

Immigration Detention through the Lens of International Human Rights: Lessons from South America

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The Global Detention Project (GDP) is a non-profit research centre based in Geneva, Switzerland, that investigates the use of detention in response to global migration. The GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) facilitating accountability and transparency in the treatment of detainees; and (3) encouraging scholarship in this field of immigration and refugee studies.

About the author

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Immigration Detention through the Lens of International Human Rights: Lessons from South America

By Pablo Ceriani Cernadas

ABSTRACT: South America has not witnessed the same growth in immigration detention that has occurred in other parts of the world. This Global Detention Project Working Paper discusses developments across the region through the lens of international human rights standards to argue that while the failure of many Latin American countries to implement aggressive detention systems may appear to be anomalous, this underscores how detention has become normalized across most of the globe as a tool to respond to the complex phenomenon of irregular migration.

I. INTRODUCTION

International migration is one of the major challenges on the global agenda. Increasing numbers of people are leaving their countries, mostly for reasons linked to interrelated structural factors. An important aspect of today's complex migration phenomenon is that a large number of people are migrating through irregular channels. Indeed, many are only able to flee from their countries if they do it irregularly due to the lack of regular avenues for migration and related factors. Among these are growing smuggling networks that take advantage of the vulnerable living conditions of people, as well as those who benefit from migrants as a cheap labour force that meets the demands of the informal economy in destination countries.

Although international migration – and particularly, irregular migration – is multidimensional and systemic, numerous policies aimed at addressing its challenges are conceptualized by an extremely narrow approach. A general allegation of public order and national and/or international security concerns have led to the development of a large number of migration control mechanisms at international borders, but also beyond those borders—externalization policies—and within the states' territory.¹

The extension of this restrictive and coercive approach to irregular migration has led numerous scholars to argue that migration control policies are creating a permanent “state of exception” that excludes migrants from general rule of law. In particular, this type of exclusion or distinction is verified when it comes to respecting human rights that have been universally recognized for every person without discrimination.²

One of the main tools that demonstrates this restrictive trend in policy responses to international migration is the expanding use of deprivation of liberty of migrants and asylum seekers, immigration detention. A large variety of detention practices have been developed by states during recent decades, particularly with two purposes: 1) punishing infractions to migration laws through what is called legal criminalization of irregular migration; 2) using migration-related detention as an interim measure within migration procedures regarding entrance, residence or expulsion.

It could be argued that both modalities include a policy goal of preventing or reducing irregular migration. However, there is evidence about the wrongfulness and inefficiency of

¹ On the process of Externalization of Migration Control Policies, see the Reports submitted by the UN Special Rapporteur on the Human Rights of Migrants (2013; 2015); as well as Red Cross & International Federation of Red Cross (2013).

² See in this regard Ceriani-Hernández Bologna (2013), De Lucas (2011), Lochak (2007).

using detention as a deterrent of a structural, multidimensional phenomenon as irregular migration. Unfortunately, this evidence has not led to diminishing migration-related detention, probably due to structural aspects that makes irregular migration an increasingly profitable business for informal labour-market and private entities that play a role in migration-control mechanisms.

This paper has two interlinked aims. The first one is to examine the case of migration policies in South American countries, specifically regarding the use of detention and other responses to irregular migration. It describes the particularities of the policies implemented in this region where there has developed a strong position against criminalization and securitization of irregular migration, including with respect to migration detention. The paper briefly reviews some of the most important policies, practices and statements made by countries of the region on these issues, particularly since the beginning of this century.³

Notwithstanding these trends, the paper shows that it has not been a homogeneous and lineal process. Indeed, along with differences between and within each country, some recent developments alert to the amount of challenges ahead on the goal of ending migration-related detention, including regressive measures that have already been put in place.

The second aim of the paper is to view developments in this region through the lens of key international human rights law instruments, with a particular focus on the Convention on the Protection of the Rights of All Migrant Workers and Their Families. A brief examination of the articles related to the right to liberty and its interpretation by the UN Committee on Migrants' Rights and other experts reaffirms that the limited or exceptional use of detention policies in Latin America should not be seen as an exception but rather the norm.

The paper is primarily focused on detention rather than on other related issues such as detention conditions and due process safeguards within procedures that could imply migrants' detention. Nevertheless, as corollaries of the main discussion, it includes some reflections on conditions of migration-related detention, particularly aimed at highlighting the necessity of a new approach able to get rid of the influence of criminal law and punitive-nature detention facilities. Similarly, a few aspects on procedural safeguards are taken into account as key tools for preventing arbitrary detention of migrants and asylum seekers.

II. IMMIGRATION DETENTION IN SOUTH AMERICA

Until a few decades ago, as Gündoğdu (2015) asserts, “detention was mainly used as an exceptional measure in times of emergency (e.g., war), especially to confine those who were categorized as ‘terrorists’ or ‘enemy aliens’”. Since the 1990s, however, detention has been normalized as a legitimate tool used by states in immigration control, especially due to the increasing securitization and criminalization of asylum and immigration” (pp. 116-117). Available information and statistics reveal a trend that has led to “naturalizing” and spreading of migration-related administrative detention, as well as a number of cases where irregular migration has been criminalized (Flynn 2014).

Conversely, policy discussions and reforms in South American countries have been moving in a different direction. This trend not only refers to the issue of migration detention but also to migration policies in general due to the growing incorporation of a rights-based approach, although this process is neither over nor -even less- exempt of contradictions and challenges. Therefore, before examining the issue of migrants' detention in the region, it is important to briefly describe some of the key changes within migration policies, particularly in terms of human rights recognition.

³ See also, for example, Acosta and Freier (2015), Ceriani Cernadas and Freier (2015), Ceriani Cernadas (2015; 2013; 2012), IOM (2012).

II.1. A Rights-Based Approach to Migration in South America

In this region, over the first fifteen years, it has been developed by critical stakeholders – including governments- a process characterized by a progressive inclusion of a human rights lens to migration discussions and policies. While it is still under debate whether it has led to a new paradigm on migration policies (Ceriani Cernadas, 2012; 2013; Domenech, 2013), it is clearly evidenced that an important shift in the position that the States of the region have had on migration issues, putting the rights of migrants centre stage.

Through reading the Declarations that the States have been approving every year since the creation of the South American Conference on Migration in 2000 it is evidenced not only this shift but also the progressive incorporation of human rights language in the positions and decisions taken at a regional level. One of the symbolic cornerstones of this change is the recognition that migration, rather than something that depends only on discretionary willing of a sovereign State, is a human right that has to be protected and fulfilled.

In this regard, for instance, the Plan of Action on Human Development and Migration (PSDHM) approved at the 10th South American Conference on Migration (SCM, 2010) affirms the following: the right of every person to freedom of circulation and residence is a Basic Human Right that has been a principle traditionally assumed by the countries of the region through their policies aimed at receiving and promoting migrations. This principle has been preserved and incremented nowadays, in spite of the restrictive trends to human mobility in other regions of the world during the last years.⁴ Similarly, they asserted:

We recognize the right of persons to migrate and return in a free, informed and secure manner, without criminalizing displacements, and consider migrants as the centre of migration policies, regulations and programs. No human being will be considered illegal because of his or her involvement in an irregular migration situation (Declaration of Migration Principles and Overall Guidelines of the South-American Conference on Migration; October 2010, paragraph. 1)⁵

As it is described in the next section, this shift has included some specific language regarding migration control policies and the impact of a security approach to international migration. In particular, the states of the region approved a number of declarations in relation to the growing global trend of criminalization, detention and deportation of irregular migration.

II.2. Regional Trends

Over the last decade, many South American countries have explicitly and repeatedly rejected policies aimed at criminalizing irregular migration and enforcing punitive tools such as detention and deportation, in contrast to some policies implemented by the European Union and the United States (Ceriani Cernadas, 2009, 2012).

In the MERCOSUR Principles and Guidelines, the States of the region rejected “the criminalization of migrant persons” and “the abuse of authority and especially arbitrary detentions and deportations applied in some extra-regional countries”. Similar statements had been made in previous Declarations of the South American Conference on Migration (Brasilia, 2011; Montevideo, 2008). In the Quito Declaration (2009) they reaffirmed their rejection to practices of persecution, detention and deportation implemented by some receiving countries.

⁴ X South American Conference on Migration. Plan of Action on Human Development and Migration. Cochabamba, Bolivia, 26th October 2010, para. c.2. The translation is not official.

⁵ At the 15th SCM they reaffirmed “the full validity of its principles and guidelines: a) right to migrate, not migrate and return in a free, informed and secure manner, without criminalizing migrants’ movements and with migrants at the centre of migrant policies, regulations and programs.” (Santiago, 2015)

Furthermore, apart from discarding security-based responses to irregular migration, the countries of the region have been repeatedly pointing out the relevance of creating regular avenues for migration. In this regard, the 2002 MERCOSUR Residence Agreement Promotion represented a turning point, as it recognizes the right to a 2-year residence permit –and then, a permanent permit- based on the nationality of one of the State Parties. This Agreement, which has been ratified by almost all the South American countries since then, has importantly contributed to reducing irregular migration within the region. While it may have some – questionable- similarities with the EU integration process, it must be singled out that the vast majority of migration flows in these countries are intra-regional (Ceriani Cernadas, 2012).

Complementarily, it is important to note that the States of the region have been consistently promoting regularization programs as a more legitimate and effective response to irregular migration, including as a tool of human development policies (Ceriani Cernadas, 2012) and as a “fundamental element of public policies in the field of migration” (PSDHM, 10th South American Conference, 2010). The official title of one of the South American Conference on Migration clearly illustrates the positive relevance given to regularization mechanisms by South American States: “Migration regularization as a mechanism to ensure the full exercise of the rights of South American migrants and strengthen regional integration” (13th South American Conference on Migrations, Cartagena de Indias, Colombia, 2013).

Finally, it should be highlighted that some countries of the region have also contributed to important advancements on the protection of migrants’ rights at the Inter-American Human Rights System. For instance, it is worth noting that in 2011 the then-four full members states of MERCOSUR requested the elaboration of an Advisory Opinion on the Rights of Children in the Context of Migration before the Inter-American Court of Human Rights (Abramovich and Saldivia, 2012).

The resulting Advisory Opinion No. 21 of the Inter-American Court (2014) comprises a critical set of international standards on the rights of children affected by migration. As well, and more importantly for this paper, it is the first decision by an international court that explicitly addresses the principle of non-deprivation of children’s liberty due to their migration status or their parents’, as it had been proposed by the states that submitted the proposal before the tribunal. Hence, according to the IACourtHR, there is no ground for depriving a child’s liberty for migration purposes, not even as a last resort measure. This prohibition of detention applies not only for unaccompanied and separated children but also for families.⁶

Regarding the development of migrants and refugees’ human rights regional standards on the matter examined in this paper, it has to be noted that both the Inter-American Commission and Court of Human Rights have been increasingly releasing critical decisions, recommendations, judgments or reports. Some recent reports of these bodies describe their position against criminalization of irregular migration, in favour of a progressive eradication of administrative migration-related detention, the fulfilment of due process safeguards within detention procedures and adequate detention conditions –in the exceptional case that a deprivation of liberty is decided.⁷

II.3. Trends at the National Level

Alongside the abovementioned regional process, some individual countries have made relevant changes in their migration policies at a national level. While not every South American country has experienced this shift and each reform has its own characteristics and scope, it is evidenced that the rhetoric of all the governments and, in some cases, their policies, have increasingly incorporated the human rights lens as a central tool. In terms of migration-related

⁶ For more details, see Inter-American Court of Human Rights (2014), paragraphs 144-160.

⁷ In order to further explore the jurisprudence developed by the Court, see Inter-American Court of Human Rights (2016) and Inter-American Commission of Human Rights (2015).

detention, it is important to explore in the first place those countries where migration policies where substantially modified.

As it happened with regional Declarations, all countries of the region that have changed their migration laws since 2004 have included the human right to migrate (see Charter below):

- Argentina, Law 25,871 (2004), article 4;
- Uruguay, Law 18,250 (2008), article 1;
- Ecuador, National Constitution (2008), article 40. Human Mobility Law (2017), article 2.
- Bolivia, Law 370 (2013) article 12;

When it comes to the issue of detention, these new legislative pieces have represented a progressive change, although each case is different from the others. The first country that reformed the migration law was **Argentina**, the main South-South migration receiving country in the region. In late December 2003, Argentina derogated a restrictive migration law that had been adopted by the military dictatorship in 1981, which provided great power to the migration authority and a number of security forces to detain migrants with irregular status with no judicial control.

The current legislation could be summarized as it follows: 1) in cases of irregularity, including within deportation procedures, liberty must be the rule; 2) detention could only be applied after all administrative and judicial remedies against a deportation order are exhausted and exclusively in order to enforce such decision; 3) a deprivation of liberty only can be decided by a judge; migration officers and security forces are not capable of doing it; 4) in extremely exceptional circumstances, Migration authorities could ask a judge to detain someone before the exhaustion of all domestic remedies.

In practice, very few cases of detention have been verified since this legislation was adopted. One of the main reasons for this is the low number of deportations due to irregular migration status during this period. In this regard, it is important to stress that in cases of irregularity, the law affirms that the state has the duty to facilitate regularization, instead of prosecuting and punishing said offense. Therefore, most people expelled were actually detained as a result of a criminal conviction. However, some cases of detentions of migrants were questioned by civil society organizations because they ignored the substantive and procedural guarantees recognized in the law (see CELS-FIDH, 2011). However, as it is described in later in this paper, recent regressive measures adopted in 2016 and 2017 have changed these provisions and may drastically impact migrants' rights in Argentina, including their right to liberty.

The case of **Uruguay** is particularly interesting. Its new Migration Law (18,250, 2008) followed the Argentinean legislation to a large extent, especially regarding the central place given to the recognition of human rights to all migrants, irrespectively of their migration status. As an example, both norms establish equal treatment as nationals regarding basic rights such as health care, social protection, education and, among others, labour rights, and include a prohibition of any restriction or distinction based on administrative migration condition. The distinctive note is that in this case the legislation does not include any provision that would legitimate the deprivation of liberty within migration procedures.

Similarly, in **Bolivia** neither Migration Law No. 370 (2013) nor its Regulation (Supreme Decree no. 1923, 2014) contain a provision that authorizes migrants' deprivation of liberty due to their migration status. The handling of this issue is the same in the recently approved Migration Legislative Decree of **Peru** (2015).

This position against migration-related detention is even more explicit according to the normative framework of **Venezuela**. Article 46 of Migration and Foreigners Law (2004) enumerates interim measures that could be implemented within a migration procedure that could lead to deportation, it then adds that the authority could apply any measure aimed at ensuring the

enforcement of the decision “provided that it *does not* imply a deprivation or restriction of the right to personal liberty” (article 46.5).

The Constitution approved in Ecuador in 2008 has a progressive human rights language in several subjects, including human mobility. Even though it does not mention the issue of detention of migrants, it forbids the term “illegal” and any type of criminalization of irregular migration (art. 40). Moreover, it recognizes the principle of universal citizenship, the freedom of mobility for all human beings, the progressive ending of foreign Constitution and migration law, as well as some recent practices, as it is described in the next section.

Legislation adopted in the majority of the South American countries fall into one of the following three positions: a) forbidding any kind of deprivation of liberty; b) not allowing this measure by omitting any reference to it; or c) ruling that detention could only be an exceptional measure to be implemented in very specific circumstances. These legislative changes evidence an important shift in migration policies by countries that in previous decades primarily addressed migration flows with the national-security lens. Notwithstanding the importance of this shift of, a number of challenges remain and many states continue to experience important transitions. As detailed below, during the first half of 2017 the region experienced both positive and negative changes, including new legislation approved in Brazil, Ecuador and Peru, as well as regressive measures adopted by the Argentinean government.

II.4. On-going Challenges and the Risks of Regression

Over the last decade, South American states have repeatedly stressed the need for a new paradigm for migration policies, with an emphasis on human rights. However, this progressive trend has coexisted alongside contrary practices, policies and laws that obstruct or contradict advances.

In terms of legislation, it is important to note that countries like Brazil and Chile have not reformed their migration normative framework in spite of the fact that their current laws were adopted during dictatorships that caused severe human rights abuses.⁸ In both cases, their legislation is not only deeply regressive from a human rights perspective, but also obsolete tools for addressing migration issues nowadays in two countries that have increasingly become destinations of migrants and asylum seekers from this and other regions.

Regarding migrants’ detention, both laws include the possibility of depriving a person of their liberty due to his or her migration status. Additionally, the Chilean one considers to be a criminal offense a number of irregularities on the entrance or permanence in the country. Notwithstanding these clauses, it is worth noting that there is no evidence about their actual enforcement during the last years, although it is important to highlight that the Courts of Justice have contributed to restricting the use of detention in cases of expulsion. In a critical decision, it was affirmed that detention is an exceptional measure aimed at enforcing a deportation order after exhausting remedies and with a maximum duration of 24 hours.⁹

Currently, there are migration law proposals under discussion at Parliament (Brazil)¹⁰ and Ministries (Chile).¹¹ According to the drafts, it is expected that in both cases they could breach the gap between, on the one hand, the existing legislation and on the other, the statements they endorsed at a regional level and international human rights obligations.

⁸ In Chile, the Decree-Law 1094 was signed by Pinochet in 1975. In Brazil, Migration Law No. 6815 –called Foreigners Statute- is from 1980.

⁹ See “Corte de Apelaciones, Santiago”. Case Cuartel Borgoño. Judgement of 9th March 2013.

¹⁰ A new Migration Law was approved by the Brazilian Parliament in April 2017. Article 123 of the new law affirms that nobody shall be deprived of liberty due to migratory grounds.

¹¹ The Brazilian Senate is expected to approve in early 2017 a new Migration Law, which has just been endorsed by the Deputies Chamber at 6th December 2016 (Projeto de Lei 2516/2015). This proposal incorporates a number of human rights’ duties and principles. In particular, the draft includes an article that stipulates that nobody shall be deprived of his/her liberty based on migration grounds.

The case of **Ecuador** has been particularly paradoxical until recently. As it was mentioned, its National Constitution represents a major progressive change in terms of human rights and human mobility. Nevertheless, between its approval in 2008 and until January 2017, it has been impossible to approve one of the several legislative proposals that have been submitted by/to the National Assembly. Therefore, among other consequences of this normative *lacuna*, there have been serious effects in the field of detention of migrants during the last years:

First of all, the validity of outdated legislation –from 1971- legitimizes detention practices in cases of irregular migration. Secondly, this restrictive legislation, along with the lack of political coordination needed for the pending policy shift, led to the rehabilitation of a former administrative detention centre (“Hotel Carrión”). It is important to highlight that until recently this was one of the only countries in the region that had developed a dedicated detention facility for depriving people of their liberty due to their migration status. Finally, some recent cases of arbitrary detention practices against migrants and asylum seekers in 2016 have deepened the contradiction between policies and realities,¹² as well as the need for a legislative reform in order to put into practice the progressive principles included in the Ecuadorian Constitution.

This situation was aggravated in January 2017, when the government reformed the Migration Law through a Decree of Necessity and Urgency—namely, without the participation of Parliament, as should have been done according to the National Constitution. This decree, announced employing a stereotyping and criminalizing narrative, includes a number of regressive provisions that affect basic rights and guarantees, including migrants’ right to liberty. Indeed, Decree No. 70/17 removed the exceptional character of detention, extended its length, and reduced the due process safeguards in the context of detention and expulsion measures. This reform has spurred a number of complaints submitted by migrants and civil society organizations before the Inter-American Commission of Human Rights and UN human rights mechanisms, committees¹³ as well as local courts.¹⁴

Lastly, it is critical to add to this list of challenges recent regressive measures in Argentina. In August 2016, the government announced that they would open an administrative detention centre aimed at accommodating migrants that would have committed infractions of migration law, pending deportation.¹⁵ While the current legislation legitimates migrants’ detention as an exceptional measure –as it was described above—it should be noted that since 2003 there have been very few cases and some of them were revoked by judicial decisions due to the arbitrariness of the measure as well as the conditions of detention. In any case, the opening of a detention centre for migrants in the first country worldwide that included in its legislation the human right to migrate implies a regressive, worrying message not only for the region but beyond.¹⁶

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¹² See Coaliciones por las Migraciones y el Refugio et al (2016).

¹³ See, for instance, Global Detention Project, ANDHES, CAREF, CELS, Centro de Justicia y Derechos Humanos de la Universidad Nacional de Lanús, COPADI, GDP, IARPIDI and Red de Migrantes y Refugiados en Argentina, “Joint Submission on Argentina to the United Nations Universal Periodic Review,” May 2017, <https://www.globaldetentionproject.org/submission-to-the-universal-periodic-review-upr-argentina-2>

¹⁴ For further information on the content of the Decree 70/17, see the judicial claim submitted by CELS and other NGOs at https://classactionsargentina.files.wordpress.com/2017/03/2017-02-14-jncafed-1-caba_cels-y-ots-c-ena-dnu-70-17-migrantes-escrito-de-demanda.pdf (online, May 15th, 2017).

¹⁵ By the end of 2016 the opening of this facility was still pending, although that it would be functioning by 2017.

¹⁶ For further details on this issue, see CELS et al (2016).

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Notwithstanding these and other challenges regarding detention of migrants in the region, the general picture is comparatively progressive. The last decade evidenced a remarkable improvement on the level of recognition and protection of the human rights of migrants in South America, although it has not been a linear process and the advancements have not had the same scope and effectiveness in every country. This positive development has also included a tendency to substantially reduce, or even forbid in some cases, immigration detention.

These policy changes may be seen as an anomaly in a global scenario depicted by a dramatic increase of detention practices within migration policies. However, the exact opposite could be argued. Indeed, as it is examined in the next section of this paper, the exceptional use of migration-related detention -if not its eradication- would be the corollary of a careful, in-depth analysis of the International Human Rights Law Framework.

III. THE RELEVANCE OF THE CONVENTION ON MIGRANT WORKERS AND OTHER INTERNATIONAL HUMAN RIGHTS AGREEMENTS

The right to liberty is one of the foundation stones of the human rights legal system at an international level. It is not unintended that the Universal Declaration of Human Rights, right after the paramount principle of equality and non-discrimination (articles 1 & 2), recognizes the human right to life, liberty and security of every person. The prohibition of arbitrary arrest (article 9) completes the protection of the right to personal liberty under the UDHR. Similarly, article 9 of the International Covenant on Civil and Political Rights reaffirms the right to liberty of every human being, as well as the prohibition of arbitrary arrest.

When it comes to examining the issue of detention of migrants due to migration reasons, the key tool developed by the international framework is the UN Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families (MWC), unanimously approved by UN States Parties on December 18th 1990.¹⁹ Two articles, 16 and 17, regulate in detail a number of aspects in relation to the right to liberty and the protection against arbitrary detention, which are analysed hereinafter.

This paper is focused only on the clauses that refer to migration-related detention, namely, to any issue linked to the entrance or permanence in a territory. Therefore, the clauses of these articles that address cases of migrants being detained on criminal grounds with no relation to migration law regulations are not taken into consideration. Other clauses are meant to regulate issues as conditions of detention and due process guarantees. In this regard, while these aspects are also critical for deciding whether a detention is arbitrary or not, the main focus of this paper - as it was already underlined- is on detention itself. Namely, the key discussion is whether, according to International Human Rights Law, migrants can be deprived of their liberty due to their migration status.

¹⁷ See, for instance, Global Detention Project, ANDHES, CAREF, CELS, Centro de Justicia y Derechos Humanos de la Universidad Nacional de Lanús, COPADI, GDP, IARPIDI and Red de Migrantes y Refugiadxs en Argentina, "Joint Submission on Argentina to the United Nations Universal Periodic Review," May 2017, <https://www.globaldetentionproject.org/submission-to-the-universal-periodic-review-upr-argentina-2>

¹⁸ For further information on the content of the Decree 70/17, see the judicial claim submitted by CELS and other NGOs at https://classactionsargentina.files.wordpress.com/2017/03/2017-02-14-jncafed-1-caba_cels-y-ots-c-ena-dnu-70-17-migrantes-escrito-de-demanda.pdf (online, May 15th, 2017).

¹⁹ However, after this unanimity approval, only 49 States have ratified the Convention as October 2016.

Articles 16 and 17 of the MWC start by recognizing the right to liberty of all migrants (16.1). Three basic corollaries emerge from this fact. Firstly, every interpretation of these clauses must be directed to reach the main goal, namely, ensuring the protection and fulfilment of the right to liberty. Secondly, any restriction on this paramount human right must be in line with international standards on human rights restrictions –the principle of legality, necessity in a democratic society, etc.-; thirdly, specific obligations and standards on the right to liberty must be taken into account, particularly acknowledging two key aspects that are examined below: a) irregular migration cannot be considered a crime, but only an administrative irregularity; b) migration-related detention is generally used as an interim measure within migration procedures.

In order to analyse these articles, the most appropriate and adequate method is observing what has been affirmed about them by the international body explicitly created for interpreting the Convention: the UN Committee on Migrant Workers (CMW). In this regard, the jurisprudence of the CMW has been developed through three tools or means: i) General Comments; ii) Recommendations to State Parties; iii) other position documents. From a careful reading of their content it could be stressed that at least six key principles emerge, which are as follows²⁰:

- 1) Prohibition of detention as a criminal sanction to a violation regarding migration, namely, the principle of non-criminalization.
- 2) Principle of exceptionality of the detention for reasons of immigration;
- 3) Duty to adopt alternative measures to detention, in law and in practice;
- 4) Under no circumstances will children and adolescents be deprived of liberty because of their migration status or their parents’;
- 5) Ensure due process guarantees within migration procedures, and particularly in cases where the right to liberty may be restricted;
- 6) In the exceptional case of resorting to detention, appropriate conditions to the situation of migrants and their families must be ensured;

Based on the reasons above-mentioned, the next sessions are focused on the first four of these principles and standards.

III.1. Prohibition of Criminalization of Irregular Migration

According to the Committee’s interpretation of the Convention on Migrant Workers, an irregular migration status –regarding entrance to or permanence in a territory- could only be considered an administrative irregularity. Hence, no person could consider it a criminal offense and then, imposing a criminal-type punishment, e.g., depriving someone’s liberty for certain amount of time.

In its General Comment 2, the CMW affirmed that “crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security”.²¹

Likewise, in the recommendations that the Committee has made to State Parties of the MWC, it has repeatedly stressed this position, recalling “that irregular entrance into a country or

²⁰ See in this regard CMW, *Contributions from the Committee on Migrant Workers for the General Comment no. 35 of the Human Rights Committee, on “The Right to Freedom and Personal Safety: Article 9”*; 2014. www.ohchr.org/Documents/.../CMW_DGC9_en.doc.

²¹ Committee on Migrant Workers (2013), para. 24.
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expiration of authorization to stay is an administrative infraction, not a criminal offence. Consequently, such situation cannot imply a punitive sanction”.²² In all these cases, the CWM recommended that any legislation which criminalizes irregular migration has to be removed,²³ including in cases where irregular exit is considered a crime.²⁴

It is worth noting that other key international and regional human rights bodies have coincided on the position that those irregularities can never be considered a crime. At a UN level, the Special Rapporteur on the Human Rights of Migrants has reaffirmed the non-criminalization principle in several reports and statements,²⁵ as it also did the Working Group on Arbitrary Detention.²⁶ Similarly, regional tribunals like the Inter-American Court of Human Rights and the European Court of Justice have adopted the same standard, highlighting that punishing irregular migration exceeds the legitimate margin that States have within migration control policies.²⁷

III.2. Exceptionality and Last Resort

While it is crystal clear that detention of migrants as a mean to punishing irregular migration is forbidden by International Human Rights Law, the other central discussion is whether in the context of migration procedures a person could be deprived of his or her liberty as an interim measure directed to fulfil migration policy goals. This kind of migration-related detention is usually named Administrative Detention due to the fact that this is not a criminal issue according to what was explained in the previous section.

When it comes to examining international human rights standards regarding migration administrative detention, there is another critical standard that was developed –among a number of international bodies- by the CMW: the Principle of Exceptionality. In its General Comment No. 2, the Committee stated that “any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. Such assessment should consider the necessity and appropriateness of any restriction of liberty, including whether it is proportional to the objective to be achieved. The principle of proportionality requires States parties to detain migrant workers only as a last resort...”²⁸

Over the last years, the Committee has been reaffirming this standard through the Observations and Recommendations to Member States within the Reporting process. In these cases, first of all, the Committee expressed its concern about policies and issues such as the following:

- The widespread, increasing and automatic detention of a large number of migrant workers and asylum seekers in an irregular situation, including families and children;²⁹
- The legislation provides that administrative detention can be ordered for the purpose of removal for those who breach the rules of entry into and exit from the State party;³⁰

²² CMW, Concluding Observations, Belize; CMW/C/BLZ/CO/1, 26 September 2014, para. 27.

²³ See, among others, CMW Concluding Observations: México, CMW/C/MEX/CO/1, 8 December 2006, paras 14-15; CMW Concluding Observations: Belize, CMW/C/BLZ/CO/1, 26 September 2014, para. 27; CMW Concluding Observations: Senegal; CMW/C/SEN/CO/2-3, 20 May 2016, para. 26-27.

²⁴ Among others, see CMW Concluding Observations on: a) Sri Lanka, CMW/C/LKA/CO/2, 11 October 2016, para. 30-31; b) Morocco, CMW/C/MAR/CO/1, 8 October 2013, para. 26.

²⁵ For instance, see the following reports of the Special Rapporteur on the human rights of migrants: , E/CN.4/2003/85, 30 December 2002, para. 73; A/HRC/7/12, 25 February 2008, para. 15, 19, 42-43; A/HRC/17/33, 2011, para 19; A/HRC/20/24, 2 April 2012

²⁶ See Working Group on Arbitrary Detention: Preliminary Findings from its visit to the United States of America (11-24 October 2016).

²⁷ Inter-American Court of Human Rights, Case *Velez Loor c. Panama*, Sentence of 23rd November 2010, para. 166-172; Case *Pacheco Tineo c. Bolivia*, Sentence of 25th November 2013, para 131. European Court of Justice (ECJ), Case *El Dridi vs. Italy*, C-61/11, Sentence of 28th April 2011.

²⁸ Committee on Migrant Workers, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 of August of 2013, para 26.

²⁹ CMW Concluding Observations: Turkey, para. 47

- Undocumented migrants and asylum seekers are routinely arrested and detained at State prisons or immigration detention centres while deportation hearings are pending;³¹
- Migrant workers in an irregular situation awaiting expulsion are subjected to detention.³²

It is worth noting that the Committee not only highlights its concern on cases in which migrants are detained automatically or on a routine basis. More importantly, the CMW regrets that legislation authorizes migrants' detention –for instance, in the context of removal procedures— as well as the mere fact that migrants pending expulsion could be subjected to detention.

Although it may seem a basic or expectable position, it has become critical within the worrying and regressive scenario on migration-related detention at a global level. Therefore, if liberty is the right at stake and protecting it is the goal and purpose of the Convention, the Committee has to reassure that liberty is the rule and make it clear that detention is not what it is expected from States in these cases.

Following those Observations, the Committee has been doing a number of Recommendations aimed at ensuring that the Exceptionality rule is respected, as it can be seen in the following examples:

- Ensure that administrative detention is used as a measure of last resort only and that non-custodial alternatives are promoted, in line with the Committee's general comment No. 2 (2013);³³ and refrain from detaining migrant workers for infringing migration laws other than in exceptional cases and as a last resort;³⁴
- Strengthen the policies directed to protect the right to liberty of migrant workers and their families abroad, in particular through: bilateral initiatives and dialogues aimed at promoting that transit and receiving States only use migration-detention as an exceptional, last resort measure;³⁵

In line with the CMW, the UN Special Rapporteur on the Human Rights of Migrants affirmed that deprivation of liberty for reasons related to migration should never be mandatory no automatic. According to the Special Rapporteur, international human rights standards would only authorize this kind of measures as a last resort, or for the shortest time possible and when a less restrictive measure does not exist. Therefore, he affirms, governments are required to provide in their national legislation a presumption in favour of liberty, considering first non-custodial measures, evaluating every single case and choosing the less stringent or restrictive measure.³⁶

The corollaries that emerge from these standards are unmistakably evident: while liberty is the rule, detention is not only an exception but also a last resort measure. The next section will focus on these other measures that should be put in place before getting to the last resort. Before doing so, it is important to deepen the analysis on the principle of exceptionality, based on other international human rights principles and standards, which do nothing else but corroborating the standards that emerge from human rights treaties as the MWC.

As it was explained, migrants' detention cannot be a punishing-like measure. Then, it would only be admissible as an interim measure based on an administrative irregularity and within a migration procedure. However, according to key principles of both human rights law

³⁰ CMW Concluding Observations: Turkey 47

³¹ CMW Concluding Observations: Sri Lanka, 32

³² CMW Concluding Observations: Lesotho, CMW/C/LSO/CO/1, 23 May 2016, para. 29.

³³ CMW, Concluding Observations: a) Turkey, cit., para. 48; b) Sri Lanka, cit., para. 33.

³⁴ CMW, Concluding Observations: Mauritania, CMW/C/MRT/CO/1, 31st May 2016, para. 35.

³⁵ CMW, Concluding Observations: Honduras, cit., para. 37.

³⁶ Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2nd of April 2012, para 68

and administrative law, the rule is that someone should not be deprived of liberty due to an administrative irregularity. In fact, some experts affirmed decades ago that administrative detention should be abolished.³⁷ If this standard applies as a punishment—that is, an administrative offense should not be punished with a freedom privative measure—it should be even stronger as an interim measure. Furthermore, if the outcome of an administrative procedure cannot imply the detention of a person, it looks patently obvious that his/her liberty should not be affected during that procedure.

Considering that the rule is that there is no precautionary detention in administrative law, an analogy with criminal law has to be done in order to find a similar legal figure: the pretrial or preventive detention. A worldwide solid jurisprudence on this matter states that preventive detention should only be applicable in exceptional cases, apart from other limitations—due process, individual assessment, etc.-. This principle is reaffirmed in the CMW when its article 16.6—on migrants’ detention within a criminal procedure- asserts that “It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgment”.

Consequently, it is critical to examine what would mean “exceptional” in the context of administrative migration-related detention after considering, first of all, these three key rules: a) irregular migration is not a crime, but only an administrative condition; b) detention of migrants cannot be a punitive measure; c) in criminal procedures, pretrial detention is only valid as an exceptional measure. In addition, it has to be taken into account the following questions: i) migration procedures could never end up depriving someone’s liberty, as it could happen in criminal procedures; ii) irregular migration status is a circumstance that, unlike criminal offenses, does not generate victims, neither personal nor material. Then, the intrusion of a State into such a valuable right seems even less justified.

In words of the CMW, if in criminal law, detention during a procedure is an exceptional measure, in proceedings relating to the entry and stay of persons in a territory, the standard of presumption in favour of liberty (*favor libertatis*) must be considered even higher and should be respected more rigorously, since immigration violations are purely administrative in nature.³⁸ It is evident that this “exceptionality” would have such a scope that would rarely validate migration-related detention. In addition, if some key international human rights principles are taken into account, as the principles of progressiveness, *pro personae* (*pro homine*) and proportionality, as well as the principle of dynamism or *effet utile*, the above conclusion would only be reaffirmed.

A last thought on the principle of exceptionality of migration-related detention might be necessary. Given the strong and different standards on the right to liberty in cases of criminal and administrative procedures/offenses, an important question is inevitable: why would these standards be different—lower- in the case of irregular migration? Which would be the extraordinary grounds that justify such an unequal treatment? If the answer were either the nationality or migration status of the person, would it not be a violation of the cornerstone principle of non-discrimination and, therefore, an arbitrary detention?

³⁷ Report of Mr. Louis Joinet on the practice of administrative detention; E/CN.4/Sub.2/1990/29, para. 18.

³⁸ CMW, Contributions from the Committee on Migrant Workers for the General Comment no. 35 of the Human Rights Committee, on “The Right to Freedom and Personal Safety: Article 9”; 2014.
www.ohchr.org/Documents/.../CMW_DGC9_en.doc.

III.3. Alternatives to Detention

Based on the previous arguments, deprivation of liberty within migration procedures could only be an exceptional measure subject to a very unique and deep scope of exceptionality. The subsequent discussion would be whether another measure could be adopted in each case during such procedures, in order to ensure that legitimate migration policy goals are achievable without affecting a fundamental human right beyond international human rights law obligations.

In this regard, the CMW affirmed that the principle of proportionality requires States parties to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the Committee added, the least intrusive and restrictive measure possible in each individual case should be applied.³⁹ In addition, through its Recommendations to State Parties, the CMW has been strengthening and detailing the meaning of this duty.⁴⁰

A reasonable approach to the issue of alternatives to detention within migration procedures should be sustained in the principles and standards abovementioned. Therefore, any policy discussion or case-by-case evaluation should start with the key legal interest protected: the right to liberty. Indeed, as it happens within administrative procedures in general, the rule is that people should be free during the process. Subsequently, if necessary in a particular case, a particular measure could be adopted, provided there is no deprivation of liberty. An adequate interpretation of the rules of liberty as the primary response and detention as the last resort, the obligation of providing a number of options in-between is unquestionable.

Moreover, this duty of developing alternatives to detention would entail a number of specific obligations directed to ensure its effective implementation. States must establish by law, and guarantee in practice, a number of alternatives to detention in the context of migration procedures, since they are less burdensome and constitute an appropriate and consistent response to the respect for human rights of migrants⁴¹. In addition, as noted by the Special Rapporteur on the Rights of Migrants, detailed guidelines and appropriate training for judges and other officials, such as police officers, border guards and immigration officials, in order to ensure consistent application of non-custodial measures of freedom instead of detention, should be provided.⁴²

A more in-depth analysis of the discussion on alternatives to detention cannot be covered in this paper. However, a final remark on this issue would be appropriate. Serious policy debates on migration-related detention are usually linked to the policies and practices that States develop in order to respond to irregular migration. In this context, detention practices have been more likely to increase in the countries where a narrow approach to irregular migration has been a distinctive note, with a particular emphasis on deportation measures.

In this regard, it is worth noting what was described before regarding the discussions and statements of South American countries on the issue of Regularization as a critical tool of migration policies. The more avenues for regularization and regular migration channels, the less reasonable and necessary detention becomes –apart from the legal issues within international human rights law. On this matter, it is important to note that on several occasions the CMW has recommended State Parties to develop regularization programs or strengthen regularization procedures for migrants.⁴³

³⁹ Committee on Migrant Workers, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families, CMW/C/GC/2, 28 of August of 2013, para 26.

⁴⁰ For further information, see the CMW's Concluding Observations and Recommendations to each State Party at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CMW.

⁴¹ Human Rights Committee, 2012, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2nd of April 2012 §48-50

⁴² Special Rapporteur on the human rights of migrants, 2012, para 53

⁴³ E.g., CMW Concluding Observations: Mauritania, cit., para. 36-37.

III.4. Non-detention of Children and Families

Over the last years it has been increasingly developed and reaffirmed another key international standard on the issue of migration-related detention: the principle of non-detention of children and families. Namely, a person under 18 years old can never be deprived of his or her liberty due to migration grounds. A comprehensive reading of key human rights instruments –as the MWC and the Convention on the Rights of the Child—along with the interpretation by the CMW and the CRC, robustly support that conclusion.

Based on those Conventions and other human rights treaties, the first and strongest argument against child detention in the context of migration is that there is no legal base within the International Human Rights Law framework. Indeed, none of them includes a provision that authorizes the restriction of children’s right to liberty within migration control procedures or on the ground of their migration status or their parents’.

The MWC provisions that rule the right to liberty of migrants and their families do not provide any argument that could justify the detention of children in the context of migration policies. While article 16 does not include any mention of the possibility of depriving a child of their liberty, the only two clauses of articles 16 and 17 that make reference to children, and to be more precise, “juvenile persons”, are only directed to criminal cases. That is, they do not apply to administrative migration procedures. Furthermore, none of the sections that regulate migration-related detention make any allusion to children, adolescents or any other category of persons under 18 years old.

Similarly, as to the Convention on the Rights of the Child, its Article 37(b) affirms that children could only be deprived of his or her liberty as a measure of last resort. However, it is critical to highlight that this provision is exclusively directed to address the possibility of detaining children in the context of juvenile justice, that is, due to criminal-nature offenses. It is not aimed at being applied within administrative procedures or when an administrative infraction or status is being discussed. Therefore, child migration-related detention is out of the scope of CRC article 37(b).

Regarding the Committees interpretation, the CMW stated that as a general rule, children and families with children should not be detained and States parties should always give priority to alternatives to detention where children and families are concerned.⁴⁴ Since that position in its General Comment No. 2, the Committee has been reaffirming the principle of non-detention and, hence, the duty of ceasing any kind of detention of children and families in the context of migration, as it can be evidenced in the following Recommendations:

- Expediently and completely cease the detention of children on the basis of their or their parents’ immigration status, and adopt alternatives to detention that allow children to remain with family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved, consistent with their best interests, and with children’s rights to liberty and family life;⁴⁵
- The State party should strengthen cooperation with transit and destination countries in order to ensure that unaccompanied migrant children are not detained for having entered transit or destination countries in an irregular fashion, that children who are accompanied by family members are not separated from them and that families are housed in protection centres;⁴⁶
- Design –in law and practice- and implement alternatives to detention of families, unaccompanied and separated children, under the coordination of national and/or local bodies in charge of the integral protection of children;⁴⁷

⁴⁴ Committee on Migrant Workers (2013), para 44

⁴⁵ CMW. Concluding Observations: Turkey; cit., para. 48.

⁴⁶ CMW. Concluding Observations: El Salvador. CMW/C/SLV/CO/2, 2 May 2014, para. 49.

⁴⁷ CMW. Concluding Observations: Honduras, cit., para. 55.

The CRC Committee, in the same direction, affirmed that “the detention of a child because of their or their parents’ migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status”.⁴⁸ This standard has been strengthened through its Recommendations to State Parties:

- Cease the detention of asylum-seeking and migrant children;⁴⁹
- Expeditiously and completely discontinue the detention of children on the basis of their or their parents’ immigration status and provide alternatives to detention that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts;⁵⁰
- Adopt the necessary measures, including those of a legal nature, to avoid the detention of children in waiting zones through increased efforts to find suitable alternatives to deprivation of liberty and place children in appropriate accommodation;⁵¹
- Take all measures necessary to end the administrative detention of migrant children and continue to establish community-based shelters for them;⁵²

IV. CONCLUSIONS

The first part of this paper described recent developments that have been taking place in South American countries in regard to migration policies, particularly in the field of migration-related detention. In spite of the number of challenges and even contradictions that the region still copes with, it is evident that the human rights paradigm has been considered one of the pillars of the policy and rhetoric reforms that have taken place. In this framework, criminalization and detention of irregular migrants have been either prohibited or restricted to an exceptional, last resort measure.

While these advances may be understood as a rare approach to irregular migration by certain countries in a very particular region, two key issues have to be highlighted. First of all, several countries in the region have become countries of destination of migration flows from the same region or others, apart from their traditional role as countries of origin. Then, no matter the qualitative and quantitative difference that may exist when compared to host countries in other regions, they also face a number of challenges to deal with.

Secondly, as it was explained in the subsequent section of this paper, international human rights law does not differ from that developed in South America. Indeed, after examining key treaties such as the Migrant Workers Convention, as well as the interpretation of the bodies created by these legal instruments, it could be argued that the paramount IHRL duties and principles match the standards promoted by South American countries in either political statements or, more importantly, in some cases, in legislative and policy changes that have been made over the first decade and a half of the current century.

In particular, these critical standards emerge from a strong prohibition of any measure directed to criminalizing irregular migration, and hence, to using detention as a punishment of infractions to the regulations on the entrance to or permanence in a territory. Consequently,

⁴⁸ Committee on the Rights of the Child (2012).

⁴⁹ Committee on the Rights of the Child. Concluding Observations: United Kingdom and Northern Ireland. CRC/C/GBR/CO/5, 12 July 2016, para. 77.

⁵⁰ CRC Committee. Concluding Observations: Slovakia. CRC/C/SVK/CO/3-5, 20 July 2016, para. 53.

⁵¹ CRC Committee. Concluding Observations: France. CRC/C/FRA/CO/5, 23 February 2016, para. 74.

⁵² CRC Committee. Concluding Observations: Mexico. CRC/C/MEX/CO/4-5, 3 July 2015, para. 60.

given that irregular migration would only be considered an administrative issue, the general rule is that people should not be deprived of their liberty due to their irregular migration status. Furthermore, during administrative procedures directed to taking a decision in those aspects – entry, residence, exit—migrants should exercise their right to liberty as any other human being that could be part of a legal process that may –or may not- lead to the imposition of an administrative sanction.

In cases in which, due to specific facts or circumstances, additional measures were needed, alternatives to detention could be put in place, provided that they do not include any kind of restriction to liberty. These alternatives should be included by law and, through concrete policies –budget, training, etc.—actually be put into practice. According to international human rights standards, it is only after exhausting in every case every single alternative regulated by law that deprivation of liberty might be taken into consideration. This is the principle of last resort. In addition, the principle of exceptionality strongly suggests that the liberty of a person should not be affected due to an administrative irregularity.

As a result, if the advances in South America are clearly in line with those standards that have been developed by international human rights bodies based on IHRL the subsequent question should be: In the field of migration-related detention, is the South American case an anomaly? Or, based on what the international legal framework rules on this matter, would the anomaly be somewhere else, precisely due to the dramatic increasing of automatic and generalized detention of migrants and asylum seekers?

These contradictions between international standards and current policies in numerous countries in the world are increasingly and dramatically impacting basic human rights of hundreds thousands of people every year. Moreover, migration-detention policies have widely proved to be ineffective responses to irregular migration, a structural and multidimensional phenomenon of the current global context. On the contrary, as it happened in some South American countries, alternatives measures –such as regularizations- have not only proved to be more effective measures, but they also generate a number of positive outcomes in different public policies, such as preventing diseases, improving living conditions and social integration of migrants –and their contribution to economic and development policies—as well as reducing informality at work, labour exploitation, trafficking in persons and smuggling of migrants, among many others.

In conclusion, paraphrasing Dworking, taking seriously the right to liberty of migrants has to ensure the principle of exceptionality and the duty to develop alternatives to detention. In addition, of course, a number of critical standards regarding due process guarantees and detention conditions must be fully respected. There are compelling arguments against migration-related detention. An enormous amount of legal tools and mechanisms aimed at protecting this basic right have been built in every democracy and rule of law, in some cases a very long time - in England, for instance, starting with the Habeas Corpus recognition eight centuries ago.

Unfortunately, current toxic debates on migration policies, along with the lack of willingness to address this critical phenomenon in a proper way, among other reasons, are regressively affecting this core human right. Even in South American countries, as it was mentioned, recent measures and decisions could lead to a serious and unreasonable regression. The recent regressive measures implemented by Argentina clearly reveal that this region is not exempt from such risks.

This worldwide regressive trend not only impacts the right to liberty and other related human rights, including the right to family life, children's' rights and many others, but it can also be understood as a discriminatory policy against a particular social group due to their nationality and/or migration status. When such discrimination exists, for either a short or long time, humanity as a whole is affected. Indeed, current consequences of migration-related detention reveal its grave effects. If this tendency continues, future consequences could be dramatic for generations to come, and not only in the case of migrants or asylum seekers. In

sum, it is the right time to go back to basics, it is the right time to take migrants' right to liberty seriously.

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