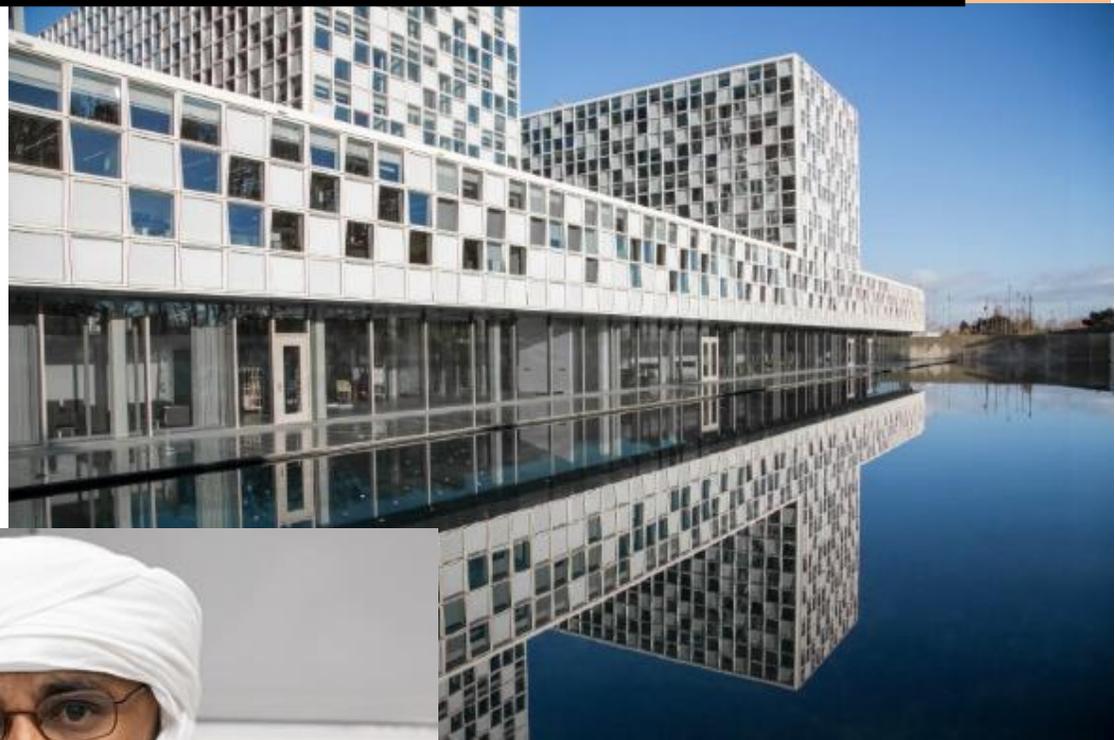




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CANADIAN PARTNERSHIP
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International Criminal Court
The Prosecutor v. Al Hassan Ag Abdoul Aziz
Decision on the Confirmation of Charges
in the *Al Hassan* case : Expert
Commentary



6 JULY 2020

SUMMARY

On 14 July 2020, the trial of Al Hassan Ag Abdul Aziz [‘Al Hassan’] will begin before the International Criminal Court [‘ICC’], marking a major step in the fight against impunity for international crimes committed in Mali. Al Hassan, a member of the coalition formed by the armed groups [Ansar Dine](#) and [Al-Qaeda in the Islamic Maghreb](#) [‘AQIM’], will face charges of crimes against humanity and war crimes allegedly committed in the [Timbuktu](#) region between 1 April 2012 and 28 January 2013.

This document highlights some of the most salient aspects of this important case a few days before the start of the trial, which begins on 14 July 2020. Despite the accused’s low hierarchical level within the organisation of which he was a member, the case remains admissible and is likely to open the door to eventual prosecutions of more powerful and influential figures, to whom greater responsibility can be attributed. The accuracy of the charges allows the Office of the Prosecutor [‘OTP’] of the ICC to avoid repeating the mistakes that led to the acquittal of Jean-Pierre Bemba in 2018. The analysis made by the ICC Pre-Trial Chamber on war crimes reveals a fair application of the international humanitarian law. Charges of crimes against humanity reflect the systematic nature of the crimes committed. The confirmation of the charge of crimes against humanity of gender-based persecution is a historic first, which may lead to an important clarification of the definition of gender in international criminal law. Nevertheless, many challenges still seem to limit the accused’s exercise of his right to a full answer and defence.

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In this document, the admissibility of the case in light of the gravity criteria and the accused's hierarchical level will be discussed first. Then, it will be argued that the precision of the charges allows to avoid the repetition of errors made by the Office of the Prosecutor ['OTP'] in the trial of Jean-Pierre Bemba, acquitted in 2018. The charges of war crimes and crimes against humanity will be examined in turn, before examining specifically the implications of the confirmation of the charge of crimes against humanity of gender-based persecution. This commentary will conclude with a critical analysis of the respect for the rights of the accused in this case.

1. A 'Small Fish' Prosecuted: the Prosecutor's Mistake?

The admissibility of the Al Hassan case was challenged by the defence, which argued that the case was not serious enough to warrant the Court's action ([Rome Statute of the International Criminal Court](#) [['Rome Statute'](#)], article 17(1)(d)). To this end, it notably argued that Al Hassan was not a senior Islamic police officer but a 'small fish', a junior agent, an enforcer within the Ansar Dine/AQIM coalition (Al Hassan, [Defence Submissions for confirmation of charges](#), paras. 256-258).

Pre-Trial Chamber I agreed with the defence on this point as it found that Al Hassan was not a senior Islamic police officer, that he did not exercise authority over members of the Islamic police, and that his day-to-day work consisted mainly of managing administrative tasks and issues related to security patrols in the city of Timbuktu, and sometimes to the enforcement of the sanctions imposed by the Islamic court (Al Hassan, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#) [['DCC'](#)], paras. 763-765).

However, the Chamber has argued that the lower or intermediate-level of an accused is irrelevant to the assessment of the gravity of a case. This analysis is carried out on a case-by-case basis, based on criteria that may include the nature of the crimes, their scale, their impact on the victims and the *modus operandi* used (Al Hassan, [Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case](#) [['Decision on the Admissibility Challenge'](#)] paras. 50, 57; Blé Goudé, [Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity](#), paras. 20-22). Moreover, in its [Decision on the Admissibility Challenge](#), the Chamber recalled that the Rome Statute does not exclude any category of authors from the exercise of the Court's jurisdiction, which 'could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court' ([Decision on the Admissibility Challenge](#), para. 50; [Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'](#), para. 75). This decision, issued by the Pre-Trial Chamber I on 27 September 2019, was [upheld on appeal](#) on 19 February 2020. The exclusion of the accused's rank as a factor in challenging the admissibility of a case, in the name of the fight against impunity, has been a consistent interpretation in the Court's jurisprudence since 2006 (Situation in DRC,

[Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#)). More than admissibility, Al-Hassan’s prosecution therefore directly questions the Prosecutor’s prosecution strategies.

It is important to note that prosecutions of lower- and intermediate-level perpetrators have proven useful in the past in enhancing the effectiveness of subsequent proceedings against senior executives. In fact, subject to a few exceptions, such as the [Kambanda](#) and [Plavšić](#) cases, the successes of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda in judging senior leaders were built on prosecutions of ‘small fishes’ during the first years of operation of these tribunals. Indeed, the evidence gathered and the judicial findings of certain facts considered to be public knowledge during these proceedings have been used in the trials of more senior leaders (see in particular the cases [Karadžić](#), [Mladić](#), [Stanišić](#), [Bagosora](#), [A. Bizimungu](#) and [Nyiramasuhuko](#)). On the other hand, the ICC’s initial focus on ‘those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organised the alleged crimes’ ([OTP, Prosecutorial Strategy 2009-2012](#), para. 19) has shown its limits in some emblematic prosecutions, such as those of [Jean-Pierre Bemba](#) and [Laurent Gbagbo](#). The OTP’s difficulty in proving the responsibility of these senior leaders for the crimes committed by their subordinates or supporters testifies to the importance of a pyramidal prosecution strategy, from the bottom up and not the other way around.

Since 2012, under Fatou Bensouda’s tenure, a gradual strategy has been enshrined ([Strategic Plan 2012-2015](#), p. 6), and constantly reaffirmed ([Strategic Plan 2016-2018](#), p. 16; [Strategic Plan 2019-2021](#), p. 22). In addition, the [Policy Paper on Case Selection and Prioritisation](#) (2016) has contributed to the diversification of the profiles of authors who may be prosecuted by notifying the OTP’s intention to target ‘lower level-perpetrators where their conduct has been particularly grave or notorious’ (p. 14). The same document states that the OTP will pay ‘particular attention to crimes that have been traditionally under-prosecuted,’ citing sexual and gender-based crimes, and recalling their particular gravity (p. 15). Moreover, they are also subject to a specific policy paper ([Policy Paper on Sexual and Gender-Based Crimes](#)) demonstrating the OTP’s strong interest in prosecuting them.

Thus, the prosecution of Al Hassan seems to be a perfect illustration of the Prosecutor’s strategic orientations. She seems to focus on the types of crimes prosecuted, as she prosecutes an author that is far from the top of the hierarchy, but whose alleged crimes are considered as priority by the OTP due to their particular gravity and their under-representation in prosecutions. A parallel with the Al Mahdi case, concerning the destruction of cultural and religious property, can be observed in this case.

Therefore, the prosecution of Al Hassan could be useful in the context of possible proceedings against highest officials, either before the Malian courts under the principle of complementarity or

before the ICC, as well as in order to highlight certain international crimes with a view to raising awareness of their prosecution.

2. More Accurate Charges

The charges against Al Hassan are highly accurate. The Prosecutor seems to have wanted to avoid repeating certain mistakes made in the context of the trial of Jean-Pierre Bemba, [acquitted](#) by the ICC Appeals Chamber in June 2018.

In that case, Jean-Pierre Bemba's conviction at trial was based in part on specific criminal acts that went beyond the facts and circumstances described in the charges. The Appeals Chamber found a violation of Article 74(2) of the [Rome Statute](#) (Bemba, [Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgement pursuant to Article 74 of the Statute'](#) [[Judgement](#)], paras. 98-116) and affirmed that specific criminal acts, as factual allegations relating to the underlying offences, are an integral part of the charges. As such, they can only be used to establish the guilt of an accused if they are explicitly confirmed or brought into the charges by way of amendment in accordance with Article 61(9) of the [Rome Statute](#) (Bemba, [Judgement](#), paras. 110-112, 114-116).

In contrast, in the Al Hassan case, the [DCC](#) refers limitedly and exhaustively to the criminal acts that underline each confirmed charge (paras. 350, 352, 354-355, 515, 531, 655, 657, 659 and 707; pp. 451 and 465). In addition to meeting the accused's right to be informed with precision of the charges he will face at trial ([Rome Statute](#), art. 67(1)(a)), such an approach resonates with one of the main functions of the procedure of confirmation of charges, namely the determination of the precise framework of the case to be referred to trial ([Rome Statute](#), art. 61(7)(a) and 61(11)).

3. Fair Application of International Humanitarian Law

Confirmation of the charges of war crimes requires both the existence of an armed conflict and a nexus between that armed conflict and the facts alleged against the accused ([DCC](#), para. 200; Katanga, [Judgement](#), para. 1176). To this end, the reasoning of the Pre-Trial Chamber I in Al Hassan is consistent with international humanitarian law.

First, the Chamber concluded that there was an armed conflict that was not of an international character. In its analysis, it correctly relied on the findings of the Trial Chamber VIII in the Al Mahdi case, as the territorial and temporal framework of this case was similar to that of the Al Hassan case ([DCC](#), (para. 204; Al Mahdi, [Judgement](#), para. 49). It also identified the armed groups involved, namely the [Malian regular national forces, Ansar Dine, AQIM, MNLA and MUJAO](#). It then highlighted their respective levels of organisation, as well as the intensity of the violence and the prolonged nature of the armed conflict ([DCC](#), paras. 206-214). It noted that following the fighting between the Malian government armed forces and the Ansar Dine/AQIM/MUJAO alliance, which began on 17 January 2012 in the Gao region, government forces withdrew from the

three northern regions of Gao, Kidal and Timbuktu. The insurgent alliance then took control until 2013, while driving the MNLA out of the area. The Malian government, with the support of France, did not regain control of the three regions until January 2013 (DCC, para. 219).¹ A UN peace mission was then set up (DCC, para. 219). A two-step peace agreement was reached in 2015 and 2018, but did not prevent numerous clashes and ceasefire violations (DCC, paras. 215-220).

It is notable that the judges removed the term ‘occupation’ from their analysis, thus definitively resolving the ambiguity resulting from the use of this notion by both Pre-Trial Chamber I and Trial Chamber VIII in the Al Mahdi case (Al Mahdi, [Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), paras. 44, 45, p. 24; Al Mahdi, [Judgement](#), paras. 33, 36, 53). This concept, which had also been taken up by the OTP, only exists in the context of international armed conflicts (the Chamber highlights this in the [DCC](#), para. 225, footnote 588, p. 105). The judges rightly preferred the notion of ‘control’ of certain areas by armed groups. Note, however, the use of the term ‘combatants’ (DCC, paras. 201, 213, 216), whose use in this case can be criticised since it is also reserved for international armed conflicts. Although there is no French equivalent of the term ‘fighters’, used in English to distinguish members of government armed forces (i.e. combatants in the legal sense) from members of armed groups, the Court could still have avoided the use of the term by referring to ‘members of armed groups’, for example, or by proposing another useful term for their designation.

The defence had attempted to withdraw the period from 1 April 2012 to 28 January 2013 from the Court’s analysis, arguing ‘the absence of armed fighting in Timbuktu during the period of the facts relating to the case’ (DCC, para. 221, [our translation]). However, in a development that is in line with the previous jurisprudence of both the ICC and the *ad hoc* tribunals, the Pre-Trial Chamber found that the conflict persisted at the time of the perpetration of the acts alleged against the accused. At best, it concedes a ‘provisional truce’ (DCC, para. 223 [our translation]), which does not reflect the end of the conflict or a period of peace. To do so, the Chamber relies on the date of the signing of the peace agreement (15 May 2015) and on the conclusion that Article 8 of the [Rome Statute](#) applies ‘from the beginning of armed violence, until a peace agreement has been reached throughout the territory under the control of one of the parties, even in the absence of actual armed fighting on that part of the territory’ (DCC, para. 222 [our translation]). In other words, the Chamber confirms that the disappearance of one of the criteria necessary for the characterisation of a situation as non-international armed conflict, namely the organisation of the parties and the intensity of the violence, does not lead to the conclusion that this conflict is over. This requires a return to peace, of which a peace agreement may be the beginning of testimony (DCC, paras. 221-224).

¹ It should be noted that this element is [controversial](#).

4. Charges of Crimes Against Humanity that Reflect the Systematic Nature of the Attacks Perpetrated

The Pre-Trial Chamber adopted an important conclusion by confirming that acts of torture, rape, sexual slavery, forced marriage, persecution and other inhuman acts committed against the civilian population of the Timbuktu region by members of the Ansar Dine/AQIM coalition constituted crimes against humanity. This decision reflects the nature and scope of the crimes committed against the civilian population of this region, pursuant to the policy imposed by the members of these armed groups (OTP, [Situation in Mali: Article 53\(1\) Report](#), para. 132; Al Mahdi, [Judgement](#), paras. 10, 63 and 109; [DCC](#), para. 171).

The Chamber concluded to the existence of a widespread and systematic attack directed against the civilian population of Timbuktu by the Ansar Dine/AQIM coalition. The members of these armed groups thus aimed to control the population through violence, through the unilateral enactment of new rules previously unknown to the population and accompanied with severe sanctions ([DCC](#), paras. 182-183). The acts of violence perpetrated by Ansar Dine/AQIM, far from being a mere aggregate of isolated or random acts, constituted a real campaign of violence, characteristic of an attack in the context of crimes against humanity ([DCC](#), para. 175; Bemba, [Judgement pursuant to Article 74 of the Statute](#), para. 149). This campaign of violence was widespread in its scope, and systematic in its regular and repetitive modus operandi ([DCC](#), para. 190; Katanga, [Judgement](#), para. 1162; Ntaganda, [Judgement](#), para. 693).

The Chamber has considered in particular the targeting of women and girls, as is confirmed a wide range of sexual and gender-based charges. The Al Hassan case thus provides a new opportunity for the ICC to address sexual and gender-based violence, distinguishing itself from the Al Mahdi case, where no sexual or gender-based crime charges had been raised.

However, with respect to the crime against humanity of persecution on religious grounds, it is unfortunate that the Chamber missed the opportunity to explicitly recognise the destruction of the mausoleums of Timbuktu as an act underlying this international crime (see notably Blaskić, [Judgement](#), paras. 227-233; Kordić, [Judgement](#), paras. 206-207).

5. An Open Door to a Historical Development of the Concept of Gender in International Criminal Law

The confirmation of the charge of crime against humanity of gender-based persecution should be welcomed as it provides an unprecedented opportunity for the ICC to clarify the concept of gender as defined in the [Rome Statute](#).² Indeed, this crime is the only one that explicitly refers to the

² Although the French version of Article 7(3) of the Statute uses the term ‘*sexe*’, other official versions of the text use terms that translate like ‘gender.’ For example, the terms *gender* and *género* are used in English and Spanish, rather than *sex* and *sexo*, which would rather translate as ‘sex’. In order to fill this gap in the French version, the OTP has made a distinction in its [Policy Paper on Sexual and Gender-Based Crime](#) between the concepts of sex ‘in the generic

concept of gender. Moreover, this is the first time that such a charge has been brought before the ICC³, which is also the first international criminal tribunal to be able to hear about this crime, the reason of persecution being absent from the statutes of the *ad hoc* tribunals.

Throughout the drafting Article 7(3) of the Rome Statute, which defines gender, the debate was generally polarized between two groups, one seeking to limit the definition of gender to two biological sexes, and the other seeking a broader definition that takes into account the context of society (Oosterveld, 2005, pp. 58-66). As proponents on both sides agreeing on the need to include a definition in the Statute, the definition retained reflects a ‘constructive ambiguity’, which means that the language used is deliberately imprecise in order to accommodate diverging opinions (Oosterveld, 2014, p. 567). Thus, pursuant to Article 7(3) of the Rome Statute, gender ‘refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.’ In the absence of any judicial clarification, the debate persists as to the meaning of this definition, and the ideological polarisation present in Rome continues to this day.

In the Al Hassan case, the Pre-Trial Chamber did not explicitly take a position in this debate, but its analysis seems to suggest that it also takes into account the social context and not only the physical and biological characteristics of individuals. Indeed, its analysis of acts of persecution based on gender appears intimately linked to the social roles and perception of women in the society targeted by the actions of Ansar Dine/AQIM members. The Chamber noted that the ‘persecution suffered by women has resulted in the loss of their social status among the civilian population of Timbuktu’ (DCC, para. 701, [our translation]). It claimed that violence against women constituted ‘persecution on sexist grounds, **in that these women were treated as objects**’ (DCC, para. 700; emphasis added [our translation]). In other terms, the Chamber considered that women were attacked not only because of their biological sex, but rather because of what they were perceived as objects in the context of the society of which they were a part (for a similar point of view, see Grey *et al.*, 2019, p. 977).

In short, the confirmation of the charge of persecution based on gender against Al Hassan is likely to allow the ICC to offer a first interpretation of the definition of gender in international criminal law, which will likely have repercussions far beyond this case. An interpretation of the concept of gender that takes into account the social component of this concept could in fact imply that the crime of gender-based persecution encompasses certain acts of persecution committed on the basis of sexual orientation (Oosterveld, 2005, p. 77-78), which would be a major advance for the rights of those affected by such acts.

sense’ (i.e., gender) and ‘in the biological sense’ (i.e., sex). For clarity and brevity, in this document, the term ‘gender’ has been preferred to ‘sex in the generic sense’ or ‘sex as defined in Article 7(3) of the Rome Statute’. Similarly, the concept of ‘gender-based persecution’ is used as a synonym for ‘persecution on sexist grounds’.

³ This crime had been included in the [arrest warrant](#) issued in 2010 against Callixte Mbarushimana, but was ultimately not included in the [document containing the charges](#).

6. Rights of the Accused and Protection of Witnesses and Victims: Asymmetrical Interactions?

In the DCC, the Pre-Trial Chamber refrained from modifying the Prosecutor's legal characterisation of certain facts, while calling on the Trial Chamber to requalify *in limine litis* if it 'deems it appropriate' [our translation], as permitted by regulation 55 of the [Regulations of the Court](#) (DCC, paras. 315 and 682). The use of this regulation *proprio motu* by judges to requalify facts or modes of liability in this case as well, as in several others (see e.g. Lubanga, [Judgement pursuant to Article 74 of the Statute](#), paras. 566-67; Bemba, [Décision informant les parties et participants que la qualification juridique des faits peut être modifiée conformément à la norme 55-2 du Règlement de la Cour](#), para. 5; Katanga, [Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons](#), paras. 23-26) continues to be criticised. Many see it as an [abuse of power](#) limiting the accused's exercise of the rights to information, of his right to have the time and facilities necessary to prepare its defence, the right to be tried within a reasonable time and, ultimately, of his right to a fair and impartial trial. While this call to the Trial Chamber allows the defence to prepare in advance for possible changes, it is not enough to mitigate all the resulting violations of the rights of the defence.

The defence is also very concerned about the continued use of protection measures for witnesses, victims and their family members, and denounces the unprecedented scale of the redaction of the documents provided by the Prosecutor. These measures, although legitimate in view of the very high insecurity in the areas where these persons live (several murders have been reported and the authorities do not seem to control these areas or have a little control), nevertheless have a negative impact on the rights of the accused in that they hinder the preparation of a full defence, an essential bulwark against arbitrariness and bias. It also is for this reason that Al Hassan is detained under very restrictive conditions and has very little contact with the outside world, including his family, thus limiting his rights to privacy and to the family (Al Hassan, [Request on behalf of Mr Al Hassan to vary the conditions of his detention](#), para. 2). These restrictive measures to protect victims and witnesses would be justified by the presence of members of jihadist groups or their accomplices in the region. However, while necessary, they should not be unreasonable or disproportionate to the objectives pursued, and the ICC should mitigate its negative effects.

Finally, in a request submitted on 26 June 2020, the defense asked Trial Chamber X to terminate the ongoing proceedings and release Mr. Al Hassan, as the charges and evidence would be tainted by torture and cruel, inhuman and degrading treatment (Al Hassan, 'Corrigendum to "Defence Request to terminate the proceedings"', paras. 101 and 109). Future developments related to this request will be an aspect to follow closely in the coming weeks.

7. Conclusion

The trial of Al Hassan is an important step in the fight against impunity for international crimes committed in Mali. Despite the accused's hierarchically low level within the organisation of which he was a member, the case remains admissible, and is also likely to open the door to possible prosecution of higher officials. The accuracy of the charges brought by the OTP allows it to avoid the repetition of errors made in the context of the Bemba case, acquitted in 2018. The Chamber's analysis of war crimes reveals a fair application of international humanitarian law and the charges of crimes against humanity reflect the systematic nature of the crimes committed. Confirmation of the charge of crime against humanity of gender-based persecution is a historic first, which can be anticipated leading to an important clarification of the definition of gender in international criminal law. However, some challenges still seem to limit the accused's right to a full defence. These aspects will be closely observed throughout the trial, which begins on July 14.



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