

EXPANDED WAR CRIMES ACT OF 1997

JULY 25, 1997.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1348]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1348) to amend title 18, United States Code, relating to war crimes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Expanded War Crimes Act of 1997”.

SEC. 2. DEFINITION OF WAR CRIMES.

Section 2441 of title 18, United States Code, is amended—

(1) in subsection (a), by striking “grave breach of the Geneva Conventions” and inserting “war crime”;

(2) in subsection (b), by striking “breach” each place it appears and inserting “war crime”; and

(3) so that subsection (c) reads as follows:

“(c) DEFINITION.—As used in this section the term ‘war crime’ means any conduct—

“(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

“(2) prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

“(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

“(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.”.

PURPOSE AND SUMMARY

H.R. 1348, as reported by the Committee, would amend section 2441 of title 18, U.S. Code, by expanding the number of war crimes violation of which would subject the perpetrator to criminal penalties.

BACKGROUND AND NEED FOR THE LEGISLATION

I. PUBLIC LAW 104–192 AND THE PUNISHMENT OF PERPETRATORS OF GRAVE BREACHES OF THE GENEVA CONVENTIONS

In the 104th Congress, H.R. 3680, the “War Crimes Act of 1996”, was favorably reported by the Judiciary Committee.¹ The legislation was passed by the House and the Senate. It was enacted into law on August 21, 1996, becoming Public Law 104–192.

H.R. 3680 carried out the obligation the United States incurred when it ratified the 1949 Geneva Conventions for the Protection of Victims of War² to provide criminal penalties for grave breaches of the conventions.³

H.R. 3680 created a new Chapter 118 of title 18 of the United States Code entitled “War Crimes.” The Chapter contains a new section 2441, providing that whoever, whether inside or outside the

¹The Judiciary Committee’s report is available as H.R. Rep. No. 104–698, 104th Cong., 2d Sess. (1996) (hereinafter referred to as “Committee Report on H.R. 3680”), reprinted in 1996 U.S.C.C.A.N. 2166.

²There were four conventions: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Convention Relative to the Treatment of Prisoners of War, and Convention Relative to the Protection of Civilian Persons in Time of War.

³See Committee Report on H.R. 3680 for a description of the Geneva Conventions, “grave breaches” thereof, and the punishment of the perpetrators of war crimes generally.

United States, commits a grave breach of the Geneva Conventions in two specified circumstances shall be fined under title 18 or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

The two circumstances are (1) the person committing the breach is a member of the armed forces of the United States or a national of the United States, and (2) the victim of the breach is a member of the armed forces of the United States or a national of the United States. "Grave breach of the Geneva Conventions" means conduct defined as a grave breach in any of the four Geneva Conventions, or any protocol to the conventions to which the United States is a party.⁴

II. ADMINISTRATION REQUEST THAT THE SCOPE OF THE STATUTE BE BROADENED

When the Immigration and Claims Subcommittee held hearings on H.R. 2587, the predecessor bill to H.R. 3680, Michael J. Matheson, Principal Deputy Legal Adviser to the Department of State, advised that the bill be amended to criminalize under domestic law "war crimes" other than grave breaches of the Geneva Conventions. The Committee agrees with the Department's recommendation.

Excerpts from Mr. Matheson's testimony follow:

[T]he Administration supports expanding the types of violations of international humanitarian law to be addressed by H.R. 2587. We suggest that the provision cover not only grave breaches of the 1949 Geneva Conventions, but a more general category of "war crimes" that would be defined to include certain violations of the laws of war in addition to grave breaches. Specifically:

We believe H.R. 2587 should make it a crime under U.S. law to commit violations of the rules specified in Common Article 3 and Additional Protocol II to the 1949 Geneva Conventions that apply during non-international armed conflict, that is, civil wars and other internal conflicts. As the grim experience in Rwanda reminds us, some of the most horrible war crimes occur in internal armed conflicts, as to which the grave breach provisions of the 1949 Geneva Conventions may not be applicable.

For example, Common Article 3 of the Geneva Convention prohibits murder, cruel treatment, and torture of persons, such as civilians or captured or wounded combatants, taking no active part in hostilities during a non-international armed conflict. As evidence of the importance of the protections of international law in non-international armed conflicts, the United States has taken the position that the Statute of International Criminal Tribunal for the Former Yugoslavia, which give the Tribunal jurisdiction over "persons violating the laws or customs of war," includes violations of Common Article 3 and the additional

⁴Presently, two protocols have been drafted: Protocol I (Relating to the Protection of Victims of International Armed Conflicts) and Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts). They were opened for signature in 1977 and have not been ratified by the United States.

protocols to the Geneva Conventions. We believe that such violations should similarly be treated as war crimes for purposes of U.S. law, and thus should be covered by an expanded H.R. 2587.

Further, H.R. 2587 should be expanded to cover violations of Articles 23, 25, 27, and 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, of October 18, 1907, applicable to international armed conflict. The 1907 Hague Convention is an important source of international humanitarian law, and it served as an important basis of law for the Nuremberg Tribunal.

Article 23 of the Convention lists a series of acts prohibited in war, including, among other things, using poison weapons, killing individuals who have laid down their arms and surrendered, and employing arms calculated to cause unnecessary suffering. Article 25 prohibits the bombardment of undefended towns, villages, dwellings, or buildings. Article 27 requires forces to take steps to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. Article 28 prohibits pillage. Provisions such as these have provided the basis for Article 3 of the Statute of International Criminal Tribunal for the former Yugoslavia, which gives the Tribunal jurisdiction over "persons violating the laws or customs of war."

The Administration believes such violations should also be treated as war crimes in H.R. 2587.

Finally, the United States has recently participated in the successful negotiation of an amendment to Protocol II (on land mines) to the Convention on Conventional Weapons, to which the United States is a Party. The amended Protocol, which will soon be submitted to the Senate for its advice and consent, will require the imposition of penal sanctions against persons who, in relation to armed conflict and contrary to the provisions of the Protocol, willfully kill or cause serious injury to civilians.

The United States should take care now, in H.R. 2587, to provide for making such offenses criminal under U.S. law when the amended Protocol comes into force for the United States. (We fully expect favorable Senate consideration, and hopefully entry into force, next year.) Doing so would ensure, for example, that deliberate, indiscriminate use of anti-personnel mines to harm civilians would constitute an offense under U.S. law. This objective is entirely consistent with Congressional sentiments and Administration policy on ending the humanitarian crisis posed by these weapons.⁵

⁵See War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. On Immigration and Claims of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 12-13 (1996) (hereinafter referred to as "Hearing"). A representative of the Department of Defense testified similarly. *Id.* at 15-16.

III. H.R. 1348

A. The legislation

H.R. 1348 carries out the recommendation of the Department of State to expand the number of offenses commission of which would subject perpetrators to federal criminal penalties under section 2441 of title 18, U.S. Code. The new offenses are conduct:

Prohibited by articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;⁶

which constitutes a violation of common article 3 of the 1949 Geneva Conventions, or any protocol to such conventions to which the United States is a party and which deals with non-international armed conflict;⁷ or

of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996, when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.⁸

*B. Relevant provisions of treaties that have been ratified by the United States**1. Article 23 of the Hague Convention*

[I]t is especially forbidden:

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

⁶The Hague Convention was ratified by the United States on November 23, 1909.

⁷Protocol II of the Geneva Conventions (Relating to the Protection of Victims of Non-International Armed Conflicts) has never been ratified by the United States. Thus, the United States is not yet a party to the protocol.

⁸Senate hearings on this protocol are expected to commence in the fall of 1997. Article 14 of the Protocol provides in part that:

(1) Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

(2) The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, willfully kill or cause serious injury to civilians and to bring such persons to justice.

S. Treaty Doc. 105-1 (Protocols to the 1980 Conventional Weapons Convention) at 51 (The entire protocol is reproduced in this document.). Like the four Geneva Conventions, this protocol thus requires signatory countries to enact domestic criminal legislation to punish violators. See Committee Report on H.R. 3680 at 3.

(h) To declare abolished, suspended, or inadmissible in a Court of Law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

2. Article 25 of the Hague Convention

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

3. Article 27 of the Hague Convention

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

4. Article 28 of the Hague Convention

The pillage of a town or place, even when taken by assault, is prohibited.

5. Common Article 3 of the Geneva Conventions

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

HEARINGS

No hearings were held on H.R. 1348. However, during the 104th Congress, the Committee's Subcommittee on Immigration and Claims held one day of hearings on H.R. 2587, the predecessor bill to H.R. 3680.⁹

COMMITTEE CONSIDERATION

On July 15, 1997, the Subcommittee on Immigration and Claims met in open session and ordered reported the bill H.R. 1348 by a voice vote, a quorum being present. On July 23, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 1348 without amendment by a recorded vote of 17 to 4, a quorum being present.

VOTE OF THE COMMITTEE

Vote on Final Passage: Adopted 17 to 4.

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. McCollum	Mr. Scott
Mr. Gekas	Mr. Watt
Mr. Coble	Mr. Delahunt
Mr. Smith	
Mr. Gallegly	
Mr. Canady	
Mr. Inglis	
Mr. Buyer	
Mr. Bono	
Mr. Bryant	
Mr. Chabot	
Mr. Jenkins	
Mr. Cannon	
Mr. Nadler	
Ms. Lofgren	
Mr. Meehan	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

⁹See Hearing.

representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1348, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 24, 1997.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1348, the Expanded War Crimes Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 1348—Expanded War Crimes Act of 1997

CBO estimates that enacting H.R. 1348 would not result in any significant cost to the federal government. Because enactment of H.R. 1348 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would not be significant.

Under current law, a perpetrator of certain war crimes in violation of the 1949 Geneva Conventions would be subject to criminal prosecution in the United States if either the victim or the perpetrator is a member of the U.S. armed forces or is a U.S. national. Enacting H.R. 1348 would make additional war crimes federal offenses that could be prosecuted by the U.S. government. Thus, CBO expects that under H.R. 1348 the government would be able to pursue cases that it otherwise would have been unable to prosecute. Based on information from the Department of Defense, however, CBO does not expect the government to pursue many addi-

tional cases. Thus, CBO estimates that enacting H.R. 1348 would not have a significant impact on the cost of federal law enforcement activity.

Because those prosecuted and convicted of committing war crimes could be subject to fines, the government might collect additional fines if H.R. 1348 is enacted. Collections of such fines are recorded in the budget as governmental receipts, or revenues, which are deposited in the Crime Victims Fund and spent in the following year. Any such collection from enacting H.R. 1348 are likely to be negligible, however, because it is not likely that the federal government would pursue many cases under this bill. Because any increase in direct spending would be the same as the amount of fines collected with a one-year lag, the additional direct spending also would be negligible.

Section 4 of the Unfunded Mandates Reform act of 1995 excludes from the application of that act legislative provisions that are necessary for the ratification or implementation of international treaty obligations. CBO has determined that the provisions of H.R. 1348 fit within that exclusion because the bill would implement penal provisions of the Geneva Conventions of 1949.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 10 of the Constitution.

The constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions¹⁰ to prosecute perpetrators of these crimes. The Supreme Court affirmed such authority in *In Re Yamashita*.¹¹

In *Ex parte Quirin* * * * we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, sec. 8, cl. 10 of the Constitution to “define and punish * * * Offences against the Law of Nations * * *,” of which the law of war is a part, had by the Articles of War * * * recognized the “military commission” appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.¹²

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act may be cited as the “Expanded War Crimes Act of 1997.”

¹⁰ For information on military commissions, see Committee Report on H.R. 3680 at 5–6.

¹¹ 327 U.S. 1 (1946).

¹² *Id.* at 7.

Section 2. Definition of war crimes

Section 2441 of title 18, U.S. Code, provides that whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions in two specified circumstances shall be fined under title 18 or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death. The two circumstances are (1) the person committing the breach is a member of the armed forces of the United States or a national of the United States, and (2) the victim of the breach is a member of the armed forces of the United States or a national of the United States. "Grave breach of the Geneva Conventions" means conduct defined as a grave breach in any of the four international conventions relating to the laws of warfare signed at Geneva on August 12, 1949, or any protocol to the conventions to which the United States is a party.

Section 2 of H.R. 1348 expands the offenses that would subject a perpetrator to criminal penalties under section 2441 from "grave breaches of the Geneva Conventions" to "war crimes." As defined in section 2, this term includes not only such grave breaches, but also conduct (1) prohibited by articles 23, 25, 27,¹³ or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, (2) which constitutes a violation of common article 3 of the Geneva Conventions, (3) which constitutes a violation of any protocol to the Geneva Conventions to which the United States is a party and which deals with non-international armed conflict,¹⁴ and (4) of a person, who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

AGENCY VIEWS

The Administration has submitted no views as to H.R. 1348. The Committee Report to H.R. 3680 (from the 104th Congress) contains the comments of the Department of State and the Department of Defense as to H.R. 2587, the predecessor bill to H.R. 3680.¹⁵

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 2441 OF TITLE 18, UNITED STATES CODE

* * * * *

¹³ Article 27 was incorrectly referred to as "article 17" in H.R. 1348 as introduced. Pursuant to authority granted by the Judiciary Committee to committee staff to make technical and conforming changes, this reference was corrected. Certain other purely technical errors in H.R. 1348 as introduced were also corrected.

¹⁴ See n.4.

¹⁵ Committee Report on H.R. 3680 at 12-16.

§ 2441. War crimes

(a) OFFENSE.—Whoever, whether inside or outside the United States, commits a [grave breach of the Geneva Conventions] *war crime*, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES.—The circumstances referred to in subsection (a) are that the person committing such [breach] *war crime* or the victim of such [breach] *war crime* is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

[(c) DEFINITIONS.—As used in this section, the term “grave breach of the Geneva Conventions” means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.]

(c) DEFINITION.—As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict;
or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

DISSENTING VIEWS

H.R. 1348 would expand the definition of "war crime" to include not only grave breaches of the Geneva Convention, but also breaches of any other Convention or Protocol to which the U.S. is or becomes a signatory. Companion legislation establishing federal jurisdiction over war crimes became law in the 104th Congress. That legislation included a provision which permitted imposition of the death penalty in cases where the victim of the war crime was killed.

While we fully support U.S. implementation of war crime legislation, we do not believe such legislation must include a death penalty in order to be effective. By building on last year's legislative base, the expanded definition of war crime included in H.R. 1348 has the net effect of broadening the scope of the death penalty.

As a matter of principle, we oppose any legislation which includes or expands the use of the death penalty. Therefore, we are unable to support H.R. 1348.

JOHN CONYERS, Jr.
MELVIN L. WATT.
MAXINE WATERS.
BOBBY SCOTT.
WILLIAM D. DELAHUNT.

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