

PROBLEMATIC ASPECTS OF THE LEGAL DEFINITION OF HYBRID WARFARE

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Abstract *The increased military threat brings anxiety and heightened sensitivity to the use of the term. Therefore, „hybridity“ has become a much-debated concept these days. War is a state when one goes beyond the limits of coexistence with one's neighbours, where the human mind and the greatest cruelty are manifested to win. Therefore, regulating such relations has always been a big challenge. Modern hybrid warfare is new in that it challenges the established order since World War II, the US leadership in establishing global order. It is a challenge to the dominance of military power and scientific thought of Western civilization. New military powers are emerging that, unable to challenge the United States directly, seek to compete for dominance in their region or the world through other means.*

Keywords: *hybrid war, international law, hybrid actions, hybrid peace, the definition of hybrid warfare, hybrid threats, hybrid interference.*

Introduction

Russia's military and non-military campaigns in Ukraine opened another, new page of hybrid actions for the international community. We are faced with a situation where neither national nor international legal regulation is adequate to respond to these actions. There is a problem with their legality and attribution to a hostile state. In Lithuania, the continuing migrant crisis orchestrated by the Lukashenko regime also poses a number of problems to the Lithuanian state in tackling the crisis and at the same time in the assurance of human rights. The new amendments to the Law on the Legal Status of Foreigners (2004) and the Law on State Border and its Protection (2000) legalising the push-back policy in times of extraordinary situations immediately faced controversy due to the alleged violation of human rights and opposition to international law (Vasiliauskas, 2023).

Ever since the Trojan War, all means are used to gain an advantage in war. As far as the ingenuity of the human mind allows, any methods are used in war. War is a state (Žilinskas, 2012, p. 1206) when one goes beyond the limits of coexistence with one's neighbours, where the human mind and the greatest cruelty manifest in the pursuit of victory. Therefore, regulating such relations has always been a big challenge. More or less, past wars have had elements of “hybridity” and most of them have been characterised by episodes of lawlessness and “unconventional” methods. The use of the term shows that we have an assumption that war can be regulated by international institutions (Johnson, 2018, p 141). Modern hybrid warfare is new in that it challenges the established order since World War II, the US leadership in the established global order. It is a challenge to the dominance of military power and scientific

thought of Western civilization. New military powers are emerging that, unable to challenge the United States directly, seek to compete for dominance in their region or the world through other means. All these factors influence the need for the analysis of the hybrid warfare phenomenon in the context of legal regulation. The article aims to reveal the concept of hybrid warfare and emerging problems in the context of international law regulating the conduct of states in the international arena.

The definition of hybrid warfare

During the last twenty years, the global balance of power has been called into question by the emerging ambitions of China, India, Pakistan, and Iran. And they have someone to learn from - since the collapse of the Soviet Union, Russia has been a leader on the front of hybrid threats. The main feature of hybrid war is the constant combination of military and non-military methods of influence, which poses unusual political tasks for both the army and the security services (Dykyi, Kharchenko, 2016, p. 8). The term “hybrid warfare” or “hybrid threat” has been used synonymously with terms “ambiguous warfare,” “fourth or fifth-generation warfare,” “non-linear warfare,” “low-intensive asymmetric war,” “unconventional warfare” or “full-spectrum warfare” indicating perhaps something new and different than the normal understanding of conventional “warfare.” (Fogt, 2021, p. 30).

In 1948 the USA Central Intelligence Agency was charged by the USA National Security Council with conducting espionage and counter-espionage operations abroad. It therefore was, for operational reasons, not to create a new agency for covert operations, but in times of peace to place the responsibility for them within the structure of the Central Intelligence Agency and correlate them with espionage and counter-espionage operations under the over-all control of the Director of Central Intelligence (National Security Council Directive on Office of Special Projects, 1948).

Covert operations were understood to be all activities which are conducted or sponsored by government against hostile foreign states or groups or in support of friendly foreign states or groups but which are so planned and executed that any US Government responsibility for them is not evident to unauthorised persons and that if uncovered the US Government can plausibly disclaim any responsibility for them. Specifically, such operations would include any covert activities related to: propaganda, economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-communist elements in threatened countries of the free world. Such operations shall not include armed conflict by recognized military forces, espionage, counter-espionage, and cover and deception for military operations (National Security Council Directive on Office of Special Projects, 1948).

We see that the definition includes hybrid actions, but does not call them “hybrid” actions them according to the current understanding.

Speaking about the history of the use of the term, Solmaz (2022) notes that “the use of the term ‘hybrid warfare’ dates to the 1990s. To our best knowledge, the term ‘hybrid warfare’ first appeared in Thomas Mockaitis’ book entitled *British Counterinsurgency in the Post-imperial Era* in 1995.” (Solmaz, 2022) In later years several authors used the term, but their definitions were not that similar to each other, but in essence they indicated that “hybrid warfare” was a mode of warfare neither purely conventional nor irregular. (Solmaz, 2022).

Further mentions of hybrid warfare are related to the description of the strategy used by the Hezbollah in the 2006 Lebanon War (Van Puyvelde, 2015).

One of the most famous researchers on hybrid warfare, Hoffman (2007, p. 28) has maintained that states can shift their regular forces to irregular units and employ non-traditional warfare tactics. In the final analysis, his notion of 'hybrid warfare', in substance, refers to non-state actors with high-tech weapons and states who adopt irregular tactics. Hoffman's idea of 'hybrid warfare' well describes what 21st-century insurgents such as Hezbollah, Hamas, the Taliban, ISIS, and PKK have done over the last two decades. Also, it captures state-based irregular fighters such as Russia's masked troops known as 'little green men', China's maritime militias, and Iran's Quds Force. So, although non-state actors with sophisticated weapons and states who employ irregular tactics are not completely new, today they seem dominant in today's armed conflicts, as Hoffman forecasted correctly in 2007 (Solmaz, 2022).

F. G. Hoffman (2009) has defined hybrid threats as "any adversary that simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism and criminal behaviour in the battle space to obtain their political objectives." He identifies five characteristics of hybrid warfare that distinguish such warfare from conventional warfare:

- 1) modality of actions - four action modules are distinguished in the area of military operations: conventional warfare, tactics characteristic to irregular groups, terrorist and criminal actions;
- 2) synchrony - all 4 types of actions are coordinated, take place at the same time and in the same space;
- 3) fusion - all actions of the warring groups aim for a common goal;
- 4) multimodality – different groups participate in military operations, characterised by a variety of tactics and weapons;
- 5) criminality - an atmosphere of fear and mistrust is created in the space of military actions by means of criminal actions (Kilinskas, 2023).

The terms "hybrid war" and "hybrid threats" further entered modern vocabulary after Russia's illegal annexation of Crimea in 2014 and the war in eastern Ukraine. Here, for the first time, we clearly saw that a completely different kind of conflict was taking place. Instead of a clear enemy, his structures, in Crimea we saw "green men" without distinguishing marks. Russian President Vladimir Putin initially insisted that "these are not our soldiers", although he later rewarded them and publicly acknowledged their involvement. At the time, Ukraine was under diplomatic and economic pressure and a veritable information war, cyber-attacks and subsequent actions by special operations forces. (Bajarūnas, Keršanskas, 2016).

Turning to the field of international organisations, NATO has developed its definition of hybrid threats with the aim of developing a NATO strategy on the countering of hybrid threats. In 2010, NATO defined hybrid threats as "those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives" (NATO, 2010).

NATO's interpretation of hybrid warfare depicts it as a mixture of military means and non-military means, including propaganda and cyber activities. For NATO officials, hybrid warfare is "the highly integrated use of a wide range of overt and covert military, paramilitary and civilian means" (NATO, 2014). This depiction describes a combination of political and non-traditional means of coercion and influence. These activities include the coercive use of military force and more subtle forms of harmful influence in the political and informational spheres.

One of the well-known international organisations analysing the hybrid threat, Hybrid Centre of Excellence, defines "hybrid threat" as an action carried out by state or non-state actors whose purpose is to harm or weaken the target by influencing its decision-making at the local, regional, state or at the institutional level. (Hybrid CoE, 2023a)

Accordingly, the main features of hybrid threats according to the Hybrid CoE are:

1. Coordinated and synchronised actions, deliberately targeting the systemic vulnerabilities of democratic states and institutions by various means.

2. Activities that exploit the limits of detection and attribution as well as different interfaces (war and peace, internal and external security, local state and national and international).

3. Activities aimed at influencing various forms of decision-making at the local (regional), state or institutional level and are intended to further and/or implement the agent's strategic goals while undermining and/or undermining the goal (Hybrid CoE, 2023).

The first principle of hybrid warfare is that the composition, capabilities, and actions of a hybrid force are unique to the force's specific context. That context includes the temporal, geographic, sociocultural and historical environment in which a particular conflict takes place (McCulloh, Johnson, 2013). Hybrid warfare occurs whenever it is not possible to wage war directly on the battlefield. That is, whenever the warring parties are different and one of the parties has a smaller advantage on the battlefield, it tries to avoid confrontation by all means and to fight in other ways. This is especially characteristic of guerrilla warfare - distribution of leaflets, recall, ambushes, mining of roads and bridges, acts of terrorism and the like. However, a hybrid war can be waged by both a weak side and a strong one that is fighting in territories outside of its control. On one side, the French partisans under the Vichy government or the partisan movements of Lithuania, Latvia, and Estonia, on the other side Al Qaeda, or coups organised or supported by the Soviet regime in Cuba, South American countries, or Finland in order to create the illusion of a legitimate war.

Part of hybrid warfare involves exploiting the economic openness of Western democracies to seize strategic economic sectors, such as critical infrastructure, finance, and media, through which these authoritarian actors can attempt to destabilise Western democracies and purposefully damage them (Heather, et. al., 2016). Democracies urgently need to find ways to defend themselves against such hybrid interference without jeopardising the values they are supposed to defend. Expanding state control of civil society is not a viable liberal democratic strategy. Western democracies should also not resort to countermeasures such as corruption, disinformation, election interference, and other hybrid measures of interference, as this would only further erode liberal democratic values around the world. More dangerous to the West are the more subtle, non-military activities that authoritarian regimes use to infiltrate democratic societies. "Hybrid interference" is a concept coined to capture non-military practices aimed at mostly covert manipulation of other states' strategic interests (Wigell, 2019). As such it is similar to what was called "active measures" etc. during the Cold War, and recently in Russian strategic discussions as "Gibridnaya voyna" (translated from Russian "hybrid warfare"). The idea behind the "Gibridnaya voyna" is to avoid the traditional battlefield in order to destroy the political cohesion of the enemy from within, using a carefully crafted hybrid of non-military means and techniques that intensify political, ideological, economic and other social polarisation in western society, leading to its internal collapse (Fridman, 2018, p. 96). Keeping diplomatic relations intact and thus not crossing any formal threshold of war, the aggressor mobilises opposition and radicals in the target state through a variety of means, from disinformation campaigns to the corruption of political figures and the financing of subversive movements, carefully synchronised to intensify the conflict (Wigell, 2021).

Researchers Breitenbach and Byrjalsen (2019) suggest that central feature to hybrid interference is subversion. Subversion refers to an aggressor state's purposeful attempt to destabilize and undermine the authority of a target state by using local proxy actors. Mikael Wigell (2021) thinks it specifically involves the use of disinformation and economic inducements to recruit and assist these actors inside the target country, detach their loyalties

from the target government, and use them as interlocutors to transform the established social order and its structures of authority and norms. The aim is to weaken democratic governance and norms as a means of enhancing their own authoritarian standing. Not only are weakened democracies less able to directly confront these authoritarian aggressors, but they will also look less appealing as models of success and partners for others. By portraying Western democracies as corrupt and ungovernable, authoritarian regimes such as China, Iran, Russia, and Turkey are less at risk of being overthrown by their own populations (Wigell, 2021).

Problems in the legal field regarding hybrid warfare - *ius ad bellum*

The hybrid actions are often conducted in the way that would allow the perpetrating state to “fly below” the radar of the prohibitions established in the international law, especially the prohibition of the use of force established in Article 1(4) of the UN Charter. “In practice, hybrid measures are designed to avoid being identified as clear violations of the Charter even when they do constitute an unlawful use of force. One way this is achieved is through an emphasis on covert action” (Cantwell, 2017). One of the aims of using covert action is to avoid being implicated in clear breaches of international law. Covert means means are important for the perpetrator of hybrid warfare because such action exploits the weakness of an international enforcement regime and encourages inaction, especially where aggressor states have sown doubt as to attribution or the the legality of their behaviour. (Cantwell, 2017).

Hybrid measures falling short of the use of force and measures in other fields usually do not violate Article 2(4). Disinformation, criminal activity, economic measures - all these fall below the threshold of the use of force. However, such actions may be considered a form of interference, a prohibition implicit in Article 2(1) of the Charter. (Cantwell, 2017). The General Assembly has stated in 1965 that interference is the “subordination of the exercise of [a state’s] sovereign rights. In 1970 the General Assembly has stressed that there is a ban on intervention in the internal or external affairs of any other state along with “all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.” (Cantwell, 2017, UN General Assembly, 1970).

The prohibition of the use of force is a cornerstone provision, *ius cogens* of international law. The inherent right to self defence from an armed attack is established in Article 51 in UN Charter (1945). It states that every state has the right to defend itself in case if an armed attack occurs. However, the exact extent of the actions constituting armed attack is not as clear-cut. Armed actions of state’s armed forces will surely constitute armed attack in the sense of Article 51 and customary international law, but a question arises when the actions in question are low-intensity or are perpetrated by irregular armed bands. The International Court of Justice (hereinafter - ICJ) has stated that “[t]he Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.” (ICJ, 1986). In the Nicaragua case, the ICJ held the view that “a mere frontier incident” – however, this should be defined – does not qualify as an “armed attack.” (Fogt, 2021, p. 63), thus requiring the gravity of the offensive in order to invoke self defence of the state. However, Fogt (2021) argues that this restrictive and cautious interpretation has been rejected by some states and various scholars. “It seems, indeed, most convincing to depart from the view of a gravity requirement expressed by the ICJ in the Nicaragua case and regard any attack which results in or is likely to cause destruction of property and injury or loss of life as an “armed attack,” which justifies state self-defence subject to the jus ad bellum principles

of necessity and proportionality. A proportionate response to a small-scale attack, which could be conducted as part of a hybrid warfare, would in itself be limited in scale and effect in order to be lawful.” (Fogt, 2021, p. 63).

The question whether one may take into account several incidents which in accumulation then would together constitute an armed attack is raised by the accumulation of events theory. Fard, et. al. (2023) state that the ICJ has confirmed the existence of a severity threshold to distinguish between “the most severe forms” and “less severe forms” of the use of force. The doctrine of accumulation events refers to a series of minor incidents that have accumulated until they reach the threshold of an armed attack, and is also known as the “spiking” theory, which some governments use to justify their right to self-defence. have resorted to this theory, there are indications that transnational terrorist attacks have presented serious problems to governments, making them willing to accept this theory, which previously had little support, to some extent. (Fard, Hatami, Azadbakht, 2023)

“When applied to malicious cyber activities in the context of international law, normative aggregation may be appropriate where a series of acts can be attributed to a single State. As with normative aggregation in domestic criminal law, individual malicious cyber activities do not have to constitute a standalone wrongful act if, in the aggregate, the consequences of state action constitute a breach of an international obligation. Under international law, this theory of aggregation is called the Accumulation of Events Theory, or Nadelstichtaktik” (McLaughlin, 2023) In other sources theory is called needle prick or pin-prick or spiking.

McLaughlin (2023) states that the foundational test for when a cyber or other hybrid activities constitutes an armed attack triggering a right to self-defence is whether the consequences are comparable with those resulting from a kinetic weapon. To aggregate the cumulative effects of malicious activities that do not individually reach this threshold, the consequences and actions must be causally and temporally related and attributed to a single source. The accumulation of events begins with the first identifiable wrongful act in the series and continues until the activity ceases. Any action taken in self-defence must be both proportionate and necessary to the effective exercise of self-defence. In responding to hybrid activities, proportionality and necessity are predicated on that which is required to affect either the ability or the will of the nation in violation to continue its wrongful actions.

We can assume that the theory of accumulation is suitable for the legal definition of hybrid threats. It helps to properly assess that a legal threshold has been crossed, from which retaliatory action can be taken. Regulating the use of force is a primary function of international law because if states could freely resort to force the ideal of the rule of law in international society would be impossible. In this situation, accumulation theory comes to help. Fogt (2021) states that “The accumulation of events theory is of particular importance when discussing hybrid threats and warfare designed to stay under the triggering threshold. The asymmetric hybrid character of the low-level use of force, the flexibility regarding intensity and rapid adaptability coupled with disinformation and fake news targeted at the entire society as such may collectively constitute an “armed attack” and, thus, justify a necessary and proportionate act in self-defense.”

The question of attribution remains: one still has to establish whether this string of actions may be attributed to one or more specific states or a non-state group. “Both the standard evidence of attribution to such hybrid attacks to a specific state or non-state actor group, and the determination of the necessary scale and frequency of small attacks required remains unclear. On the one hand, this makes the accumulation of theory a most difficult *jus ad bellum* justification to apply for the state claiming self-defence or collective self-defence, but it does open the legal door of self-defence of the victim state by a series of hybrid acts.” (Fogt, 2021).

Many other jus ad bellum issues of state self-defence also have the character of complex legal grey zones covered by uncertainties such as: the quality and quantity of the target of an armed attack (a person, unit, military facilities, infrastructure or territory), the standard of burden of proof, the need of a possible intention (*mens rea* element), a duration or gravity requirement, or whether accumulation of “small” events suffices (Fogt, 2021). These additional legal grey zones add to the possibility for states to conduct a legally reasonable justified hybrid warfare campaign under the commonly accepted or at least plausible defensible threshold for state or alliance self-defence.

Hybrid warfare and *ius in bello*

When analysing hybrid warfare, there are questions and issues surrounding the *ius in bello* of international law, or international humanitarian law (hereinafter - IHL). The measures of hybrid warfare, as mentioned, often are so executed as to fly “below the radar” of international law. This applies also to the international humanitarian law, which is the set of rules activated when the activities of the parties reach the threshold of armed conflict. “The beginning of an armed conflict is the moment from which the application of the full regime of one or another international humanitarian law begins. Therefore, it can be said that the classification of the situation as an armed conflict is a legal fact of extraordinary importance” (Žilinskas, 2008, p. 92).

The precise determination of the existence of an armed conflict has significant and far-reaching implications in international law. During an armed conflict, contractual obligations may change, refugee rights are assessed differently, arms control standards are applied during it, and the law of neutrality is also changed (Use of Force Committee, 2010, p. 33). The most important implication would be that only during an armed conflict can parties exercise the rights of belligerents. Exercising these rights outside of armed conflict risks violating fundamental human rights that apply in peacetime (Vasiliauskienė, 2012, p. 182).

During an armed conflict, for example, the protection of the right to life changes. In peacetime, the state may use force to maintain order, including the taking of life, but according to human rights norms this must be absolutely unavoidable and strictly proportionate to the objectives pursued. The taking of life during an armed conflict is analysed according to IHL norms, which set completely different standards and proportionality requirements (Vasiliauskienė, 2012, p. 182). Furthermore, a state responding in a proportionate and necessary manner in self-defence can only use force against persons and objects if it fulfills the requirements of the IHL (Fogt, 2021, p. 73). An object is a legitimate target if it constitutes a military objective and if the use of force against this target is proportionate and conducted with lawful methods, means and all feasible precautions have been taken. (Fogt, 2021, p. 73).

The International Criminal Tribunal for the former Yugoslavia (hereinafter - ICTY) in Tadic case has elaborated the definition of an armed conflict which since has been cited in numerous occasions and became accepted as textbook definition of armed conflict, not provided for in the Geneva Conventions on the laws of war, Common article 2. ICTY states that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State” (ICTY, 1995, para. 70).

The UN High Commissioner for Human Rights’ Special Rapporteur on Human Rights and Terrorism has defined an armed conflict as a situation where two or more parties to the conflict, armed with military weapons, engage in military operations (hostilities) sufficient to meet the customary definitions of armed conflict. What constitutes sufficient military action

depends on whether the conflict is international or not. When analysing whether there is an armed conflict, it is taken into account that the armed forces (rather than the police), military weapons (rather than the police) and military (rather than law enforcement) operations are being used (UN Special Rapporteur, Kalliopi K. Koufa, 2004, p. 9).

The Committee on the Use of Force of the International Law Association analysed the concept of armed conflict in international law. Based on its analysis in 2010, the Committee found that the definition of armed conflict presented in the Tadić case is supported by the analysis of other sources. The committee distinguished two essential features of every armed conflict: the existence of organised armed groups and involvement in combat actions of a certain intensity (Use of Force Committee, 2010, p. 2).

The problems arise with both aspects of the definition of the armed conflict.

Speaking about the organisational aspect, in case of the activity of states, the organisational criterion does not raise questions, as state is *ipso facto* considered an organised entity fully capable to participate in an armed conflict. But a different question arises, of attribution of particular hybrid action to the state. In case of hybrid actions, the states aim to “hide” behind proxies, armed groups, green men etc., therefore it is difficult to ascertain the organisator of hybrid actions and thus the existence of armed conflict.

Furthermore, the intensity criterion is even more problematic. Manifestations of hybrid warfare in many cases do not amount to armed actions, but in totality may incur consequences similar to armed actions. Therefore a question arises whether the accumulation of actions could be considered together in order to determine whether the threshold for armed conflict has been crossed.

As mentioned, the implications of this determination are that “a crisis situation just below the uncertain threshold for a [non-international armed conflict] will be dealt with by the national crisis and emergency (martial) law and law enforcement [rules of engagement] under a human rights law paradigm, which may be done with or without military support from the state itself or its alliance partners.” (Fogt, 2021, p. 74). A conflict situation matching the requirements above would trigger armed response according to the rules of IHL. Fogt (2021, p. 74) continues stating that “in case the hybrid campaign and the non-state armed resistance group(s) are down-scaled and hostilities decrease, the threshold for a NIAC may no longer be met with the result that the peacetime *jus ante bellum* re-applies.” Thus many questions yet remain unanswered

Conclusions

The use of the term “hybrid warfare” dates to the 1990s, it appears for the first time in Thomas Mockaitis’ book entitled *British Counterinsurgency in the Post-imperial Era* in 1995. Further mentions of the phenomenon include Hezbollah strategies in 2006 Lebanon War and 2014 Russian strategy in Ukraine. Hybrid threats are defined as fused mix of conventional weapons, irregular tactics, terrorism and criminal behaviour in the battle space to obtain their political objectives. NATO defines hybrid warfare as a mixture of military means and non-military means. Hybrid CoE defines hybrid threats as actions carried out by state or non-state actors whose purpose is to harm or weaken the target by influencing its decision-making at the local, regional, state or at the institutional level. Thus all the definitions stress the use of various methods in pursuit of specific political and military objectives.

The first area where the questions about hybrid threats arise is the *ius ad bellum*, or the prohibition of the use of force. Self-defence by armed force is permitted only in case of an armed attack, and many actions of the spectrum of hybrid threats or hybrid warfare fall below this threshold. Disinformation, criminal activity, economic measures – such actions are clearly

below the threshold of self-defence. However, some actions of this spectrum may be more like armed actions according to their consequences. Therefore there is the question whether the accumulation of such events may lead one to conclude that an armed attack has occurred.

The *ius in bello* application is triggered by an armed conflict and causes numerous changes in the rights of the belligerent parties, regime of possible actions in armed actions, and implications on the protection of human rights. According to the famous ICTY definition in Tadic case, “an armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. Speaking about the first element – organisation of the parties of the conflict, it is more a question of attribution of the conduct to the state or to a particular group that is problematic in case of hybrid threats. Furthermore, the question of intensity is in a way similar as in case of armed attack – the question is whether a number of relatively low-intensity actions may be considered together as amounting to armed conflict.

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