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WHERE THE WATER IS SAFER THAN LAND: AN ANALYSIS OF THE PRINCIPLE OF NON-REFOULMENT AND REQUISITES FOR AN EFFECTIVE MIGRATION SECURITY PARADIGM

by

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ABSTRACT

The principal of non-refoulment is a key principle under international human rights and proposes for non-deportation of any individual where they might face inhumane treatment or irreparable harm. The migrants in such situations undergo a triple syndrome wherein they are vulnerable and are at risk of facing harm from their native country, non-state entities faced while escaping native country and harm face in destination country. While some nations around the world have adopted this principle, most nations fear that providing refuge to immigrants might lead to breach in their national security. While that may be a valid concern, most nations use this threat as a way of avoiding the infiltration of immigrants in their nation's population or choose to discriminate between immigrants from different countries based on their nationality, religion, race, etc. The author has delved into the harm faced by immigrants, international frameworks against the same and the security paradigm set up by countries to move their own political agenda. The author has analysed the paper from both a global and an Indian perspective and has further analysed the Indian government and judiciary's difference of treatment to Rohingyas from Myanmar and refugees fleeing from Afghanistan and has provided for factors involved in formation of a uniform security paradigm.

Keywords: non-refoulment, immigrants, refugees, security paradigm, global burden sharing, Rohingyas, Afghanistan, securitization.

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“No one leaves home unless home is the mouth of a shark.”

— Warsan Shire

INTRODUCTION

The principle of non-refoulment is one of the key principles that forms the bedrock of international human rights law since it emphasises on the ‘international’ nature of human rights. It absolute a situation wherein no individual, irrespective of the nationality, citizenship, migration status or statelessness¹, should be deported to their country where they might undergo torture or inhumane treatment which may or may not lead to irreparable harm.² It regulates a fundamental nature of protection under international refugee and humanitarian law for it prevents the states from deporting or even jettisoning individuals from the jurisdictional land or exercise effective control, including the territory outside the state’s control, which may lead the same to face persecution by way of torture amounting to violation of human rights.

An intrinsic aspect of prohibition of all forms of torture, the scope of the non-refoulement principle is absolute nature in nature; and devoid of any exception. Thereby, the principle, under applicable governing human treaties on rights law is wider than that regulated in international refugee law. However, this does not negate its importance and indispensability in international refugee law. Special attention is given to ensure that a child should not be returned if doing so would violate their basic human rights, such as risk of inadequate food or healthcare. The state's decisions must be driven by the child's best interests. The principle exists under international human rights law in accordance with International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) along with several country specific instruments explicitly providing for the said principle.

¹ UNHCR, Report of the Special Rapporteur on Torture, A/HRC/37/50 26 February 2018, para. 40; CAT, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 22

² Roland Bleiker, ‘The Visual Dehumanisation of Refugees’, (2013) 48(4) Australian Journal of Political Science, 398-416

As interpreted by international human rights mechanisms and courts, refoulment is also prohibited for a range of offenses apart from torture, including but not limited to blatant deprivation of right to a fair trial³, threat to infringement to life, dignity, and/or freedom⁴, severe kinds of sexual gender-based violence⁵, death penalty⁶, genital mutilation⁷, or long-term solitary confinement⁸. While other international courts have taken a step further and interpreted violation of social, cultural and economic rights to be covered under the ambit of prohibition of non-refoulment since they are a representation of violation of right to life and dignity. These may include deplorable living and working conditions⁹, a denial of medical treatment¹⁰, or psychiatric illness¹¹.

PROTECTION NEEDS OF MIGRANTS: A TRIPLE SYNDROME

Under international law on human rights, states have the legal duty to uphold the principle of non-refoulement, which includes formulating and implementing a variation of functional and human rights-based protection frameworks. States should provide procedures for admittance and residency for those migrants that are unable to return under the framework of International Human Rights Law, to ensure the principle of non-refoulement and to facilitate the rehabilitation¹² of those who have been tortured. Administrative and legislative processes should be streamlined to provide legal status to migrants who are unable to return, whether temporary, long-term, or indefinite.

The protection from threat to life faced by the refugees can be characterised by way of a triple syndrome of harm: i) Harm they witnessed in their native country which operated as a precursor to or is part of the factor behind their departure; ii) harm they endured on their protracted routes to 'safety,' which frequently took them through multiple countries and exposed them to non-state entities like militias, pirates, and criminal groups, along with corrupted governments. Destination states have also made agreements with the transit countries to detain or prohibit

³ Human Rights Committee, General Comment No. 31, para 12.

⁴ Inter American Convention on Human Rights, art. 22(8). IACtHR, Pacheco Tineo Family v. Bolivia, , 2013, para 135.

⁵ CAT, Njamba and Balikosa v. Sweden, No. 322/2007, 3 June 2010, para 9.5; CEDAW, General Recommendation No. 32, para 23.

⁶ Human Rights Committee, Judge v. Canada, No. 829/1998, 20 October 2003, para 10.3; ECtHR, Soering v United Kingdom, No. 14038/88, 7 July 1989, para 111.

⁷ Human Rights Committee, Kaba v. Canada, 21 May 2010, para 10.1; CEDAW, General Recommendation No. 32, para 23.

⁸ Human Rights Committee, General Comment No. 20, 1994, para 6.

⁹ ECtHR, MSS v. Belgium and Greece, 30696/09, 2011.

¹⁰ Human Rights Committee, C v. Australia, No. 900/1999; ECtHR, Paposhvili v. Belgium, 41738/10, (2016), 9

¹¹ Human Rights Committee, A.H.G. v Canada, No. 2091/2011, 2015, para 10.4.

¹² Report of the Special Rapporteur on Torture, A/HRC/37/50 26 February 2018, para. 40

people from accessing destination states' land; these arrangements have resulted in inhumane conditions, often reaching crisis levels; iii) horrific encounters in the destination country – poverty, instability, alienation, and prejudice are the key denominators.

The mere reality of detention, processing of asylum requests, and lack of proper facilities and essential amenities can lead to ill treatment in and of itself for vulnerable individuals fleeing their origin countries. For many, indefinite imprisonment, deplorable conditions, and various types of ill treatment by guards or fellow prisoners, including forms of sexual and gender-based abuse are daily instances. Despite the fact that triple syndrome of damage aggravates vulnerability, it is scarcely understood, much less frequently addressed by border patrol guards and officials which deal with these marginalised individuals. On the contrary, much of the harm is accounted for and exacerbated by abdication of duty and proactive effort to make reception conditions unpleasant in order to prevent more migration.

Despite the fact that the lack of outlets for secure and legal access to security is the key challenge faced by those seeking protection, states have responded to the issue by increasing border security and tightening migration policies instead of enforcing a comprehensive humanitarian approach. The receiving states have largely retorted to the rise in the number of asylum seekers and migrants by adopting technocratic containment policies rather than empathy and compassion for individuals' dignity and humanity.

Measures like Visa limits and carrier sanctions are implemented, along with constructing boundary barriers and closing border crossings to deter people attempting to reach the country by land or sea; and funding third countries to detain persons in transit countries and police their borders to prevent them from continuing their journeys. Instead of focusing on the rights and related responsibilities of states under both national and international law, both of these steps are aimed at preventing refugees from reaching their destination by monitoring migration flows or preserving internal security (handling protection and security threats).

These deterrence policies are impractical and contentious, particularly given their inconsistency with states' responsibilities under the 1951 Refugee Convention in practise. The broader legal implications of deterrence policies needs to be analysed. When states have a legal obligation to intervene in response to human distress, a laissez-faire approach engages states' legal responsibility along with their clear moral obligations.

STATUS OF REFUGEES (1951) AND LEGITIMACY OF SECURITY INTERESTS

The 1951 Convention Relating to the Status of Refugees defines the concept of refugee, their rights and responsibilities, and the basic structure for their care and safety. Article 1 indicates that refugees shall not just be in need of foreign security, but must be worthy of it by defining the requirements of the refugee classification. Article 1(F) protects State's valid security interests by determining who, after meeting the definitional criteria for refugee status, does not merit foreign protection.

The refugee law framework is fundamentally humanitarian, with the aim of granting asylum to those who need it. However, basic elements of the legal code are skewed, and exclusion clauses are enacted in overly vague terms in order to deny entry, withhold citizenship, and expel people who must be included. Nevertheless, the framework never aimed at including hardened criminals, terrorists or individuals posing threat to the host state.¹³ We will now analyse how national security paradigms have influenced refugee laws, particularly. The 1951 Convention Relating to the Status of Refugees in the detriment of people requiring serious protection.

Provisional Measures under Article 9

In periods of conflict or other grave and extraordinary situations, Article 9 of the 1951 Convention requires States to apply interim mechanisms in the determination of refugee status that they find appropriate for ensuring national security. Where required for national security, states can apply these measures even to formerly recognised refugees. Administrative custody of a refugee or asylum seeker should be the case rather than the law. The above-mentioned Article 9 reaffirms the extraordinary nature of incarceration.

However, in times of conflict or grave and unusual situations, the sovereign rights of States have been adequately safeguarded in the interest of national security, as this provision permits arrest and imprisonment of citizens while deciding their refugee status, or after being granted that status, if the steps taken are appropriate for national security. As a result, the State can, under appropriate situations, cite national security grounds to apprehend and detain an asylum seeker or refugee. It is important to emphasise that this is a one-time initiative that cannot be invoked as a justification or legal basis for detaining asylum seekers or refugees.¹⁴

¹³ Hoewe, J., *Coverage of a crisis: Effects of international news portrayals and misuse of the term "Immigrant"* (2018) *American Behavioural Scientist*, 62 (4), 474– 492 <<https://doi.org/10.1177/0002764218759579>>

¹⁴ UNHCR, Report of the Special Rapporteur on Torture, A/HRC/37/50 26 February 2018, para. 40; CAT, General Comment 4 (2017) on implementation of article 3 in context of article 22, para 22

Travel Documents under Article 28

For legitimate national security purposes or public security, State Parties may refuse to issue travel documents to refugees wishing to leave their territories under Article 28 of the 1951 Convention. It is worth stressing that this is an extraordinary step, since it is apparent that issuing personal documents, including travel document, is in the State's self-interest as it encourages protection by helping in knowing and specifically identifying refugees who have status within its jurisdiction.

Expulsion of Refugees under Article 32

In the interest of national security, a country can legally expel a refugee from its territory in compliance with the 1951 Convention under Article 13, if the conclusion is drawn in accordance with standards of due process. Article 32 as well as Article 13 of the International Covenant on Civil and Political Rights, allow for the exceptions to right to a fair trial in immigration cases where there are valid national security grounds.¹⁵

Nevertheless, it is mandatory that the refugee, must be given fair chance to coordinate for admission into a third state legally. Moreover, American Convention on Human Rights, on the other hand, neither establishes national security as a basis for deporting aliens who are legally present in a State's jurisdiction nor provides exceptions to protections of due process in such deportation cases.¹⁶

Prohibition on Expulsion under Article 33

The concept of non-refoulement is a core principle in international refugee law, and it is founded on the premise that a State can never expel or return a refugee to a country where his or her existence or rights will be jeopardised due to ethnicity, faith, nationality, participation in a specific social group, or political opinion. Conversely, under the 1951 Convention on the Status of Refugees, the principle of non-refoulement provides for exceptions where there are

¹⁵ UNHCR India, UNHCR Global Appeal 2011 Update (2011), UNHCR global appeal 2011 update India: Working environment, <https://www.unhcr.org/enus/publications/fundraising/4cd96e919/unhcr-global-appeal-2011-update-india.html>

¹⁶ Who are the Rohingya and what is happening in Myanmar? (2017, September 5), *The Guardian*, <<https://www.theguardian.com/globaldevelopment/2017/sep/06/who-are-the-rohingya-and-what-is-happening-in-myanmar>>

legitimate reasons to assume that the refugee in consideration poses a threat to the host country's welfare.

The 1951 Convention strikes a healthy balance between states' legitimate security interests and humanitarian concerns for refugee rights. States shall have stronger resources to ensure their safety while also ensuring complete compliance with the international obligations on refugee security as the efficient enforcement of the said instrument through the introduction of national legislations and development of a just, equal, and effective operational system for determining refugee status is improved.

It's necessary to emphasise that this exceptional provision is to be used in extreme circumstances only and cannot be seen as another additional Exclusion Clause. However, if the State can legitimately extend the exception to concept of non-refoulement laid down in the Article 33(2) of the 1951 Convention, other human rights instruments will be applicable and available.

CAVEAT ON NATIONAL SECURITY SUPPRESSING RIGHTS OF REFUGEES

Therefore, it is the duty of the State to ensure that no refugee, meeting the necessary elements of inclusion pertaining to the definition, not involved in activities posing threat to the nation, must be denied entry on any of the grounds for exclusion; while ensuring that these refugees receive international protection. Thereby, for precisely this reason, it is the state which shall benefit from utilizing a just and efficient system of determining refugee status and filter out individuals who need international protection.

In specific instances, States may revoke or not grant refugee status in order to maintain peace and humanitarian character of their institutions granting international protection. However, more often than not, refugee status is not granted due to certain acts of asylum seekers in the country they are seeking asylum or a third country that are of grievous nature or revoked if said status was validly issued. If a country is concerned that a refugee committed deceit or misled while explaining evidence on which their claim is based, or where an Exclusion Clause might have been extended had any applicable facts of their case established, the refugee's status will be legitimately revoked. Similarly, a country can legitimately revoke the given refugee status

if the refugee receiving it commits an offence against peace, war crime, or crimes against humanity, or if they commit actions contrary to the United Nations' objectives and principles.¹⁷

In addition, a refugee who commits an offence on the territory of the state has the right to be punished. Refugee status does not mean immunity, and impunity does not promote it. If an applicant does not follow or ignores the rules of the country granting asylum, they will face similar measures and penalties as the residents or other foreigner residing within the country's control.

As a result, a fair and logical understanding of the refugee concept requires a balance to be struck between valid security concerns and the humanitarian needs of the ones who deserve international protection. The strict interpretation of refugee definition's inclusion and exclusion clauses protects States' legitimate rights and encourages them to distinguish between those who require and merit foreign protection and those who do not. As a result, domestic laws surrounding refugees, and operational guidelines for equal as well as effective assessment of their refugee status, are in the best interests of States.

REFUGEES FROM NEIGHBOURING COUNTRIES FROM THE INDIAN EYE

“Being one of the few countries without a national refugee protection system or immigration policy, India's approach to refugee issues has traditionally been guided by political considerations rather than constitutional legislation.”

According to the United Nations High Commissioner for Refugees (UNHCR), Afghans were the second-largest refugee group migrating to India in 2019, behind the Rohingyas, accounting for 37% of the overall refugee population. They have mostly fled to India due to the two nations' close geographical proximity and favourable historical connections. Following the Soviet invasion of Afghanistan in 1979, an inflow of Afghans entering India began, with the bulk being from the oppressed Hazara Shia group and a few being Hindus or Sikhs.

¹⁷ UNICEF, Humanitarian Situation Reports, (2019). Humanitarian situation report: Rohingya influx, 2019 (Report No. 49). https://www.unicef.org/appeals/files/UNICEF_Bangladesh_Humanitarian_SitRep_Rohingya_influx_March_2019.pdf

Further, the Rohingyas have mostly fled to India due to the two nations' close geographical proximity and favourable historical connections. Following the Soviet invasion of Afghanistan in 1979, an inflow of Afghans entering India began, with the bulk being from the oppressed Hazara Shia group and a few being Hindus or Sikhs.

Historically, India's refugee policy has mirrored diplomatic and political objectives rather than humanitarian ones. Due to its geopolitical competition with China, India welcomed the massive stream of Tibetan exiles who followed the Dalai Lama in 1959. They are currently regarded as the “most successful refugee community,” having successfully assimilated into Indian culture. Due to its close diplomatic connections with the Soviet Union, India, on the other hand, refused to recognise Afghan migrants as “refugees” in 1979, instead referring to them as “transients.”

Despite centuries of documented heritage, Rohingyas, in Buddhist-majority Myanmar, are refused citizenship and treated as undocumented immigrants. As of 2017, India was home to almost 40,000 Rohingya Muslims who had fled Myanmar during the previous decade. As per United Nations, almost 15,000 people have been granted refugee status, but India wants to expel them all.¹⁸ India and Bangladesh are facing immense political pressures as a result of the refugee crisis, which is also impacting economic stability and domestic and foreign policies of the two countries.¹⁹ In this crisis situation, the media plays a crucial part in both reporting the situation to foreign institutions and other nations, as well as expressing their national governments' strategies and reactions to the crisis.

THE SECURITY LENS

The human-interest lens is frequently seen in Bangladeshi newspapers, while the security lens is frequently seen in Indian print media while the conflict lens is frequently seen in Chinese publications, according to a comprehensive content study of six newspapers from Bangladesh, India, and China.²⁰ The human-interest prominence centres on the “human rights abuses by the Myanmar authorities, such as murder, rape, and burning down homes, of individuals taking

¹⁸ Suchitra Mohanty, Rupam Jain, “India calls Rohingya refugees 'threat to national security', *Thompson Reuters*, (September 14, 2017 8:25 PM), <<https://www.reuters.com/article/us-myanmar-rohingya-india-idUSKCN1BP24M>>

¹⁹ Bangladesh Pratidin tops circulation list, *The Daily Star*, (2014) <<https://www.thedailystar.net/bangladesh-pratidin-tops-circulation-list-15026>>

²⁰ Islam, M. K., *How newspapers in China, India and Bangladesh framed the Rohingya crisis of 2017* (2018), The University of Mississippi, Oxford.

refugee in Bangladesh, and lack of food and water,” and emphasised on the “emotional side” of this subject.²¹

The security frame, depict “refugees as a danger to national security, focusing on illicit border crossing and their links to terrorist groups,” while the conflict frame described “the Rohingya crisis as a battle between Rohingya citizens and Myanmar law enforcement agencies, including the army, or a clash between Rohingya and Buddhists”. Bangladeshi newspapers cite relief organisations as their predominant sources, while the Indian papers cite national officials as their most common sources, according to Islam.

Although, the Indian government, attempted to strike a balance between its diplomatic ties with both Bangladesh and Myanmar, relying mostly on government officials as their primary source.²² Since India is not a signatory to the 1951 UN Refugee Convention or its supplementary 1967 Protocol, the Indian government views the Rohingya refugees as having possible links to terrorism and has stated their intention to expel them.²³ As a result, in Indian news reports, the Rohingya refugees are often more prone to be portrayed as intruders and a possible threat.

The Rohingyas are also accountable for the breakdown of general law and order in their host communities. Apart from insurgency, extremist activity, and religious extremism, the Rohingya crisis is linked to a variety of trafficking and illegal activities, including drugs, human trafficking, SALW (small arms and light weapons), aggravated robbery, and maritime piracy. Smuggling and illegal cross-border infiltrations are two other big issues. Extortion, sexual abuse (including trafficking and sexual slavery), murders for organs, domestic servitude, and forced labour are all crimes that Rohingyas are tied with in their host countries.²⁴

It's also worth noting that, as a result of the failure to ascertain a diplomatic resolution for the status of Rohingyas' citizenship, the Rohingya population within and outside Bangladesh-Myanmar is becoming more radicalised and international militant groups are using the problem

²¹ Hoewe, J., Coverage of a crisis: The effects of international news portrayals of refugees and misuse of the term “Immigrant” (2018) *American Behavioral Scientist*, 62(4), 478– 492
<<https://doi.org/10.1177/0002764218759579>>

²² Yhome, K., Issue briefs and special reports: Examining India's stance on the Rohingya crisis (2018), Retrieved from the Observer Research Foundation website
https://www.orfonline.org/wpcontent/uploads/2018/07/ORF_IssueBrief_247_Rohingya_FinalForUpload.pdf

²³ UNHCR India, UNHCR Global Appeal 2011 Update (2011), UNHCR global appeal 2011 update India: Working environment, <https://www.unhcr.org/enus/publications/fundraising/4cd96e919/unhcr-global-appeal-2011-update-india.html>

²⁴ Dr. Siegfried O. Wolf (Heidelberg), The Rohingyas Crisis: A Security Perspective from Bangladesh, *Applied Political Science of South Asia*, No. 11, 21. May 2014

to promote extremism and Islamic fundamentalism. To sum up, it is critical for regional governments in the South and Southeast Asia see this unresolved Rohingya issue as an opportunity for fruitful regional cooperation rather than a roadblock to further cooperation.

An interlocutory application was filed in 2021 in the 2017 writ petition seeking the Indian Government to provide Rohingyas taking refuge in India with basic human necessities while the petitioners, claiming to be refugees with the United Nations High Commission for refugees, further requested the release of the detained Rohingya refugees and to not deport the Rohingya refugees in the sub-jail in Jammu province of India. As per the prominent print media in India, about 6000-7000 Rohingya refugees were illegally detained in Jammu and that 30% of them were looking at immediate deportation.

Rohingyas in Myanmar were persecuted even when an elected Government was in power and now that the said elected Government is overthrown by a coup, the danger has become imminent. As per *Gambia vs. Myanmar*²⁵, the International Court of Justice recognised genocide of Rohingyas and the threat to the refugees if deported. The wide scope of Article 21 of the Indian Constitution encompasses the principle of nonrefoulement; the rights guaranteed as per Articles 14 and 21 can be availed by non-citizens; and while India may not be a signatory to the UN Convention on the Status of Refugees (1951), it is still party to the Universal Declaration of Human Rights, and other similar UN and International Conventions.

However, India contends that principle of non-refoulement is available only for the 'contracting States'. The Indian borders are permeable and shared with many countries, which leads to a threat of influx of illegal immigrants which already poses a serious threat to national security. Moreover, while Non-citizens may have access to the rights provided by Articles 14 and 21, but only citizens have access to the fundamental right to life and settle in this country guaranteed under Article 19(1)(e). Therefore it is correct that all people, residents or not, have access to the rights provided by Articles 14 and 21. However, the freedom to not be deported is ancillary to Article 19(1), which guarantees the right to live or settle in part of India's territory (e). The Government also claimed that Indian intelligence agencies have noticed activities of grave concern which threaten the internal security of the country due to the offences committed by the Rohingya refugees.

GLOBAL BURDEN SHARING

²⁵ Imran, H. F. Al., & Mian, Md. N. (2014), *The Rohingya refugees in Bangladesh: A vulnerable group in law and policy*, Journal of Studies in Social Sciences, 8(2), 226-253.

In bilateral talks on refugee and migration solutions, burden sharing has now become the lingua franca. However, inside the world of realpolitik, global burden sharing is defined on the one side by increasing pleas from countries that host majority of the refugees to other countries to rise to the resettlement challenge, and conversely, developed states in the west seeking to negotiate agreements and incentivize neighbouring states to improve.

Is there any possibility of a fairer reframe? Unlike the Universal Declaration of Human Rights, which includes the right to seek asylum other than by the back door of the corollary clause of non-refoulement, the Refugee Convention recognises no right of entry for the intention of obtaining asylum. Amnesty International has referred to the G20's appeal for burden sharing as "hypocritical."

The issue in burden sharing, whether on regional or global scale, is that it succeeds only if all countries participate. When some states refuse, it puts more pressure on others and decreases the benefits altogether. Burden sharing necessitates strong moral compass, as well as an transnational perspective that prioritises international interests over national interests, and this is the challenge.

CONCLUSION/THE WAY FORWARD

The majority of attempts to redefine security are focused on redefining nation-state policy agendas rather than the idea of security itself. Normative claims on the values against which individuals or classes of people should be covered, as well as scientific arguments about the existence and extent of risks to such values, are commonly used to support those proposals. Securitizing an issue is a means for power players to legitimise their appropriation and misuse of emerging issue fields.

Securitization is either used to strengthen institutional order or to reclaim political trust.” Indeed, political and institutional factors play a significant role to understand how the idea of human security is to be framed and applied. In certain situations, major bureaucratic divisions within governments of states becomes apparent, and such friction arises between various ministries of international relations with foreign policies involving human rights, especially the advancement of security, and the ministries of internal affairs concerning citizen protection.

Burden-sharing by countries on an international level will help in equally disperse off of refugee populations and avoid putting the burden of hosting refugees solely on the country where they come. Although, only ten nations host almost 60 percent of the world's refugees,

with 86 percent of refugees living in developed countries. The affluent nations have largely shied away from taking in their fair share of migrants, relying instead on financial and logistical assistance.

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