

WASMUN 2018

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Background Guide for the International Court of Justice

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Note: this is background guide was updated on 30 January 2018.

Welcome from Director-General

Dear Delegates,

It is with great pleasure that I welcome you all to Washington State Model United Nations (WASMUN) 2018. My name is Tyler Lincoln, and I am serving as your Director-General for this year's WASMUN conference. Throughout my time at the University of Washington, I have been able to participate in Model United Nations as a delegate, committee staff, and executive staff, each bringing their own sets of challenges and rewards. I have been working with WASMUN for 3 years now, first serving as committee staff, and last year as the Assistant-Director-General for WASMUN 2017. As Director-General for this year's conference, it has been my goal to continue to increase WASMUN's ability to provide a fun, challenging experience from which all can grow and learn.

The theme of this year's WASMUN conference is building a more sustainable future together. With the conference taking place in the Pacific Northwest, and keeping in mind the 2015 Sustainable Development Goals, this year's WASMUN is focusing on diversity and inclusivity. The wide range of committees chosen for WASMUN this year aims to reflect the importance of sustainable development. Additionally, the diversity of committees aims to show the interlinkages between the social, economic and political pillars of sustainable development. Each of these three dimensions is crucial for promoting the development of all. We hope you keep this in mind as you pursue your own unique solutions to the challenges we provide you.

On a final note, each committee dais worked hard in ensuring they provide you with helpful and useful information through writing the background guides. That being said, I wish you the best of luck in preparing for this conference and I look forward to meeting you all in a couple of months! If you have any questions during your preparation, please don't hesitate to send them to dg@wasmun.org.

Best,

Tyler Lincoln

Director-General
WASMUN 2018

Welcome from the ICJ Committee Staff

Dear Delegates

On behalf of the rest of the committee and conference staff at WASMUN, we would like to welcome you to WASMUN 2018's International Court of Justice (ICJ). We're looking forward to working with you, and excited to see how participants will use the weekend to come together to solve some of the largest challenges facing the geopolitical community today! The ICJ is a unique body - over the weekend, we will take on subjects and procedures very different from other committees at the conference. We hope you're as enthusiastic as we are to tackle the unique challenges and experiences that come with the court! As former directors and staff for WASMUN's past, both of us have been consistently impressed by the innovative, team-based solutions that have been generated by generations of WASMUN delegates before you. While we're here to help facilitate a great experience for you and your fellow delegates, we're also excited to learn from you and the unique perspectives you have consistently brought to the conference. Please feel free to reach out if you have any questions, or comments, and we look forward to welcoming you to the University of Washington campus in March for WASMUN 2018!

Sincerely,

Cassie Lynch, Assistant Director

Alex Wirth, Director

Introduction to the International Court of Justice

The movement to establish a World Court happened after The Hague Conferences of 1897 and 1907 eventually leading to the establishment of the Permanent Court of Arbitration. With the creation of the League of Nations after World War I, a new push was made. The *Covenant of the League* called for ideas for a World Court; this led to the founding of the Permanent Court of International Justice (PCIJ), whose tasks included providing peaceful method of dispute settlement based on International Law. After the Second World War (WWII), it was decided to drop the “Permanent” when the International Court of Justice (ICJ) succeeded the PCIJ. Cases decided by the PCIJ carry the same weight as those decided by the ICJ.¹ After WWII, the United Nations Charter (Chapter 3, Article 7) created the current International Court of Justice (ICJ) as one of the principal organs of the United Nations. Chapter 14, Article 92 states that the ICJ “will be the principal judicial organ of the United Nations.”²

Overview

The ICJ was established in 1945 to settle international legal disputes, as well as offer advisory opinions for international organizations and agencies. In addition, the ICJ is the only major UN body whose headquarters is not in New York City; the Court is located at The Hague, in the Netherlands. States that have not signed the UN Charter may also appear before the Court. To do this they must meet certain qualifications that have been outlined by the General Assembly (GA) under the recommendation of the Security Council (SC), accept the provisions within the “Statute of the ICJ” and agree to comply with the decisions of the ICJ, and make annual contributions to the cost of the Court.³

The structure and authority are further outlined in the “Statute of the ICJ,” which grants the ICJ the ability to resolve legal disputes submitted by member states and to give advisory opinions on legal questions referred to the Court by other international organizations and agencies, such as the GA or the SC.⁴ The Court consists of fifteen justices elected by the GA and the SC to a nine-year term in office. Justices must have high moral character, be competent in International Law, and have the qualifications to be appointed to the highest judiciary in their country. These nominations are then submitted to the GA and SC for the vote. The elected justices do not represent their governments but are instead independent magistrates. Even with this safeguard, no two justices may be selected from the same country.

The ICJ’s Authority

The primary purpose of the ICJ is to render opinions on international legal disputes between States. Only States that have accepted the jurisdiction of the ICJ may submit these cases. Another purpose of the ICJ is to clarify significant international legal questions brought to it by the GA and SC. When a UN body brings an issue before the Court, they are requesting an Advisory Opinion. The ICJ does not have authority to decide disputes involving individuals, the public or private organizations.⁵

¹ “A Guide to the History, Composition, Jurisdiction, Procedure, and Decisions of the Court.” <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage>.

² Charter of the United Nations, 1945.

³ International Court of Justice, *Overview*. <http://www.icj-cij.org>.

⁴ Statute of the International Court of Justice, 1945.

⁵ International Court of Justice, *Authority*. <http://www.icj-cij.org>.

When States have a case before the Court, participants submit written memorials and present oral arguments. At the parties' request and the Court's approval, a "Reply" and a "Rejoinder" may be permitted for written memorials. When the Court is asked to render an Advisory Opinion, assigned parties also submit written memorials and present orally before the Court. Article 38 of the Statute of the ICJ establishes the sources of law to be applied by the Court in resolving disputes in accordance with international law as defined by: 1). International Conventions (and treaties); 2). International Custom, or evidence of a general practice accepted as law; and 3). General Principles of Law recognized by civilized States.⁶

The Court's rulings are typically considered as authoritative interpretations of law and have a strong moral and assuasive effect on the international legal community. The Court's most effective areas have been boundary disputes and providing legal basis for enforcing damage claims by states in disputes involving the use of force.⁷ Once the Court has been notified of the case, it is given to the Court's Registrar who verifies that the formal requirements have been completed. The Registrar then enters the case on the Court's General List, informs the press, and sends a formal copy of the complaint to the other party(s), to the Secretary-General of the UN, as well as any country, institution or person who requests a copy.⁸

⁶ Statute of the International Court of Justice, 1945

⁷ *Ibid.*

⁸ International Court of Justice, *the Proceedings*. <http://www.icj-cij.org>.

Preparation for the ICJ Simulation

The President presides all meetings of the Court, directs its work, and supervises its administration. During judicial deliberations, the President has a casting vote in the event of votes being equally divided. In regards to the Rules of Procedure, simulation of the ICJ will differ from most committees in its lack of structured debate. The ICJ has no Speakers' List, speaking time, resolutions, or other formalities. Parliamentary procedure will be used only minimally and then only to maintain professionalism and order.

The Director and Assistant Director, acting as the President and Vice President of the ICJ respectively, will recognize individual judges to speak, and they may continue their remarks as long as reasonably necessary. The ICJ thrives on active and engaged debate and discussion, and more than any other committee judges must listen to and treat each other with the respect and professionalism normally accorded to respected legal scholars. Participating in the ICJ is about coming to some mutual understanding of the relevant legal issues, even if total consensus is never reached. Back-and-forth debate, which is not allowed in most large committees, is the most useful part of ICJ deliberations, provided it is done with consideration and respect for others. In general, most of the committee sessions in ICJ will involve moderated debate.

With this in mind, judges are encouraged to mention any questions and concerns they have, particularly in the early stages of the process. As opposed to convincing fellow justices of the merits of an argument, each judge should try to make sure others understand the arguments and analysis and leave it for fellow judges to decide individually whether the arguments make sense. The process should help each judge arrive at their own reasonable decision on the case; the ICJ will not write its decision until all judges have made up their minds on all relevant legal issues. Judges must listen carefully to the statements and questions of fellow judges. Confusion is acceptable, and dissension is encouraged. If all debate is conducted with a mind open to change and with respect for the ideas of all judges. The true purpose of the simulation is to discuss issues that face the Court and, to that end, all debate that enriches discussion is welcome.

It is critical that each member of the ICJ understands and is prepared to discuss the case at hand. Each judge should arrive thoroughly researched, ready to participate in each debate, and with an interpretation of international law that is personally (and rationally) satisfying. Information provided to the Court during simulation is designed to enhance discussion, not replace outside research. Each judge should look at the relevant past cases of the ICJ in these areas in an effort to become knowledgeable in relevant international law before the conference. When making your decisions, remember the ICJ is bound to apply the rules of international law as interpreted by the court. Article 38 of the Statute of the ICJ specifies the sources of international law, which include treaties ratified by states, the rules of customary international law as determined by the practice observed by most states, and general principles of law.⁹ The proceedings of the ICJ begin with a written phase. For the case at hand, this includes the Memorials, and if applicable Counter-Memorials. All judges must familiarize themselves with both the facts and arguments of the case.

Flow of Committee

Once we begin substantive debate on the case, the judges will enter into an overview discussion of the legal questions presented. During this segment, each judge will present their initial views; from this, the ICJ will come

⁹ International Court of Justice, Proceedings. <http://www.icj-cij.org/en>.

to an understanding of the primary issues involved. The judges are also responsible for formulating a list of questions to ask of Advocates (counsel) who will visit the court to present additional informational and perspective during Oral Proceedings. **The initial views and the list of questions will be written by the judges before arriving at the conference and will be turned into the Director and the Assistant Director** (just as all the position papers are due for the other committees at WASMUN).

The Oral Proceedings are a chance to understand and question the legal arguments made by each side. An advocate from each party will come before the ICJ as an expert on international law, with specific knowledge of the argument posed by their state. **The questions asked should focus on clarifying each state's interpretation of international law, not on ascertaining facts.** The facts presented in the background guide should be considered accurate and complete, although they may be amended, clarified, updated, or supplemented as the Director and Assistant Director deems fit. The Advocates (counsel) who appear before the court during oral proceedings are there to answer questions about their interpretation of facts and international law, and the consequences their analysis has on the case. The court will then have to assess the presentations made by each party to determine the legal soundness of each argument. After the oral proceedings, the judges will be asked to present their preliminary opinions on the case in the form of a moderated caucus. These opinions are not binding, for the Court will not have formally deliberated the case. However, the preliminary opinions are an opportunity to see which issues are partially resolved, and which are still unclear. This will serve as a preliminary guide to the leanings of the ICJ and as a jumping-off point to begin formal deliberation.¹⁰

Formal deliberations will be the main phase of the Court's proceedings. During the deliberations, judges will go over the facts and aspects of international law, ultimately arriving at opinions. The court will determine the format of the deliberations completely so long as requests remain reasonable and debate civil. Typically, judges will be recognized to speak by the President and may present comments, critiques, and questions either to specific judges or to the court as a body. At times, the court may choose to limit discussion to a particular issue or question requiring clarifications. As the deliberations progress, the opinions of the judges will become more defined, and a consensus among the judges—or among certain groups of judges—will be reached. Towards the latter stage of deliberations, the court will also begin to arrive upon a methodology to deal with the case, i.e., a flow-chart style analysis that fits individual components into a final resolution of the case as a whole.

Lastly, the judges will write formal statements of opinions during an extended caucus. Judges will break into groups based on their legal analysis of the case. Decisions fall into three categories: majority, concurring, and dissenting. The majority opinion has the most supporters within the ICJ, both with respect to decision and methodology; this will be the Opinion of the Court. Some judges may agree with the conclusion of this opinion but have different lines of reasoning; these judges will construct one or more majority concurring opinions. Judges who dissent in part or in whole with the ruling of the court will write minority opinions. A decision may also concur in part and dissent in part. The ICJ can produce as few as one or as many distinct opinions as it has members.

Each decision will have a basic format explained by the Director as the decision writing process begins. Examples of past decisions will be included in the appendix of this guide for judge reference before and during simulation. Many judges will be new to the ICJ simulation and the Director and Assistant Director will assist in moving the

¹⁰ International Court of Justice, *Proceedings*. <http://www.icj-cij.org/en>

committee forward. Additionally, judges will be expected to have a copy of this background guide with them in committee to serve as a reference for procedural and substantive matters.

Roles

There are three roles in the ICJ; there are Applicants and Respondents, who are both advocates, and there are also judges.

Advocate

Each advocate has the role of advancing the case of their State. Clearly, this means that only States that are a Party to a case, will have advocates. Advocates will be doing most of the talking throughout the case, and as such, they have to be very well prepared. The biggest role of an advocate is in making their State's speech and responding to the questions of the judges. There will be two sides in the cases before the ICJ at WASMUN, the Applicant which brought the case to the Court, and the Respondent who, as the other Party, mounts a defense against the case brought by the Applicant. Advocates should be addressed as "Counsel" or as "Counsel for [State]". Quite often, the procedure for the WASMUN ICJ is similar to a trial simulation, where the applicant (plaintiff) and respondent (defendant) hold presentations to the judges, and afterwards, the judges deliberate and reach a decision.¹¹ Make sure to quote the key points of law in this case as you address them to show that you have given thought to the word of the law.

Judge

The role of a judge is to hear the arguments put forward by each Party's advocate and to decide upon their merits. After the advocates make their speeches, the judges will have an opportunity to question them on the certain points or on anything which they feel needs clarification or explanation. Judges should be addressed as "Judge [Name]" or "Your Honour".¹² Judges may interrupt an advocate during speeches, but a judge cannot make objections to advocates speeches—that is the role of the opposing Party's advocate.

For their position paper, judges will submit a Preliminary Opinion, which is not part of the process of the actual ICJ. It will be described in the appropriate section, but primarily differs in that a judge is not a Party to a case and should not be arguing for one party over another before deliberations. Notably, instead of developing an argument, judges will be asking questions of the advocates. Writing these questions ahead of time will help you to ask any clarifying questions on the case and on international law when the Parties of the case arrive.

WASMUN strives to simulate the actual composition of the ICJ. However, to make simulation easier and more enjoyable, there are two notable changes:

1. We will not simulate Article 31 of the ICJ Statute.
2. In certain cases, there will be 'extra' judges on the Court.

¹¹ International Court of Justice, Proceedings. <http://www.icj-cij.org/en>

¹² International Court of Justice, the Court. <http://www.icj-cij.org/en>

The first change is actually straightforward; Article 31(2) allows a Party who does not have a judge of their nationality on the Court to choose a person to sit as judge.¹³ However, choosing this *ad hoc* judge would be difficult to simulate given the time constraints of WASMUN. For this reason, we are not simulating the Court this way. This change also requires WASMUN to not simulate Article 31(1) of the Charter, which says that judges of each of the nationality of a Party to a case before the Court retain their right to sit before the Court.¹⁴ Article 31 was written to maintain the Court's impartiality, and, to maintain the spirit of this article, it would not be fair to allow one Party to have a judge of their nationality on the Court if the other does not have the opportunity to choose a judge of their own, even if judges are not supposed to rule based on national interest.

The second change is also a product of adjusting the ICJ for WASMUN. In both of this year's cases, there are Parties who are represented that do not have a judge of their nationality on the Court. Were we not to make this change, those Parties would be unable to participate in the other case. This is clearly not inline in the mission of WASMUN, for which reason, we will simulate the ICJ as if they were judges in the other case. These judges, as they are not present in the actual ICJ, will not have a name, and they should be referred to as either "Your Honour" or as the "Judge from [State]". Though WASMUN will be making this deviation from the actual ICJ, judges still must act impartially and independently and should not make decisions based on their State's policies.

Position Papers

Due to the unique nature of the ICJ, position papers for this committee not only differ from those of other committees, but also differ within this committee. As there are three roles, there are three types of parts that can make up your position paper:

1. The Memorial, which is written by an Applicants
2. The Counter-memorial, which is written by a Respondents
3. The Preliminary Opinion, which is written by a judge

Because the type differs on role, your final position paper may consist of two parts each of different type. For example, were a delegate to be a judge in the first case and the Respondent in the second, they should write a Preliminary Opinion for the first case and a Counter-memorial for the second. Delegates must keep in mind what role they are play for *each* case when writing their position paper.

A sample Memorial will be made available on the WASMUN website (wasmun.org).

Memorials and Counter-Memorials

Memorials and Counter-memorials are the written basis for arguments UN Member States make in the ICJ.¹⁵ For the purposes of WASMUN, they are part of the position papers of the ICJ. Memorials and Counter-memorials have essentially the same form and are distinguished only by which nation is submitting one of these documents. The Applicant (plaintiff) State will write a Memorial, and the Respondent (defendant) State will write a Counter-memorial. The Applicant is the state bringing the dispute or claiming a breach of international law, while the

¹³ Statute of the International Court of Justice, 1945

¹⁴ *Ibid.*

¹⁵ International Court of Justice, *Proceedings*. <http://www.icj-cij.org/en>

Respondent is the nation against which the claim is being brought. In the naming of Court cases, the Applicant is always listed first, and the Respondent, second. For example, in *Marshall Islands v. United Kingdom*, the Marshall Islands is the Applicant and writes a Memorial, whereas the United Kingdom is the Respondent and writes a Counter-memorial. Both Memorials and Counter-memorials give advocates a chance to introduce yourself and your ideas to the dais before the conference begins. More importantly, the Memorial allows you to consider and evaluate the case before the ICJ and the laws involved in them. The advocates for each country write the Memorials. It is important to note that, because the ICJ is not a traditional committee, you will not be representing countries but rather your own experiences, reasoning, and judicial expertise.

Though you may not read from your Memorial or Counter-memorial during oral arguments, treat your Memorial as if it were an opening statement before the court. Begin by summarizing the case and pointing out any aspects you may have doubts about. Address the laws and treaties involved and relate them to the facts of the case. Explain whether or not the laws were violated and, if so, how. Finally, address the direction you feel the court should move in when deciding each case. The ICJ has no blocs, nor any standing national policies to research. What it does have, however, is submissions to the ICJ, and international law. This last part is essential. Advocates are expected to provide details on the submissions to the ICJ and on the international laws involved in the case. Demonstrate how these interact using logic and your experience. Bear in mind that a critical skill within the field of international law is presenting your ideas clearly and succinctly.

Your Memorial or Counter-memorial should have a heading that includes:

- The names of those arguing the case
- The State you represent
- Your school
- Whether the document is a Memorial or Counter-memorial
- The name of each case (e.g., *Marshall Islands v. United Kingdom*)

A Memorial or Counter-memorial should be at least 2 pages and be in double-spaced 12 point Times New Roman.

The content of a Memorial or Counter-memorial should be organized under the following sections:

1. **Statement of Jurisdiction.** Explain why the ICJ has—or does not have—jurisdiction over this case.
2. **Statement of Law.** Briefly describe the relevant international law, treaties, and ICJ Charter sections that you will use in your argument.
3. **Statement of Fact.** Include the objective facts of the case.
4. **Arguments.** Use the facts and pertinent legal documents to present the case from your States’s perspective. While, as stated, you may not read from your memorial or counter-memorial during your oral presentation, it should still be the framework on which your oral argument is based.
5. **Summary and Prayer for Relief.** Describe what specific findings that you hope the Court will reach.

Conclude your Memorial or Counter-memorial with the phrase “Respectfully submitted by” and your names.

At the simulation, each set of counsel will be given the other's Memorial or Counter-memorial so that they may prepare later arguments that they will give during the case.

Preliminary Opinion

Judges will be submitting a Preliminary Opinion as their position paper. While this is not part of the ICJ's actual process, it will allow delegates who are judges the chance to submit a position paper.

Your Preliminary Opinion should have a heading that includes:

- The names of those arguing the case
- The State you represent
- Your school
- Whether the document is a Memorial or Counter-memorial
- The name of each case (e.g., *Marshall Islands v. United Kingdom*)

A Preliminary Opinion is similar to Memorial with the following exceptions:

- There is no arguments section.
- There is no Summary and Prayer for Relief.

Instead, the content of a Preliminary Opinion should be organized under the following sections:

1. **Statement of Law.** Briefly describe the relevant international law, treaties, and ICJ Charter sections and how they apply to the case.
2. **Statement of Fact.** Include the objective facts of the case.
3. **Questions for Advocates.** While you, as a delegate, will likely develop an opinion based on the objective facts of the case, as a judge on the ICJ, you should not let that opinion prevent you from considering what the advocates say during the simulation. It is part of your role to ask questions, and to ensure that you prepare, you are required to include potential questions to ask the advocates, which should aim to clarify any doubts or lack of information about factual matters, but be sure to include questions whose answers will allow you to reach a stronger, more well-informed decision as well. This section should not be a simple list of questions. Write in paragraphs, and also include the reasoning behind the questions you propose. There will be no specific number of questions that must be included, as it is the reasoning behind them that also demonstrates your ability to think critically over the cases presented.

Conclude your Memorial or Counter-memorial with the phrase "Respectfully submitted by" and the name of your judge, or, if relevant, "Judge from [State]."

Like the Memorial and Counter-memorial, a preliminary opinion should be double-spaced and use 12 point Times New Roman. However, because it contains fewer sections, specifically lacking a Summary and Prayer for Relief, it has a minimum length of 1.5 pages.

Submission

When sending these to the ICJ dais (icj@wasmun.org), include the position paper (Memorial, Counter-Memorial, or Preliminary Opinion) for each case in the same file. Bear in mind that the total minimum length for your position paper is the sum of the minimum lengths for each part.

How Does the Court Hear Cases?

The Court begins hearing a case by allowing the applicant 30 minutes to present its oral argument.

The respondent will receive 30 minutes to present its oral argument once the applicant has concluded and the President has instructed the respondent to begin.

Either side may ask for additional time if their presentation extends beyond thirty minutes, but such time will only be granted at the discretion of the President.

While few delegates ever use the entire 30 minutes, applicants and respondents should strive to speak for at least 10 minutes. The substance of the presentation is much more important than its length.

Any time during oral arguments, a judge may interrupt the delegates with a question.

Maps, posters or copies of legal documents may be used to supplement your oral argument. To use these aides, make copies in advance and approach the President regarding their submission.

What should you do (and not do) when you are presenting your oral argument?

Relax. If you have researched the case thoroughly, you will be able to deliver a compelling argument and answer any questions posed by the judges.

Oral argument is not your Memorial or Counter-Memorial. Do not read from your Memorial or Counter-Memorial. If you do, the President will stop you.

Begin your oral argument by greeting the court.

From your introduction, proceed to describe the facts of the case and the international laws and treaties your state believes to be applicable.

Your argument must be based on international law. An applicant or respondent that simply presents the facts will likely not win the case.

If you are the applicant, attempt to predict the argument of the respondent and explain why that argument should not be accepted.

If you are the respondent, take notes during the applicant's oral argument and be prepared to rebut the points made in it during your oral argument.

Conclude your argument by detailing exactly what your nation wants the court to find in its decision.

When addressing the President, use the phrase "Mister/Madame President."

When addressing a judge, use the phrase “Judge [Last Name]” or “Your Honour.”

Resources

- The Statute of the Court is available for viewing in the official web page of the ICJ, under *Basic Documents*: <http://www.icj-cij.org>. It should be an integral part of every judge and advocate’s file.
- The UN website (www.un.org) can provide you with a tremendous amount of information for your memorial/counter-memorial, international law, and oral arguments.
- All delegates, especially those arguing before the court, should be familiar with the United Nations Charter.
- The Hague Justice Portal (www.haguejusticeportal.net)
- Legal information institute (<http://www.law.cornell.edu/topics/international.html>)

I. Jadhav Case (India v. Pakistan)

Introduction

The tensions between India and Pakistan have been persistent for decades¹⁶. The political discord between the two states has manifested not only in outright military conflict, but in covert operations and intelligence gathering. Most recently, Pakistan arrested and sentenced an Indian citizen to death after finding him guilty of working within the country on behalf of India's Intelligence agency, the Research and Intelligence Wing (RAW)¹⁷.

On 3 March 2016, Indian national and former naval officer Kulbhushan Sudhir Jadhav was arrested in Balochistan, Pakistan. Weeks after his arrest, the Pakistan Government aired a video in which Mr. Jadhav confessed to working for RAW for several years. This confession, along with other evidence of Mr. Jadhav's proceedings in Balochistan were used to sentence him to death in a Pakistan military court. The government of Pakistan didn't alert India of this trial until several weeks after a verdict had been reached. The government of India has released official statements saying that Mr. Jadhav has not partaken in subversive activities at the government's request, and asserting that his confession was fabricated. Moreover, the government of India contended that Pakistan was not responding to the Indian government's request for consular access and information regarding the trial¹⁸.

On this basis, India submitted an application to the ICJ on the 8 May 2017, contending that the act of ignoring these requests constitutes a violation of Article 36 of the 1963 Vienna Convention on Consular Relations on the part of Pakistan (VCCR or 'Vienna Convention'). The government of Pakistan maintains that Mr. Jadhav worked with RAW for many years partaking in espionage and terrorism, which negates the rights he would have in Pakistan as an law-abiding Indian citizen¹⁹. Pakistan also argues that the bilateral agreement between Pakistan and India, the 2008 Agreement on Consular Access (2008 Agreement), modifies the agreements made between the two countries in the VCCR, making Pakistan's treatment of Mr. Jadhav legal and within the state's rights.

The ICJ must decide if the government of Pakistan has violated the VCCR in its dealings with Mr. Jadhav and the Indian governments request for consular access. Furthermore, the ICJ must then determine if the Indian government's requests to terminate the execution of Mr. Jadhav are warranted and should be enforced.

History

India and Pakistan have had a contentious relationship for many decades. While tensions have historical roots, conflict was exacerbated during British rule in the 1940's. These conflicts stem predominantly from economic and religious reasonings, both of which can be traced back before the formal creation of the states in 1947 with the splitting of British India²⁰.

¹⁶ Blahnik Tate, A History of Conflict between India and Pakistan with Intervention from the United Nations, 1999 https://web.stanford.edu/class/e297c/war_peace/confrontation/hintervention.html

¹⁷ Jayshree Bajoria, "The Covert Clashes Between India's and Pakistan's Spy Agencies," Council on Foreign Relations, 7 November 2008, accessed July 13, 2017, <https://www.cfr.org/backgrounder/raw-indias-external-intelligenceagency>.

¹⁸ Press Statement by the Indian Government on Jadhav Case Video Confession, http://www.mea.gov.in/press-releases.htm?dtl/26612/Press_statement_on_video_released_by_Pakistani_authorities

¹⁹ Jadhav Case, Public Sitting, <http://www.icj-cij.org/files/case-related/168/168-20170515-ORA-01-00-BI.pdf>

²⁰ Blahnik Tate, A History of Conflict between India and Pakistan with Intervention from the United Nations, 1999 https://web.stanford.edu/class/e297c/war_peace/confrontation/hintervention.html

As independent states, they both voluntarily ratified the VCCR, India on 28 November 1977 and Pakistan on 14 April 1969²¹. Mr. Jadhav was arrested on the 3 March 2016. The government of India was alerted to the arrest of Mr. Jadhav 22 days after it had taken place through the Foreign Secretary of Pakistan informing the Indian High Commissioner.²²

After becoming aware of Mr. Jadhav's arrest on 25 March, 2016, India sent a request for consular access, which was ignored by the government of Pakistan. Between 5 May, 2016 and 19 April, 2017, India sent 13 more reminders for consular access to Pakistan, all of which India claims were met with no response. India submitted an application instituting proceedings to The Hague, contending that Pakistan had transgressed Article 36 of the VCCR.

Pakistan finally acknowledged the requests by asking India for assistance in the investigation of Mr. Jadhav with the First Information Report (FIR) No. 6 of 2016. India did not provide the requested information, reiterating that Mr. Jadhav had not been granted his consular rights as an Indian national. After Mr. Jadhav was convicted within Pakistan, the government stated on 12 March 2017 "the case for the consular access to the Indian national... shall be considered in the light of India's response to Pakistan's request for assistance in investigation process and early dispensation of justice".

India argues that this is evidence of consular access being used to leverage access to information, rather than being provided as a citizen's right as dictated in Article 36 of the VCCR. Pakistan rebutted stating that it refused to acknowledge Mr. Jadhav's rights for consular access because he was being tried as a terrorist, and was requesting more information on the case as a national security matter²³.

Though Pakistan claims that during his trial Mr. Jadhav was "allowed to ask questions from the witnesses", and 'a law qualified field officer was provided to defend him throughout the court proceedings', India claims that because he was not allowed access to counsel from a fellow Indian national and informed of his rights under the VCCR, the trial was conducted unlawfully and should be declared invalid by the ICJ (Mittal ???).

On 17 April, 2017, Pakistan stated that, "the Indian national is not eligible for consular access nor will he be granted consular access" (public sitting). Pakistan cited the evidence and confession used against Mr. Jadhav to find him guilty of terrorism and espionage as justification for his lack of access to consular rights as a tried terrorist and threat to national security.²⁴

International Framework

India stakes their claim primarily on the violation of Article 36 of the VCCR. Article 36 states, "With a view to facilitating the exercise of consular functions relating to

nationals of the sending State:

²¹ Status of Treaties, Vienna Convention on Consular Relations,

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3&lang=en

²² Jadhav Case, Public Sitting, <http://www.icj-cij.org/files/case-related/168/168-20170515-ORA-01-00-BI.pdf>

²³ Ibid.

²⁴ *ibid.*

a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with

respect to communication with and access to consular officers of the sending State;

b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”²⁵

India particularly emphasizes the violation of article (b) on behalf of Pakistan, as the government of India was not notified of the arrest of Mr. Jadhav until 22 days after the authorities had secured him. India also draws attention to article (c), as several requests for consular access to Mr. Jadhav were ignored, and he was unable to be legally assisted by a fellow Indian citizen. Pakistan counters this claim, stating that Mr. Jadhav was not entitled to consular access and the rights of an ordinary citizen, as he was tried and found guilty of terrorism, a crime that threatens Pakistan’s national security.

The international framework is complicated past the VCCR by the 2008 Bilateral Agreement between India and Pakistan that directly references, and further specifies, the two states’ laws regarding consular access and rights of imprisoned nationals. The agreement was made in order to further “the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country”. While India does not lay its claim on this agreement, the 2008 Agreement does state the mandatory “release and repatriation of persons within one month of confirmation of their national status and completion of sentences”. India focuses its claim on the argument that Pakistan violated the VCCR. Meanwhile, The 2008 Agreement is central to Pakistan’s rebuttal. The defense argues that subparagraph (vi), “in case of arrest, detention or sentence made on political or security

²⁵ Vienna Convention on Consular Relations, http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

grounds, each side may examine the case on its merits” overrides the VCCR and vindicates actions taken by Pakistan. The 2008 Agreement could be seen as a written interpretation of Article 36 between the two states.

Within the VCCR, Article 73 recognizes the importance of outside bilateral agreements such as the 2008 Agreement, stating: “there may be other international agreements in force as between the parties, and that nothing in the Convention ‘shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.’”

Pakistan also utilizes Article 55, subparagraph 1 of the VCCR as it states: “Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State.”. Pakistan interprets its dealings with Mr. Jadhav as an internal affair pertaining to the security and safety of its citizenry, thus justifying their immediate detention of him.

Court-specific Action

As stated by Article 36 of the Statute of the International Court of Justice, “1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matter specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.”²⁶ The Court thus has jurisdiction in this case not only at the request of India, but because it involves an interpretation and question of international law in the VCCR, as outlined in Article 36 of the statute²⁷.

A previous ruling on Article 36 of the VCCR is found in a 1998 ruling on the Vienna Convention on Consular Relations (Paraguay v. USA)²⁸. In this case the ICJ ordered the US to take, “all measures at its disposal to ensure that the Paraguayan national concerned was not executed pending the decision by the Court”. Despite this order, the US executed Mr. Angel Francisco Breard on 14 April, 1998.²⁹

As of 18 May, 2017, the Court has ordered that Pakistan shall “take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decisions in these proceedings” (<http://www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf>).

Key Issues

²⁶ Statute of the International Court of Justice, ICJ, <http://www.icj-cij.org/en/statute>.

²⁷ Ibid.

²⁸ Overview of the Case: Vienna Convention on Consular Relations (Paraguay v. United States of America), ICJ, <http://www.icj-cij.org/en/case/99>

²⁹ Paraguay V. USA, Hague Justice Portal, <http://www.haguejusticeportal.net/index.php?id=6216>

Citing Pakistan's disregard for consular visitation, India is requesting the suspension of Mr. Jadhav's death sentence. India has also filed for the ICJ ruling to be accelerated, in accordance with Article 41 of the Statute of the Court which allows for the expedition of time sensitive cases. India requested that the Court insist that Pakistan take no further action in regard to Mr. Jadhav until the ICJ has reached a final judgment. Moreover, India is imploring that the ICJ find the sentencing of Mr. Jadhav unlawful and invalid, given the perceived dismissal of rights under Article 14 of the 1966 International Covenant on Civil and Political Rights, as well as the disregarding of Article 36 in the VCCR. Pakistan argues that these rights are not applicable to a tried terrorist and that the government's actions are justified under Article 55, subparagraph 1 of the VCCR and the acknowledgment of the 2008 Agreement within Article 73 of the VCCR.

Pakistan has requested that the case of India be dismissed. Pakistan asserts that there is no urgency on the matter as Mr. Jadhav's execution will not be carried out in the near future (public sitting). Pakistan backs this claim stating that because he was found guilty of espionage with links to terrorism, they will be attempting to extract more information out of the accused rather than expediting his execution. Pakistan also argues India's request for the IJC to nullify the Pakistani Military Court hearing is overreaching the bounds of the court, reiterating the state's right to try terrorists within its borders as a sovereign entity. Pakistan reinforces the state's right to try terrorists without consular access stating that the 2008 Agreement limits the VCCR. The defense argues that the the bilateral agreement modifies and specifies the two countries' understanding of the VCCR and thus justifies their disregard of Article 36.

Conclusion

Though the Jadhav case technically determines the fate of one Indian national, it sets a precedence for the priority of international law in regards to more specific bilateral agreements made between countries. It also deals with the Court's involvements with state court rulings, and the ability of the ICJ to delay or overturn sovereign rulings when regarding foreign nationals.

Research Questions

Does the 2008 Bilateral Agreement on Consular Access hold a higher precedence than the VCCR (specifically regarding Article 36) in legal matters on consular access between the two states, and do Pakistan's actions abide by the 2008 Agreement?

Does the Court have the power to override the Pakistan Military Court ruling to sentence Mr. Jadhav to death, as per India's request?

II. Certain Iranian Assets (Islamic Republic of Iran v. the United States of America)

Introduction

In 2016, the Islamic Republic of Iran (Iran) instituted proceedings against the United States of America (U.S.) in a case brought before the International Court of Justice (ICJ), where they contended the U.S. has adopted numerous measures that violate the *Treaty of Amity, Economic Relations, and Consular Rights* (Treaty of Amity).³⁰ These measures include freezing Iranian assets and refusing to do business with Iranian companies, particularly the Central Bank of Iran (Bank Markazi).³¹ The U.S. has awarded, through suits brought in its courts, over \$56 billion from Iran, its companies, and assets in the U.S. for alleged involvement in various terrorist acts, proliferation of nuclear weapons, and money laundering.³² The case between the U.S. and Iran, which primarily aims to resolve a dispute relating to the investment treaty between the two states, could have larger implications for the nature of foreign-owned companies operating in states under investment treaties, and the status of state immunity in international law.³³

History

The U.S. and Iran signed the Treaty of Amity in August 1955, establishing an investment agreement that laid out general rules on trade and the treatment of each state's respective companies and nationals in the others jurisdiction.³⁴ Importantly, this treaty established that disputes regarding the treaty are to be submitted to the ICJ.³⁵ While the U.S. and Iran enjoyed good relations under Shah Mohammad Reza Pahlavi, the 1979 Iranian Revolution (including the Iranian Hostage Crisis) and actions by the Carter and Reagan administrations in the U.S. resulted in significantly poorer relations between the two countries.³⁶ The U.S. has since imposed sanctions on Iran, starting in 1979 and expanded to include Iranian corporations in 1995.³⁷ In 2006, the UN joined the U.S. in sanctioning Iran over its nuclear program.³⁸ The U.S. has called Iran a state sponsor of terrorism, notably pointing to the 1983 bombing of U.S. military personnel in Beirut, Lebanon.³⁹

³⁰ Application Instituting Proceedings. Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (International Court of Justice June 14, 2016); Treaty of Amity. http://www.parstimes.com/law/iran_us_treaty.html

³¹ Ibid.

³² Sanctions Against Iran: A guide to Targets, Terms, and Timetables. Harvard Kennedy School. <https://www.belfercenter.org/publication/sanctions-against-iran-guide-targets-terms-and-timetables>

³³ BakerHostetler, Iran's World Court Case Against the United States May Impact Investment Arbitration, 2016. <https://www.bakerlaw.com/alerts/irans-world-court-case-against-the-united-states-may-impact-investment-arbitration>

³⁴ US State Department, Treaty of Amity. <https://www.state.gov/documents/organization/275251.pdf>

³⁵ Application Instituting Proceedings. Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (International Court of Justice June 14, 2016); Treaty of Amity. http://www.parstimes.com/law/iran_us_treaty.html

³⁶ Sanger, David, *Iran Complies with Nuclear Deal; Sanction Lifted*, 2016.

https://www.nytimes.com/2016/01/17/world/middleeast/iran-sanctions-lifted-nuclear-deal.html?_r=0

³⁷ US State Department, Iran Sanctions. <https://www.state.gov/e/eb/tfs/spi/iran/index.htm>

³⁸ United Nations, Press Release, 2006. <https://www.un.org/press/en/2006/sc8928.doc.htm>

³⁹ US State Department, State Sponsor of Terrorism. <https://www.state.gov/j/ct/list/c14151.htm>

Since 1995, U.S. sanctions have particularly hit Iran's financial and energy sectors.⁴⁰ The Treaty of Amity includes provisions that protect and call for the betterment of each state's financial and commercial sectors, which Iran argues the U.S. has disregarded with its sanctions. In the past, the ICJ has reviewed other argued breaches of the Treaty of Amity, including a 1992 case on Iranian oil platforms.⁴¹ In this 1992 case, which involved the sinking of a U.S. naval ship and several Iranian oil platforms, the court found that the claims of both states were invalid. The ICJ found the U.S. claim of invoking the essential security exemption was not convincing because of the lack of evidence proving the missiles sinking its ship were Iranian. On the other hand, Iran's claim of violation of the Freedom of Commerce provision was also invalid because the sunken platforms were not used for trade with the U.S., which is the jurisdiction of the treaty.⁴²

International Framework

The Treaty of Amity extends further trading rights between subjects of Iran and U.S. within the context of commerce between those two countries⁴³. In doing so, Article IV of the treaty states that:

Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests [...].

In other words, Article IV implies that a distinction exists between the state and “nationals and companies”.⁴⁴ Additionally, Article XXI. 2 of the treaty provides a mechanism for arbitration of disputes regarding the enforcement of the treaty, stating

“Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.”⁴⁵

The case before the ICJ is rooted in several domestic court cases within the U.S., particularly *Bank Markazi v. Peterson* (2016).⁴⁶ While sovereign states generally are immune from lawsuits from the U.S. judiciary under the Foreign Sovereign Immunities Act (FSIA), several plaintiffs used the state sponsor of terrorism exemption to incur monetary judgments against Iran over its alleged involvement in the Beirut attack as well as several other incidents.⁴⁷ In 2012, the U.S. froze several assets within the U.S. alleged to belong to Iran, including a bank

⁴⁰ Sanctions Against Iran: A guide to Targets, Terms, and Timetables. Harvard Kennedy School.

<https://www.belfercenter.org/publication/sanctions-against-iran-guide-targets-terms-and-timetables>

⁴¹ ICJ, Case Concerning Oil Platforms, 2003. <http://www.worldlii.org/int/cases/ICJ/2003/4.html>

⁴² Ibid.

⁴³ Chachko Elena, Iran Sues the U.S. in the ICJ – Preliminary Thoughts, 2016. <https://www.lawfareblog.com/iran-sues-us-icj-%E2%80%93-preliminary-thoughts>

⁴⁴ Ibid.

⁴⁵ US State Department, Treaty of Amity. <https://www.state.gov/documents/organization/275251.pdf>

⁴⁶ Application Instituting Proceedings. Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (International Court of Justice June 14, 2016). http://www.parstimes.com/law/iran_us_treaty.html

⁴⁷ Bank Markazi V. Petersen et. al. , Supreme Court of the United States Opinion. https://www.supremecourt.gov/opinions/15pdf/14-770_9o6b.pdf

account held by a mediator for the Central Bank of the Islamic Republic of Iran (Bank Markazi)⁴⁸. While Iran argued that the money in that account was not Iranian (instead it was the property of the mediator), during the judicial process the U.S. legislature amended the definition of state-held assets to specifically include the account linked to Bank Markazi⁴⁹. Iran further argued that this change amounted to a legislative breach of U.S. separation of powers; however, the U.S. judiciary ruled against Bank Markazi and allowed the account to be used to pay plaintiffs claims against Iran.⁵⁰

In June 2016, two months after the *Bank Markazi v. Peterson* decision, Iran filed suit with the ICJ arguing that the release of funds from the account linked to Bank Markazi was in violation of the Treaty of Amity.⁵¹ Iran has argued that the “nationals and companies” cited in the Treaty of Amity include Bank Markazi and that the actions by the U.S. do not amount to “fair and equitable treatment” to those parties.⁵² In response, the U.S. has argued that the Treaty of Amity makes a distinction between those “nationals and companies” and state-owned or controlled enterprises, and that Bank Markazi does not fit that definition as outlined in the treaty.⁵³

Court-specific Action

The ICJ has made several previous judgments relevant to the outcome of this case as well as several steps in the litigation of this lawsuit. The aforementioned 1992 “oil platform” case established the ICJ’s willingness to consider arbitration of disputes related to the Treaty of Amity, and can be considered an example of previous ICJ action on the treaty in question, despite focusing on different aspects of the treaty than this case.⁵⁴ In addition, the 2012 ICJ Jurisdictional Immunities of The State Case, which involved Italy waiving the state immunity of Germany in several cases involving Italian victims of war crimes in the Second World War, also follows parallels with the current case by showing an instance in which a state waived the immunity of another state in its own courts.⁵⁵ In this 2012 case, the ICJ ruled against Italy and rendered its court decisions void.⁵⁶ In past cases, the ICJ has also cited the 2004 UN *Convention on Jurisdictional Immunities of States and Their Property*.⁵⁷

Key Issues

Question of Jurisdiction

The question of jurisdiction must be decided before proceeding with the case. While the ICJ has historically found jurisdiction with the Treaty of Amity, the specific circumstances of Certain Iranian Assets are unique, and the court must decide whether the arguments given by Iran in instituting proceedings give reason for the court to hold

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Application Instituting Proceedings. Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (International Court of Justice June 14, 2016). http://www.parstimes.com/law/iran_us_treaty.html

⁵² Ibid.

⁵³ Chachko Elena, Iran Sues the U.S. in the ICJ – Preliminary Thoughts, 2016. <https://www.lawfareblog.com/iran-sues-us-icj-%E2%80%93-preliminary-thoughts>

⁵⁴ United Nations, Press Release, 2006. <https://www.un.org/press/en/2006/sc8928.doc.htm>

⁵⁵ Judgments, Jurisdictional Immunities of the State. <https://web.archive.org/web/20161213071233/http://www.icj-cij.org/docket/files/143/16883.pdf>

⁵⁶ Ibid.

⁵⁷ United Nations, Convention on Jurisdictional Immunities of States and Their Property, 2004. http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

jurisdiction, particularly whether there is reason to believe U.S. violated Article III of the Treaty of Amity by mistreating Bank Markazi.⁵⁸

Bank Markazi and Article IV of the Treaty of Amity

Should the ICJ decide that Certain Iranian Assets is within the court's jurisdiction, the court must decide whether Bank Markazi qualifies as a national or company as intended in the Treaty of Amity, or whether it should be categorized as an organization of the state. While Iran argues that Bank Markazi qualifies as a company because, *inter alia*, it is defined as such under the Banking and Monetary Act of Iran, the U.S. argues that Article XI. 4 of the Treaty of Amity more closely resembles the status of Bank Markazi, rendering it exempt from the issues covered under the Treaty of Amity.⁵⁹

State Immunity and Human Rights

The most wide reaching impacts of a court decision on Certain Iranian Assets would likely involve a judgment that involves opinions on the U.S. use of exemptions to sovereign immunity. In past cases, such as the 2012 *Jurisdictional Immunities Case*, the court found very narrow or a lack of justification for the existence of exemptions to state immunity for the purpose of litigating crimes against humanity or human rights abuses.⁶⁰ In that decision, the court noted that the U.S. was only the country to have a terrorism exemption in its laws regarding state immunity, but did not comment as to its opinion on the legality of that exemption.⁶¹

Conclusion

While Certain Iranian Assets can be read as another dispute in a continued deteriorating relationship between the plaintiff and the defendant states, the case involves questions that can have a major impact on international law. Court decisions on this case could revolve around items so small as technical minutiae in a 20th century trade agreement, or take on the status of sovereign states before domestic courts.

Research Questions

1. Does the ICJ hold jurisdiction over Certain Iranian Assets? That is, is there reason to believe that Iran's claim of U.S. violation of Article III of the Treaty of Amity is valid?
2. Is Bank Markazi within the definition of "nationals and companies" in Article III of the Treaty of Amity? Under what definition does Bank Markazi fit within the Treaty of Amity?
3. Is the terrorism exemption in the FSIA acceptable under international standards of state immunity laws? Will the court continue to base its definitions and standards of state immunity on the unimplemented UN Convention on Jurisdictional Immunities of States and Their Properties⁶²?

⁵⁸ Ibid.

⁵⁹ Application Instituting Proceedings. Certain Iranian Assets (Islamic Republic of Iran v. United States of America) (International Court of Justice June 14, 2016). http://www.parstimes.com/law/iran_us_treaty.html

⁶⁰ Judgments, Jurisdictional Immunities of the State. <https://web.archive.org/web/20161213071233/http://www.icj-cij.org/docket/files/143/16883.pdf>

⁶¹ Ibid.

⁶² United Nations, Convention on Jurisdictional Immunities of States and Their Property, 2004. http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

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