further**".

[…]

The hearing in the petition

15. […] According to Adv. Habib, there is no support for the argument that house demolition indeed serves the deterrence factor, and as far as he is concerned the opposite is true – since it increase hatred and the desire to take revenge. Adv. Habib added that it constituted collective punishment of innocent persons, which was unlawful according to international law "**and also morally**". […]

16. Respondent's counsel, Adv. Mozes, argued in response that there was no need to wait for the completion of the criminal proceeding in Rajeb's case and that according to the judgments of this court, administrative evidence which satisfied the military commander, was sufficient. As to the scope of Rajeb's involvement, it was argued that he was directly involved in the attack in view of the fact that he was the one who recruited the activists, planned the specific attack and equipped the perpetrators with firearms. […]

In view of the above, we were requested to deny the petition.

Discussion and Decision

17. It should be clarified at the outset that in the context of this petition I do not find any reason to discuss the general issue, which pertains to the mere exercise of the authority to issue seizure and demolition orders according to Regulation 119. Said issue has already been discussed and resolved in a host of former judgments […]

18. Nevertheless, and in view of the fact that the exercise of the authority under Regulation 119 inflicts a severe impingement on the fundamental rights of the inhabitants of the house designated for seizure and demolition, with the presumption being that they are not involved in any unlawful activity, a host of directives and criteria was established by this court in its judgments which qualify and limit the manner by which the discretion of the military commander should be exercised. Firstly it was held that the military commander may use Regulation 119 only when it can serve the purpose of deterrence, since it is the only purpose underlying the exercise of the authority. Hence, the military commander may not exercise the authority as a punitive measure which constitutes collective punishment of uninvolved persons […]. It was further held that in the use of Regulation 119 the military commander should exercise reasonable discretion, act proportionately and in a manner which conforms, to the maximum extent possible, with the spirit of the Basic Law: Human Dignity and Liberty […].

Among the considerations which the military commander should take into account when he intends to use his

authority under Regulation 119, the court specified the following considerations:

a. The severity of the acts that are attributed to such suspect who resided in that structure and the existence of verified proof of the performance thereof by that suspect should be taken into account.

b. The extent of involvement of the remaining residents of the house, in most cases the family members of the terrorist, in his terrorist activity, may be taken into account. Lack of evidence pertaining to awareness and involvement on the part of the relatives does not in and of itself prevent the exercise of the authority, but such factor may affect as aforesaid the scope of respondent's order.

c. A relevant consideration is whether the residence of the suspect perpetrator can be deemed as a residential unit that is separate from the remaining parts of the structure.

d. It should be checked whether the suspect's residential unit can be demolished without harming the remaining parts of the structure or neighboring structures; if it turns out that the same is not possible, then making-do with sealing the relevant unit should be considered.

e. The respondent must take into account the number of persons who may be harmed by the demolition of the structure and who are assumedly innocent of any crime and were also not aware of the suspect's acts. […]

However, case law emphasized that the above criteria were not all-inclusive and that each case should be considered according to its own circumstances, including circumstances of time and place […].

Based on the above specified principles I will therefore turn to examine the specific case before us.

19. We shall firstly commence with the data which indicate of a significant rise in the wave of terror which hits the state, with emphasis on East Jerusalem and the Judea and Samaria Area. Over the course of the last three years there has been an increase in terror activity […]

20. With respect to the administrative evidence in Rajeb's case, it seems that the respondent has established proof that Rajeb was the commander of the cell which executed the attack and that he was ostensibly personally involved in the hideous killing, as a collaborator […] Rajeb gave not less than six statements in the police, in which he admitted to everything which was attributed to him, and in short his words may be summarized as follows: Rajeb belonged to the Hamas organization, and in this framework he obtained an M-16 assault rifle and a 14 handgun, and according to his statement dated October 3, 2015, "**I have been all my life in Hamas and this gun I mentioned belongs to Hamas**". […] Even if we are concerned with evidence that has not yet been examined by the court, the argument of Adv. Habib that it would be appropriate to wait for the completion of the legal proceedings in Rajeb's matter, should be denied. It has already been held long ago that the exercise of the authority according to Regulation 119 "**is not**

conditioned upon the conviction of the perpetrator under criminal law, but it is rather sufficient that administrative evidence was presented to the respondent which satisfied him that the offense was committed by the inhabitant of the house designated for demolition" […]

21. The main issue which concerned us in this petition pertains to the effectiveness of house demolition for deterrence purposes, as there is no dispute that it is the only purpose which can justify the exercise of this severe and offensive power. As was held in **HaMoked** case:

"The principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined… Therefore, I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused" […]

Adv. Mozes, respondent's counsel, argued in the open part that deterrence of potential perpetrators and their family members, who may dissuade the perpetrator from carrying out his evil plan, is examined from time to time by the highest officials of the security forces as well as by the senior political and legal levels, and the conclusion is that under the circumstances of time and place, it is an effective deterring tool, to the extent that the demolition order is executed shortly after the date of the attack. In the privileged part, we were introduced with an up-to-date opinion dated November 9, 2015, in the context of which examples of cases were presented in which attacks were prevented, or in which the perpetrator had serious doubts as to whether to carry out the attack, due to the concern that the family house would be demolished. At the same time, there was quite a significant number of cases in which the family members of the perpetrator, who were aware of the intention to carry out an attack, acted to thwart said intention, due to the fear of a severe response in the form of house demolition. On the other hand, we were also presented with the possibility that house demolition could increase the motivation for the execution of attacks out of a desire to take revenge, but the ultimate conclusion was that the gain of deterrence obtained from exercising the house demolition measure is quite significant and immeasurably exceeds the concern of revenge attacks.

22. After I heard the arguments of the parties and reviewed the privileged material I am satisfied that the respondent met the burden which rests on him to show that the exercise of the authority according to Regulation 119 has a deterring effect, and it seems that things have been seriously considered lately against the backdrop of the acts of terror which have been taking place over the last weeks […]

23. With respect to petitioners' argument that they are discriminated against as compared to Jewish perpetrators, I am of the opinion that this argument was merely made while no sufficient factual infrastructure

was presented for the existence of selective enforcement which did not stem from pertinent considerations. As noted by Justice **Y. Danziger** in **Qawasmeh**:

In view of the fact that Regulation 119 has a deterring rather than a punitive purpose, the mere execution of hideous terror acts by Jews, such as the abduction and murder of the youth Mohammed Abu Khdeir, cannot justify, in and of itself, the application of the regulation against Jews, and there is nothing in respondent's decision alone, not to exercise the regulation against the suspects of this murder, which can point at the existence of selective enforcement. (*Ibid*., paragraph 30).

Therefore, petitioners' argument on this issue should be denied.

[…]

26. Based on the above said, I am of the opinion that the military commander exercised his discretion in connection with the issue of the seizure and demolition order being the subject matter of this petition reasonably and proportionately, and therefore I do not see any reason to intervene in his decision.

Therefore, I will propose to my colleagues to deny the petition.

Justice M. Mazuz

1. Having reviewed the opinions of my colleagues, Justices **N. Hendel** and **U. Shoham**, I cannot join their position and the conclusion they have reached.

[…]

2. […] Among other things, it was argued that Regulation 119 runs contrary to the rules of international humanitarian law, including those prohibiting collective punishment and causing damage to property, as well as contrary to international human rights law. Arguments were also raised concerning the proportionality principles of Israeli constitutional law, including arguments regarding discrimination and arguments concerning the effectiveness of the sanction and its reasonableness. […]

[…]

4. The renewed use of Regulation 119 in the Judea and Samaria Area and East Jerusalem after approximately a decade (2005-2014) during which it had been frozen raises a host of difficult legal questions, which in my view, have not been adequately or recently addressed in the jurisprudence of this court. The court has recently dismissed attempts to raise these issues for renewed, comprehensive discussion […]. The main reason cited was that these issues had already been discussed and resolved in previous judgments. However, a careful examination indicates that deliberation of these issues in previous judgments was not

exhaustive. Furthermore, these were mainly judgments handed down in the 1980s and early 1990s, prior to the constitutional era in Israeli law, and in the time that has elapsed, considerable changes have also occurred in the norms of international law pertaining to this issue.

5. In view of my colleagues' position that this petition should be dismissed, I see no reason to discuss here in detail said general and basic questions concerning the validity of Regulation 119 and the manner in which it is employed, and I shall only make some brief comments in that regard.

6. There is ample literature, Israeli and foreign, which discusses the status of Regulation 119 relative to the provisions of international humanitarian law (the laws of armed conflict), international human rights law and the principles of Israeli administrative and constitutional law. […]

7. The vast majority of the authors, Israeli and foreigner, are of the opinion that Regulation 119 runs contrary to a host of provisions of international humanitarian law and international human rights law, and first and foremost, the prohibition on collective punishment, enshrined in Article 50 of the regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, 1907 (hereinafter: the **Hague Regulations**), and Article 33 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War, 1949 (hereinafter: the **Geneva Convention**). The interpretation given to this prohibition by the ICRC, international tribunals and foreign and Israeli scholars, in the context discussed above as well as in general, demands a substantive examination of whether Regulation 119 complies with said prohibition, and if so – under what conditions.

Another prohibition imposed by international humanitarian law which raises questions and difficulties with respect to the use of Regulation 119 is the prohibition on the seizure and destruction of the property of protected persons: Article 23(g) of the Hague Regulations and Article 53 of the Geneva Convention.

Similar prohibitions also ostensibly derive from different provisions of international human rights law and international criminal law.

8. In addition, the finding, often repeated in case law, that the sanction employed under Regulation 119 is a deterring rather than punitive measure, is not free of doubts. Firstly, Regulation 119 is located in Part XII of the Defence Regulations entitled "Miscellaneous Penal Provisions". Secondly, the fact that a sanction is a deterring measure does not, in and of itself, preclude it from acting as a punitive sanction at the same time. A sanction is classified according to its nature and not necessarily according to its objective, and in any event, deterrence is one of the clear objectives of criminal punishment […].

It should be noted in that regard that in the first judgment in which Regulation 119 was discussed by this court, the sanctions permitted thereunder was defined by the court as "unusual punitive measures whose main purpose is to discourage similar acts" (HCJ 434/79 **Sahweil v. Commander of the Judea and**

Samaria Area, IsrSC 34(1) 464, paragraph 3 (1979), hereinafter: **Sahweil**, and see also HCJ 1056/89 **Hamed Ahmad a-Sheikh v. Minister of Defense** (March 27, 1990), where Regulation 119 was defined as "a deterring punitive measure"). To the extent that it is indeed a punitive sanction, even if its purpose is deterrence, then, in addition to the significance this fact has on the issue of collective punishment, it has additional ramifications, including on the procedural aspect of the process by which a decision is made, the timing of the decision and the level of evidence required for it.

9. Using the authority in East Jerusalem area also raises the question of whether residents of this area are "protected persons" in terms of international humanitarian law, and as such come under the provisions of the Hague Convention and the Geneva Convention. Even if said conventions do not apply in East Jerusalem, there is no dispute as to the applicability in this area of human rights conventions, to which Israel has been a party since the early 1990's, primarily the Covenant on Civil and Political Rights from 1966 (ICCPR). These covenants include a host of provisions relevant to the case at hand. It should be noted that the committees overseeing said covenants have repeatedly criticized the State of Israel for its house demolition policy.[…]

[…]

10. Though it has been held in the past that even if Regulation 119 cannot be reconciled with the provisions of international customary law, it is still valid as an internal statutory provision which trumps a provision of international law […]. However, this finding is not free from doubt either, for a host of reasons which this is not the place to specify in detail, particularly given that the matter are concerns a territory held under belligerent occupation.

[…]

13. An examination of Regulation 119 according to the rules of Israeli administrative and constitutional law as aforesaid, may require a determination of limitations and qualifications on its use, as well as various distinctions regarding what may and may not be permitted in this matter, including:

1. A distinction between a house which is the home and property of the perpetrator, and a house in which he is merely an "incidental resident", such as the parents' home where he lives, sometimes only partially, such as a student who stays in the house only on holidays etc. […];
2. A distinction between cases in which the house was in fact used for the perpetrator's terrorist activities (such as for storage of ammunition, or for meetings with his accomplices in the terrorist activity), and cases in which the house was used by the perpetrator as his residence only […];
3. A distinction between cases in which the family members of the perpetrator, the occupants of the house designated for demolition or sealing, were to a certain extent parties to the perpetrator's actions, and cases in which the family members were completely unaware of the perpetrator's intentions or even expressed their disagreement with his actions. […]
4. Restrictions on the timing for issuance of the order and its execution date […];
5. Circumstances which may justify requiring a criminal conviction as a condition for issuing an order

pursuant to Regulation 119, rather than relying on administrative evidence alone, as opposed to cases in which the above may be unnecessary (such as an uncontested confession) or impossible (such as when the perpetrator was killed or escaped), and the what evidence is required in such cases;

[…]

14. These distinctions and limitations (not an exhaustive list) may have, as aforesaid, ramifications on the legitimacy of using Regulation 119 *per se*, as well as on the manner in which it is employed and the level of the sanction imposed.

15. In view of all of the above I cannot join my colleagues in their opinion regarding the dismissal of this petition. Had my opinion been heard we would have requested the respondent to provide a detailed response to all of the above questions before making a decision. […]

Discussion

I. Classification of the situation and applicable law

1. *(Document B, Justice U. Shoham, paras. 1 and 5 ; Justice M. Mazuz, paras. 2, 6, 7 and 9))* Based on the reasoning of the judges and the provisions they invoked, what is your deduction concerning the classification of the situation in Nablus ? Who are the parties? What is the applicable law? (GC I-IV, Art. 2 *)*

2. *(Document A)* Why should an Israeli court apply a British regulation from 1945? By applying British legislation does the Court admit the status of Nablus as occupied territory requiring application of the Geneva Conventions? (HR, Arts 23(h) and 43; GC I-IV, common Art. 2(2); GC IV, Art. 6; P I, Arts. 1(3) and 3(b)); GC IV Art. 64)

3. (*Document B, Justice U. Shoham, para. 20;)* What is the status of Rajeb Aliwa under IHL? Do his links with Hamas in any way affect this status? *(* GC IV, Art. 4)

II. Protection of private property

*4. (Document A) "*Regulation 119(1)" permits destruction of private property; is this consistent with the Geneva Conventions? (HR, Art. 53; GC IV, Arts. 53 and 147; CIHL, Rules 50 and 51)

5. Is the seizure and demolition order which was issued against Rajeb's home covered by the law of military occupation, by the law on the conduct of hostilities, or both? In each case, when is the demolition of a house justified? (GC IV, Art. 53; P I, Art. 52; CIHL, Rules 7-10)

6. *(Document B, Justice U. Shoham, paras. 6, 9, 12, 18 and 21)* Given that he organized and planned the murders of the Henkin spouses, could the destruction of Rajeb's home be justified by military necessity? Was that the justification cited for the demolition order in the case?

III. Collective Punishment

7. (*Document B, Justice U. Shoham, paras. 2-5*) Had Rajeb been prosecuted by a tribunal for the actions of which he was accused? Was he the owner of the apartment destroyed? If he was not the owner, would this have changed the decision? The evaluation under IHL? Which other persons would have been affected by the demolition order? Were any of them complicit in the commission of the offences he had planned? Were any of them prosecuted?

8. (*Document B, Justice U. Shoham, paras. 9 and 12*) For what reasons does the IDF commander invoke Regulation 119 to demolish Rajeb's apartment building? Does Justice Shoham agree *(paras. 17 – 23)*?
9. *(Document B, Justice U. Shoham, paras. 12, 18, 20, 21).* What are collective punishments under IHL? How do the IDF commander and Justice Shoham suggest that house demolitions and sealings under Regulation 119 differ from collective punishments? What is your opinion? (HR, Art. 50; GC IV, Art. 33; CIHL, Rule 103)
10. (*Document B, Justice M. Mazuz*). On what grounds does Justice Mazuz disagree with his colleagues? What would you say is his main counter-argument?
11. (*Document B, Justice M. Mazuz, para. 13*). How far do you think the limitations suggested by Justice Mazuz would help to prevent the application of Regulation 119 from resulting in collective punishment? Which limitations would be the most useful? Why?
12. If application of "Regulation 119(1)" contradicts IHL rules on destruction of property and collective punishments, must the Regulation, if constituting local law in force prior to occupation, be applied? May it be applied? (HR, Art. 43; GC IV, Art. 64)

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