

**INTERNATIONAL LAW:  
THE ILLEGALITY OF THE WAR ON AFGHANISTAN**  
by Gail Davidson, lawyer

“We the peoples of the United Nations determined to save succeeding generations from the scourge of war...”

The war against Afghanistan is illegal. The US, assisted by Canada and Britain is bombing Afghanistan and will perhaps use additional force with ground troops for the stated purpose of capturing or killing Osama bin Laden and others associated with his organization and of toppling the Taliban government.

No international or national law or policy legalizes these attacks on Afghanistan. No resolutions of the United Nations’ Security Council or the North Atlantic Treaty Organization could provide a legal justification for these attacks and none do.

The war against Afghanistan violates international law including the Charter of the United Nations (The Charter), the Geneva Conventions and the relevant provisions of the eleven International agreements dealing with the suppression and control of terrorism. The attacks by bombing and the use of other military force are war crimes pursuant to the Rome Statute.

**THE CHARTER OF THE UNITED NATIONS (THE CHARTER)**

The Charter prohibits the use and the threatened use of any force in their international relations. The Charter specifically prohibits the use of force to topple foreign governments. It goes without saying that all national and international laws forbid the killing of non-combatants (i.e. arguably all Afghans) the bombing and other use of force in Afghanistan will inevitably kill and injure large numbers of non-combatants. The October 11 edition of the Vancouver Sun reports 200 Afghanistan people killed in US bombing raids including 4 United Nations employees. October 13, 2001 reports indicate a residential area hit by a missile. Mass killing of non-combatants is considered by the world community the most egregious of crimes.

The Preamble to the Rome Statute, in reference to such crimes states, “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock that conscience of humanity.”

The United States, United Kingdom Canada and Afghanistan are all Member States of the United Nations. The Charter of the United Nations imposes on members the binding obligation to settle disputes in a manner that ensures the maintenance of peace and justice. Article 2 of the Charter prohibits the use or threatened use of force against another state. [See Box I] The Article 2 prohibition applies to all force and is a rule of customary international law. As such the Article 2 prohibition is universally binding

even on the few states not members of the United Nations. (Nicaragua 2. U.S., ICJ Reports, 1986, pp. 98-101)

The Article 2 prohibition has been reiterated in numerous Resolutions of the UN General Assembly. For example on 17 December 1984 the UN General Assembly passed a resolution affirming the inadmissibility of the policy of State terrorism including actions by States aimed at undermining the socio-political systems in other sovereign states. This resolution specifically prohibits the use of military action and contains the demand:

“...that all States take no actions aimed at military intervention and occupation, forcible change in or undermining of the socio-political system of States, destabilization and overthrow of the their Governments and, in particular, initiate no military action to that end under any pretext whatsoever and cease forthwith any such action already in progress.”

The fact that the attacks on Afghanistan are in response to horrific crimes believed to have been committed by people believed to be hiding in Afghanistan does not provide any legal justification whatsoever. As observed in “A Modern Introduction to International Law, 7th edition”, page 261, “The Charter is based on the belief that international law should not be enforced at the expense of international peace.” Neither can international law be enforced by the commission of more crimes.

<p>Box I - CHARTER OF THE UNITED NATIONS: The Preamble to the Charter states the purpose of the United Nations as “to save succeeding generations from the scourge of war”. Article 2 prohibits the use of force (3) &amp;(4) read: ARTICLE 2. 3 All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. ARTICLE 2. 4 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.</p>
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## **SECURITY COUNCIL RESOLUTIONS**

The United Nations Security Council, (Security Council), the body with primary responsibility for the maintenance of international peace and security, passed two resolutions regarding the September 11 attacks: resolution 1268 on 12 September 2001 and Resolution 1373 on 28 September 2001. Neither resolution authorizes the use of force.

Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting on 28 September 2001 (incorporating the earlier resolution 12 September) affirms the responsibility of Member States to take only those measures that are:

”in compliance with national and international law including international human rights standards’ to prevent and suppress terrorist attacks and to take action against the perpetrators of such acts.

Security Council resolution 1373 specifically restricts member states to actions that are authorized by law and in accordance with the Charter of the United Nations.

Canada is already largely in compliance with the directives contained in Resolution 1373 and has promulgated regulations under Canada’s United Nations Act to implement provision of the resolution, including prohibiting financing and fundraising and for freezing the assets of terrorist organizations.

Article 51 of the Charter defines Member States’ right of self-defence. This article neither authorizes bombing and armed force as self-defence nor bestows legal authority for the US to wage war. Article 51 gives Member States the narrow power to defend themselves against a continuing armed assault until such time as the Security Council intervenes to maintain and restore peace and security. Article 51 of the Charter of the United Nations (The Charter) does not create any right to make retaliatory attacks or to engage in the use of force to repel anticipated armed attacks. The right to self-defense in Article 51 is restricted to actions that are necessary to repel and proportionate to an ongoing armed attack and only exists until the Security Council takes measures to restore peace and security. The right to self defense is restricted to self-defense action and is further restricted to those actions necessary to maintain “international peace and security” and must be carried out in accordance with The Charter.

The entire Charter is based on the premise Member States must maintain international peace, security and justice and may not use force to settle international disputes or to remove foreign governments. Article 51 does not displace the obligation imposed on States by Article 2. [See Box II]

<p>Box II - CHARTER OF THE UNITED NATIONS RIGHT TO SELF DEFENCE ARTICLE 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”</p>
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## **NORTH ATLANTIC TREATY ORGANIZATION RESOLUTIONS**

Media coverage also infers that some legal authority for the use of armed force against Afghanistan or the Taliban was created by the resolutions of the North Atlantic Treaty Organization (NATO). That is entirely false.

NATO, a regional organization with the goal of restoring and maintaining the security of the North Atlantic area, resolved on September 12 2001 that the September 11 attacks were covered by Article 5 of the Washington Treaty and therefore all NATO members will consider the September 11 attacks as an armed attack against all NATO members. [See Box III]

Box III - ARTICLE 5 OF THE WASHINGTON TREATY: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measure taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to respect and maintain international peace and security.”

Although this resolution enabled NATO countries to act collectively, countries were restricted to action determined by the North Atlantic Council. The September 12 resolution in clear language barred any action until further decision by the Council. “No collective action will be taken by NATO until further consultations are held and further decisions are made by the North Atlantic Council.”

On October 5 2001 NATO at the request of the United States agreed to take eight measures collectively and individually including the provision of ‘blanket over flight clearances for US. aircraft and to provide access to ports and airfields to US. NATO thereby agreed to facilitate actions taken by the US outside the restrictions of the NATO decision-making process. [Box IV]

The United States has rejected this collective approach and has put together its own group of ‘allies’ leaving the US in control of all aspects of the current bombing of Afghanistan and of any future war actions including bombings of additional countries. Lloyd Axworthy correctly described the ‘coalition’ of which Canada is now an active member as a “hub-and-spoke arrangement, where direction comes from the centre with little input from the outside members.” (The Globe and Mail Monday October 8 2001)

Box IV - NATO RESOLUTION 5 OCTOBER 2001: The October 5 2001 NATO Allies agreed to: (1) Enhance intelligence sharing and cooperation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions be taken against it; (2) Provide, individually or collectively, as appropriate and according to their capabilities, assistance to Allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism; (3) Take necessary measures to provide increased security for facilities of the United States and other Allies on their territory; (4) Backfill selected Allied assets in NATO’s

area of responsibility that are required to directly support operations against terrorism; (5) Provide blanket over flight clearances for the United States and other Allies' aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operation against terrorism; (6) Provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including for refueling, in accordance with national procedures; (7) That the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; and (8) That the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning force to support operations against terrorism.

Article 52 of the Charter restricts regional agencies, including NATO, to activities consistent with the purposes and principles of the United Nations. The NATO resolutions cannot override the provision of the UN Charter.

Yet without authorization from the Security Council the US, UK and Canada are bombing Afghanistan, and US President Bush threatens to bomb other countries. These threats and the threats to “starve” the Taliban are themselves crimes pursuant to the provision of to the Geneva Convention Protocol 1. (See Box V)

### **GENEVA CONVENTIONS PROTOCOL 1 - RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS**

The Geneva Convention Protocol 1 is an absolute prohibition against attacks and threats of attacks on civilians. [See Box IV] Protocol 1 also prohibits indiscriminate attacks. Indiscriminate attacks are defined as including: attacks by any method or means that will either strike military and civilians objects without distinction or cause death and injury to civilians disproportionate to the “concrete and direct military advantage anticipated.” Reprisals against civilians, starvation as a method of warfare and attacking or destroying objects indispensable to the survival of the civilian population, such as food, crops, livestock, drinking water and irrigation systems are all strictly and absolutely prohibited.

Box V - THE GENEVA CONVENTION PROTOCOL 1: (The Protocol Additional To the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts adopted 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts entry into force 7 December 1979) begins with an affirmation of the obligation to refrain from the use of force. The Preamble to Protocol 1 states; “Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.” Article 51 Protection of the civilian population: (1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operation; (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the

primary purpose of which is to spread terror among the civilian population are prohibited; (3) Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities; (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are: ... (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction; (5) Among others, the following types of attacks are to be considered indiscriminate; (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (6) Attacks against the civilian population or civilians by way of reprisals are prohibited. Article 54 Protection of Objects indispensable to the survival of the civilian population 1. Starvation of civilians as a method of warfare is prohibited.

## **MULTI-LATERAL AGREEMENTS AGAINST TERRORISM**

Although the international community has not defined terrorism there are 11 international legal agreements that enable the international community to take legal actions to suppress terrorism and to prosecute those responsible for acts of terrorism. [See Box VI]

The European Justice Ministers at their recent conference (Moscow, 4-5 October 2001) called on all European member and observer states to become Parties to the international treaties on terrorism in particular the 1999 International Convention for the Suppression of the Financing of Terrorism.

The September 11 attacks are illegal under these conventions. So is the war against Afghanistan. Some examples of the illegality of the attacks against Afghanistan under two of these Conventions follow.

The Convention to Suppress Terrorist Bombings (58 signatories, 29 parties) has been signed and ratified by the UK. Canada and the US have signed 12 January 1998 and have not ratified. The Convention to Suppress Terrorist Bombings defines in Article 24 a terrorist bomber as a person who unlawfully and intentionally delivers, places, discharges or detonates a bomb, explosive, lethal or incendiary device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or the destruction of such a place resulting in major economic loss.

This definition would appear to include the person(s) bombing Afghanistan. The US led attacks on Afghanistan highlight one of the critical reasons for defining terrorism; to preclude the use of war to combat terrorism.

The International Convention for the Suppression of the Financing of Terrorism (25 February 2000) by Article 2 makes it an offence to directly or indirectly provide funds to be used to carry out, “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

**Box VI - MULTI-LATERAL AGREEMENTS ON TERRORISM:**

- (1) CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT SIGNED AT TOKYO ON 14 SEPTEMBER 1963 - Entry into force: Convention entered into force on 4 December 1969 Status: 41 signatories; 172 contracting States;
- (2) CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFTSIGNED AT THE HAGUE ON 16 DECEMBER 1970 - Entry into force: The Convention entered into force on 14 October 1971. Status: 77 signatories; 174 contracting States;
- (3) CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION SIGNED AT MONTREAL ON 23 SEPTEMBER 1971 - Entry into force: The Convention entered into force on 26 January 1973.Status: 60 signatories; 175 contracting States;
- (4) PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION, SUPPLEMENTARY TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION, SIGNED AT MONTREAL ON 24 FEBRUARY 1988 - Entry into force: The Protocol entered into force on 6 August 1989. Status: 69 signatories; 107 contracting States;
- (5) CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL - Entry into force: 8 February 1987 Parties: 69 Signatories: 45;
- (6) CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988 Adoption: 10 March 1988 - Entry into force: 1 March 1992;
- (7) CONVENTION ON THE MARKING OF PLASTIC EXPLOSIVES FOR THE PURPOSE OF DETECTION SIGNED MONTREAL 1 MARCH 1991 - Entry into force: 21 June 1998 Status: 51 signatories, 68 contracting States;
- (8) INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS New York, 15 December 1997 - Entry into force: 23 May 2001, in accordance with article 22(1). Registration: 23 May 2001, No. 37517.Status: Signatories: 58, Parties: 29;
- (9) INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES New York, 17 December 1979 - Entry into force: 3 June 1983, in accordance with article 18(1). Registration: 3 June 1983, No. 21931. Status: Signatories: 39, Parties: 96;
- (10) CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS, INCLUDING DIPLOMATIC AGENTS New York, 14 December 1973 - Entry into force: 20

February 1977, in accordance with article 17 (1). Registration: 20 February 1977, No. 15410. Status: Signatories: 25, Parties: 107;  
(11) INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM New York, 9 December 1999 - Not yet in force: (see article 26). Status: Signatories: 57, Parties

## **THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT**

The September 11 attacks are crimes pursuant to national and international law and many member states have called for these crimes of terrorism to be brought before the International Criminal Court (ICC). This is not possible because the ICC does not yet exist. It may not be possible to prosecute these crimes through the ICC when it comes into operations because Article 11 of the Rome Statute precludes prosecutions for offences that took place prior to the statute coming into operation. However some legal commentators argue that Article 11 is invalid because it is contrary to the General Assembly resolution #2391 of 26 November 1968 that passed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

The Rome Statute (The ICC Treaty) is a multi-lateral treaty approved by 120 countries on July 17, 1998 and is the constituent statute for the ICC. (120 voted for, 7 against and 20 abstentions. The US and China were amongst the 7 countries voting against acceptance of the Rome Statute on 17 [sic] July 1998)

The International Criminal Court will begin operation when 60 Countries ratify the Rome Statute. As of October 12 2001 43 countries have ratified and 139 countries have signed the Rome Statute. The US despite significant involvement in the drafting of the Rome Statute is the only Western democracy now opposed. The US Congress recently re-introduced the bill that will ban any kind of cooperation and military assistance with Member States of the UN that have ratified the Rome Statute and obstruct the participation of the US in UN peacekeeping operations. The same bill will authorize the President of the US to use “all the necessary measures” to liberate any US citizens detained by the ICC.

This is in stark contrast to the past US record of support to international criminal courts. The US spearheaded the Nuremberg and Tokyo Tribunals and the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The Rome Statute defines three categories of international crimes committed during violent conflicts between and within states: war crimes, crimes against humanity and genocide. The Rome Statute also creates the International Criminal Court to be a, “permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this [Rome] statute, and shall be complementary to national criminal jurisdictions.” (Article 1)



The International Criminal Court will have jurisdiction to prosecute these crimes when the state(s) having jurisdiction are unable or unwilling to do so. Crimes of aggression will eventually be within the jurisdiction of the International Criminal Court.

The US still vigorously opposes the creation of an International Criminal Court. However, the European community vigorously supports the creation of an International Criminal Court with jurisdiction over a broader range of crimes. On 26 September 2001 the Council of Europe parliamentary assembly voted in favour of expanding the mandate of the International Criminal Court to allow it to prosecute perpetrators of terrorist acts. By a nearly unanimous vote (148 to 1 abstention) urged European governments to impose sanctions on countries providing safe haven to terrorists.

The war against Afghanistan also violates the provisions of the Rome Statute war crimes provisions Article 8. [See Box VII]

Box VII - ROME STATUTE article 8.2.b.iv “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;” and 8.2.b.v “Attacking or bombarding, by whatever means, town, villages, dwellings or buildings which are undefended and which are not military objectives;” and 8.2.b.xxv “Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;”

## **BOMBING OR FAIR TRIALS BY FAIR TRIBUNALS**

The September 11 attacks in New York were crimes both nationally and internationally. Murder, highjacking, destruction of property are crimes under the national laws of the many countries whose nationals were killed and are crimes pursuant to a wide range of international laws.

The bombing of Afghanistan and the resulting deaths, injuries, starvation and displacement of Afghanistan people and the destruction of property including the destruction of necessary infrastructure is illegal. The use of force to topple the Taliban government is also illegal.

While the rhetoric justifying war raids on Afghanistan (and possibly other countries) suggests there are no laws or law enforcement mechanisms that can respond to the September 11 attacks. That is not true and flies in the face of both international law and its underlying policies.

When the US entered Germany in 1945, it was not suggested that millions of German civilians be stripped, gassed and bulldozed into mass graves in retaliation for the holocaust. The crimes that had been committed were so enormous that to even think of

retaliation in like kind was unimaginably barbaric. Instead the Nuremberg trials were held, setting up the rule of law as the most powerful opponent of rule by military force.

The world community has, through the United Nations and regional agencies worked to “save succeeding generations from the scourge of war” by

- Prohibiting the use of force as a means of settling international disputes (The Charter); and,
- Developing by global consensus, minimum standards of human rights and international laws that criminalize the crimes most intolerable to the world community including: crimes against humanity, war crimes and crimes of genocide.

There have been many reminders during the past 50 years of the urgent need to develop laws and to eschew violence as a response to crime. A reminder that the use of force (retaliatory bombing in the following example) contributes to the escalation and not the deterrence of terrorism occurred subsequent to April 1986 when two US servicemen were killed when a bomb exploded in a Berlin nightclub. The US, believing Libyans to be responsible, retaliated by bombing Libya killing 36 civilians including the year old daughter of Libyan leader Moamar Khadafy. Twenty months later, in December 1988 Pan Am flight 103 exploded over Lockerbie Scotland killing 270 people. Three Libyans were subsequently tried by a Scottish Court and located in the Netherlands. Two of the accused were convicted and one was acquitted.

Mechanisms for global enforcement of existing national and international laws exist as evidenced in part by the above mentioned Resolutions directing all members of the United Nations, in the case of the Security Council resolutions, and all NATO members, in the case of the NATO resolutions, to cooperate in the exchange of information and resources to enforce existing laws.

Member states to the UN are obliged to participate in all aspects of a global investigation of the September 11 attacks that would lead to a process of indictment, extradition, prosecution, trial and punishment of those guilty. The cooperative directives from the Security Council also relate to effecting the coordination of measures to prevent future terrorist attacks.

Prosecutions of the perpetrators of the September 11 attacks could take place in the national courts of either the US or a number of other affected states. Alternately, the Security Council can create an ad hoc International Criminal Tribunal on the model of the existing International Criminal Tribunal for the former Yugoslavia to conduct the global investigation of the September 11 attacks and the resulting prosecutions and trials.

The Security Council has the power to order the creation of an international military force to carry out the requisite investigations.

Canadians must insist that all governments adhere to the restraints of law. Citizens must act to ensure that the people of Afghanistan have the security and rights to life provided

for by international law and enjoyed by Canadians. Canadians must act to ensure that the people in Afghanistan are afforded legal protections against death injury, starvations, displacement and deprivation of the necessities of life.

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"Fascism should rightly be called corporatism as it is a merge of state and corporate power"...Benito Mussolini

"The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled" Supreme Court of Canada A.G. of Nova Scotia and A.G. of Canada, S.C.R. 1951 pp 32

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