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The Emergence of a Civil Counter-Terrorism Judge in Cameroon: Simple Mimicry or the Need to Comply with International Law

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Abstract:

Cameroon has been plagued by terrorism for several years. The Boko Haram sect is active in the far north, and separatists are perpetuating terrorist attacks in the north-west and south-west of the country. To suppress terrorism, Cameroon adopted the law of 14 December 2014. This law assigns exclusive jurisdiction over terrorism-related litigation to the military courts. Strongly criticized because it undermines the right to a fair trial recognized by international law for the benefit of those prosecuted for terrorism, this law has limitations in terms of its effectiveness. In fact, there has been an upsurge in acts of terrorism in the far north and the NOSO. It is, therefore, legitimate to ask if Cameroon should not, as some countries have done, entrust terrorism litigation to a specialized civil court, which is the best guarantor of a fair trial. This solution could enable Cameroon not only to comply with international law but also to combat terrorism more effectively.

Keywords: Terrorism, international law, civil courts, Cameroon

1. Introduction

The beginning of the twenty-first century, marked by the attacks of 11 September 2001 in the United States, led to a growing awareness on the part of most States of the need to take firm measures to combat terrorism, considered to be a major threat to peace and security in the world. Although terrorism in itself is not a new phenomenon, the acuteness of the phenomenon has led States to adopt rules of protection, some of which are of an exceptional criminal nature and are directed against people on whom there is a suspicion and to whom differential treatment is then applied since their behaviour is considered to seriously undermine the fundamental principles of the society, by behaving as an enemy of the rule of law. This differential treatment has its origins in the theory of the 'criminal law of the enemy'. The fight against terrorism has led to the drafting of several international, regional and national norms. Resolution 2178 of the United Nations Security Council calls on States to ensure that the characterization of criminal offences in domestic laws and regulations enables acts of terrorism to be prosecuted and punished. At the regional level, the 1999 Convention of the Organisation of African Unity encourages States to take all necessary measures to protect the fundamental rights of their populations against terrorist acts.³

In 2011, the presence of members of the Islamist sect Boko Haram who had fled repression in Borno State in Nigeria was noted in the far north of Cameroon. From 2013 onwards, acts of criminal violence perpetrated by this sect took on considerable significance on Cameroonian territory. Several public figures and foreigners living in Cameroon were kidnapped. It was in this context of the security crisis in the Far North of Cameroon and emotion that the National Assembly on 23 December 2014 adopted the law on the repression of terrorism.

It should be noted that Cameroon had originally adopted a criminal law inspired by the modern principles incorporated by the 1789 Universal Declaration of the Rights of Man and of the Citizen, which advocates taking into account fundamental principles guaranteeing respect for human rights and the rule of law. The aim was to strike a balance between the need for law enforcement and the need to take account of the human dimension of the individual who has breached the criminal law. However, faced with the threat of terrorism, Cameroon decided to review its original criminal policy. The balance previously sought between the requirements of freedom and security will be lost in favour of the demands of security. Cameroon's criminal law now follows the logic of the criminal law of the enemy. We are thus witnessing a form of relegation of the individual, who ceases to be a citizen and becomes an 'enemy'.

The law of 23 December 2014 has been heavily criticized by legal scholars, firstly because it adopts an imprecise and broad definition of the offence of terrorism, enshrines the exclusive jurisdiction of military courts to hear terrorism offences and provides for procedural rules that derogate from ordinary law and infringe the rights of persons prosecuted for terrorism. It is true that terrorism is a particularly serious offence and, therefore, deserves special treatment. However, beyond the fundamental question of compliance with our country's international commitments on the right to a fair trial, Cameroon's choice of criminal policy in the area of terrorism raises questions about its practical effectiveness. In what way is the option of a hasty procedure more apt to provide a concrete solution to a problem as complex as that of terrorist

ideology? Does the legitimate need to combat terrorism justify the many breaches of fair trial introduced by the 2014 Act? In what way would the trial of defendants by a civil court have altered the effectiveness of the fight against terrorism?

In 2006, as part of the global counter-terrorism strategy, the United Nations General Assembly adopted a resolution in which the Member States unanimously stated: "*Effective action against terrorism and the protection of human rights are not conflicting objectives, but complementary and mutually reinforcing*".¹ It is clear from this UN General Assembly resolution that an effective fight against terrorism is perfectly compatible with respect for the rights of those being prosecuted.

In addition to the climate of insecurity orchestrated by the Boko Haram sect, the Anglophone crisis that erupted in 2016 has made the north-west and south-west regions of Cameroon the scene of several acts of terrorism, the most recent of which took place on 11 February 2024². This attack, which took place in Nkambe in the southwest region of Cameroon, left two people dead and more than fifty injured.³

The resurgence of terrorist acts in the northwest and southwest regions of Cameroon demonstrates the weaknesses of the judicial response to the fight against terrorism. This highlights the need for Cameroon to review its criminal justice policy.

In their fight against terrorism, some States, like France, have established an anti-terrorist judge. These are specialized, experienced judges with special security clearance. His jurisdiction extends to all terrorist offences. However, while the judge will continue to focus on the prosecution and investigation of the elements of the alleged terrorist offence with a view to convicting the perpetrators, he or she will remain a civilian judge from the bench who is independent and will investigate both the prosecution and the defence. In view of the above considerations, could Cameroon not, following the example of France, envisage the emergence of such a judge to enable it to combat terrorism effectively and guarantee respect for the rights of those prosecuted?

Although such an initiative might appear at first sight to be a mere imitation, in reality, the emergence of a civilian counter-terrorism judge in Cameroon (I) is a necessity that would guarantee Cameroon's compliance with international standards (II).

2. A Civilian Anti-Terrorist Judge: Ensuring Cameroon's Compliance with International Law

International law recognizes the right of anyone prosecuted for acts of terrorism to a fair trial.¹ A fair trial is one that respects and protects the essential rights of all those involved.² In this respect, article 14-1 of the International Pact on Civil and Political Rights states: "*Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of any criminal charge against him...*"

In its fight against terrorism, Cameroon has chosen to entrust the judicial handling of acts of terrorism to military courts. This choice is questionable for two reasons: on the one hand, the appearance of civilians before international courts is a breach of international law; on the other, the procedure before the military court does not provide for the intervention of an investigating judge and undermines the requirements of a fair trial. The emergence of a civilian anti-terrorism judge will enable the State of Cameroon not only to avoid having civilians tried by a military court (A) but also to strengthen the rights of those prosecuted (B).

2.1. The Incompetence of Military Courts to Try Civilians

The law of 23 December 2014 on the suppression of terrorism in Cameroon provides that all offences that fall within the scope of terrorist activity fall under the exclusive jurisdiction of military courts. This jurisdiction of the military courts is questionable because it is not in line with the international law.

Article 45 of Cameroon's Constitution states that international treaties and agreements that have been duly approved take precedence over laws as soon as they are published. The Cameroon Penal Code follows the same logic when it states that the rules of international law and duly promulgated and published treaties are binding on the Code and on all penal provisions. After reading these two articles, I realized that Cameroon is bound to respect its international commitments. The international commitments ratified by Cameroon prohibit a Cameroonian civilian from being tried by a military court.

The incompetence of military courts to try civilians can be observed both internationally and regionally.

Article 14 of the United Nations Convention for the Suppression of Terrorist Bombings, ratified by the State of Cameroon on 21 March 2005³ states: "*Any person taken into custody or against whom any other measure is taken or proceedings are brought under this Convention shall be accorded fair treatment and all the rights and guarantees in accordance with the law of the State in whose territory he is and the applicable provisions of international law, including those relating to human rights.*"

According to Article 14, the aim is to guarantee defendants a fair trial, which cannot be guaranteed by a military court insofar as the presence of military officers in the composition of such a court is incompatible with judicial independence.

In the same vein, the United Nations Human Rights Committee, in a general comment, explains, "*The trial of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can demonstrate that recourse to such courts is necessary and justified by objective and serious reasons and where, in relation to the specific*

¹United Nations Office on Drugs and Crimes, Human Rights and Criminal Justice Responses to terrorism, <https://www.unodc.org>, consulted on 4th of April 2024.

²<https://jurislogic.fr>, consulted on 5th of April 2024.

³ It is the New York Convention adopted on 15 December 1997.

category of persons and offences in question, the ordinary civilian courts are unable to undertake such trials."⁴ It is important to note that the Committee considers that the right to a competent, independent and impartial tribunal is absolute and cannot be subject to any exception, even in times of war or during a state of emergency.⁵

In view of the above, by providing for the exclusive jurisdiction of military courts in respect of terrorism-related litigation, the 2014 Act is in breach of international law.⁵ This violation is all the more regrettable in that, under international law, a rule or provision of domestic law cannot justify any failure to take a decision required by international law or the taking of a measure prohibited by international law. This is the case for all provisions of domestic law, regardless of whether they are constitutional in nature or have some form of special status in domestic law.⁶

At the regional level, Article 7 of the OAU Convention on the Prevention and Combating of Terrorism also guarantees the right to a fair trial for persons prosecuted for terrorism. Paragraph 4 of the same article goes further, asking States to ensure that the rights provided for in paragraph 3 are guaranteed by their legislation.

Similarly, the African Charter on Human and Peoples' Rights, cited in the preamble to the 1996 Cameroonian constitution, prohibits a Cameroonian civilian from being tried by a military court.⁵

Paragraph 1(a) of Article 7 of the Charter clearly states that everyone has the right to be tried within a reasonable time by an impartial court. If a military court's essential purpose is to try military personnel and not civilians, then a civilian who is called to answer for legal proceedings before a military judge appears before an inappropriate court composed of military personnel, who are subject to the discipline of the military code and receive instructions from the Minister of Defence. A military judge, therefore, does not have the independence and impartiality expected of a representative of the judiciary, of which the military judge is not a part.

From the above, it is clear that the military tribunal does not present any guarantee of impartiality as required by Article 7 paragraph (1) of the African Charter on Human and Peoples' Rights, a guarantee protecting any civilian person appearing before a court.

Furthermore, Point L (c) of the guidelines and principles on the right to a fair trial and legal aid in Africa⁶ states that military courts may not, under any circumstances, try civilians. Military tribunals are courts of special jurisdiction; in other words, a court of special jurisdiction dedicated to the trial of special persons such as military personnel or men-at-arms cannot try civilians who are not subject to the same rules of recruitment and discipline as military personnel.

Furthermore, the incompetence of military courts to try civilians has been confirmed by several decisions of both the African Commission on Human Rights and the UN Human Rights Committee. For example, in *Media Rights Agenda v Nigeria*, the African Commission on Human Rights clearly stated that military courts should under no circumstances try civilians. Similarly, special courts should not try offences that fall within the jurisdiction of ordinary courts.⁶ The case law of *Kévin MGWANGA GUNME and others v the State of Cameroon* follows the same logic. In this case, the African Court on Human and Peoples' Rights stated unequivocally that the trial of civilians by the military courts of Yaoundé and Bafoussam was a violation of Article 7, paragraph 1 of the Charter insofar as the military courts were created to try military personnel.⁷

The African Court of Human Rights, which has been hammering away at the incompetence of military courts to try civilians, has made a leap forward with a peremptory ruling. In the case of *CHEONUMA Martin and others v State of Cameroon*, the Commission ruled decisively that military courts could not try civilians. In the Commission's view, even if the States parties to the African Charter have full discretion regarding the adoption of national standards, all national legislation must comply with the obligations laid down by the Charter and the relevant international law.⁶

Finally, on the same point, the UN Human Rights Committee and the Committee against Torture adopt the same position as the African Court of Human Rights. In the *AKWANGA v State of Cameroon* case, the Human Rights Committee concluded that the military could not be competent to judge civilians.

On this subject, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism welcomed the fact that *several countries, notably Algeria and India, had abolished the practice of bringing terrorism suspects before special courts and transferred jurisdiction over terrorism cases back to the ordinary courts.*⁶

Like Algeria and India, Cameroon should comply with international law by relieving the military tribunal of jurisdiction over civilians prosecuted for terrorism.

The procedure before the military tribunal involves numerous breaches of the principles of fair trial. The involvement of a civilian anti-terrorism judge would better guarantee respect for defendants.

2.2. The Civil Anti-Terrorist Judge: Investigating Judge and Best Guarantor of the Rights of Persons Prosecuted for Terrorism

The appointment of an anti-terrorism judge, an independent and impartial civilian judge, will allow the introduction of an investigation phase and better guarantee the rights of the accused.

2.2.1. The Civil Anti-Terrorist Judge: Investigating Judge

The right to a fair trial, guaranteed by international law, is essential at all stages of the dispute, i.e. the investigation, the trial and the determination of the penalty.

⁴General Comment n°32, article 14: Rights to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32,23 août 2007, (para.22).

⁵ Cameroon signed the charter on the 23th of July 1987, ratified on 20th of June 1989 and deposited its instrument of ratification on the 18th of Septembre 1989.

⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms when combating terrorism, A/63/223, para..27.

On this point, the Terrorism Suppression Act 2014 has shortcomings. It makes no provision for a preparatory investigation phase in terrorism cases. Under the terms of Article 2 of the law, the court - the Military Court - is seized by an order for direct trial (OMJD) from the Government Commissioner. From then on, everything is decided at the trial hearing. It will, therefore, be for the trial panel to try to establish the elements of the offence as well as they can to establish the responsibility of the accused. This entails risks for the prosecution because, in a judicial system dominated by the presumption of innocence, many cases would be dismissed because of the inconsistency of the evidence.

On the other hand, the text does not say anything about the act of detention of the accused, who passes from the police phase (police custody) to the trial without any judicial act constituting the legal basis for the deprivation of liberty to which he will inevitably be subjected. However, the pre-trial investigation phase is essential in criminal matters and should be mandatory in these proceedings. In fact, the pre-trial investigation is indispensable in that it is the phase during which evidence is gathered and the elements of the prosecution are circumscribed. It also makes it possible to discard fanciful or hasty accusations and presumptions. As a result, the procedural rules developed by the 2014 Act in relation to the initiation of prosecutions seriously undermine both the effectiveness of law enforcement and the rights of the accused. In fact, when a case is brought before a court without prior investigation, the court will have to decide on a case that is often flawed. Terrorism is an emotional offence with a strong pathological component.

In this context, the serenity of the court may be called into question because, as the case has not been purged of all its dross, the judge may be tempted to convict where a well-crafted investigation would have led him to acquit.

It should also be noted that terrorist and similar offences are crimes that carry the death penalty or sentences with a minimum of ten years; the severity of these sentences makes it difficult to approximate when preparing the case. This is why the laws of 29 December 2006 and 14 December 2011 on the organization of the judiciary in Cameroon and the Code of Criminal Procedure, which came into force in 2007, explicitly state that The emergence of a counter-terrorism judge is, therefore, a necessity for the purposes of a fair trial. The intervention of this specialized judge, supported if necessary by military professionals, will make it possible to combat the arbitrariness currently observed in the initiation of prosecutions.

In addition, unlike a military judge, a specialized civilian judge better guarantees the rights of those being prosecuted.

2.2.2. The Civil Anti-Terrorist Judge: The Best Guarantor of Defendants' Rights

One of the challenges facing states is reconciling the fight against terrorism with respect for the rights of the defence. The international community, through resolution 60/288 of the United Nations General Assembly, is committed to taking measures to ensure respect for human rights and the rule of law as a fundamental basis in the fight against terrorism. The International Pact on Civil and Political Rights clearly sets out the principles of a fair trial.⁷ Article 4 of the Covenant specifies that this right is one of the substantial and intangible rights and, as such, cannot be derogated from, even in the context of the fight against terrorism.

As part of its strategy to combat terrorism, Cameroon has opted for a trial by military court. The consequence is a weakening of the procedural rights of the accused. In fact, the procedure provided for by the 2014 law before the military court has repercussions on the rights of the person prosecuted due to several factors.

Firstly, and as we have already mentioned, the jurisdiction of military magistrates may infringe on the rights of those being prosecuted. Although trained at a magistrates' training college, military judges are still subject to the discipline of the military code and, therefore, receive instructions from their superiors. A military judge, therefore, lacks the independence and impartiality expected of a representative of the judiciary. The civilian anti-terrorist judge, an independent and impartial judge, is undoubtedly the best guarantor of the rights of those accused of terrorism.

In addition, the repression of terrorism before the military court also makes it difficult for the accused to exercise their right to a judge due to the insufficient decentralization of the military courts. There is currently one military court per region, which does not make it easy for defendants to access a court. This situation is a source of judicial delays and consequently undermines the right of defendants to be tried within a reasonable time. Once again, the intervention of a civil anti-terrorism judge, a magistrate of the high court, will ensure that cases are dealt with swiftly. This territorial jurisdiction of the anti-terrorist judge at the level of the regional courts (high courts) in the jurisdiction where the act was committed will finally facilitate access to a judge for those subject to the law.

3. The Adjustments Required for the Emergence of a Civilian Anti-Terrorist Judge

The emergence of a civilian anti-terrorism court necessarily requires the amendment of Cameroon's anti-terrorism law. It is true that the new law will have to relieve the military court of its jurisdiction, but this relinquishment will have to take place gradually (A); the new law will also have to lay down rules for the operation of the civil counter-terrorism court. (B).

⁷ F. DUBUISSON, "The definition of terrorism: debates, challenges and functions in legal discourse" in *Confluences méditerranéenne*, 2017

3.1. *The Gradual Relinquishment of the Jurisdiction of the Military Court*

Military courts will, therefore, have to be relieved of jurisdiction over terrorist acts committed by civilians.

However, this transfer of jurisdiction from the military court cannot take place immediately. The transfer of cases from the military court to the civilian court will have to take place gradually. It is true that criminal law is intended to apply immediately to situations that have not been definitively judged when it comes into force. However, given the sensitive nature of the offence of terrorism, it seems wiser for this law not to apply retroactively to situations that have not been definitively judged, which would continue to be governed by the old law. In other words, the old military judges would be allowed to hear the old cases to their conclusion, and the new law would apply only to the new situations.

Military courts should, therefore, be relieved of jurisdiction over terrorist acts committed by civilians.

3.2. *The Operation of the Future Civil Anti-Terrorist Court*⁷

Terrorism is a complex offence with vague legal content.⁷ To date, no universal definition has been adopted. As a result, the crime of terrorism requires special investigative resources and in-depth knowledge of the elements needed to understand it.

The State of Cameroon is faced with acts of terrorism in three main regions: the North West, the South West and the Far North. In light of the recurrence of these acts, Cameroon must review its criminal law policy in the fight against terrorism. As the terrorist threat has become permanent, the State must take measures to increase its capacities by equipping itself with new means of preventing and combating terrorism. These include developing the capacity of the judiciary by centralizing litigation and specializing civilian judges while drawing on the expertise of military judges and coordinating initiatives relating to judicial cooperation and mutual legal assistance in criminal matters.

3.2.1. Specialization of Civil Magistrates and Centralisation of Terrorism-Related Litigation

Specialization requires better training for the magistrates of the future anti-terrorism court. They will need to acquire the knowledge and skills necessary to understand terrorism. Civilian counter-terrorism judges will, therefore, need to adapt constantly to changes in terrorist behaviour to anticipate and mitigate potential threats. This will require centralization, which will enable the future judicial institution to develop its capacity to combat terrorism.

With regard to centralization, there is a need to ensure centralized judicial handling of terrorism-related litigation. This centralization should take place at all stages of the procedure, from the prosecution phase to the post-trial phase. As a result, the future court will be involved at all stages of the criminal justice chain (conducting investigations, monitoring judicial information, the trial phase and enforcing sentences).

Thus, when an act likely to be classified as a terrorist act occurs in the NOSO, the Far North or any other region of Cameroon, it should not be the role of the public prosecutor's offices in the area under attack to initiate or conduct investigations under a terrorist label. When notified of the perpetration of a potential terrorist act within their jurisdiction, it will be up to the local public prosecutor's offices to immediately contact the anti-terrorist judge so that the latter can decide whether to take up the case. If the anti-terrorist judge decides not to take up the case, the local public prosecutor's office will decide whether to prosecute under ordinary law. However, the Anti-Terrorism Judge may not be relieved of jurisdiction without first obtaining the latter's approval.

In the event of a terrorist crisis, the public prosecutor with territorial jurisdiction must immediately inform the anti-terrorist judge. Furthermore, the territorially competent magistrate must go to the scene where he will be joined by the magistrates from the anti-terrorist prosecution service. Once at the scene, the magistrate from the local public prosecutor's office must ensure that the crime scene is frozen and check that the security perimeter set up by the first responders is sufficient to prevent any further attacks. This includes requesting intervention from the bomb disposal services, evacuating the surrounding accommodation, and taking care of the victims. It should be noted that once the case has been referred to the anti-terrorist judge, the territorially competent judge must not give any instructions to the police services regarding the direction of the investigation to respect the objective of centralizing the prosecution.

In view of the above, perpetrating a terrorist act requires a certain amount of technical expertise, both in terms of securing the scene and in terms of investigations; hence, the need to call on the expertise of the military judge.

3.2.2. Recourse to Military Expertise

Litigation relating to terrorism is of a special nature due to the unique investigative techniques used. The crime of terrorism requires special investigative resources and in-depth knowledge of the elements needed to establish the truth during the investigation phase. Recourse to the expertise of the military judge will inevitably contribute to uncovering the truth. It should also be noted that this expertise will be commendable from the moment the terrorist act is committed. Securing the scene of the crime is a crucial element in the smooth running of the investigation; in addition to securing the scene, military expertise is needed to provide better care for the victims and protect the public.

Apart from the fact that terrorism is a complex offence, it is also cross-border in nature, hence the need to promote cooperation and mutual legal assistance through the anti-terrorist jurisdiction.

3.2.3. Coordination of Judicial Cooperation and Mutual Assistance in Criminal Matters

Terrorism is a changing phenomenon. Nowadays, the terrorist threat has taken on a dual face: on the one hand, there are structured networks experienced in armed means and equipped with substantial logistical resources, and on the other, there are more unpredictable activists acting outside the traditional networks, using social networks and the principle of

⁷ F. DUBUISSON, "The definition of terrorism: debates, challenges and functions in legal discourse" in *Confluences méditerranée*, 2017

concealment.⁸ Added to this is the cross-border nature of terrorism, facilitated by the development of new technologies. The terrorist threat has, therefore, become both endogenous and exogenous. As a result, the fight against terrorism requires a perfect mastery of the mechanisms of international cooperation and mutual legal assistance in criminal matters. The stakes of judicial cooperation in the fight against terrorism are high, and international mutual assistance in criminal matters is used on a daily basis. As the point of contact identified by foreign judicial authorities, the anti-terrorism judge will be able to ensure cooperation with foreign judicial authorities, particularly in extradition matters.⁸

The instigators of the terrorist acts perpetrated in the NOSO are believed to be located abroad; improved judicial cooperation could lead to their extradition.

4. Conclusion

Faced with numerous acts of terrorism, the State of Cameroon should review its judicial response to this form of serious crime. It is clear that the criminal policy adopted has many weaknesses that can be corrected by introducing a civil anti-terrorist judge whose jurisdiction will be clearly defined by efficient anti-terrorist legislation.

Originally, Cameroonian criminal law gradually opened up to the idea of striking a balance between the need to punish and the need to take into account the human dimension of the individual who breaches the criminal law. With this in mind, the Cameroonian legislator embarked on a wide-ranging reform that culminated in 2005 in the promulgation of the law of 27 July 2005. As a result, Cameroonian criminal law has been given principles derived from the Declaration of the Rights of Man and the Citizen. These are fundamental principles that guarantee respect for human rights and the rule of law, such as the principles of legality, necessity and proportionality. The development of new forms of crime, such as terrorism, has led the world's states to take measures to curb this scourge. Cameroon joined this movement by enacting the law of 23 December 2014. This law, which has been strongly criticized, establishes the exclusive jurisdiction of military courts to try cases of terrorism in violation of international law, which prohibits military courts from trying civilians. The law also lays down very rigid procedural rules that infringe on fundamental human rights. This raises the question of whether the repression of terrorism, although a particularly serious offence, requires procedural rules that ignore all constitutional principles and the competence of a highly contested jurisdiction. The need for the emergence of an anti-terrorist judge and special rules of procedure that take account of the specific nature of terrorism and respect for the rights of the person being prosecuted, therefore, seems obvious.

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