

CRIMINAL OFFENSES OF FELONY MURDER IN THE CRIMINAL LEGISLATION OF THE REPUBLIC OF SERBIA

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Abstract

Criminal offences of murder are the most serious crimes against life and body, criminalized by Article 113 to 118 of the Criminal Code of the Republic of Serbia (murder, aggravated murder and privileged murder). The object of protection of these most serious crimes is the life and body of a person and the right to life as a basic human right. In these criminal acts of *delicta communia*, the causal nexus between the execution of the act and the resulting consequence must be clearly established, which implies that it was precisely because of the incriminated action that the consequence occurred, i.e. the death of another person. In the paper pointed out the actions of committing the criminal offences of murder, as well as the fact that the act of committing the criminal offences of murder can only be undertaken against another person, but not against oneself. In the paper, the author explained different understandings and concepts regarding the question of when the criminal protection of life and body of a person begins and lasts. In addition to the basic form of the criminal offense of murder, the paper also points to its milder or privileged forms, which contain a lower degree of severity and danger. The focus of the paper is on the distinction of crimes of aggravated murder according to the method of execution, the motives of the perpetrator, the circumstances of the execution and the consequences, and the property of the passive subject.

Keywords: *murder, criminal legislation, Republic of Serbia*

Criminal offenses of murder

Crimes against life and body occupy Chapter XIII of the Criminal Code of the Republic of Serbia (Criminal Code of the Republic of Serbia (CC RS), "Official Gazette of RS", no. 85/2005, 88/2005 - corrected, 107/2005 - corrected, 72/2009, 111/2009, 121/2012, 104/ 2013, 108/2014, 94/2016 and 35/2019), whose object of protection is the life and body of a person, i.e. the physical integrity or physical or psychological constitution of a person (Mršić 2004: 70-79), i.e. the right to life as one of the basic, fundamental human rights (Božić 2016: 267-288). The right to life is the most important human right and the right of a person as an individual, without the right to a free life and protection from being harmed, all other human rights would have no meaning (Božić, Đukić 2021: 213). The right to life, the right to freedom and security, the prohibition of slavery, positions similar to slavery and forced labor, the inviolability of physical and psychological integrity, the right to freedom of movement, freedom of thought, conscience and religion, freedom of thought and expression, the right to equality between people, the right to work, the right to education, the right to health, are basic human rights protected by the Constitution (Constitution of the Republic of Serbia, Official Gazette of RS, no. 98/06, 115/21).

These crimes belong to the classic criminality of violence and fall under blood crimes, and refer to different forms of murder as a criminal offense (1 - the basic form of the criminal offense of murder, 2 -

qualified or more severe form of murder and 3 - privileged or less severe form of murder). Criminal acts of murder can also have the characteristics of organized crime (Božić 2023: 69).

The criminal offense of murder (who takes the life of another) consists, therefore, in the unlawful taking of the life of another person with direct intent (when the perpetrator was aware of his act and wanted to carry it out), or by possible premeditation (when the perpetrator was aware that he could do the act and agreed to it) (Art. 25. CC RS). The perpetrator of this crime can be any person, because the perpetrator is defined and determined by the word "who", which classifies this criminal offense as a *delicta communia*.

The act of committing the criminal act of murder includes any act that can lead to the death of another person, which means that the act of this criminal act consists in taking the life of another person and can only be committed against a living person. There must be a *causal nexus* between the execution of the action and the resulting consequence, which means that it was precisely because of the incriminated action that the consequence occurred, i.e. the death of another person.

The act of execution (both doing and not doing) is a consequential disposition. Namely, any act of doing or not doing, which directly or indirectly leads to the consequence or to the death of another person, is a criminal offense of murder. Under actions we can consider all different activities that are sufficient and suitable to cause the death of another person.

Acts of doing can be done indirectly or directly, in different ways (directly, indirectly, physically, psychologically) as well as by various means. The most common cause of death in practice is *physical death*, which can be achieved by different means such as firearms or cold weapons or tools, as well as some other means that can seriously injure the body or seriously damage health. *Psychologically causing death* means bringing another person into a state of excessive excitement, fear or terror or grief that is of such a degree that it can lead the other person to shock, which results in heart block or interruption of other life functions, i.e. death.

Actions of inaction can lead to the death of another person in those cases where there is a duty to act which would prevent death from occurring. In order for it to be a criminal act of murder, it is necessary that the act of committing the murder was undertaken *illegally*.

We would like to draw your attention to the fact that this criminal offense does not exist if the deprivation of life occurred in necessary defense (Art. 19. paragraph 2. CC RS),¹ in the ultimate necessity (Art. 20. paragraph 2. CC RS),² in the performance of duties in public and state security affairs, or when the regulations of the service allow or require it (Jovašević 1998: 43-61).

It should be emphasized that the act of committing criminal acts of murder can only be undertaken against another person, but not against oneself. Namely, suicide and self-harm cannot be considered criminal acts because they are not criminalized as criminal acts in the criminal legislation of the Republic of Serbia. Namely, self-harm can be legally relevant only in two prescribed criminal acts: 1) Evasion of military service (Article 394 of the CC) or 2) Abuse of social security rights (Article 168 of the CC).

The protection of a person's life and body starts from his birth and continues until his death (Božić, Đukić 2022: 87-108). This kind of interpretation has three different interpretations in legal theory. According to the first, criminal law protection of life begins with the process of giving birth to a child, that is, its separation from the mother's body. According to another understanding, the life of the child, and thus the protection of life under criminal law, begins with the partial or complete exit of the child from the mother's body. According to the third understanding, the independent life of the child begins with the cessation of placental respiration and the beginning of pulmonary respiration (Stojanović 1998: 3-15).

¹ *Necessary is the defense that is absolutely necessary for the perpetrator to repel a simultaneous illegal attack from his property or the property of another.*

² *The ultimate necessity exists when the act is committed in order for the perpetrator to remove from his good or the good of another a simultaneous undistorted danger that could not be removed in any other way, and the evil done is not greater than the evil that threatened.*

In the criminal legislation of the Republic of Serbia, the first interpretation is accepted, that is, that the criminal law protection of life begins with the process of giving birth to a child, that is, its separation from the mother's body, from the moment when human life becomes autonomous, self-reproductive and self-regulatory. Here we have to warn that this understanding in our criminal legislation has one exception, which refers to the killing or destruction of the fetus in the mother's body even before the birth process has begun (criminal act *Unauthorized termination of pregnancy*, Article 120 of the CC), so in this case, criminal law protection of life and body begins even before the birth of the child. This criminal offense protects the fetus, bodily integrity, health, and the life of a pregnant woman.

On the other hand, with regard to the question of how long the protection of life under criminal law lasts, three different understandings are also imposed in legal theory. According to the first understanding, human life lasts as long as a person breathes, therefore, death occurs with the cessation of breathing, which implies the cessation of the work of the heart and lungs. This appearance of death is called apparent or clinical death. According to another understanding, the death of a person occurs at the moment when not a single organ shows signs of life anymore and when not a single life function takes place in a person, which means that a person's life lasts until the moment of biological death. According to the third understanding, the death of a person occurs when the brain stops working, which consists in shutting down all brain functions (cerebral or brain death).

In the criminal legislation of the Republic of Serbia, the third understanding is accepted, that the criminal law protection of a person's life and body lasts until his death, which occurs by shutting down all his brain functions. This moment of death is also important for transplanting organs and body parts (Božić 2016 II: 628-657). The achievements of modern medicine have turned human organs into a storehouse of spare human parts for brain-dead people, whereby globally people become immortal, and in all this, life and death are intertwined (Božić 2012: 59).

Qualified and privileged forms of the criminal offense of murder

The more serious or qualified form of the crime of murder is criminalized in the criminal legislation as aggravated murder (Art. 114 CC RS). In the Criminal Code of the SFRY from 1974, the word „*umorstvo*“ was used instead of aggravated murder.

Felony murder is the most serious form of murder, which carries the most severe punishment. Felony murder is the unlawful killing of a human being accompanied by a specific attitude of the perpetrator towards the act, which was carried out for specific motives, under specific circumstances or towards a specific person provided for by law which, due to the aforementioned circumstances, give him a greater degree of severity and danger, which is why the legislator prescribed a higher penalty for aggravated murder. Felony murder means taking the life of another person, this criminal offense contains all the elements of the basic criminal offense of murder, with the fact that it is also necessary to fulfill some of the qualifying circumstances specified in the assessment.

The legislator has foreseen several forms of the criminal offense of aggravated murder, which differ according to the method of execution, the motive of the perpetrator, the circumstances of the execution, the consequences and the property of the passive subject. The following shall be punished with imprisonment for at least ten years or life imprisonment: 1) who takes the life of another in a cruel or insidious manner; 2) who deprives another of his life through reckless violent behavior; 3) who deprives another of life and at the same time intentionally endangers the life of another person; 4) who takes another's life while committing the crime of robbery or robbery; 5) who takes another's life out of self-interest, for the purpose of committing or concealing another criminal act, out of wanton revenge, or out of other base motives; 6) who takes the life of an official or military person while performing official duty; 7) who takes the life of a judge, public prosecutor, deputy public prosecutor or police officer in connection with the performance of

official duties; 8) who takes the life of a person performing tasks of public importance in connection with the tasks performed by that person; 9) who takes the life of a child or a pregnant woman; 10) who takes the life of a member of his family whom he previously abused; 11) who intentionally takes the life of several people, and it is not a case of murder, killing a child during childbirth or taking life out of compassion (Art. 114 CC RS, Božić 2019: 91-105, Božić, Simović 2020: 129-142).³

Milder or privileged forms of the criminal offense of murder contain a lower degree of severity and danger, so accordingly, they are threatened with a lighter punishment than the basic form of the criminal offense of murder. Milder or privileged forms of the crime of murder criminalized in the Criminal Code of the Republic of Serbia are: 1) murder at random (Article 115 of the CC RS), 2) killing a child during childbirth (Article 116 of the CC RS), 3) deprivation of life out of compassion (Article 117 of the CC RS) and 4) negligent deprivation of life (Article 118 of the CC RS).

Felony murder

Criminal acts of aggravated murder differ according to 1) the method of execution, 2) the motives of the perpetrator, 3) the circumstances of the execution and the consequences, and 4) the property of the passive subject.

According to the method of execution, the crimes of aggravated murder are murder in a brutal manner and murder in a treacherous manner. *In relation to the motives of the perpetrator of the criminal act*, serious murders are murder for self-interest, murder for the purpose of committing or concealing another criminal act, and murder for wanton revenge or other base motives. *Considering the circumstances of the execution and the consequences*, the criminal offenses of aggravated murder are murder with reckless violent behavior, murder with intent to endanger the life of another person, murder during the commission of robbery and robbery, and murder of several persons. *Considering the characteristics of a passive subject*, the crimes of aggravated murder are the murder of an official or military person in the performance of official duty, the murder of a child, the murder of a pregnant woman, the murder of a family member who was previously abused, the murder of a judge, of a public prosecutor, a deputy public prosecutor or a police officer in connection with the performance of official duties and the murder of a person performing tasks of public importance in connection with the tasks performed.

1- *Deprivation of life in a cruel manner* is a serious murder which, by the way of execution, exposes the victim to unnecessary infliction of physical or psychological pain, torment and suffering, with the intention of exposing the victim as much as possible to torments which, in terms of intensity and duration, exceed the pain and suffering that are characteristic of ordinary murder.

The actions carried out by the perpetrator of this criminal act are characterized as extremely cruel and horrible, with the fact that it should be emphasized that the perpetrator must be aware of the cruelty and inhumanity of the acts he willingly undertakes. The same is stated in the judgment of the Appellate court in Kragujevac:

"According to the judgment of the court, when distinguishing ordinary murder from murder in a brutal manner, one starts from the assessment of objective circumstances, which consist in the severity of the torment, suffering and pain caused to the victim, and subjective circumstances, which are reflected in the insensitivity of the perpetrator or his desire to inflict torment, suffering, pains and the feeling of satisfaction with such a way of taking life. According to the court's opinion, both of these elements must be fulfilled cumulatively."

³ See more about the prison sentence.

(Judgment of the Appellate Court in Kragujevac Kž. 3141/2010 Bulletin of Court Practice of the Court of Appeal, Kragujevac, No. 2/2010, p. 40-41.)

The features of the crime of murder in a cruel manner are expressed in the following: in the act of execution, which consists in taking life; the consequences, which are manifested in the occurrence of death and in the subjective element, the executor acts with the intention to cause death by the act of execution (Stojanović, Perić 2006: 30). The Court of Appeal in Belgrade is of the same opinion:

„The first-instance court correctly found that the objective side of the brutality of the execution of this criminal offense is reflected in the infliction of unnecessary suffering on the victim that exceeds the suffering that usually accompanies every murder, in addition to 20 stab wounds in the front of the neck, chest and abdomen, the defendant previously, now deceased, inflicted 37 shallow stab wounds up to 5 cm deep on the front side of the neck, in the lower part of the chest from the front, on the front side of the abdomen, and the said injuries were inflicted on her on several occasions when she felt pain and fear for her life and defending herself in an attempt to save herself, the injured party also received three burns on her hands by grabbing the knife with which she was attacked with her bare hands, during which she felt maximum fear to the degree of horror during the entire defense due to the feeling of her life being threatened, while by receiving each subsequent injury, until she lost consciousness, she felt increasing pain, which increased the feeling of fear and threat for her own life, whereby the injured party felt pain, suffering and fear for her own life for a long period of time, for the entire duration of the event, which lasted almost the entire morning from the early hours of the morning.“

(Judgment of the Court of Appeal in Belgrade Kž. 351/2012 of April 19, 2012, Bulletin of the High Court in Belgrade, Belgrade, No. 83/2013, p. 14-15.)

2- *Deprivation of life in an insidious manner* implies a murder that was carried out in a cunning, covert, secret, and insidious manner, which means that the victim does not expect an attack, nor can he assume that his life is in danger. For the stated reason, the victim is not able to defend himself, nor to call any other person for help. Deprivation of life in an insidious way can be carried out, for example, from behind or while the victim is sleeping. Here we note that for the execution of this criminal act, the relationship of the perpetrator of the criminal act towards the victim, which is based on kinship, friendship or love, is of crucial importance. Cumulative conditions must be met: that it is a covert, secret way of carrying out the act (objective assumptions) and that the criminal offense was committed in a cunning and fraudulent manner with abuse of the victim's trust (subjective assumptions). Deprivation of life in an insidious way will be discussed, for example, in the case of the crime of murdering a spouse while sleeping, or e.g. ambush murders in the case where the victim is tricked into coming to a certain place.

3- *Criminal offense murder with greed* (self-interest murder) is the taking of another person's life with the aim of obtaining excessive and unnecessary material or non-material benefit for oneself or another natural or legal person. The perpetrator of this criminal act acts with greed and lust for excessive and unnecessary acquisition and increase of material benefit or prevention of its reduction, as the basic motive for committing this criminal act.

4- *Murder for the purpose of committing or concealing another criminal offense* means taking the life of another person with the intention of enabling or facilitating the commission of another criminal offense. Also, this criminal offense can be committed with the aim of concealing an earlier committed criminal offense. It should be emphasized here that the second criminal act does not even need to be committed, it is enough that it constitutes a motive for committing the murder.

5- *Murder out of wanton revenge or other base motives* is the crime of aggravated murder in which the perpetrator is motivated by wanton revenge or other base motives, from egoistic and self-serving motives. It is irrelevant whether the stated motivations were realized in the specific case, as well as whether

the revenge was carried out after a longer period of time. It will not be a criminal act of murder out of wanton revenge or from other base motives if the evil caused by the murdered person was proportionate to the consequence of the death by which the perpetrator retaliates, because wanton revenge means a significant disproportion between the evil that was done and the loss of life (Jovašević 2013: 269-287).

6- *Murder with reckless violent behavior* is considered a serious murder due to the violent, thuggish or hooligan behavior of the perpetrator of this criminal act that preceded the murder. The murder usually happens without any reason, so it's a case of murder out of spite and whim. It is necessary that the violent behavior exceeds the usual measure (recklessness) and that it occurs during the reckless violent behavior. It is a two-act criminal offense consisting of two necessarily related activities: 1) violent behavior (criminal offense against public order and peace) and 2) murder (criminal offense against life and limb).

7- *A murder in which the life of another person is intentionally endangered* is aggravated murder when, in addition to taking the life of one person, the life of another person or several other persons is also endangered. The perpetrator intentionally caused a concrete danger to the life of another person, e.g. a murder that was carried out by throwing a bomb that killed one person and endangered another. It is worth noting the similarity of this criminal offense with the criminal offense of attempted murder of several persons. The subjective attitude of the perpetrator towards the criminal act (intent), that is, whether the perpetrator wanted to kill only one person or wanted to kill several people, is the basic element of demarcation of the criminal act (Jakovljević 1975: 361). The perpetrator must be aware that the action undertaken will cause danger to the life of other persons by the method or means used, as well as that he, in addition to having said awareness, undertakes such an action (*dolus directus*).

8- *Murder during the commission of the criminal offense of robbery or the criminal offense of robbery theft* is serious murder in which we have two protective objects: the life of a person and the property of another person. We can talk about this criminal offense under the condition that there is deprivation of life of one person during the commission of the criminal offense of robbery or robbery theft, with the intention of the perpetrator. It is a complex criminal offense, which consists of the criminal offense of robbery (Article 206 of the Criminal Code), that is, robbery theft (Article 205 of the Criminal Code) and the criminal offense of murder (Articles 113 and 114 of the Criminal Code).

In the case of murder during the commission of the criminal offense of robbery or robbery theft, three conditions must be met cumulatively: the act of applying coercion against a person, the act of confiscating someone else's movable property, and the act of unlawfully taking the life of another person with intent must be done. In the case of murder during robbery, the use of force precedes the commission of theft, while in murder during robbery theft, the perpetrator first commits theft, and then coercion with the aim of keeping the stolen item, whereby as a consequence of the applied force, the consequences of the death of one or more persons are caused with the intention (Marković, Pavlović, Stanojević 2009: 36). We note that a necessary element of this form of aggravated murder is the fact that the consequence of death occurred during the commission of the crime of robbery or robbery theft, regardless of whether this crime was completed or remained in the process of being attempted.

The distinction between this act and murder for self-interest is in the motivation to commit the criminal offense of murder, i.e. the criminal offense of theft, where in the case of self-interest, the motivation is in the form of greed, lust for excessive and unnecessary acquisition and increase of material benefits, while in the case of robbery or robbery theft it can be about satisfying basic existential needs (Marković 2009: 22).

9- *Murder with the intention of several persons* is serious murder, considering the scope and intensity of the consequences, in which the perpetrator intentionally deprives the life of at least two persons, e.g. planting a bomb under the bus that explodes while driving. We draw attention to the fact that it is not

necessary for the perpetrator to be the perpetrator in all murders, in some cases it is enough to be an instigator or a facilitator.

In order to commit the murder of several persons with intent, the following conditions must be met cumulatively:

- 1) that the murder was committed in ideal or real merger or in return,
- 2) that all murders were committed with intent,
- 3) that all murders are completed acts,
- 4) that no murders on the spur of the moment were committed, killing a child during childbirth or taking life out of compassion, and
- 5) that the same person participated in the execution of all murders in the capacity of perpetrator, co-perpetrator, instigator or helper (Jovašević 2014: 13-14).

10- The murder of an official or military person in the performance of official duty is aggravated murder, in which it is necessary that the passive subject be an official or military person who, at the time of the murder, was performing an official duty.⁴ It is about the deliberate deprivation of life of a person who has the capacity of an official or military person in connection with the performance of his official duty. The qualifying circumstance of the act is the property of a passive subject who deprives himself of life while on official duty. In the case of the perpetrator, it must be about the consciousness and intention that he is depriving the said person of his life.

11- The murder of a child or a pregnant woman is serious murder, which involves taking the life of a person under the age of 14 or taking the life of a pregnant woman, which must be known to the perpetrator of this crime at the time of the execution. Direct or potential intent is required to commit this criminal act. If the perpetrator did not know about the victim's pregnancy, it will be an ordinary murder, with the fact that the victim's pregnancy will be considered an aggravating circumstance.

12- The murder of a family member who was previously abused is qualified as aggravated murder, in which it is necessary that the perpetrator, for a short or long time, previously physically or mentally abused a member of his family.⁵

⁴ An official person is considered to be: 1) a person who performs official duties in a state body;

2) an elected, appointed or appointed person in a state body, a local self-government body or a person who permanently or occasionally performs official duties or official functions in those bodies;

3) notary public, public bailiff and arbitrator, as well as a person in an institution, company or other entity, who is entrusted with the exercise of public authority, who decides on the rights, obligations or interests of natural or legal persons or on the public interest;

4) an official person is also considered a person who is actually entrusted with the performance of certain official duties or tasks;

5) military person (Art. 112, paragraph 3, CC RS).

A military person is considered a professional soldier (professional officer, professional non-commissioned officer, contract officer, contract non-commissioned officer and contract soldier), soldier serving military service, military academy student, military school student, a person from the reserve while on military duty as a conscript and a civilian performing a certain military duty. (Art. 112, paragraph 6, CC RS).

⁵ The following are considered family members: spouses, their children, spouses' ancestors in the direct line of blood kinship, common-law partners and their children, adoptive parents and adopted children, breadwinners and breadwinners. Family members are also considered brothers and sisters, their spouses and children, ex-spouses and their children and parents of ex-spouses, if they live in a joint household, as well as persons who have a child together or a child is about to be born, even though they have never lived in the same family household. (Art. 112, paragraph 28, CCRS).

13- *The murder of a judge, public prosecutor, deputy public prosecutor or police officer in connection with the performance of official duty* is a serious murder characterized by the passive subject's property of being deprived of life in connection with his vocation. It should be emphasized that this type of murder is considered not only the killing of a person while he is performing his duty, but also at any other time, provided that it can be established that he was deprived of his life in connection with the official duty he was performing or should have performed. The victim needs to have a special official capacity; the capacity of a judge, public prosecutor, deputy public prosecutor or police officer, which must be known to the perpetrator of this criminal act at the time of the execution. The intention of the perpetrator must cumulatively include the awareness of the property of a passive subject and the intention to deprive him of his life.

14- *The murder of a person who performs tasks of public importance* in connection with the tasks performed by that person is the last form of aggravated murder provided for in the Criminal Code.⁶ In this criminal offense, the attribute of a passive subject refers to a person who performs tasks of public importance, and taking the act of taking the life of that person is related to the performance of tasks performed by that person.

Concluding considerations

The Criminal Code of the Republic of Serbia prescribes the criminal acts of murder, aggravated murder and privileged criminal acts of murder. The object of protection is human life. The perpetrator can be any person, which places these criminal acts in the category of *delicta communia*.

One exception refers to the privileged form of the criminal offense of murder, to the criminal offense of *killing of a child during childbirth*, the perpetrator of which can only be a mother who takes the life of her child during childbirth or immediately after childbirth, while she is suffering from a disorder caused by childbirth, therefore this is *delictum proprium*.

In terms of guilt, it is necessary that the perpetrator acted with intent. The exception refers only to Article 118 of the Criminal Code, which criminalizes the crime of *Negligent Deprivation of Life*.

A qualified form of murder (aggravated murder) will be considered if the execution of the criminal offense, considering the manner of execution, the motive of the perpetrator, the overall circumstances of the execution and the consequences, resulted in a greater degree of severity and danger. According to the method of execution, serious murders are murder for self-interest, murder for the purpose of committing or concealing another criminal act, and murder for wanton revenge or other base motives. With regard to the circumstances of the execution and the consequences, serious murders are considered to be murder due to reckless violent behavior, murder with intent to endanger the life of another person, murder during the commission of robbery and robbery theft, and murder of several persons.

Considering the characteristics of a passive subject, serious murders are considered to be the murder of an official or military person in the performance of official duty, the murder of a child, the murder of a pregnant woman, the murder of a family member who was previously abused, the murder of a judge, public prosecutor, deputy public prosecutor or police officer in relation to with the performance of official duty and the murder of a person who performs tasks of public importance in connection with the tasks performed.

⁶ Work of public importance is considered to be the performance of a profession or duty that has an increased risk for the safety of the person who performs it, and it refers to professions that are important for public information, people's health, education, public transport, legal and professional assistance before the courts and others state bodies (Art. 112, paragraph 32, CC RS).

The felony murder endangers the most basic human values in the most cruel and reckless way, which the state punishes with the prescribed high penalties. Exceptional progress in prescribing high penalties for criminal offenses of murder was achieved by the adoption of the so-called Tiana's Code (Criminal Code from 2019). The goal is primarily to deter the potential perpetrators of these crimes from possible execution by means of prescribed high penalties. In addition to these repressive measures, the state should undertake more prevention activities considering that these crimes violate the most basic human right - the right to life.

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