
Migrants and Refugees: Conceptual and Legal Ambiguities

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ABSTRACT

In today's world, individuals leave their countries of origin for various destinations, motivated by different reasons. Some leave voluntarily, while others are forced to flee. Two fundamental terms have emerged internationally: 'migrant' and 'refugee'. This study aims to decipher the conceptual and legal confusion surrounding these terms, given that acquiring either characteristic entail different legal effects, particularly regarding the legal protection granted to each. The research examines the existing definitions, legal frameworks, and emerging categories of migrants and refugees, highlighting the need for a more comprehensive and adaptive legal framework to effectively manage migration and protect the rights of both groups in an increasingly complex world.

Keywords

Migrant; Refugee; Legal Categorization; Legal Protection.

Introduction

Migration is not a new phenomenon; it is as old as humanity. However, in recent years, its magnitude has exceeded expectations, leading to increased interest in this human phenomenon from the press, sociologists, politicians, and jurists. These groups have referred to the actors of the migration phenomenon using several terms, notably "refugee" and "migrant." This terminological confusion has created a public debate, as these two terms have essential distinctions crucial for understanding the reality of migration.

Consequently, these two notions have become topical issues and, above all, vital and unavoidable concepts in the discussion of migration at the international level.

The conceptual confusion between the term's "migrant" and "refugee," which have distinct and different meanings, has made establishing a legal framework for each of them difficult. This is particularly true regarding the legal protection that must be guaranteed to these two types of populations, as the ambiguity surrounding these terms is directly reflected in the legal guarantees for each group.

In light of this, the present study attempts to answer the following question:

What is the importance of distinguishing between refugee and migrant status regarding the legal protection granted to each group?

This question suggests several sub-questions that can be included as follows:

What is a refugee? What is a migrant? What are the types of refugees and migrants in international law? What legal protection does international law provide for each category?

This study, therefore, aims to remove the conceptual ambiguity surrounding the terms "refugee" and "migrant" and to construct a framework for reflection linked to the use of these words in the sphere of public and legal debate. The goal is to determine if there is a difference in legal protection.

The current study is presented in three main sections to address the stated problem. First, it addresses the conceptual framework of human mobility, focusing on the notions of migrants and refugees, which are crucial and unavoidable in discussing the migratory phenomenon. Second, it attempts to classify people in mobility into legal categories. Finally, it determines the legal protection established for each category while adopting an analytical and deductive approach.

The Conceptual Framework of Human Mobility

In the history of humanity, the term "foreigner" was the first to appear in human movements to designate residents as opposed to 'nationals'.

Then, the term "migrant" appeared in the sixties of the previous century, "not as an independent noun, because at the beginning, it was used to describe a group of people in many terms such as 'migrant population' or 'migrant workers'." In other words, it was used as an adjective before birth as a noun, often in the plural: "migrants". (Catherine de Coppet, 2019)

The term "migrant" is generally used as a generic term that covers all people who leave their country of origin for different destinations and reasons, and it encompasses several determined legal categories of people. ("Key Migration Terms," International Organization for Migration, 2023)

The notion of refugee only began to take on a precise meaning and to be constructed as a legal category between the two world wars (Lochak, 2013). For this reason, and to clarify the migratory phenomenon surrounding these two notions, we must discuss the two concepts and then give a legal qualification to each of them.

1. What is a Migrant?

The definition of a "migrant" varies slightly between sources but generally refers to individuals who move from one place to another. According to Merriam-Webster, a migrant can be a person who moves regularly to find work, particularly in agricultural sectors, but the term can also encompass immigrants or refugees. It signifies both the action of moving and the reasons behind such moves, including economic, social, or safety motivations (Merriam-Webster). The International Organization for Migration (IOM) provides a broader perspective, describing a migrant as an umbrella term for people who move away from their usual residence, whether within a country or across international borders, temporarily or permanently, for various reasons. This definition acknowledges the complex spectrum of migration, encompassing legal

categories like migrant workers and students, without suggesting a new legal category.

At the international level, there is no legally recognised definition of "Migrant". The following definitions gather a relative consensus:

According to the International Organization for Migration (IOM), a "migrant" is "any person who, leaving his or her usual place of residence, crosses or has crossed an international border or moves or has moved within a State, regardless of the legal status of the person, the voluntary or involuntary nature of the movement, the causes of the movement or the length of stay".

UNESCO proposes to call a migrant "any person who lives temporarily or permanently in a country where he or she was not born and has acquired some significant social ties to this country".

The United Nations (UN), for its part, has defined the migrant by stating that the migrant is:

"A person who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate".

The International Federation of Red Cross and Red Crescent Societies' migration policy defines a migrant as: "a person who leaves or flees his or her habitual place of residence to go to a new destination, abroad or within his or her own country, in the hope of finding safety or more favourable living conditions there".

From these definitions, it can be concluded that migration is not a sudden situation accompanied by constraint and force; it is often a voluntary action, planned and prepared because the migrant chooses their country of migration. They usually settle in developed countries where they can live comfortably and have a rewarding job.

Finally, it should be noted that the term "forced migration" is sometimes used not by lawyers but by sociologists or politicians as a general term covering many types of involuntary movements inside and outside the country to flee famine, for example, or internal conflicts.

This term has never been used by international instruments, which indicates that it is not a legal term but rather a term derived from political discourse.

2. What is a Refugee:

According to the Larousse dictionary, a refugee is: "a person who has left his or her country of origin for political, religious or racial reasons, and who does not have the same status in the country where he or she resides as the indigenous populations, whose nationality he or she has not acquired". This implies that, unlike the migrant, the refugee did not have the free choice to leave their country of origin, but rather tricky circumstances imposed on them.

At the legal level, international legislation has been proactive, defining refugees through Article 1A2 of the Geneva Convention of July 28, 1951, which stipulated that:

"The term 'refugee' shall apply to any person (...) who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

In addition to incorporating the refugee definition of the 1951 Convention, the 1969 OAU Convention provides in Article I(2) that "the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality."

According to these two articles, to be eligible for refugee status, four essential criteria must be met:

- Satisfy the five conventional grounds for persecution specified in this article, which is mainly limited to the well-founded fear of being persecuted because of race, religion, nationality, membership in a particular social group, or political opinion.
- Cross the border of one's country of nationality or habitual residence.
- Be unable or unwilling to avail oneself of the protection of one's State of origin.

- Be unable or unwilling to return to the State of residence because of this fear.

The United Nations High Commissioner for Refugees has given a broader definition that reads as follows: "A refugee is any person who is:

- Outside their country of origin or habitual residence
- Unable or unwilling to return there because of serious and indiscriminate threats to their life, physical integrity, or freedom resulting from generalised violence or events seriously disturbing public order (Refugees, Septembre 2005)

It is clear from the above definitions that they differ in subtraction but are united in terms of the conditions the refugee must fulfil.

3. The Distinction Between "Migrant" and "Refugee"

Suppose the point of convergence between migrant and refugee status is crossing an international border. In that case, the distinction is undoubtedly important because it impacts several legal aspects. We must, therefore, clarify the points of difference between these two categories, which can be summarised as follows:

The refugee has an old status defined by the 1951 Geneva Convention, while the migrant does not benefit from an internationally recognised status, even though the phenomenon of migration has existed since antiquity (UNHCR, UNHCR viewpoint refugee or migrant- wish is right?, 2016)

The essential criterion that distinguishes a refugee from a migrant is that the purpose is not the same. The migrant leaves his country of his own free will to improve his standard of living, while the refugee is constrained and forced to leave his country to find protection elsewhere.

The circumstances are also distinct. Refugee status is circumstantial, surprising and unpredictable, whereas the situation of the migrant is prepared and calculated; it is not a sudden or unexpected act. (Erozzi, 2023)

Concerning the laws applicable to each category, the situation differs because if it is a question of immigration, the State applies its immigration laws and procedures. But suppose the issue is related to refugees. In that case, it is not enough for the State to use its own rules because

international law imposes international obligations on its territory and borders. (Trafficking, 2019)

Generally, the refugee chooses a neighbouring country, often bordering, to benefit from the protection that is lacking in his country of origin, unlike the migrant who retains the protection of his country of origin and who has chosen a developed country far from his country, even on another continent, such as migration from the South to the North (Africa-Europe) (Erozzi, 2023).

Legal Categorisation of People in Mobility

The legal categorisation of people in mobility consists of attributing a legal identity to each migrant. Its primary purpose is to classify foreigners according to characteristics and criteria subject to the laws of the sovereign State, which can decide and recognise whether a migrant belongs to a particular category or the rules of international law (Mesnard, 2019). This process is a primary means of regulating migratory flows on the one hand and of determining adequate legal protection for each category on the other hand. To this end, we will try to categorise people in mobility according to the key terms of our study.

1. Categorization of Refugees

At the conventional level, there is no typology of refugees. However, the doctrine has sought to establish a classification of refugees and has included them in three main categories: political refugees, ecological refugees, and economic refugees. However, at the legal level and following the provisions of Article 2 of the Geneva Convention, there is no economic refugee because the latter are non-persecuted persons who enjoy the protection of their country of origin and can return there at any time. On the other hand, there is no longer an ecological refugee. He is forced to leave their place of life temporarily or permanently because of an environmental rupture (of natural or human origin) that has endangered their existence or seriously affected their living conditions. (Courni, 2015)

UNHCR defines seven categories of people, collectively called "persons of concern to UNHCR". These are:

Refugees, asylum seekers, internally displaced persons, refugees who have returned to their country (returnees), internally displaced persons who have returned to their place of origin, stateless persons, and other persons who do not belong to any of the above categories but to whom the organisation provides protection and/or assistance. (UNHCR, Refugees and Migrants - Frequently Asked Questions (FAQS), 2016)

A-Refugees:

The word "refugee" refers to persons awaiting recognition of their refugee status. This category includes immigrants who have been granted permanent resident status because of a well-founded fear of returning to their country of origin.

B-Asylum Seekers:

The right to asylum is internationally recognised as a human right by several international conventions, such as the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union and the 1951 Geneva Convention (Right of Asylum and Migration Policy], 2022) . An asylum seeker is, therefore, a person who seeks international protection outside the borders of their country of origin but has not yet been recognised as a refugee, so a refugee has been an asylum seeker. Still, not all asylum seekers are recognised as refugees because they will only benefit from this status once their asylum application is accepted (What is an Asylum Seeker, 2023)

From the above, it is clear to us that an asylum seeker is a person who files an asylum application to benefit from refugee status and be protected from persecution and serious human rights violations committed in their country. (Canada, 2022)

C-Internally Displaced Persons

"Internally displaced persons are persons or groups of persons who have been forced to flee their homes or places of habitual residence, in particular as a result of or to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or man-made disasters, and who have not crossed an

internationally recognised State border". (UN Doc. E/CN.4/1998/53/Add.2, 1998)

In 1998, the United Nations adopted the Guiding Principles on Internal Displacement. Based on the norms outlined in human rights law, refugee law and international humanitarian law, these Principles constitute a framework for preventing internal displacement, protecting displaced persons, and finding solutions.

Finally, the issue of "environmental refugees" opens up another problem: categorisation as refugees or displaced persons because of the political definition of a refugee under the Geneva Convention and considering the environmental issue as inducing a new profile of migrants (Wenden, 2010)

Refugees Who have Returned to their Country (Returnees)

These refugees have crossed their national borders for specific reasons and then return to their country of origin after a period, voluntarily or involuntarily, after the circumstances that motivated their departure have disappeared (Barutcisk, 2021).

D-Internally Displaced Persons Who Have Returned to their Place of Origin:

These are people who are forced by circumstances to move within their country of origin to escape violence, internal conflict, human rights violations, or natural disasters. What distinguishes them from the previous category is that the movement process occurs within the State without crossing its borders. They represent one of the largest groups of displaced people. Their number was estimated at 41.3 million at the end of 2018 (Wenden, 2010).

E-Stateless Persons

These are people deprived of legal identity at birth, "no State considers them as its nationals under the operation of its national law (UNHCR, The Convention Relating to the Status of Stateless Persons, 1954)", or people who possess a nationality that is not recognised. They are people deprived of citizenship and fundamental rights, such as health, work, education and property.

The problem of statelessness leads to social tensions, hinders economic and social development efforts, and can cause conflicts and population displacements (Agency, 2006).

F-Other Groups or Individuals of Concern

These are persons or groups of persons who cannot be classified into any of the above categories but who, for humanitarian reasons, benefit from the protection that the United Nations High Commissioner for Refugees provides in the form of services or assistance (UNHCR, Global Trends in 2008: Refugees, Asylum Seekers, Returnees, Internally Displaced Persons and Stateless Persons, 2008).

2. Categorization of Migrants:

The issue of categorising migrants was born mainly within political, media, and doctrinal discourses, which have divided migrants into several categories that differ in the motives and nature of immigration and go beyond the legal framework. Therefore, in this respect, we can only deal with the most common divisions:

A-Migrant Worker:

According to the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, economic migrants are:

"Any person who is to engage in an engaging or has engaged in a remunerated activity in a State of which he or she is not a national" (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990). It should be noted here that the work performed by a migrant worker may be temporary or long-term.

The notion of an economic migrant may overlap with that of a migrant worker when the latter aims to improve their financial situation so that they and their family settle permanently in the host country (Landaro, 2019).

B-Economic Migrant

Economic migrants are people who migrate for financial reasons and not for humanitarian reasons. They leave a developing country regularly or irregularly to seek a better life in a developed country. They are called "economic migrants" because "they choose to move for better prospects for themselves and their families," explains UNHCR, unlike refugees, who are "forced to move if they want to save their lives or preserve their freedom.

C-Environmental Migrant

There is no legal recognition of environmental migration caused by ecological phenomena internationally. But the United Nations Environment Program speaks of "a person forced to leave his or her place of life temporarily or permanently because of an environmental rupture of natural or human origin (El-Hinnaw, 31 Decembe1985) . As for UNHCR, it has classified these environmental migrants as internally displaced persons who have returned to their place of origin. They are, therefore, refugees because they have been forced to leave their usual place of residence to preserve their lives (UN Doc. E/CN.4/1998/53/Add.2, 1998).

D-Regular/Irregular Migrant

Regular migrants are in a legal situation; they have obtained authorisation from the destination country and met the immigration standards of the host country with a visa, work contract or residence permit.

As for irregular migrants, they enter a foreign territory clandestinely for various reasons, among them improving their standard of living (Erozzi, 2023). The International Organization for Migration (IOM) has defined irregular migration as a "movement that takes place outside the regulatory norms of the countries of origin, transit and destination" ("Key Migration Terms," International Organization for Migration, 2023)

The importance of distinguishing between these two categories of migrants lies in the privileges enjoyed by regular migrants through their right to health, education, work, etc., which are rights denied to an illegal migrant.

Finally, there are various other categories of migrants, including stateless persons, victims of trafficking, unaccompanied children and rejected asylum seekers, who also seek to be protected under international law. However, these categories are not watertight and can vary over time: a migrant can thus fall into two categories -asylum seeker and victim of trafficking, for example) or move from one category to another (undocumented migrant in country A and asylum seeker in country B- (UNHCR, Refugees and Migrants - Frequently Asked Questions (FAQS), 2016)

The legal protection of people in mobility

The international legal protection enjoyed by people who leave their country of origin is directly linked to the reason for their displacement. Suppose they flee their country to escape persecution within the meaning of Article 1A of the 1951 Convention Relating to the Status of Refugees (Geneva Convention). In that case, they are "asylum seekers" or "refugees" and can claim the special - enhanced - protection guaranteed by this international treaty, which 145 States have ratified. If they leave their country for any other reason, they are designated as migrants and do not enjoy special protection, only general protection under international human rights law.

1. International Protection of Refugees

The refugee no longer benefits from the protection of their State of origin; they try, through the internationalisation of human rights, to find protection in other States. They are, therefore, protected by several legal instruments. They are surrounded by international refugee law 1951 Geneva Convention on the Status of Refugees, 1969 African Union Convention on Refugees, Cartagena Declaration..., international human rights law (Universal Declaration of Human Rights, International Covenants (Rights, 10 December 1948) and finally international humanitarian law -Geneva Convention on the Protection of Civilians- (Erozzi, 2023).

However, the provisions of the 1951 Convention remain the primary international standards by which any measure of refugee protection and treatment is judged. This protection has many aspects, which include guaranteeing that they are not forcibly returned home so that refugees must not be expelled or returned to situations where their life or freedom would be threatened (Refugees C. r., 1951) , allowing refugees access to fair and efficient asylum procedures, and several measures to ensure that their fundamental rights are respected, to allow them to live in dignity and security, while helping them to find a long-term solution. (Trafficking, 2019)

Therefore, the host states are solely responsible for this protection. As for UNHCR, it works closely with governments to advise, support or

assist them, if necessary, in assuming their responsibilities (UNHCR, UNHCR in partnership with governments, 2021).

2. International Protection of Migrants

Unlike refugees, the recognition of rights for migrants has only emerged recently. While bilateral, international, regional or universal instruments have taken the initiative to establish a legal framework for the protection of migrants, which has appeared in the form of numerous norms divided into different branches of international law (international human rights law, humanitarian law, international social law, investment law). The applicable law is "fragmented" (Migration, Human Rights and Governance, 2015).

These rules remain, however, too general for them to be seen as anything other than soft law provisions. They constitute the framework for concerted migration governance and essentially reflect the interests of states, their nationals, and inter-State relations, such as the recognition of the human rights of migrants and the need to defend and protect them.

Finally, it should be noted that the main legal instrument established at the universal level, in addition to fundamental conventions adopted by the International Labor Organization (Convention No. 97 concerning workers), is the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990).

3. The Protection of Foreigners in Algeria

Algeria has always been a hospitable country and a land of welcome for many persecuted people worldwide. It agreed to host many refugees in the time when dictatorial regimes reigned, notably in Spain, Portugal and Greece. Nowadays, according to UNHCR statistics, there are 165,000 Sahrawi refugees, 4,000 Palestinian refugees, and more than 12,000 Syrian refugees, all taken care of by the Algerian government (UNHCR, Statistical Overview, 2022).

Algeria ratified the Geneva Convention on February 7, 1963, and then the 1967 Protocol on November 8, 1967. It has been a member of the Executive Committee of the United Nations High

Commissioner for Refugees since 1963. Our country also ratified the Convention of the Organization of African Unity (OAU) governing the specific aspects of African refugee problems on July 25, 1973. Following Articles 31 to 33 of the 1951 Convention (Permanent Mission to the United Nations Office and International Organizations in Switzerland, 2022), the right of asylum in Algeria has become a constitutional right; according to Article 50 of the current Algerian constitution, "Any foreigner who is legally on the national territory enjoys, for his person and his property, the protection of the law. No one may be deported except by a duly ratified international convention or law. In no case may a political refugee legally benefiting from the right of asylum be surrendered or extradited."

This article shows that the Algerian constitution does not recognise the right to escape persecution and other forms of serious harm by the 1951 Convention relating to the Status of Refugees.

Decree N°. 63/274 (N°63/274, 1963) set the terms for applying the 1951 Convention on Algerian soil and created the Bureau for the Protection of Refugees and Stateless Persons (BAPRA), attached to the Ministry of Foreign Affairs.

If a foreigner wishes to be recognised as a refugee in Algeria, he must apply for a BAPRA, which decides in the first instance whether or not to grant him this status. In case of refusal, he can file an appeal before a commission composed of representatives of the ministries concerned and a representative of UNHCR (UNHCR P. O., 1984). Its prominent role is re-examining rejected asylum applications (Art. 4.1) and ruling on irregular stay, expulsion or refoulement criminal measures.

Foreigners who come to Algeria to settle there or as transients benefit from legal protection in a specific legislative framework by Algeria's international obligations, particularly the Convention on Labor Law and the United Nations Convention on the Protection of Migrants and Human Rights.

Faced with the legal vacuum suffered by Algerian legislation on migration, the Algerian legislator had to follow the pace of international developments and fulfil its international obligations, particularly after the ratification of the

Palermo Protocols (Protocol to Prevent, November 2000), by adopting Law 08/11 (Law No. 08-11 relating to the conditions of entry, stay, and movement of foreigners in Algeria, 2008) on the conditions of entry, stay and movement of foreigners, which tends to modify the law on foreigners dating from 1966 consequently, and just after Law 11/08 which modified the penal code by adding the offence of irregular exit from the territory for its citizens and resident foreigners, as well as the crimes of migrant smuggling and human trafficking.

This reform is not only intended to penalise irregular migration because it also deals with the granting of rights to immigrants in an irregular situation. This new Algerian law temporally regulates administrative detention (30 renewable days). It introduces procedural, but not substantive, advantages for specific categories of foreigners in expulsion due to their vulnerability or their links with Algeria. It evokes family reunification and long-term residence.

Finally, we can affirm that the Algerian legislator has sought to fulfil its international obligations in matters of immigration and asylum by adopting several internal legislations which aim at protecting these groups. Still, they remain tainted by many legal loopholes that it must fill (Anna Di Bartolomeo, December 2010).

Conclusion

This research has endeavoured to shed light on two terms that have gained significant attention on the international stage: "refugee" and "migrant". The study has delved into the conceptual and legal controversies surrounding these terms, and the findings can be summarised as follows:

Firstly, while the Geneva Convention, despite its age, has provided an internationally accepted definition of a refugee, the same cannot be said for the term "migrant". The lack of a universally recognised definition for "migrant" has led to an overlap between the two concepts, with the abundance of definition formulas contributing more to obscuring the issue rather than providing clarity.

Secondly, the analysis of the two concepts has revealed that distinguishing between "refugee"

and "migrant" is particularly problematic from a legal perspective. The current normative framework does not allow for a precise and unambiguous categorisation of these two groups of individuals.

Thirdly, although international obligations bind states regarding the definition of a refugee, the implementation of this definition remains within the sovereign domain of each state. Domestic legislation determines whether an individual falls within the refugee definition and establishes the necessary procedures for this determination.

Fourthly, it has been observed that new categories of refugees are emerging due to causes beyond those initially outlined in the Geneva Convention. In many southern countries, refugees are no longer primarily fleeing persecution based on the five grounds listed in the Convention but instead escaping internal conflicts, crises, or natural and climatic disasters.

Fifthly, the legal categorisation of refugees and migrants is crucial for controlling and monitoring migratory phenomena and determining the legal status of each foreigner. While there is no conventional typology of refugees or migrants, various types are recognised through legal doctrine and await formal legal recognition and protection.

Additionally, a key observation is that refugees, unlike migrants, do not benefit from the legal protection of their country of origin. Instead, they rely solely on internationally recognised protection specific to refugees. Migrants, on the other hand, maintain the legal protection of their country of origin in addition to the protection guaranteed by international migration treaties.

Furthermore, this study has prompted reflection on several recommendations that could help clarify the legal positions of both immigrants and refugees:

In its current form, the Geneva Convention no longer encompasses all the asylum cases encountered in the modern era. Therefore, it is necessary to amend the Convention by reformulating the refugee concept and precisely redefining the grounds for asylum.

Given the increasing levels of migration in today's world, the international community must promptly work towards establishing a convention that

regulates migration at the global level. This convention should clearly define the concept of migration, its various types, and the conditions that must be met for each category.

Faced with the legal loopholes and deficiencies in Algerian immigration legislation, the Algerian legislator must expedite legislative reforms. These reforms are necessary not only to fulfil Algeria's international obligations but also to ensure national security.

In conclusion, this research has highlighted the importance of clarifying the conceptual and legal distinctions between refugees and migrants. Addressing the identified challenges and implementing the proposed recommendations will contribute to a more effective and coherent approach to managing migration and protecting the rights of both refugees and migrants in the international arena.

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