The establishment of Specialist Chambers and Specialist Prosecutor's Office

How did the Kosovo Specialist Chambers and Specialist Prosecutor's Office become established?

In the framework of the project of “Monitoring the Work and court sessions of the Kosovo Specialist Chambers and Specialist Prosecutor’s Office and Inclusion of Youth in Justice Sector”, the Humanitarian Law Centre Kosovo (HLCK) has compiled an analysis that elaborates on the inception of Specialist Chambers & Specialist Prosecutor’s Office.

The Kosovo Specialist Chambers (KSC) represent a court within the Kosovo justice system, and together with the Specialist Prosecutor’s Office (SPO) are a separate and temporary mechanism within the system. The mechanism has a specific jurisdiction over crimes against humanity and war crimes, suspected to have commenced or been committed in Kosovo from 1 January 1998 to 31 December 2000. In addition to the above crimes, the Chambers have jurisdiction over other crimes stipulated in the Criminal Code of the Republic of Kosovo (2012), when they relate to criminal offences against administration of justice and those against official proceedings.¹

Prosecution of war crimes in Kosovo

In charge of investigating and prosecuting war crimes and crimes against humanity in Kosovo were: International Criminal Tribunal for the former Yugoslavia (ICTY), which ceased to exist in December 2017; Kosovo local courts including UNMIK (2000-2008) and EULEX (2009-2018) missions.

Since June 2014, the Special Prosecution of the Republic of Kosovo (SPRK) has gradually started to receive war crimes cases from the EULEX Mission, and the War Crimes Department was established within the SPRK in May 2015.

With the end of the executive mandate of EULEX, as of June 2018, the SPRK has an executive mandate over investigation of war crimes in Kosovo. The Special Department within the Basic Court in Pristina is in charge of handling indictments filed by the SPRK.

Publication of Carla Del Ponte's book

The first steps towards setting up such a mechanism were made in April 2008, when Carla Del Ponte, the former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), published a memoir of her experiences at the tribunal, which was co-authored by Chuck Sudetic. The book was first published in Italian as 'La caccia - Io e i criminali di guerra', and later in English as "The Hunt: Me and the War Criminals"². The book was published almost ten years after the end of the 1998-1999 armed conflict in Kosovo and contained allegations that

¹ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 2015, Article 15 (2), other Crimes under Kosovo Law, p. 9. https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=11036
² C.Del Ponte and Ch.Sudetic, The Hunt: Me and the War Criminals, Italia, 2008
triggered many reactions. In her book, Carla Del Ponte claimed that human organs had been taken from a certain number of prisoners and trafficked during and after the period of the armed conflict in Kosovo and that members of Kosovo Liberation Army (KLA) were suspected of the commission of the crimes.\textsuperscript{3}

In the same year when her book was published, namely on 15 April 2008, Konstantin Kosachev, a Russian representative at the Parliamentary Assembly of the Council of Europe (PACE)\textsuperscript{4}, filed a motion for a resolution with the Committee on Legal Affairs and Human Rights. The motion was not discussed at the Assembly at first, but was signed by the representatives of several countries, such as: Russia, Serbia, Belgium, Hungary, Switzerland, United Kingdom, Poland, Netherlands, Sweden, Ukraine, Portugal, Cyprus, Finland, Azerbaijan and Georgia.\textsuperscript{5} The motion contained claims about the need for the Assembly to pay attention to facts of inhumane treatment of people and illicit trafficking in human organs in Kosovo, as described in the book of Carla Del Ponte. “The members of the Assembly are convinced that such monstrous crimes deserve the strongest condemnation on behalf of the European peoples, gathered in the Council of Europe in the common goal to “protect and implementation of ideals and principles which are their common values”,\textsuperscript{6} - the motion signed by the MPs reads.

\textbf{Report by Dick Marty}

Following the motion, the PACE Committee on Legal Affairs and Human Rights decided to send its representative to Kosovo, namely the Special Rapporteur Dick Marty, who initially served as Switzerland's deputy representative at the Parliamentary Assembly from 1998 to 2003, and then as a regular representative from 2003 to 2012.\textsuperscript{7} Marty belonged to the 'Alliance of Liberals and Democrats for Europe' party. He was commissioned in August 2008 to see closely if there were allegations of human rights violations allegedly committed during and after the armed conflict in Kosovo. It did not mean that a criminal investigation would be conducted, as they did not have an authorisation for such an inquiry but, nevertheless, the PACE representative would conduct a close observation. Dick Marty's mission was not so well received in Kosovo. It was tagged along by much controversy from the very beginning, given that Marty had criticized the quick recognition of Kosovo's independence by Switzerland, before taking on his mission in Kosovo.\textsuperscript{8}

The observations were completed in 2010 and the report compiled by Dick Marty was entitled "Inhumane treatment of persons and illicit trafficking in human organs in Kosovo". Based on observations of the Assembly representative, numerous indications had confirmed that some Serbians and some Albanian Kosovars were held prisoners in secret places of detention under KLA

\begin{itemize}
\item \textsuperscript{3} Ib\textsuperscript{id}.
\item \textsuperscript{4} The Council of Europe is an international organization promoting human rights, democracy and rule of law. It is made of 47 member states and has two bodies: The Parliamentary Assembly (PACE) and the Committee of Ministers.
\item \textsuperscript{6} Ibid, par. 3.
\item \textsuperscript{7} PACE, Member of the Council of States Radical-démocratique, https://pace.coe.int/en/members/4023/marty?
\item \textsuperscript{8} A.Raxhimi, Balkan Transitional Justice, Dick Marty, Controversial Investigator, 16 December 2010, https://balkaninsight.com/2010/12/16/dick-marty-controversial-investigator/
\end{itemize}
control in northern Albania and were subjected to inhuman and degrading treatment, before ultimately disappearing. From the viewpoint of international humanitarian law, what concerned the Parliamentary Assembly the most was the issue of missing persons. These places of detention were regions in the territory of the Republic of Albania, which included Kukës, Burrel, Rripe, Cahan, Bicaj, Durrës and Fushë Krujë. According to his report, Dick Marty considered that the leaders of the Drenica Group bore the greatest responsibility for running the ad-hoc network of KLA detention centres in the territory of Albania and for determining the fate of the detainees that were held in those premises. Special mention is made of the “House of K.”, also known as the “Yellow House”, which was located in Rripe and was subject, at the same time, of an earlier visit by UNMIK/ICTY forensic experts in 2004, having been identified by investigative journalists. Dick Marty's report, among other things, contained findings that claimed that, during the period immediately after the end of the armed conflict, before international forces had really been able to take control of the region and re-establish a semblance of law and order, organs were removed from some prisoners at a clinic in Albanian territory, near Fushë-Krujë, to be taken abroad for transplantation.

The report was first submitted to the Committee on Legal Affairs and Human Rights on 7 January 2011, and was then discussed at the Parliamentary Assembly on 25 January 2011, when Resolution 1782 (2011) was adopted, endorsing the PACE report, at the fourth voting session, where 166 deputies voted in favour of the resolution, 8 were against, and 14 abstained. The MPs who voted against the resolution were mainly from Albania, Turkey, Great Britain and one MP from Georgia.

Like Dick Marty's mission, his report was not well received by the people and government of Kosovo. The Prime Minister of Kosovo at that time, Hashim Thaçi, in a statement said that he felt heavily insulted by the baseless charges made against him, and above all against his country and his people. Thaçi considered the PACE report an "ill-intentioned propaganda". His statement was also supported by the President of Albania at that time, Bamir Topi, who said that the report did not contain any "plausible evidence".

Following the adoption of the report, through Resolution 1782 (2011), PACE considered it was facing an important matter that it should not ignore. On that occasion, the Parliamentary Assembly invited all the the member states of the European Union and the other contributing states to allocate to EULEX the resources it needed to deal with the extraordinarily complex and important role entrusted to it. EULEX is a European Union rule of law mission in Kosovo, deployed after

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10 Ibid.
11 Ibid.
14 Ibid.
UNMIK. In addition to EULEX's duty to initiate investigations, this mission also committed to establish witness protection programs.\textsuperscript{15}

Special Investigation Task Force

EULEX took the responsibility for the case and set up a Special Investigative Task Force (SITF), where the elected prosecutors would deal with the issue exclusively. This Task Force was stationed in Brussels and consisted of selected EULEX staff, and, due to the confidentiality and type of investigations, the SITF was made of international staff only. In parallel with the initiation of investigation proceedings, EULEX boosted its witness security program.\textsuperscript{16}

SITF was funded by the European Union and commissioned to investigate individuals for the crimes alleged in Dick Marty's report and, if necessary, prosecute them for the crimes alleged therein. Investigations began in 2011, and the first SITF Chief Prosecutor was Clint Williamson, the former U.S. Ambassador for war crime cases. Williamson served in the SITF from October 2011 to August 2014, and David Schwendiman took over in May 2015.

In a press release issued in July 2014 in Brussels, SITF Chief Prosecutor Williamson stated that the investigation had progressed to the point that he was prepared to announce the findings. He maintained that the evidence largely matched the 2011 report of the Council of Europe. The Chief Prosecutor stated that, the SITF had found compelling evidence against former senior Kosovo Liberation Army (KLA) officers, which alleged violations of international humanitarian law, including crimes against humanity and war crimes. It was also pointed out that the victims of these alleged offences were mainly from the minority population in Kosovo, such as Serbs, Roma and others, but Kosovo Albanians too. The statement further stressed that certain former KLA senior leaders should be held accountable for the crimes committed.\textsuperscript{17} According to him, the SITF could file an indictment against these individuals only when an appropriate judicial mechanism would be in place. This meant that such a mechanism would provide for an independent, impartial and transparent trial, which would provide security for witnesses.\textsuperscript{18}

Exchange of letters

On 4 September 2012, the then President of Kosovo, Atifete Jahjaga, and the former High Representative of the Council of the European Union exchanged letters regarding the mandate of the EULEX Mission in Kosovo. In her letter to the High Representative, the President of Kosovo confirmed that the SITF would continue its work until Kosovo would be notified by the Council of the European Union of the conclusion of investigations or proceedings resulting therefrom.

\textsuperscript{18} Ibid.
On 7 September 2012, by Law No. 04/L-148, the Assembly of Kosovo ratified the Exchange of Letters mentioned above as an international agreement between Kosovo and the EU.

On 14 April 2014, the President of the Republic of Kosovo and the High Representative exchanged the letters. In her letter to the High Representative, the President of Kosovo stated that if SITF would result in an indictment and court proceedings, an appropriate environment should be provided, namely a specialist court within Kosovo judicial system, as well as a specialist prosecutor's office, which would be relocated to a third country, based on an agreement with the host country. Among other things, she stated that the work and the mandate delegated to ensure the operation of abovementioned chambers and special prosecutor's office would continue until such time as Kosovo would be notified by the Council of the European Union that investigations have been concluded or that chambers’ proceedings resulting therefrom would have been concluded.¹⁹

Baroness Catherine Ashton responded to the letter, stating, among other things, that the SITF and any legal proceedings arising therefrom would continue until the Council of the European Union would notify Kosovo that the relevant investigations and proceedings would have been concluded. Thus, according to this exchange of instruments, the temporal mandate of the Specialist Chambers and Specialist Prosecutor's Office do not have a limited mandate, and their mandate ends when Kosovo is notified that relevant proceedings have been concluded.

Later on, on 23 April 23 of the same year, by Law No. 04/L-274, the Assembly of the Republic Kosovo ratified the Exchange of Letters mentioned above as an international agreement between Kosovo and the EU.

The exchange of letters between President Jahjaga and the EU High Representative for Foreign Affairs and Security Policy, among other things, stressed Kosovo’s readiness to establish a special mechanism in case the SITF would result in an indictment and court proceedings. However, that became official on 3 August 2015, when the Kosovo Parliament adopted the 24th amendment to the Constitution of the Republic of Kosovo and the Law on Specialist Chambers and Specialist Prosecutor’s Office was voted. SITF investigations lasted until September 2016, when the SITF staff and mandate were transferred to the Specialist Prosecutor’s Office.

As for the headquarters, Netherlands i.e. the city of The Hague, was designated as the host country. This city is known to be a hub for international courts, and this is probably owing to the great contribution that the Dutch state has provided to the public international law, political neutrality, or even the readiness and experience of the Dutch government to assume such responsibilities. The headquarters was confirmed in an interim agreement between the state of Kosovo and the state of Netherlands on 26 January 2016²⁰, and then with their final agreement on the 15th of February of

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²⁰ Interim agreement with the host country between the Netherlands and Kosovo, 26 January 2016, [https://www.scp-ks.org/sites/default/files/public/trb-2016-12_0.pdf](https://www.scp-ks.org/sites/default/files/public/trb-2016-12_0.pdf).
the same year\textsuperscript{21}. As long as the proceedings will last and as long as there are sufficient funds, the mandate for the location of this institution in the host country will be automatically renewed every year.

\textbf{Structure, function and jurisdiction}

The law in force\textsuperscript{22} established and regulates the organization, jurisdiction and functions of this judicial institution. Pursuant to Articles 12-16 of this law, the Specialist Chambers have jurisdiction over crimes against humanity and war crimes under international law, which have occurred from 1 January 1998 to 31 December 2000, and other crimes according to the Criminal Code of the Republic of Kosovo. According to the latter, the substantive criminal laws in force during the temporal jurisdiction of the Specialist Chambers were: The Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) and the Criminal Law of the Socialist Autonomous Province of Kosovo (1977) or any more lenient substantive criminal law in force between 1989 and 2000.\textsuperscript{23} Pursuant to the Criminal Code of the Republic of Kosovo of 2012, the Specialist Chambers have jurisdiction over certain criminal offences against the administration of justice as well as when they relate to official proceedings and their officials.\textsuperscript{24} So, the accused before the Specialist Chambers will be tried according to the above-mentioned legislation.

The Specialist Chambers shall have jurisdiction over crimes within its subject matter jurisdiction which were either commenced or committed between 1 January 1998 and 31 December 2000 in Kosovo. This means that criminal offences may have been committed within the territory of Kosovo or may have started and been committed outside the territory of Kosovo.

In addition, the Specialist Chambers have jurisdiction over the criminal offences provided in Chapter XXXII, Articles 384 - 386, 388, 390-407, and Chapter XXXIII, Articles XXXII, Articles 384-386, 388, 390-407, Chapter XXXIII, Articles 409-411, 415, 417, 419, 421, and Chapter XXXIV, Articles 423-424 of the Kosovo Criminal Code 2012, Law 04/L-082, when they relate to official proceedings and their officials. These criminal offences are mostly committed when initiating criminal proceedings against suspects or accused persons. So, these criminal offences mainly do not fall into the period of 1 January 1998 and 31 December 2000, as they can be committed by obstructing criminal proceedings, such as the example of criminal offences of: false statement, obstruction of official proceedings, intimidation of witnesses in the course of criminal proceedings, tampering with evidence, violation of the secrecy of proceedings, court contempt, calls for resistance, etc.

Persons who can be charged by the Specialist Chambers are persons who have the citizenship of Kosovo and the former Yugoslav Republic or persons who have committed crimes against these

\textsuperscript{21} Agreement with the host country between Netherlands and Kosovo, 15 February 2016, https://www scp-ks.org/sites/default/files/public/bwbv0006581-geldend_van_15-02-2016_tm_heden_zichtdatum_30-11-2016.pdf

\textsuperscript{22} Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 2015 https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=11036

\textsuperscript{23} Ibid. Article 15 p.1 (a, b, c).

\textsuperscript{24} Ibid. Article 15, p. 2.
persons who have the citizenship of Kosovo or the former Yugoslav Republic i.e. the persons who could potentially be charged by the SPO are primarily persons that have committed crimes that relate to the Report of the Assembly of the Council of Europe, stipulated in Articles 12-16 of the Law on Specialist Chambers and Specialist Prosecutor's Office.  

The Specialist Chambers or the SPO may order the transfer of proceedings in their jurisdiction from any other prosecution office or court in the territory of Kosovo to the Kosovo Specialist Chambers and SPO, at any stage of investigation or court proceedings. The Specialist Chambers and the SPO may order a court in Kosovo to refer any case or ongoing investigation or investigation that falls within the jurisdiction and mandate of the Specialist Chambers or SPO.

All courts and prosecutors in Kosovo must notify the Specialist Chambers and the SPO without delay if they are aware of any criminal proceedings that fall within the jurisdiction of the Specialist Chambers.

Persons who have already been tried for criminal offences by Kosovo courts or by the ICTY cannot be tried again for the same criminal offence by the Specialist Chambers. But if the person who has committed war crimes or crimes against humanity was tried for crimes at a certain time and/or place, the same can be tried if he has committed crimes that differ from an earlier case which was already adjudicated upon.

Also, persons who will be tried by Specialist Chambers cannot be tried in any other court for offences for which they were already tried by Specialist Chambers.

In terms of organization, the Specialist Chambers consist of Chambers and an Administrative Offices. The chambers include all levels: the chamber of the Basic Court, the chamber of the Court of Appeals, the chamber of the Supreme Court and the chamber of the Constitutional Court. The judges in the chambers are internationals selected by the Independent Selection Panel and then recommended for appointment to the Head of the EU Common Security and Defence Policy Mission (‘Appointing Authority’). The first President of the Specialist Chambers was Judge Ekaterina Trendafilova.

The Administrative Office, within its structure, includes a Defence Office, a Victims Participation Office, a Witness Protection and Support Office, a Detention Management Unit, and an Ombudsperson’s office.

In addition to the Chambers and the Administrative Office, there is also the Specialist Prosecutor's Office (SPO), which inherited the mandate and the staff of the Special Investigative Task Force (SITF). It represents an independent prosecutor's office competent to investigate and prosecute crimes within the jurisdiction of the Specialist Chambers. The first SPO Chief Prosecutor was

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25 Ibid.
26 https://www scp-ks.org/sites/default/files/public/content/ksc_spo_al_online.pdf
27 Ibid.
28 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 2015, organization of the Specialist Chambers and Specialist Prosecutor’s Office, article 28. https://gzk.rks.gov.net/actdocumentdetail.aspx?actid=11036
29 Ibid, article 24 p.1 (a, b)
30 Ibid. Article 24, p. 2.
David Schwendiman, who remained in office until 2018. US Attorney Jack Smith was appointed after him and is still holding the position.

In accordance with the legislation in force, the Rules of Procedure and Evidence were adopted by an absolute majority of the judges of the Specialist Chambers. The Regulation was originally adopted in 2017 in an earlier version, and its latest version, after changes that were made therein, is dated 2 June 2020. This version includes the rules of procedure and evidence before the Specialist Chambers as well as the Rules of Procedure of the Specialist Chamber of the Constitutional Court. Besides this regulation, there are other regulations such as directives, guidelines and the Code of Professional Ethics.

Dilemmas about temporal mandate

As to the clarity of the end of the temporal mandate of the Specialist Chambers and SPO, it is important to emphasize that the former President of Kosovo Hashim Thaçi has on 24 August 2020 proposed two constitutional amendments, amendment 26 and amendment 27, to the Assembly of Kosovo. Amendment 26 provided that paragraph 13 of Article 162 of the Constitution should be deleted and reworded as “The mandate of the Specialist Chambers and Specialist Prosecutor’s Office shall last until the announcement of the end of the mandate by the Council of the European Union, in consultation with the Government of the Republic of Kosovo.” Amendment 27 provided that paragraph 14 of Article 162 should be deleted altogether.

Paragraph 13 of Article 162 reads: The jurisdiction of the Specialist Chambers and Specialist Prosecutor’s Office shall last for a period of five years (5), unless the announcement of the end of the jurisdiction in accordance with Law No. 04/L-274 is made earlier.

Paragraph 14 of Article 162 reads: In the absence of a notification about the end of the jurisdiction according to paragraph 12, the mandate of the Specialist Chambers and Specialist Prosecutor’s Office will continue until notification about the end is made in accordance with Law No. 04/L-274 and in consultation with the Government.

On 18 September 2020, the Speaker of the Assembly, Vjosa Osmani Sadriu, forwarded President Thaçi’s proposal to amend the Constitution to the Specialist Chamber of the Constitutional Court to see if any of the amendments diminishes the fundamental rights and freedoms defined in Chapter II of the Constitution.

Regarding these proposals for the amendment of the Constitution and the question of the Speaker of the Assembly as to whether these amendments diminish the fundamental rights and freedoms,

31 Kosovo Specialist Chambers, Rules of Procedure and Evidence before the Specialist Chambers of Kosovo including the Rules of Procedure for the Specialist Chamber of the Constitutional Court, 2020
32 A technical error was made here. It should have been paragraph 13. This technical error was also ascertained by the Specialist Chamber of the Constitutional Court in the Judgement of 16 November 2020, in Case KSC-CC-2020-11.
at the request of the Specialist Chamber of the Constitutional Court, their opinions were expressed by: the former President of Kosovo Hashim Thaçi, Jack Smith of the SPO, the Ombudsman of the Specialist Chambers Pietro Spera, the EU High Representative for Foreign Affairs and Security Policy Josep Borell Fontelles and the Head of EULEX Mission Lars-Gunnar Wigemark.

Having received the opinions of the above-mentioned institutions, the Specialist Chambers of the Constitutional Court rendered the Judgement on the Referral of the Proposed Amendments to the Constitution of Kosovo, where it concluded that the Speaker of the Assembly had made the referral in accordance with the Constitution and that the court is competent for interpretations that relate to the Specialist Chambers and SPO. The Court found that the mandate transferred through the Exchange of Letters of 2014 continues until the EU Council notifies Kosovo of the end of the mandate. The Chamber also notes that the President of Kosovo proposed the amendments at a time when the Council did not give any notice of the end of its mandate in accordance with the Exchange of Letters of 2014 and Article 162 (13) and (14) of the Constitution.

The President of Kosovo referred to “ambiguity” in Article 162(13) and (14), which could suggest that the duration of the mandate of the Specialist Chambers and the SPO was limited to a five-year period, which has already expired. However, the Chamber is unable to discern any such possible interpretation of those provisions. According to the Chambers, Article 162(13) and (14) provide that, in case there is no notification by the Council of completion of the mandate prior to expiry of the initial five-year period, the mandate shall continue beyond the initial five years until the Council notifies Kosovo of completion of the mandate. Therefore, the mandate of the Specialist Chambers and the SPO has continued and shall continue until the notification by the Council of completion of the mandate pursuant to Article 162(14).

In conclusion, this judgement found that the approval of the amendments proposed by President Hashim Thaçi would diminish the fundamental rights and freedoms of persons involved in court proceedings.

In addition, Kosovo has the obligation to hold consultations with the Council, which are expressed in the Exchange of Letters of 2014, which is a relevant criterion in the legislative process of Kosovo.

The Specialist Chamber of the Constitutional Court is the final authority for the interpretation of the Constitution in relation to the Specialist Chambers and the Specialist Prosecutor's Office.

The first indictments filed with the Specialist Chambers

Four indictments have been filed with the Specialist Chambers so far. Three of them are indictments filed for war crimes and crimes against humanity. The latter include the case of the Prosecutor vs Salih Mustafa, whose indictment was made public on 28 September 2020; the case of the Prosecutor vs Hashim Thaçi and others, whose indictment was made public on 5 November

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33 Judgement of the Specialist Chambers of the Constitutional Court dated 26 November 2020, in case KSC-CC-2020-11.
2020; as well as the case of the Prosecutor vs Pjetër Shala, whose indictment was made public on 15 April 2021.

In addition to these indictments for war crimes and crimes against humanity, an indictment was filed for obstructing administration of justice against Hysni Gucati and Nasim Haradinaj. This indictment was made public on 14 December 2020.

Through the “Monitoring the Work and court sessions of the Kosovo Specialist Chambers & Specialist Prosecutor’s Office and the Inclusion of Youth in the Justice Sector Project, the Humanitarian Law Centre Kosovo (HLCK) monitors the work and court hearings conducted in this institution. In the coming months, the HLCK will publish information letters and other analyses, which will serve the general public to be more informed about the course and progress of court proceedings.

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