**Submission for the General Observation on the**

**"Right to Personal Liberty of Migrants"**

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In order to answer some of the questions posed by the Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in order to have more information for the preparation of the General Comment No. 5 on “the right to personal liberty of migrants and their protection against arbitrary detention”, I personally provide the following information that is part of some of the conclusions of an investigation that I carried out regarding the subject matter of the Observation, with special attention to what happens in Spain and Mexico .

**A. Migration and the policy of deprivation of liberty without criminal causes**

Many studies on human migration tend to have strong subjective burdens or start from fractional analyzes with generalizing conclusions. This situation gives rise to the fact that migration is surrounded by myths that are not always easy to dispute or verify in light of the very varied methodologies used to study this phenomenon and that, for example, in the case in which only figures are used, which is the most common, they can measure or account in a partial and oriented way the same situation to satisfy an end at a given historical moment.

Migration across territorial borders is a human activity that, due to the disparity of the laws that have sought to regulate it and how difficult it is to know it precisely in many regions of the world and from all its angles, beyond some figures, it has become a global problem. Its solution will hardly be found by closing borders, imposing complex entry requirements, implementing expensive control systems, criminalizing migration and / or building new walls.

Due to its geographical location and its migration maps, both Spain and Mexico are countries regarded as the last south-north land border to access other regions that are considered to be more developed and with greater well-being. Despite this, Spain is a country of both immigration and emigration, while Mexico is mostly a country of emigration and transit.

The deprivation of liberty of sine *permissum* foreign migrants and without criminal causes is an immigration policy of control. Its historical antecedents are found in the mid-nineteenth century in the United States and its growing implementation around the world has occurred from the seventies and eighties of the western twentieth century.

Spain with the so-called internment provided for in Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration; and Mexico, with the so-called accommodation contained in the Migration Law, currently actively use the immigration control policy consisting of the deprivation of freedom of sine *permissum* migrants and without criminal causes for a period of up to 60 calendar days and 60 business days (with one exception), respectively. Therefore, both are legally established measures, but not necessarily consistent in all areas with constitutional human rights systems.

**B. Right to Liberty**

The right to personal liberty is recognized in all legal norms applicable in Spain and Mexico to every person, so it is one of those human rights that both nationals and foreigners have recognized in equal circumstances. Therefore, in all cases, it admits restrictions as it is not an absolute right regardless of who it is recognized to be.

The “internamiento” of foreign migrants in Spain is provided for in Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration; and it is also supported by Article 15 of Directive 2008/115 / EC of the European Parliament and of the Council, of December 16, 2008, on common rules and procedures in the Member States for the return of third-country nationals in irregular situation; as well as in article 5.1 f) of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 9 of the International Covenant on Civil and Political Rights. Therefore, despite not being constitutionally provided as a way in which personal liberty can be affected, it is legally and conventionally provided for.

The “alojamiento” of foreign migrants in Mexico is provided for in the Migration Law, so it is compatible with what is established in Article 7 of the American Convention on Human Rights, Article 9 of the International Covenant on Civil and Political Rights and Article 16 of the International Convention on the Protection of the Rights of Migrant Workers and their families; despite its lack of foresight as a way of affecting right to liberty in the Mexican Constitution, which only contemplates detention for the purpose of expulsion provided for in Article 33. Without both legal figures being considered one.

The legal provision of a form of affectation of right to liberty is not what determines its validity or admissibility in the constitutional system. In addition, it must satisfy a set of guarantees (information on the reasons for detention, presentation without delay before a judge, right to appeal, etc.) and characteristics that allow determining that it is not arbitrary. Therefore, in order to be constitutionally admissible, a measure that affects personal liberty is not enough for it to be legal, but also must not be arbitrary.

The so-called “internamiento” in Spain and the so-called “alojamiento” in Mexico, due to their degree or intensity, in both cases exceeding 72 hours and being carried out in closed places, are deprivations of liberty regardless of the name given to them and the nature they are assigned by the laws that provide and regulate them.

**C. The deprivation of liberty called “internamiento” in Spain**

The deprivation of liberty called “internamiento” that is carried out in the detention centers of foreigners can only be applied without criminal causes in twenty-seven specific cases that derive from three general cases: expulsion, denial of entry at the border and return. Any application without criminal causes outside of those assumptions is an illegal measure.

The Constitutional Court of Spain has declared the constitutional validity of the internment for essentially two reasons: a) due to the intervention of a judge in its determination and, b) due to the proper justification and motivation of the order that determines the internment. However, it has not made evaluations of each and every one of the assumptions that legally authorize its application, nor on the proportionality of the measure in each assumption, nor its maximum term, nor if it respects the principles of equality and non-discrimination.

In detention, in any of its assumptions, it is not possible to speak juridically about the existence of discrimination based on national origin as it is not possible to establish a comparison term between nationals and foreigners. But neither between nationals of non-Spanish member countries of the European Union and nationals of other countries (third States), since according to the European Court of Human Rights, in the latter case there is a very weighty reason that justifies differential treatment: the special legal system that the Member States of the Union have given themselves and, derived from it, European citizenship.

Detention in Spain is provided for, regulated and constitutionally admitted as a precautionary measure. However, only in some of the specific cases included in the generic case of expulsion does it satisfy this legal nature. Not so in one of the specific cases of expulsion or in all of the denial of entry and return, where it is more similar to a measure of forced execution. In view of this and that, a proportionality analysis requires that the suitability of the existence of an adequate measure be evaluated by means of which the right that is restricted was intervened, in all that set of cases in which there is no presence of a precautionary measure cannot be considered even presumptively as suitable even though it does have a constitutionally relevant ultimate purpose.

The “internamiento” envisaged as a precautionary measure in Spain for cases of expulsion, refusal of entry at the border and return is not a proportional measure as it is neither necessary nor proportional in the strict sense. The lack of necessity is demonstrated by the existence of other less harmful measures by means of which the desired end could be achieved, even without affecting the right to liberty. The lack of strict proportionality is demonstrated because the interference in personal liberty for up to 60 days does not strictly satisfy the aim sought as a direct consequence of the least restriction. Therefore, it is an arbitrary deprivation of liberty that, consequently, makes it a measure contrary to the constitutional system of fundamental rights.

**D. The deprivation of liberty called “alojamiento” in Mexico**

The deprivation of liberty called “alojamiento” that is carried out in what are known as “estaciones migratorias” can only be applied without criminal causes in twelve specific cases that derive from three general cases: deportation, regularization and assisted return. For cases of expulsion, the constitutionally foreseen detention in November 2015 does not have a law that allows to establish what will be the cases in which it will be applicable. As outside the aforementioned assumptions, any other application without criminal causes of “alojamiento” in “estaciones migratorias” is illegal.

When this investigation is concluded, the Supreme Court of Justice of the Nation has not ruled on the constitutionality or unconstitutionality of “alojamiento” in “estaciones migratorias”. Any analysis that this court develops in the future must take into account, on the one hand, the standards established by the Inter-American Court of Human Rights regarding detention for immigration purposes and, on the other hand, it must be attentive to the specific assumption that undergo the analysis in order to establish general or particular conclusions in accordance with it. It is desirable that you analyze equality, non-discrimination and proportionality as proposed in this work.

In accordance with existing inter-American standards, it can be affirmed that accommodation is an arbitrary deprivation of liberty to the extent that it is the rule and not the exception, it is an immigration policy that is applied in a generalized manner without addressing the special circumstances, case by case. But also, because it is a measure that is decreed by an administrative authority without intervention or judicial review and because it contains a deterrent to judicial intervention by extending the deprivation of liberty indefinitely in those cases. All of which increases its severity because it is applied in cases of migrant children, both unaccompanied and with family, as well as in general to asylum and refugee applicants.

By recognizing in Mexico the right to enter, leave, travel and reside in the national territory of every person, in some of the cases provided for in the Migration Law for the application of internment, it is possible to establish the existence of discrimination by generating legal consequences other than factual circumstances in which we can place ourselves both nationals and foreigners, such as, for example, entering the country without meeting the requirements or through an unauthorized place, which is required of both Mexicans and foreigners. Therefore, some of the assumptions that provide for the application of accommodation are discriminatory, to the extent that the difference in the legal consequence that is generated is based only on the national origin of the people and not on very weighty reasons.

In accordance with the current contents of the Constitution, the Migration Law and other applicable regulations, in Mexico the terms expulsion and deportation do not mean the same thing and cannot be used interchangeably. This being especially relevant for all the legal consequences that it can generate, both in an analysis of equality and non-discrimination, and to determine the cases in which the so-called accommodation is applicable.

Accommodation is a stage of the administrative immigration procedure, none of its assumptions has an expressly established purpose and its term is counted in business days so there is no certainty regarding the real maximum, in addition to that if a judicial or administrative appeal is filed, becomes undefined. When the proportionality test is applied, it is shown as lacking in suitability, unnecessary and disproportionate in the strict sense in all its cases. Therefore, also for these reasons, the so-called accommodation is an arbitrary deprivation of liberty and as a consequence, a measure contrary to the constitutional system of human rights. This is aggravated in the cases in which it is applied to children and people seeking asylum and refuge.

**E. Can Right to Liberty be affected by immigration reasons?**

Right to Liberty, regardless of who it is recognized to, may be subject to restrictions. Thus, for migratory reasons, it is one of those reasons that are expressly admissible as recognized by the various legal norms that have been analyzed in this work. However, not just any impairment can be admissible.

Under this premise and everything that has been studied in this work, we consider that any assumption that can affect the right to liberty of a sine *permissum* foreign migrant and without the existence of criminal causes must be found within the following parameters:

1. It must be a stop or arrest. In other words, regardless of the name given to it, the intensity or degree of its execution must not exceed 72 hours in any case.
2. It must have a constitutionally imperative purpose established by law. This means that it is established in law that is sufficiently accessible, precise and predictable in its application in which it undoubtedly indicates what motivates this detention or arrest of up to 72 hours: preventing the unauthorized entry of the person into the country, achieve the effective exit of a person from the territory, ensure that a person who is not allowed to enter the territory returns to the place from which they came, ensure their presence to comply with the resolution issued in the procedure followed, ensure that a person who has committed an act contrary to the law does not remain in the territory, etc.
3. It must be linked to a procedure of a strict immigration nature in which the final result of it is one of the purposes indicated in the previous point.
4. It must be of exceptional character. This means that it should not be applied in all cases, but only in those where it is essentially necessary or essential to fulfill the purposes sought.
5. It must be the last option of at least two previous ones that do not imply affectation to right to liberty. That is, to be integrated into a system of measures that seek to guarantee the purposes that are had and that only when those at least two previous ones do not work, can it be applied as the only and last measure. Preferably, as an enforcement measure against voluntary non-compliance.
6. It has to depend on the accreditation of all the material elements necessary to fulfill the purposes that are had. That is to say, being the last option available, this means that in turn the other elements that would make the fulfillment of the purpose possible are already in place at the time it is carried out: final and firm resolution, exit costs, admission to the place of destination, failure to comply with previous measures and no danger to the person.
7. It must be issued by a jurisdictional authority with competence in the central issue if it does not derive from a procedure that can be submitted to judicial review. That is, since migration and foreigners are matters of administrative law, the judge must be in that area so that he can evaluate the previous points and have full knowledge of the cases in which it is applicable and the characteristics of each one.
8. It must be executed in appropriate places and with the necessary conditions for it. That is to say, it is not enough that they are places without prison characteristics, but also that they have the necessary and sufficient conditions of stay.
9. It must provide special protection and guarantees for cases involving women, children, people with disabilities, ethnic or racial minorities and any other historically discriminated group. That is, to foresee the cases in which multiple discrimination could occur. Without forgetting in the case of girls and boys, the measure can never be directed or justified in them.
10. It must grant all the guarantees of a person deprived of liberty.

Even with this configuration and possibilities in a system of subsequent measures, it is always desirable to first think about alternative measures that should or could be applicable as a total replacement for internment in Spain and accommodation in Mexico, even if their temporality is reduced to a minimum.

**F. Is migration criminalized with deprivation of liberty without criminal causes?**

The deprivation of liberty without criminal causes of sine *permissum* migrants and for administrative offenses for long periods and in closed places, despite being regulated in laws of an administrative nature and taking place in places classified as non-penitentiary or prisons, have been built and are being built in society the perception that sine *permissum* foreign migrants and that they have committed administrative offenses are criminals and a risk to public order and security.

This is so, since being foreseen in the legal systems of both Spain and Mexico, as well as many other countries, any measure of deprivation of liberty exceeding 72 hours and in spaces under police custody only for conducts related to the commission of crimes, the criminalizing message is undeniable. In the case of Mexico, this is further reinforced because the deprivation of liberty is applied as a general rule and not as an exception in the administrative immigration procedure.

The line between misconduct and criminal conduct is thin. However, not all illegal conduct is criminal, even if all criminal conduct implies illegality. Therefore, when one of the most serious consequences of the commission of criminal conduct (deprivation of liberty) is applied to administrative offenses, even if it is not classified as a penalty, the social construction leads to equating and qualifying acts that should be equal be fully differentiated.

This construction is reinforced by the increasingly constant linkage of migration policies with security policies (including national security), contributing to create an incorrect association between sine permissum migration or administrative offenses and crime. This occurs in the case of the two countries that we analyze, but also in others, since, as it has been established, the impact on personal liberty without criminal causes is linked in a significant number of cases with the “antecedents”, “representing a danger” or “compromise” public order, public safety or national security.

In the cases of Spain and Mexico, all of the above is confirmed when, in cases ranging from the lack of renewal of the residence permit, the non-fulfillment of entry requirements, the commission of an administrative offense and the ones related to criminal matters, the same measure can and does apply to them, in the same places, under the same deadlines, even though some of these behaviors are not even an administrative offense, but a simple breach of a requirement established by law.

Notwithstanding the foregoing, it is also true that there are those who believe that in the face of the reality suffered by a large number of sine permissum migrants, the protection of a criminal process could improve the legal status of migrants. A situation that, in many latitudes, is leading us, for example, in the case of detention centers for migrants, to ask that, at least, those who are deprived of their liberty be treated as it is done in a penitentiary center that as a general rule, in all countries it is subject to the highest standards in terms of guarantees and conditions of stay.

But in any case, the solution does not involve improving the conditions of deprivation of liberty with its criminal equivalence or homologation, but rather that they are not carried out in the degree and intensity greater than 72 hours, as they were previously demonstrated for the cases of Mexico and Spain, unnecessary and disproportionate in all cases provided for in their respective immigration and immigration laws.

The foregoing may be debatable regarding its verifiable effects in both countries. However, denying the aforementioned can be in many cases a manifestation of the sociological creation known as institutionalized or institutional discrimination, that is, of the normalization of any act, conduct or behavior directed at a historically discriminated or excluded group, without questioning the morality or legitimacy of these, but rather assumes them as valid because they are included in a legal norm that is primarily directed at that group and not "ours".

Institutionalized discrimination that in our object of study has also been reflected when it seems irrelevant to question whether in all the cases to which the affectation of right to liberty is directed, one is in the same situation or if the legal figure in which it is protected is in truth what the term represents, a euphemism or a legal deviation from what is actually carried out. But also when, without analysis, it is presumed as correct and even justified because only one type of foreign migrant persons is considered as the only recipients of the measure depriving liberty without addressing the set of assumptions that may give rise to it and, with this, the multiplicity of its recipients according to the content of the rules that regulate it.

Given this reality and what we have shown before, it seems clear that the solution does not happen nor does it lie in depriving migrants of their freedom. "If [deprivation of liberty] is the solution, we have to ask ourselves, what is the problem?"

Finally, I wish to express before that Committee that, if it is of your interest, I can send you more detailed information regarding everything previously expressed, since now, in order to comply with the maximum length established for contributions (10 pages), I have limited the information (that I send you) to those aspects that I have considered especially relevant, taking into account the questions that have been formulated.

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