*Juris Gentium Law Review, Vol. 10 No. 2 (2025)*
*Special Issue on Palestine and International Law*

# O Simultaneity, Thou Shan't Flee to Unholy Divinity! "Simultaneous Obligations" Interpretation of UNSC Resolution 242 (1967) Denied in the Jurisprudence of the ICJ

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**Abstract**
The peace process between Israel and Palestine has constantly been held hostage throughout its history to a wide variety of issues, one of the thorniest being the question of the proper interpretation of the UN Security Council Resolution 242 (1967). In particular, the longstanding disputation as regards whether its commands for Israel to withdraw from the territories it has occupied since the end of the Six Days War is absolute, or whether that command is contingent on the simultaneous fulfilment of its rights according to that same instrument, has been one huge stumbling block impeding the peace process from running its course as optimally as possible. The two main schools of this central instrument's interpretation have found expression in, and thereby extended their battle to, the two advisory opinions which the International Court of Justice has rendered in the context of this chronic conflict –especially, in two individual opinions appended to each of them. A qualitative analysis of the two, in conjunction with the respective majority opinions to which they were attached, reveals that the "simultaneous obligations" school and the positions it buttresses, which essentially seeks to defend the right of Israel not to withdraw from all the territories it had occupied since the Six Days War before obtaining what they deem to be sufficient territorial concessions by Palestine, has been denied by the Court, who thereby aligned international law with the canon of interpretation allowing for a more equal playing field between the occupier and the occupied to materialise.
**Keywords:** Security Council Resolution 242 (1967); Interpretation; International Court of Justice; Simultaneous Obligations; Rejection

## Introduction

The marks of the International Court of Justice's involvement in the ongoing multifaceted conflict of interests between Israel and Palestine –a geopolitical question the development and, indeed, the very genesis of which has otherwise been inextricably tied at the hips with the wider firmament of

international law[1]—had only relatively recently been imprinted. They are, after all, generally restrained from injecting themselves into any pressing issues of the international community at their own will by virtue of the limited methods available for them to so intervene as a mere creature of its statute.[2] Seeing as no such occasion was presented to them before the UN General Assembly in December 2003 requested them to issue an advisory opinion on one conspicuous facet of the matter, they effectively bear the status of relative newcomers amongst all the other interlocutors to this nigh-on century-old story,[3] and their contact with the conflict therefore has consequently been relatively limited, having only been involved with two extensive works in relation to it, in the form of two advisory opinions which are separated by twenty years (the first being rendered in 2004[4] and the second, very recently, in 2024[5]).

Nevertheless, a thorough consideration of all the pertinent facts, precedents, and applicable theories of law in any particular case or situation is something which is demanded of them by the judicial nature of their work.[6] As a result, the Court has been forced to –and by all appreciable measures, it indeed has—produced comprehensive pronouncements upon the most prominent amongst the grim cornucopia of issues that the conflict has given birth to despite its limited work with it. This fact, compounded by the unique air of authoritativeness which its pronunciations bear, throws into sharp relief the importance of the Court for those who wish to seek clarity pertaining to the legal aspects of the conflict.

One question in particular amongst that grim cornucopia bears an exceptional degree of importance due to its uniquely fundamental position in relation to the others: that of the right of the Palestinian people to self-determination, and whether it has been violated through their long-standing occupation by Israel.[7] In this regard, the Court has once again provided a useful and timely illumination: the more recent of their two advisory opinions on this issue spelled out quite comprehensively the constituent aspects of this right, and in what ways they have been violated by its beneficiaries' Israeli occupiers.[8] It is worth noting that amongst all those constituent aspects, the Court identified in particular the territorial integrity of the Occupied Palestinian Territories as

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[1] Noura Erakat, Darryl Li, and John Reynolds, "Race, Palestine, and International Law," *AJIL Unbound, Race Racism, and International Law* (2023): 77.

[2] I.e., to issue judgements over concrete disputes or to issue advisory opinions upon requests by bodies entitled to request them as provided for in Article 65 of the Statute of the Court.

[3] Paul J.I.M. de Waart, "International Court of Justice Firmly Walled in the Law of Power in the Israeli–Palestinian Peace Process," *Leiden Journal of International Law*, Vol.18, Issue 3 (October 2005): 467.

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, ICJ Rep 136 (hereinafter the "*Wall Advisory Opinion*").

[5] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, General List No.186 (hereinafter the "*OPT Advisory Opinion*").

[6] Lyndell V. Prott, "The Style of Judgment in the International Court of Justice," *Australian Yearbook of International Law 1975*: 86.

[7] The position of the right to self-determination as an "essential condition" for the effective guarantee and observance of other human rights is firmly established in the international human rights law firmament. See, for example, the common Article 1 of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, entered into force on 23 March 1976 and the International Covenant on Economic, Cultural, and Social Rights, adopted in New York on 16 December 1966, entered into force on 3 January 1976.

[8] See an interesting analysis on this subject in Michelle Burgis-Kasthala and Matilde Masetti Placci, "Palestinian Self-Determination between Sovereignty and Conquest: Exploring Public and Private Power in the recent ICJ's Advisory Opinion on the Illegality of Israel's Occupation," *Opinio Juris*, 23 August 2024, https://opiniojuris.org/2024/08/23/palestinian-self-determination-between-sovereignty-and-conquest-exploring-public-and-private-power-in-the-recent-icjs-advisory-opinion-on-the-illegality-of-israels-occupation/, accessed 9 Februrary 2025.

an "essential" element of that right,[9] thereby arguably elevating it to a singularly central position in the wider context of the overall conflict, and attaching to its fulfilment a similarly exalted importance in the efforts to resolve said conflict.[10]

In this connection, it would be particularly felicitous to direct the focus of this article on the treatment which the World Court has afforded towards an instrument forming one very prominent part of the long line of international instruments concerning the territorial arrangement to be followed by the two states: The UN Security Council (UNSC) Resolution 242 (1967).[11] Such is the case because, aside from the fact that it has been "quoted and referred to" more than any other resolution that has been issued under the auspices of the United Nations on the subject,[12] it has also found wide acceptance in the international community as *the* basis for possible peace between the two sides.[13] This accepted importance, compounded by the fact that its interpretation has also been the subject of the most bitterly and contumaciously fought of disputes,[14] has subsequently rendered it a major factor contributing to the aforementioned inertia-inducing tug-of-war between its two principal addressees and the international community, who has an interest no less valid than the two former in seeing it resolved. This seemingly perennial dispute surrounding its interpretation thereby renders it a most natural marketplace of widely differing judicial ideas on the bases of which the ultimate battle between the two principal parties may be won or lost, and the tension undergirding which could dictate whether the resolution of the dispute shall go marching ahead or in place. These judicial ideas, as are reflected through some of the individual opinions attached to the Court's two aforementioned advisory opinions; the tension between those ideas; and how that tension has found resolution within the larger context of the Court's overall jurisprudence, shall form the main subjects of this article's discussion.

## A. Who's Afraid of Security Council Resolution 242 (1967)? The Stakes Involved in Its Construction

The foremost relevant provision of the resolution, as it pertains to the pathway which both Israel and Palestine must traverse in achieving both their interests, is its Article 1, which in two sub-articles enshrines the two principles which *both* shall be adhered to by all the interested parties to the situation: *(i) "Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and*

[9] *OPT Advisory Opinion*, para.238.
[10] It is worth noting, in this connection, that the qualifier "essential" was not used by the Court in expounding upon the other constituent aspects of the right to self-determination that it had identified in the opinion, such as the right to be protected against "acts aimed at dispersing the population and undermining its integrity as a people" (*OPT Advisory Opinion*, para.239) and the right to exercise permanent sovereignty over natural resources in the territory (*Ibid.*, para. 240). This is of course not to say that these other aspects of the right do not also constitute an essential part to the realisation of the right to self-determination; it is more proper to read the Court's omission of the "essential" qualifier in describing them as meaning that these other aspects flow from the right to territorial integrity; in other words, that the former two are but the progenies of the latter.
[11] United Nations Security Council Resolution 242 (1967), adopted by the Security Council at its 1382nd meeting on 22 November 1967 (hereinafter "Resolution 242 (1967)").
[12] Ruth Lapidoth, "Security Council Resolution 242 at Twenty Five," *Israel Law Review* Vol.26, Issue 3 (Summer 1992): 295.
[13] John McHugo, "Resolution 242: A Legal Appraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict Between Israel and the Palestinians," *International and Comparative Law Quarterly* Vol.51, Issue 4 (October 2002): 851.
[14] *Ibid.*

*political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;...*"[15] From the very outset of the discourse surrounding the correct interpretation of its contents, a demarcation line has been distinctly drawn between two modes of interpretation; one erring on the side of Israel's interests, and another on the side of Palestine's interests.[16] Such a state of affairs is largely enabled by the inherent indeterminacy tied with the constructive ambiguity of the Resolution's own terms.

To begin with, the Resolution was drafted against the backdrop of the so-called Six Days War between Israel and a coalition of Arab states acting, *inter alia*, on behalf of the interests of Palestine, against what the latter group of states saw as the former's increasingly entrenched opposition against the Palestinian people's right to return to their respective homes which were then–and still, now– under the occupation of the Israeli forces as a result of the 1947 event known as the *Nakba*.[17] The main issue in the deliberations leading to the adoption of that Resolution was the admissibility under international law of the *de facto* acquisition by Israel of the territories of the Sinai Peninsula, the Golan Heights, the West Bank, and East Jerusalem during the course of the aforesaid war through occupation.[18] The Security Council unanimously held the view that it shall be deemed inadmissible to acquire territories thusly, and Resolution 242 was therefore drafted with the main spirit of pronouncing such general sense of disapproval in mind.[19]

However, at this drafting stage of the resolution, a certain recurrent leitmotif of *tension* makes its first appearance. Indeed, throughout this phase, there were some tough push-and-pull which played out between the two major blocs, which in the end called for a balancing act to be played between the interests of maintaining the legal impermissibility of territory acquisition through annexation, and the interests of maintaining Israel's security through territorial integrity.[20] In settling this conflict of views, the drafters agreed, in the main, upon a formulation that features in its wording a certain constructive ambiguity as regards the relationship between the two obligations that the Resolution enumerates. In turn, this ambiguity has, at the very least, had the effect of lending some degree of credence to the notion that it would be admissible for the Israelis to retain the territories for the purposes of their security, notwithstanding the fact that the underlying legal principle that a blatant land-grab would not be permissible is meant to be simultaneously affirmed in strong terms.[21]

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[15] United Nations Security Council Resolution 242 (1967), Article 1.

[16] Michael Lynk, "Conceived in Law: The Legal Foundations of Resolution 242," *Journal on Palestine Studies* Vol.37, issue 1 (2007): 7-8.

[17] See, *inter alia*, United Nations Security Council Official Records (UNSCOR), 1381st Meeting, paras. 31-37, statement by Lord Caradon of the United Kingdom.

[18] John McHugo, "A Legal Reappraisal of the Right-Wing Israeli Interpretation," 851.

[19] *Ibid.*

[20] See, *inter alia,* UNSCOR, 1382nd Meeting, paras.58-61, statement by Lord Caradon of the United Kingdom ("[T]he draft resolution which we have prepared is not a British text. It is the result of close and prolonged consultation with both sides and with all members of this Council. As I have respectfully said, every member of this Council has made a contribution in the search for common ground on which we can go forward. . . . I would say that the draft resolution is a balanced whole….."). Further, see John McHugo, "A Legal Reappraisal of the Right-Wing Israeli Interpretation," 865-872.

[21] The principal drafter of the Resolution, Lord Hugh Caradon of the United Kingdom, has affirmed *post hoc* that on the legal front, no such blatantly annexation-permitting interpretation was envisioned to be deemed admissible. Hugh Caradon, "The Intent of Resolution 242: A Discussion with Lord Hugh Caradon," *Arab Studies Quarterly* (Spring/Summer 1985): 170.

Some commentators have taken such ambiguity to mean that the withdrawal that is demanded by the Resolution of Israel must be subjected to Israel's security needs –in other words, that Israel effectively reserves the right to retain as much of the occupied territories as their supposed security needs demand, and furthermore, that the territories from which Israel would be under an international obligation to withdraw their forces would need to be determined by a further negotiation process by the immediately-interested parties, *i.e.*,, Israel and Palestine.[22] Furthermore, as a corollary to the aforementioned proposition, this school holds that these negotiations ought to be conducted in a manner which bars any third parties from injecting themselves into it, at least in any capacity exceeding that of mere facilitators.[23]

Meanwhile, another school, diametrically opposed both in terms of its reasoning process and its conclusion to the first, interprets this same ambiguity as providing a conclusive command in line with what the plain text of its first stipulation, read discretely, calls for: the withdrawal of Israel armed forces from the territories it has occupied since the Six Days War, without it being subject to any preconditions as may be inferable from its subsequent stipulations. This school attaches primacy to the need for the obligations as outlined in the Resolution to be executed as they are found in that instrument, without any need for further negotiations. This is so, they hold, for no such negotiations may be able to yield a truly just result, as the lopsided dynamic of powers between Israel and Palestine would never allow for any negotiations between them to be able to be conducted "freely".[24] As will be discussed below, it becomes clear that this position of the school will necessitate its adoption of a corollary position which defies the *laissez-faire* approach advocated for by its opposing number.[25]

In these differences, one might observe an overarching distinction: that one interpretive school, which stands for the occupying power's interests, treads a path of stagnation and identifies itself more closely with the adoption of a "political" spirit of dispute resolution, while the other, which stands for the interests of the occupied people, ardently calls for movement and identifies itself more closely with a "legal" spirit of dispute resolution. The former identifies the rightful in the defence of the *status quo*, under which the spoils which the occupiers have gained through the

[22] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Oxford University Press, 1996), 211-212; and Ruth Lapidoth, "The Misleading Interpretation of UN Security Council Resolution 242," 12-13.

[23] As is reflected in the statements made by some of the states which participated in the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* advisory proceedings. See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, General List No.186, Written Statement of Fiji, 25 July 2023, p.3; Written Statement of the United Kingdom, 25 July 2023, para.10; and Written Statement of the United States of America, 25 July 2023, para.3.30.

[24] John McHugo, "A Legal Reappraisal of the Right-Wing Israeli Interpretation," 880-881 ("It is impossible to see how an independent scholar can examine the records of the Security Council debate and claim that they support a contention that Israel had the right to retain areas of the territories occupied in 1967 save through a freely negotiated agreement. The possibility of such agreement is *impeded by the maintenance of the occupation for over a third of a century*." Italics mine).

[25] This is hinted at by scholars such as Quincy Wright, who, in supporting the Security Council's intervention into the matter of the Six Days War, opined that even though "The principle of no acquisition of territory by war should, if strictly applied, require the cease fire lines to be at the frontiers before hostilities began, thus preventing military occupations as well as acquisitions by force," the *"overriding responsibility of the United Nations to stop hostilitie*s justified the acceptance of the armistices as temporary cease fire lines to be soon superseded by permanent boundaries established by peaceful means."). Quincy Wright, "The Middle East Problem," *American Journal of International Law* Vol. 64, No.2 (April 1970): 271.

exercise of force they are enjoying, and, at that, without any meaningful temporal impediments, whereas the latter identifies the same in a reversion towards the *status quo ante bellum*, in which those very spoils benefit duly and solely their original, rightful masters.[26]

The general differences between the two in terms of their respective practical legal implications can roughly be broken down into the following: 1) that the "political" route attaches primacy to the minimisation of intervention by third parties, and for such interventions, if any were to be deemed admissible, to be restricted in its form to non-binding mediation processes, whereas the "legal" route does not attach any such primacy to such a *laissez-faire* attitude, allowing more room for binding determinations to be made by third parties, which can also take the form of mere advisory pronouncements on the legal rights and obligations of each side; and 2) that the "political" route, in its effect, would allow for settlements to be reached purely upon the wills and whims of the parties, along with the ineluctable forces of the "invisible hand" of international relations, whereas the kinds of settlements allowed for by the "legal" manner are restricted to those that the strict application of an objective set of rules binding upon both the parties could reasonably result in.

### B. The Higginsian Framework: "Simultaneous Obligations", and the Legal Entrenching of Israel's "Security Interests" Side of Things?

The foregoing divisions of opinion as to which path forward is commanded by international law, along with some of the reasons which have been advanced to sustain them, have managed to find their way into the two ICJ advisory opinions which pertain to the Israel-Palestine conflict. However, it has not been through their respective *majority* opinions that a state of tension between the two schools is manifest, as is reflected by the fact that the Resolution were scantly touched upon in each.[27] Instead, such a fault line has only been discernible through the several –two, in the main– individual opinions attached to them, on account of the fact that they articulated more clearly than their respective majority opinions the legal interpretation of the contents of said resolution.

Deeply entrenched within the epistemology of the "Israeli interests" camp is a canon of interpretation that relies on building blocks constituted, in large part, by inferences derived from a few grammatical elements of the Resolution which form the aforementioned constructive ambiguity. The clearest of such building blocks is the structuring of the two provisions as being preceded by the word "both" in their *chapeau* ("*.... the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of* ***both*** *the following principles*:..."), or the supposedly deliberate omission of the word "the" or "all" preceding

[26] For the purposes of providing a convenient shorthand when so required, and in line with their respective *de facto* beneficiaries, the former shall be referred to subsequently as the "Israeli interests" camp, whereas the latter shall be referred to as the "Palestinian interests" camp.

[27] In the 2004 opinion, it was only mentioned in two paragraphs (paras.74 and 162), whereas in the 2024 opinion, it was only mentioned in three (paras. 58, 61, and 176). It warrants mentioning as well that the analysis that the Court undertook in each of those paragraphs can hardly be characterised as anything more than recalling its existence and/or inferring a legal implication out of it without any meaningful display of statutory exegesis. However, as I would argue later on, this seemingly meagre amount of mentions still bear a dispositive effect on the issue nevertheless, and that disposition would not be one which would in any way be characterisable as intellectually unbecoming for a court of law.

the word "territories" in Article 1(i),[28] compounded by the requirement in Article 1 (ii) for any peace to be obtained through the respecting of the territorial sovereignty of "every state in the area" *and* the respect for the safety interests of those states. The logical estuary of such inferences, they contend, is an interpretation whereby no obligation of withdrawal from any of the territories acquired by Israel in the 1967 war arises under the Resolution without it being achieved through a negotiated settlement. This translates into an understanding that the Resolution commands the parties to reach a *politically*-obtained[29] solution which would allow Israel to, in a way, acquire at least some of the territories that they have occupied since the Six Days War; territories which would, in their view, help them form sustainable and permanent borders between them, Palestine, and other countries which surround them, thereby accruing upon them the "secure and recognised boundaries"[30] between themselves and their "others" that their self-professed existential dreads so demand.[31]

A conspicuous instance in which one can see this interpretative canon –or at least the legal position which forms its logical conclusion– underlying a fleshed out legal argument in the ICJ's jurisprudence is within Judge Rosalyn Higgins's separate opinion in the 2004 *Palestinian Wall* Advisory Opinion. In the document, which avowedly was meant to address several issues that the British jurist felt had been unduly side-stepped by the majority of the Court,[32] she cited the Resolution, in conjunction with UNSC Resolution 1515 (2003), to underline her view that those principles which are outlined in said Resolution translate themselves into "underlying" and "long-standing" obligations for both immediately interested parties. What that, in turn, translates into are as follows: for Palestine, the obligation to help achieve the securing of Israel's entitlements "to exist, to be recognized, and to security", and for Israel, the obligation to help achieve Palestine secure its entitlements "to their territory, to exercise self-determination, and to have their own State".

[28] John McHugo, "Resolution 242 – Why the Israeli View of the 'Withdrawal Phrase' is Unsustainable in International Law," *IBRU Boundary and Security Bulletin* (Winter 2000-2001): 86 ("There is no word "all" or "the" before "territories" in the withdrawal phrase. Israel would appear to rely on this in order to hold that "the withdrawal phrase in the Resolution was not meant to refer to a total withdrawal."), citing a document issued by the Israeli government entitled "Statements Clarifying the Meaning of U N Security Council Resolution 242" on 22 November 1967. Available at the Israeli Government's website through the following URL: https://www.gov.il/en/pages/statements-clarifying-the-meaning-of-un-security-council-resolution-242-22-nov-1967.

[29] The emphasis here put on the "political" manner in which the final settlement of the question of territorial entitlements between the parties supposedly –according to this school of interpretation– ought to be reached is to be contrasted with a "legal" manner in which the same can be reached in two ways. For a delineation of the general characteristics of each, see Chapter A.

[30] Resolution 242 (1967), Article 1(ii).

[31] See Yehuda Blum, "The Territorial Clauses of Security Council Resolution 242," in "Israel's Right to Secure Boundaries: Four Decades Since UN Security Council Resolution 242" (Proceedings of a Conference held in Jerusalem, June 4, 2007): 28; Robbie Sabel, *International Law and the Arab-Israeli Conflict*, (Cambridge: Cambridge University Press, 2022), 208, *et.seq*.; Ruth Lapidoth, "The Misleading Interpretation of UN Security Council Resolution 242 (1967), *Jewish Political Studies Review* Vol.23, No.¾ , "Addressing the Components of the Delegitimization of Israel (Fall 2011): 9; and Eugene Kontorovich, "Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal, *Chicago Journal of International Law* Vol.16, No.1 (2015): 129-130, *et.passim*.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, ICJ Rep 136, Separate Opinion of Judge Higgins (hereinafter "Higgins"), paras. 2, 16, 18, *et.passim*.

Furthermore, she underlined how these obligations "are to be secured, both generally and as to their detail, by negotiation", with reference to the "Roadmap"[33] document that was endorsed by the UNSC in its Resolution 1515 (2003),[34] which provides a peace-making framework entailing several phases of actions and, more germane in this respect, negotiations, which the parties should perform throughout the process, along with the targets to be achieved through each step of said process. She capped her analysis off by observing how the obligations that the majority had found (especially, but by no means exclusively, in the *dispositif* of their opinion)[35] to have flowed from the applicable norms of international law, which constitute the *substantive* obligations of the parties, are bound to be followed by them while concurrently committing to the *procedural* obligations of partaking in the aforementioned "negotiation". These procedural obligations, Judge Higgins found, obliges both parties to "move forward *simultaneously*".

While Judge Higgins did not clearly enunciate her conceptual understanding of the nature of the relationship between the obligations which in her view flow from Resolution 242 (1967) and its subsequent resolutions, on one hand, with the substantive obligations which the majority had identified as flowing from other applicable rules of international law, on the other, it seems beyond question that the two are, in her view, distinct from each other, and that the obligatory nature of the latter is contingent upon whether they would prejudice the performance of the former. [36] This can be seen from the fact that she had used the qualifier "underlying" to describe the former, and omitted any express reference to the contents of the former when she discussed the "substantive obligations" which the Court had found to bind the parties in the penultimate sentence of paragraph 18 of her opinion. As she had also positioned the aforementioned procedural obligation to "negotiate" as being "envisaged" by Security Council Resolution 1515 (2003) to protect the "underlying" obligations, it would only be reasonable to infer that this very procedural obligation to "move forward simultaneously" is conceptualised as being a part of the so-called "underlying" obligations, and therefore rank also above the substantive obligations as identified by the majority.

It is unfortunate for us that Judge Higgins did not specifically identify which species of obligations would fall under the latter category.[37] It would suffice, however, for one who desires to put this framework into more operational terms, to conclude that it effectively positions the "underlying" obligations and its corollary "procedural" obligation as an essential precondition for any other obligation and right which the parties would possess, effectively barring any alteration to be made to the current arrangements, including territorial and political ones, through any path veering from this *simultaneousness*-centric arrangement. This interpretation is further strengthened by the fact that she lamented how minuscule was the possibility that both parties would act on their "underlying" obligations without the other doing so first,[38] compounded by her other

[33] "A Performance-based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict," as annexed to a letter by the UN Secretary-General addressed to the President of the UN Security Council, 7 May 2003, S/2003/529.
[34] United Nations Security Council No. 1515 (2003), adopted by the Security Council at its 4862nd meeting, 19 November 2003.
[35] *Wall Advisory Opinion*, para. 163, *et.passim*.
[36] Albeit with the definite exception of International Humanitarian Law norms, for, as she rightly conceded, the performance of the obligations which it dictates is absolute in nature, giving to its subject no right whatsoever to retaliate in like manner for its possible breach by said subjects' opposite numbers. Higgins, para.14.
[37] In all fairness, a simple perusal of the majority opinion would most probably render such an exercise redundant.
[38] She referred to this supposedly highly probable scenario as a "perceptible tragedy". Higgins, para.18.

lamentation of the Court's insufficient acknowledgement of the "greater whole" of the context in which they should have been rendering their opinion by omitting, in their analysis, mention of those very "underlying" obligations.[39]

It would perhaps be fair to say that such an understanding is tantamount to a preclusion of the admissibility of any pronouncement being made by the Court that touches upon the matter of the withdrawal of Israeli forces and authorities from the occupied territories. A perceptible corollary of this inevitable conclusion of the "simultaneous obligations" doctrine –which itself is a ratification of the aforementioned understanding that the law only contemplates and allows for the resolution of the dispute to be done solely through a series of *political* negotiations between the parties– in turn, would be a legal position bearing what amounts to a chilling effect[40] on any attempt by the Palestinians to exercise their inalienable[41] right to self-determination and territorial sovereignty on account of the due respect that the Court, under this framework, should afford towards Israel's "underlying" rights "*to exist, to be recognised, and to security*", compounded by the rather *laissez-faire* attitude that the Court must take in ensuring that such a state of affairs does end up materialising.[42]

In the end, an inchoate argumentative brick in the Court's jurisprudential wall might be an apt characterisation for this framework, albeit more so on account of its solitary status in the Court's assortment of opinions –no other judges in that case, even the only dissenting one,[43] joined her separate opinion or endorsed its relevant reasoning in their own individual opinions– rather than its lack of structural coherence or wholeness. Indeed, the respectable logical process which it had thread through, along with the valid logical conclusion which it had reached, had rendered it a gun with all the potential in the world to have registered a clear hit on its target; it is just that, by virtue of, in large part, its lack of contemporary supporters, that gun had simultaneously been rendered one which chambers' had only been smoking as the result of an ultimately impotent discharge. Indeed, the potential of this framework to be exalted into the realm of acceptability within the international legal firmament has seemed to be vitiated –at least in its conclusion if not its reasoning–even back in 2004, for, as was rightly pointed out by Lynk, the Court in the 2004 *Wall* advisory opinion had explicitly cited the Resolution several paragraphs[44] before restating the principle that it is inadmissible to permanently acquire a territory of another state through occupation,[45] which, in his words, can "point in one direction only: All of the territories captured

[39] *Ibid.*
[40] Rabea Eghbariah, "Towards Nakba as a Legal Concept," *Columbia Law Review* Vol.124 (May 2024): 933, note 185 (citing the American government's stance that any statehood of Palestine could only come as a result of "direct negotiations" between the parties as one form of entrenchment of the "denial of Palestinian self-determination" by the international community).
[41] See, *inter alia*, United Nations General Assembly (UNGA) Resolution 3236 (XXIX), "Question of Palestine", adopted by a plenary session of the General Assembly on 22 November 1974), preambular recitals 5 and 6, and operative paragraph 1 (a) and (b).
[42] See *supra* note 23 and accompanying text.
[43] Although it is due more to the fact that he dissented to the whole of the proceedings taking place at all than anything else, thereby rendering touching upon this particular point to be without any considerable merit to him. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 9 July 2004, ICJ Rep 136, Declaration of Judge Buergenthal, p.240, para.1.
[44] *Wall Advisory Opinion*, para.74.
[45] *Ibid.*, para.87.

by Israel in 1967 are deemed to be occupied, and Israel cannot assert a lawful claim of territorial sovereignty over any of these occupied lands."[46]

In any case, that impotence is not one the causes of which are confined to the external matrix of contemporary judicial acceptance alone; the brick is also inchoate in its own, internal, constitution. To be sure, such a *simultaneousness*-centric framework, which, by implication, places an exalted emphasis upon the importance for there to be a state of parity between all the parties to the conflict, would also afford consideration towards Palestine's parallel "underlying" rights", but this is where that leitmotif of *tension* re-enters the play, as we start to see that potent impeachments against the soundness of the framework's logical premises are raised by its adversary viewpoint. In this connection, it is important to put the limelight, in particular, upon Judge Higgins's lamentation that both sides would not act on their own initiative to achieve their obligation of "moving forwards simultaneously" in achieving the ends as envisioned in Resolution 242 (1967), a proposition which is underlain mainly by the assumption that *both* those ends had not been reached at the time the opinion was rendered, therefore rendering the *status quo* at the time lamentable on account of both immediately interested parties' *equal* lack of interest in fulfilling their respective commitments.[47] A superseding member of the Court would use the pulpit afforded him by his judicial post to provide a formidable challenge to that notion exactly two decades later, and thus show how, despite this own author's previous recognition of the Higginsian framework's logical *validity*, the *soundness* of the same has successfully eluded even the penumbras of that recognition.

### C. Making the Emperor Cognisant of his New Clothes: Judge Tladi's Declaration in the 2024 *Palestinian OPT* Advisory Opinion and the Emphatic Attempt to Level the Playing Field

It should be clear enough at this point that Judge Higgins's interpretative framework (hereinafter referred to also as the "Higginsian framework") meets quite a formidable existential blow in both of the Court's –majority– advisory opinions on the issue. The Court's pronunciation of the inadmissibility of acquiring permanently territories through occupation in the aforementioned passages of the *Wall* advisory opinion[48] is only strengthened by the recent *Israeli Policies and Practices in the OPT* Advisory Opinion.[49] In the latter, amongst many other momentous findings, the Court declared that, by virtue of its corresponding *erga omnes* status, the Palestinian people's aforementioned right to self-determination breeds a number of corresponding obligations for Israel. The most important of those obligations, especially as regards the discourse on Resolution

[46] Lynk, "Conceived in the Law: The Legal Foundations of Resolution 242," 19.
[47] Indeed, the learned judge even went so far as to assert that this supposed unwillingness (or inability) of both sides to engage with each other and to commit to fulfill each of their respective obligations in a simultaneous manner is the main reason why the Palestinian people is yet to be able to enjoy their right to self-determination, and not any particular policies imposed by Israel, such as the building of the wall which the majority of the Court had found in 2004 to be a form of breach of the Palestinians' right. to self-determination (*Wall Advisory* Opinion, para.122). The part of her opinion which indicates this view reads as follows: "*.....But it seems to me quite detached from reality for the Court to find that it is the wall that presents a "serious impediment" to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions - that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing*...." Higgins, para.30.
[48] See *supra* note 46, along with accompanying text.
[49] *OPT Advisory Opinion*, para.233.

242 (1967), is the emphatically pronounced obligation to "return the land and other immovable property, as well as all assets seized from any natural or legal person since its occupation started in 1967".[50]

Moreover, this also cannot be said to be anything but a thunderous blow against the framework's legal conclusion that any intervention by the Court on the matter of the legality of Israel's stay within the territories it has occupied since the 1967 war should be inadmissible. It might perhaps a bit infelicitous that the Court's analysis as to how Resolution 242 (1967) contributed to the materialisation of said obligation went no more sophisticated than the 2004 opinion in that, similarly to the latter, it merely noted that it emphasises the prohibition of acquisition of territory by force,[51] but the debilitating effect that it has on the framework's premises and internal logic nevertheless remains evident, as the Court, as third parties to the conflict in the same vein as the United Nations' political organs, effectively have declared the existence of a right of one of the parties and an obligation on the other to the conflict without deferring it to a negotiation as between those parties themselves.

The reasoning which clarifies why this position is tenable –or, at any rate, more tenable than its adversary– under international law is made all the more plain in the declaration which was appended to said Advisory Opinion by Judge Dire Tladi, the Court's maiden South African full member[52] taking office in its 2024 term. In that document, the jurist undertook to provide a more methodologically elaborative articulation as to the nexus between the Resolution and the obligation previously mentioned. In so doing, he laboured –whether advertently or otherwise– to turn the Higginsian framework's underlying assumptions on Resolution 242 (1967), and with them the framework and legal conclusions which they underlie, completely on their heads. He started his analysis by making a general observation as to the standard arguments which the impeached framework's proponents usually resort to in interpreting the contents of obligations which flow from the resolution,[53] and which have been discussed thoroughly in the preceding section.

He then proceeded to explicate how the application of the general rules of treaty interpretation –which may be used as a guide, provided that some other modifications are concurrently made, in interpreting resolutions of the political organs of the United Nations–[54] on the relevant principles of the Resolution 242 (1967) would seem to cast great aspersions upon a notion which the former camp seems to have taken for granted: that the two main goals or principles enumerated in the Resolution, which are preceded by the word "both", is by necessity to be taken as requiring their simultaneous performance from both parties.

That starting point of the general rule of treaty interpretation: the dictate that words of a treaty are to be interpreted in accordance with their ordinary meaning in light of their object and

[50] *Ibid*., para.270.
[51] *Ibid*., para.176.
[52] There have of course been other persons of South African nationality possessing the distinction of bearing the title of a judge of the International Court of Justice (see: International Court of Justice. "South Africa", available at https://www.icj-cij.org/index.php/taxonomy/term/184. accessed 9 February 2025.). However, those instances of their sitting upon the Court's bench were merely as *ad hoc* instead of permanent judges.
[53] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, General List No.186, Declaration of Judge Tladi, (hereinafter "Tladi") paras. 49-50.
[54] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, 22 July 2010, ICJ Reports 2010, para.94.

purpose,[55] is to be the battleground upon which Judge Tladi expounds upon and opposes his decidedly non-simultaneousness demanding interpretation of the two principles against that which was espoused by the "Israeli interests" camp, and which found its most authoritative –if not its most eloquent or thoroughly elaborative– articulation in the Higginsian framework. An apt choice, especially considering that, in the latter, reference had also been made by its architect to the fact that it is "not difficult" to determine what the "underlying" obligations for both parties are, and that a reproduction of the relevant parts of the text of the resolution was used to substantiate that position,[56] which seems to indicate an emphasis on the importance of the text of a legal instrument as the main indicator of its authors' intentions, the hallmark of a textual analysis approach to statutory interpretation.[57]

In his own textual interpretation of the Resolution, Judge Tladi, while not engaging in a more sophisticated interpretative analysis of what the ordinary meaning of the word "both" is than did Judge Higgins, undertook nevertheless to provide an alternative "ordinary meaning" reading of the conjunction and the implications of its usage in the Resolution which, upon scrutiny, seems to be more in conformity with the dictates of common usage. The persuasiveness of this reading, in turn, is further strengthened by his attempt to more adequately fit his interpretative scheme as close-fittingly as possible within the full breadth of the general rule of interpretation than his British predecessor. It is to be recalled that the full content of that rule does not stop at imputing to the words their mere "ordinary meaning" alone; they are to be taken together[58] with, *inter alia*, the context which surrounds those words –meaning they cannot be detached from the given statute as a whole–[59], the instrument's object and purpose itself, and other elements such as subsequent agreements regarding the instrument's interpretation or subsequent practices by the parties which establishes the agreement of the parties regarding the instrument's interpretation.[60]

As such, in the first instance, he noted how the word "both" in the chapeau to the Resolution's Article 1, even in its ordinary meaning, does not necessarily imply the requirement for simultaneousness, and that there are no other words in the resolution which would imply that the endowing of such effect is warranted in the grand textual scheme of the resolution.[61] This would have been different if, for example, the provision had been drafted to explicitly include the word "simultaneously", "concurrently", or "at the same time". Judging by his rather brusque treatment of this question, Judge Tladi seemed to have asserted, with some degree of rectitude, that, bearing this fact in mind, the text of the provision read in the context of the lack of any explicit reference to simultaneousness in the instrument as a whole is sufficiently clear so as to make it, in the words of Judge Dionisio Anzilotti, "impossible..... to endow it with an import other

[55] *Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion*, 3 March 1950, ICJ Reports 1950, p.8.
[56] Higgins, para.18.
[57] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, vol.II, p.220, para.11.
[58] *Ibid.*
[59] *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion*, 1922 PCIJ (Ser. B), 12 August 1922, p.23.
[60] Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, entered into 27 January 1980, Articles 31(3)(a) and 31(3)(b).
[61] Tladi, para.52.

than that which is consistent with the natural meaning of the words."[62] However, one may yet endeavour to arrive at the conclusion that the omission of such words from the final text of the Resolution instead points to the possibility that "the words have been used in a wider sense than normally attaches to them (broad interpretation)."[63] Perhaps anticipating such a line of argumentation, Judge Tladi then moved on to examining the other elements which are pertinent according to the general rules of treaty interpretation.[64]

Such elements are manifested, mainly, in the form of what the Court had found in the past to be an important element to textual interpretation of a United Nations organ's resolution: subsequent resolutions by the same organ on the same issue,[65] represented in this case by those such as Resolution 476 (1980),[66] which made mention of how there is an "overriding necessity" to end Israel's occupation of the 1967-earned territories without also mentioning the need to respect Israel's security interests. Judge Tladi accordingly forwarded his conclusion that the "interdependence"-based arrangement of the two "underlying" goals could validly lose its place to an arrangement whereby the fulfilment of one goal can be pursued independently from that of the other. He even went so far as to propose that the finalisation of one may be taken as the predicate towards the finalisation of the other.[67]

Moreover, in this connection, he somewhat implied that the Higginsian framework had jumped the gun when they took the reference made in Article 1 (i) to the "territorial integrity and political independence of *every state in the area*" as implicating the security interests of Israel *alone*,[68] as is evident by the latter's –apparently subconscious– positioning of security as one of *Israel's* "underlying rights", without any mention of it as also being within the possession of Palestine, or any "other state in the area", such as Lebanon and Egypt, for that matter.[69] Judge Tladi pointed out how the geographically sweeping language of the provision calls for an interpretation which accounts for Palestine's security interests as well. He also noted –in a "bell that cannot be unrung" kind of way, i.e., despite explicitly stating that he shall "leave it aside" in determining the correct interpretative framework for the Resolution– how the Higginsian framework has conveniently omitted the fact that Israel has *de facto* come to enjoy rights of self-determination without them insisting upon the simultaneous enjoyment of the Palestinians' right to independence,[70] an essential

[62] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Series, Advisory Opinion,* 1932 PCIJ, (Ser.A/B), 15 November 1932, Dissenting Opinion by M. Anzilotti, p.383.s
[63] *Ibid.*
[64] He did not quite embark upon an examination of the object and purpose of the Resolution in his Declaration. However, this seems to be explainable by the fact that he did not seem to contest the assertion that it is for the peaceful and just resolution of the conflict through the application of *both* principles as outlined in its Article 1 that the Resolution was drafted (see Tladi, para.50). This understanding would justify the confining of the zone of dispute between the opposing frameworks at play, and consequently the scope of Judge Tladi's necessary rebuttal, to the treatment of the plain text of the resolution itself, the broader context against which they were passed, and the other aspects which, as embodied in Articles 31(3) (a) and (b), ought to be taken together with said context.
[65] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, para.94. See also Michael C. Wood, "The interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law* Vol.20, No. (1) (2017): 91, explaining that the utilisation of such elements is enabled by way of analogy to Article 31(3)(a) of the Vienna Convention on the Law of Treaties.
[66] United Nations Security Council Resolution 476 (1980), adopted by the Security Council at its 2242nd meeting on 30 June 1980.
[67] Tladi, para.52.
[68] Tladi, para.51.
[69] Higgins, para.18.
[70] Tladi, para.49.

logical precondition[71] to *any* kind of security for a state to be guaranteed, effectively providing said framework's proponents, the emperors of what is now clearly a preeminent domain of legal cognitive dissonance, with a mirror against which to reflect upon their new clothes: the bare naked truth that their framework, belying Resolution 242's spirit, object, and purpose, acts as the bastion of Israel's and Israel's interests alone.

This logical conclusion of the Tladian framework, which effectively amounts to an emphatic endorsement of the competence of third parties to the conflict such as the ICJ to intervene on the issue of the legality of Israel's presence in the territories acquired after the 1967 war, and an emphatic denouncement of the interdependence of the two "underlying requirements" of Resolution 242 (1967), levels the playing field that has been unduly skewed against the "Palestinian interests" camp by the underlying assumptions of the Higginsian framework and the legal position which forms its logical conclusion.

These views espoused by Judge Tladi's framework are not views which are devoid of any genealogical connection to the Court's past jurisprudence whatsoever; a number of Judge Higgins' very own colleagues in the 2004 bench, which largely joined the majority opinion in the *Palestinian Wall* case, did forward views which correspond largely to the points articulated by Judge Tladi in his declaration. For one example, in his separate opinion, Judge Awn Al-Khasawneh had noted, with an emphatic tone, how the obligations of both parties to negotiate with each other, however important it may be in the wider hostilities settlement framework between the two, should remain "a means to an end", and that they cannot "in themselves replace that end", and, furthermore, that obligations of an *erga omnes* nature such as those which flow from the right to self-determination, "cannot be made conditional upon negotiations".[72] Judge Elaraby of the same 2004 bench had also made the observation, concordant in spirit with Judge Tladi's findings, that the two obligations imposed by Resolution 242 (1967) are obligations of *result* which are of "paramount importance", and, accordingly, that any attempts to frame them as mere obligations of *means*, e.g., by "confining it [those obligations] to a negotiating process", would be "legally wrong and politically unsound".[73] This is especially so, the Egyptian judge contended, if those obligations are read in light of a subsequent resolution, the Security Council Resolution 338 (1973),[74] which called upon the parties to immediately, after the materialisation of a ceasefire in the Yom Kippur War of 1973, implement Resolution 242 (1967) "in all of its parts".[75]

To these two, Judge Tladi's framework, conceived two decades after, bears the marked distinction of being their perpetuating and clarifying echo, so earned by virtue of its elaborate articulation of the methodology which further vindicates the conclusions the former two had arrived at and its firm reaffirmation of their acknowledgement of the entrenched imbalance in the immediately interested parties' standing politically, economically, and in all other respects germane to the efforts of realising a just and lasting peace between the two. As a whole, the three of them,

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[71] Yezid Sayigh, "Redefining the Basics: Sovereignty and Security of the Palestinian State," *Journal of Palestine Studies* Vol.24, Issue 4 (1995): 16-17.
[72] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Rep 136, 9 July 2004, Separate Opinion of Judge Al-Khasawneh, para.13.
[73] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Rep 136, 9 July 2004, Separate Opinion of Judge Elaraby (hereinafter "Elaraby"), p. 259.
[74] United Nations Security Council Resolution 337 (1973), adopted by the Security Council at its 1740th meeting on 15 August 1973.
[75] Elaraby p. 259.

with Judge Tladi's opinion at the vanguard, form quite a formidable argumentative structure cohering together points which, for whatever reason, are unstated by the Court as the rationale it had considered in reaching its final decisions,[76] yet are able nevertheless to act as persuasive authorities in explaining the legal theories and convictions which may plausibly underlie said final decisions, most importantly in regards to the theoretical nexus between it and the Resolution 242 (1967) –which they, after all, did cite often in their legal analysis.[77]

**Conclusion**

The Higginsian and Tladian frameworks, by virtue of their call and response-like quality, display in full transparency the intellectual –perhaps moral and political along with it as well– tensions which underlie the Court's internal discourse as regards the proper framework by which to interpret the contents and the corresponding commands of UN Security Council Resolution 242 (1967). Through a perusal of the general fault line between the two, as constituted by the differences between the reasonings incorporated in them, a rough delineation can be seen between two methodologies which can be used in the resolution process: a "political" one, and a "legal" one, with the Higginsian framework being an endorser of the former, and the Tladian framework being that of the latter.

The Court has made explicit mentions of Resolution 242 (1967) in connection with its emphatic pronouncements of Israel's obligation to return Palestinian lands and properties, thereby making it clear to everyone its views regarding on which side should the intellectual tension between the contumacious and the accommodating methods of resolution should be resolved: the latter. The framework which calls for an interpretation erring to the side of making sure that the process of seeking for the most just and durable pacific solution to the whole problem moves along well, *i.e.,* of the Tladian framework, thus prevails. Indeed, the rather perfunctory way in which the Court had made such a citation could even perhaps be taken as a sign that this conclusion of the Tladian framework has been –and should, for future purposes, also be– taken as granted by it in its deliberation process, thereby rendering an overly lengthy explanation as to why it constructed the Resolution thusly to, at best, be redundant, and, at worst, counterproductive.

To conclude, the "simultaneous obligations" interpretation, as espoused by those in the "Israeli interests" camp, has, by the decree of the supreme tribunal of the international community, as made all the more perspicuous by the illumination provided by one of its most erudite members, effectively been condemned to an ignominious rejection from ever being considered in the Israeli-Palestinian conflict discourse as being anything more than a specious legal clothing for a supremely odious policy stance; one which would seek to subordinate the vindication of inalienable rights to an ingenious *laissez-faire* scheme premised upon an erroneous assumption of equality in playing field, stage of material advancement, and commitment to lawfulness between the two parties.

The grand cradle of international law has thus been prevented from embodying the province of brutish beasts, who would shepherd mankind into a judgement which posterity would

[76] Especially those pertaining to Israel's obligation to return lands it acquired in the 1967 War previously mentioned.
[77] Especially in the section of the advisory opinion concerned with the question of the conformity of Israel's actions as an occupying power with the prohibition on the acquisition of territory by force, which is positioned directly before the section dealing with the question of the Palestinian people's right to self-determination. *Occupied Palestinian Territories* Advisory Opinion, para.176, *et.passim.*

decry as an ugly monument of a time, by then long overcome, when its kind had disgracefully deprived itself of not only its reason, but also of the basest of its sense of kinship, in determining what it is they see, and what it is they should say and do, anytime their eyes gaze upon the bloodied shrouds covering tens of thousands of its own who lie there, in the mass graveyards of Gaza and elsewhere in Palestine, for daring to lean their lives upon a reed as slender as the rights which has solemnly been pledged to them by their supposed international custodians. It has been made clear now that instead, it ought to be the doctrine, which represents the attachment of an unholy divinity to sanguinary pedantry, that is entirely without the sanction of the law, that is to lie there, in the graveyards of the very international law it attempted to contrive a mockery out of, and that none shall *not* be poorer to do that misbegotten construction reverence –not in the hinterlands of academia, and especially not in the metropoles of diplomacy and international justice.

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