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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11-29 July 2005

VIEWS

Communication No. 1095/2002

Submitted by:	B.G.V. (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	4 September 1997 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 July 2002 (not issued in document form)
Date of adoption of Views:	22 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Trial with proper judicial safeguards

Procedural issues: Substantiation of the alleged violation - exhaustion of domestic remedies

Substantive issues: Right to be tried without undue delay - right not to be compelled to testify against oneself or to confess guilt - right to one's conviction and sentence being reviewed by a higher tribunal according to law

Article of the Covenant: 14, paragraph 3 (c) and (g), and paragraph 5

Articles of the Optional Protocol: 2 and 5, paragraph 2 (b)

On 22 July 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1095/2002. The text is appended to the present document.

[ANNEX]

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

concerning

Communication No. 1095/2002[*]

Submitted by:	B.G.V. (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	4 September 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 July 2005,

Having concluded its consideration of communication No. 1095/2002, submitted on behalf of Mr. B.G.V. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed jointly by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando, Mr. Michael O'Flaherty and a separate opinion signed by Committee member Ms. Ruth Wedgwood are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 4 September 1997, is B.G.V., a Spanish national born in 1960. He claims to be a victim of violations by Spain of article 14, paragraph 3 (c) and (g), and paragraph 5 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

Factual background

2.1 The author worked in sales promotion for the company Coloniales Pellicer S.A. in Murcia. On 20 January 1989, the author signed a private document acknowledging a debt to the company. Having signed the document, the author continued working for the company until May 1990, when he was dismissed. The author and the company signed a conciliation agreement before labour court No. 4 in Murcia, terminating the employment contract, and the money owed to the author in terms of salary and redundancy pay was deducted from the total debt he had acknowledged in January 1989.

2.2 The company lodged a complaint against the author for misappropriation. On 16 May 1996, the judge of criminal court No. 2 in Murcia acquitted the author. The company lodged an appeal. On 16 September 1996, the Provincial High Court sentenced the author to five months' imprisonment for misappropriation, disqualified him from public employment or office, suspended his right to vote and ordered him to pay costs.

2.3 The author lodged an *amparo* application before the Constitutional Court, which was rejected on 29 January 1997. In the application, the author alleged both violation of his right not to be compelled to testify against himself, given that the only evidence on which he was convicted was his acknowledgement of a debt to the company, and violation of his right to be tried without undue delay. Although the author had made this last claim at the beginning of the oral proceedings, in accordance with the rules governing criminal procedure, the Constitutional Court ruled that the author's claim had been lodged out of time, when the delays had ended. As to the alleged violation of the right not to confess guilt, it is clear from the Constitutional Court ruling submitted by the author that the Court concluded that the probative force of the acknowledgement of the debt had in no way affected his right not to confess guilt, given that the acknowledgment had taken place prior to the trial, and that the author did not claim to have been coerced in any way into acknowledging the debt.

The complaint

3.1 The author claims a violation of his right not to be compelled to testify against himself (article 14, paragraph 3 (g), of the Covenant) on the grounds that the only evidence on which his conviction was based was the acknowledgment of debt that he signed long before the criminal proceedings began. He claims that he was tricked into acknowledging the debt as a way of regularizing his position in the company.

3.2 The author claims a violation of his right to be tried without undue delay (article 14, paragraph 3 (c), of the Covenant), given that 3 years, 4 months and 29 days elapsed between the start of proceedings and the day of the court hearing. The complexity of the case was insufficient to justify such a delay.

3.3 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that he was initially convicted at second instance, by the appeal court, and was denied the right to request a review of that conviction by a higher court. Although he did not include this claim in his *amparo* application before the Constitutional Court, the author believes that it would have been futile to do so, since the rules governing criminal procedure do not envisage the possibility of appealing against a sentence that was passed by the appeal court, when that court was the first to convict the accused. According to the practice of the Constitutional Court, *amparo* applications against legal norms are inadmissible when they are brought by individuals, as opposed to the bodies authorized by the Constitution to challenge the constitutionality of laws. Furthermore, the author cited the Constitutional Court ruling of 26 June 1999, which established that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

State party's observations on admissibility and on the merits

4.1 In respect of the facts reported by the author, the State party points out that the document acknowledging the debt records that the author put aside 4,725,369 pesetas without the company's knowledge or consent, and that he continued working at the company in order to pay off the debt. The author subsequently reported the theft from his house of 7 million pesetas - which he had been paid by clients of the company. The company consequently lost faith in the author, who was dismissed on 4 February 1991. A criminal investigation against him was opened thereafter.

4.2 The State party argues that domestic remedies were not exhausted in regard to the alleged violation of article 14, paragraph 3 (c), of the Covenant. It maintains that the right to trial without undue delay is protected in two ways in Spain: (i) by means of specific relief. In the case of undue delay, the person affected can complain to the court that is handling the matter. If the delay continues, the person can appeal to the Constitutional Court, which will decide whether the complaint is well-founded. If so, the Court will order an immediate end to the delay; (ii) by means of compensation. The person affected should request compensation for injury suffered as a result of the delay, in accordance with the procedure set out in the law. The European Court of Human Rights has stated repeatedly that compensation is a valid and effective domestic remedy, and the fact that use was not made of it would imply that the claim is inadmissible on the grounds that domestic remedies were not exhausted.[1] In the case of the author, the State party maintains that while the case was being investigated (3 years and 11 days), the author did not make any request for specific relief.

[1] European Court of Human Rights, complaint No. 39521/98, *Jesús María González Marín v. Spain*, final decision on admissibility, 5 October 1999.

Following the investigation, at the beginning of the trial the author invoked the alleged undue delay in the investigation, which had, by that point, ended. Given that the delay was no longer ongoing, the author should have pursued the option of compensation. Since he did not do so, his claim is inadmissible on the grounds that he did not exhaust domestic remedies.

4.3 As to the alleged violation of article 14, paragraph 3 (g), the State party maintains that the document in which the author acknowledges having appropriated the company's money pre-dates the criminal case, which is the only context in which a person's right not to be compelled to testify against himself is recognized. The author signed the document freely, and did not claim to have made the declaration in the document under any constraint or compulsion whatsoever. The document and its contents were used to acquit the author in the lower court, as the judge regarded the document as proof that the author had not intended to steal the money. The Provincial High Court set aside that ruling and concluded that there had in fact been intent to steal. The State party maintains that since the document was used in support of acquittal, it is illogical to reject it in the case of a conviction, particularly bearing in mind the author's subsequent conduct. The State party argues that this part of the complaint is inadmissible in accordance with article 3 of the Optional Protocol, and failing that, that no violation took place.

4.4 With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the State party asserts that it is inadmissible on the grounds that domestic remedies were not exhausted. The State party points out that the author should have lodged an *amparo* application before the Constitutional Court. The State party adds that the author's claim that an individual cannot lodge an *amparo* application alleging that legal norms are unconstitutional is not accurate. The law clearly provides for applications for *amparo* proceedings from individuals who consider their fundamental rights to have been violated. As to the substance of this claim, the State party points out that the right to have a conviction reviewed by a higher tribunal cannot be invoked *ad absurdum*, providing the right to a third, fourth, or fifth hearing, and cites article 2, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights. According to the Convention, a person's right to have his conviction reviewed by a higher tribunal may be subject to exceptions in cases in which the person was convicted following an appeal against acquittal at first instance. The State party adds that article 14, paragraph 5, of the Covenant cannot be interpreted as forbidding the prosecution to lodge appeals. The purpose of the right referred to in article 14, paragraph 5, is to avoid a breach of the right to a defence. The author's right of defence was not breached, since his claims were considered and ruled upon in accordance with the law by two separate judicial bodies. It is therefore not true to say that no review was carried out.

4.5 The State party further notes that the original claim made in September 1997 did not include the alleged violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. On 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999, made two years after the original claim, to allege that it was not necessary to lodge an *amparo* application before the Constitutional Court. The State party maintains that the Constitutional Court ruling does not override the requirement to exhaust domestic remedies, enshrined in article 5, paragraph 2, of the Optional Protocol. The State

party concludes that the author's claim should be declared inadmissible on the grounds that at no time did he invoke the substance of the alleged violation of article 14, paragraph 5, before the domestic courts.

Author's comments on the State party's observations

5.1 As to the alleged violation of article 14, paragraph 3 (c), of the Covenant, the author contends that the period of time that elapsed between the submission of the claim and the ruling - over three years - clearly goes against the right to be tried without undue delay.

5.2 With regard to the alleged violation of article 14, paragraph 3 (g), the author maintains that the right not to be compelled to confess guilt has implications that go beyond the prohibition of such action during the trial. The author was convicted solely on the grounds that he had, 17 months prior to making his claim, acknowledged a debt, in an attempt to resolve his differences with the company. Neither the company nor the public prosecutor brought direct evidence that the offence of misappropriation had been committed. It is clear that the document was drawn up in a climate of trust, in an effort to regularize a number of debts the author had incurred. The confession of guilt made outside the trial, in the context of a relationship of trust, cannot be the only basis on which the defendant is convicted. If it were, it would contravene the right not to be compelled to testify against oneself or to confess guilt, which includes the right not to be tricked into testifying against oneself.

5.3 As to the alleged violation of article 14, paragraph 5, of the Covenant, the author emphasizes that he was first convicted by a court of appeal. He maintains that, unlike other States parties, when Spain ratified the Covenant, it did not make a reservation that would have excluded cases in which defendants were convicted after appeals had been filed against their acquittal. He adds that the State party is obliged to guarantee a person's right to have his conviction reviewed when the first conviction is handed down at second instance. The author accepts that, owing to an error in the initial communication, he maintained that individuals could not bring *amparo* applications alleging the unconstitutionality of laws that violate fundamental rights. However, lodging an *amparo* application would have been futile because, according to the practice of the Constitutional Court, the right to review is not violated when it is the court of appeal that hands down the first conviction.

Issues and proceedings before the Committee

6.1 In accordance with rule 93 of its rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 Regarding the alleged violation of article 14, paragraph 3 (g), the Committee notes that the author admits to having signed the document acknowledging his debt of his own free

will,[2] before the trial against him began. In that document, he acknowledged that he had kept money belonging to the company without the company's knowledge or consent. The Committee recalls its jurisprudence that the wording of article 14, paragraph 3 (g) - i.e., that no one shall "be compelled to testify against himself or to confess guilt" - must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[3] As to the author's allegation that the document acknowledging the debt, which was obtained outside the judicial process, was the only evidence on which his conviction was based, the Committee notes that the court's ruling based the author's responsibility on his conduct before, during and after the document was signed. In the court's opinion, the author's conduct proved his intent to deceive. In accordance with the Committee's settled jurisprudence, it is not for the Committee to examine the manner in which facts and evidence have been evaluated by domestic courts, unless it was clearly arbitrary or amounted to a denial of justice, which was not the case here. The Committee concludes that the author has not substantiated the alleged violation of article 14, paragraph 3 (g), of the Covenant for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 As to the claim that the procedure was unduly prolonged, the Committee takes note of the State party's contention that the author could have applied for specific relief to put an end to the delay, and for compensation once the delay had ended. The Committee notes that the author has neither disputed nor dismissed the State party's assertion that recourse to compensation is an effective remedy. It therefore considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.[4]

6.4 As to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee takes note of the author's argument that lodging an *amparo* application before the Constitutional Court would have been futile because, according to the practice of the Court, the right to review is not violated when it is the court of appeal that hands down the first conviction. In this regard, the Committee recalls its jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success, and it reiterates that when the highest domestic court has ruled on the matter in dispute, thereby eliminating any prospect that a remedy before the domestic courts may succeed, the author is not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.[5] In the present case, that ruling came in a slightly later case, but it tended to confirm that resort to this remedy would have been futile.

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[2] See paragraph 5.2 above.

[3] Communication No. 253/1987, *Kelly v. Jamaica*, decision of 8 April 1991, paragraph 5.5.

[4] With regard to the issue of placing the burden of proof on the author when the State party has properly demonstrated that effective remedies are available, see communication No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, paragraph 6.3.

[5] See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, decision on admissibility, 14 October 1993, paragraph 6.3.

6.5 The Committee therefore declares that the author's claims under article 14, paragraph 5, are admissible, and turns to consideration of the merits.

7.1 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that that expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties. On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out.[6] Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the author's case, but also that the conviction will undergo a second review, which was not the case for the author. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party. The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including the review of his conviction by a higher tribunal.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proven that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[6] Communication No. 1073/2002, *Terrón v. Spain*, decision of 5 November 2004, paragraph 7.4; communication No. 64/1979, *Salgar de Montejo v. Colombia*, decision of 24 March 1982, paragraph 10.4.

APPENDIX

Individual opinion signed by Committee members Ms. Elisabeth Palm, Mr. Nisuke Ando and Mr. Michael O'Flaherty (Dissenting)

I regret that I cannot agree with the majority's finding that the author was not obliged to exhaust domestic remedies in the present case.

The author claims that it would have been futile to lodge an amparo in his case. The State party is of the opposite view. I note that the author's original claim in September 1997 did not include the allege violation of article 14, paragraph 5, of the Covenant, which the author first referred to in December 1999. In his submission on 23 April 2001, the author cited the Constitutional Court ruling of 28 June 1999 to allege that it was not necessary to lodge an amparo application before the Constitutional Court.

According to the Committee's jurisprudence an author only has to exhaust those remedies that have a reasonable prospect of success. Where there is a settled case law which indicates that an appeal would have been futile it is not necessary to exhaust that remedy. In the present case it was open to the author to lodge an application for amparo proceedings before the Constitutional Court, claiming that his fundamental right had been violated in that the rules governing criminal procedures did not envisage the possibility of appealing against a sentence that was passed by the appeal court when that court was the first to convict the accused. However, the author failed to lodge an amparo.

At the time when the author's case was finally decided on 29 January 1997 there existed no case law by the Constitutional Court. It was not until 26 June 1999 that the Constitutional Court ruled that a conviction by an appeal court following an acquittal by the court of first instance did not violate the right to review.

In my opinion the author cannot, for the purpose of exhaustion of domestic remedies, rely on a ruling by the Constitutional Court which was delivered nearly 2 and half years after his case was finally decided. As at the time there was no settled practice or caselaw on the issue the author should have lodged an amparo. He failed to do so. Accordingly, I find that he has not exhausted domestic remedies regarding his claim under article 14, paragraph 5, of the Covenant.

[*Signed*] Elisabeth Palm
[*Signed*] Nisuke Ando
[*Signed*] Michael O'Flaherty

[Done in English, French and Spanish, the English text being the original version. subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee member Ms. Ruth Wedgwood

I join my colleague Elisabeth Palm in doubting the propriety of reaching the merits of the author's claim under Article 14(5) of the Covenant, because of the author's failure to exhaust domestic remedies. When the author lodged an application for *amparo* before the Constitutional Court of Spain in late 1996, he failed to include, within the stated grounds of his petition, any semblance of his current claim to the Human Rights Committee. In particular, he declined to put to the Constitutional Court any complaint that Spain's law of criminal procedure is deficient insofar as it fails to grant a full appeal from convictions rendered in a second-instance court. Indeed, the author did not address such a claim to the Human Rights Committee in his original communication in September 1997, adding the issue only in 1999. (His case was formally registered with the Committee in 2002.)

The ruling of the Constitutional Court, in a different and later case, even if it is assumed to be dispositive on the issue, should not make a difference in regard to exhaustion. For one thing, many legal systems properly decline to give retroactive effect to a new rule unless a party has previously raised the issue in the domestic courts. It is up to a party to preserve his claim by putting the issue in a timely fashion. Here, the author is represented by legal counsel, and this further justifies the ordinary application of exhaustion as a prerequisite.

Additionally, the merits of the author's claim under Article 14(5) of the Covenant may be more problematic than the Views of the Committee suggest. The Committee holds *tout courte,* see Paragraph 7.1 *supra*, that "Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a [yet] higher court." This is new ground for the Committee, and its rule, widely applied, could disrupt the court systems of many civil-law countries.

To be sure, in the legal tradition of common-law countries, an appellate court cannot disturb an acquittal below, and indeed to do so, would pose serious constitutional questions. The historic independence of the common-law jury has protected its verdicts of acquittal from any review.

But in civil law countries, including such states as Austria, Belgium, Germany, Luxembourg, and Norway, an acquittal by a court of first instance may apparently be vacated in favor of conviction, by a second-instance court sitting in review – and there may be no further appeal, as of right, from that second-instance court. The international war crimes tribunals created by the United Nations Security Council for the trial of war crimes in the former Yugoslavia and Rwanda also create the same capacity in the appellate chamber, with no further right of review.

The five European countries cited above have entered formal reservations to the International Covenant on Civil and Political Rights to preserve their right to institute convictions at the appellate stage, without further review. But as Judge Mohamed

Shahabuddeen has remarked in another setting, "some of those statements lean towards interpretative declarations,"[7] i.e., they are worded as clarifications as to what the Covenant is assumed to mean in the first place.

In addition, the Committee should take account of Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on November 1, 1988. Article 2(1) of the Protocol guarantees to any person convicted of a criminal offense "the right to have his conviction or sentence reviewed by a higher tribunal." But Article 2(2) of the Protocol also notes, as an allowable "exception" to further appeal, those cases "in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

Of course, the European Convention does not govern the jurisprudence of the United Nations Human Rights Committee. And the language of Article 2(2) of Protocol 7 goes beyond the text of the International Covenant on Civil and Political Rights in Article 14(5). But it is hard to imagine, as Judge Shahabuddeen has wisely remarked, that the 35 [now 36] states parties to Protocol 7 of the European Convention "intended to act at variance with any obligations under article 14(5) of the ICCPR." In reaching its decision today, the Committee has not paused to survey to what extent the practice of those 36 states, or other signatories of the Covenant, may be at variance with the standard we apply.

In a matter so fundamental to the structure of national court systems in civil-law countries, we should give some consideration to the views of the states parties, as well as their widespread practice. This is especially so in construing the language of a Covenant provision whose drafting history is itself ambiguous, and where some states have explicitly preserved their right to continue these practices, without objection by other states parties.

Indeed, this Committee has previously opined that there is "no doubt about the international validity" of a reservation to Article 14(5) in the case of a conviction rendered in the Italian Constitutional Court, sitting as a court of first instance, with no further appeal. *See* Fanali v. Italy, No. 75/1980, at paragraph 11.6. We interpreted the Italian reservation to apply to parties not specifically mentioned within its text.

Hence, I would treat today's decision as limited to the facts and parties before us, and its rule as worthy of examination in a more comprehensive fashion at a later date.

[*Signed*] Ruth Wedgwood

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[7] See Separate Opinion of Mohamed Shahabuddeen, in Prosecutor v. Rutaganda, Case No. ICTR 96-3-A (International Criminal Tribunal for Rwanda, Appeals Chamber, May 26, 2003).

[Done in English, French and Spanish, the English text being the original version. subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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