

6. The migration of Haitians within Latin America: significance for Brazilian law and policy on asylum and migration

*Andrea Pacheco Pacifico, Erika Pires Ramos, Carolina de Abreu Batista Claro
and Nara Braga Cavalcante de Farias*

This chapter deals with an issue of great topical importance for migration and asylum law and policy in Latin America: recent migratory flows of Haitians towards Brazil in the aftermath of the 2010 earthquake and the permanent residency for humanitarian reasons scheme that was introduced by the Brazilian government as a response. This increase in Haitian migration exemplifies global geographical shifts in the pattern of migration from south-north to an increasing south-south element. This chaotic and unexpected flow of migrants led the Brazilian government to create an important precedent in the protection of persons fleeing from humanitarian disasters outside the framework of refugee law.

This chapter begins by describing and explaining the relevant features of the migratory flow of Haitians that has taken place between 2010–13. Addressing the Brazilian government's particular policy response, the authors here attempt to show how it unfolded in relation to, and was shaped by, a wider Brazilian migration law and policy context devoid of clear parameters. The result is a policy that, although innovative, is fundamentally ad hoc in nature and unable to guarantee properly the rights of Haitians once in Brazil. The authors equally aim to show how factors other than humanitarian ones impacted on such legal and policy development. In particular, economic interests and a focused political desire to secure Brazil's international reputation on the world stage play an important role. Finally, the potential for future national and regional policy development in this area is considered.

The migration of Haitians to Brazil

The history of the Haitian Republic has been marked by bloody political disputes over the past few decades, leading the country and its population towards misery, insecurity and hopelessness, particularly in the search for better living conditions within their nation. Even though, after about a hundred years

of French domination, Haiti was the first colony in Latin America to gain its independence,¹ this did not translate into real emancipation for the majority of Haitians, who remained in extreme poverty. The ongoing chronic political crisis in the country appears to us to be due largely to the actions of the small Haitian elite, which up to the present day, controls the politics and economy of the nation in a way that fosters social exclusion for the majority.²

Haiti's economic situation is usually viewed as the main reason for Haitian out-migration. However, this is not the only reason for displacement, since economic considerations are closely related to political ones and to the degradation of the country's natural environment. Thus, for instance, Haiti's deforestation index of 98 per cent makes producing sufficient energy to allow the industrial sector to diversify its economy a real challenge.³ Moreover, Haiti is vulnerable in terms of natural hazards, as it is located in the hurricane belt of the Americas. It also suffers from periodic floods and droughts, severe storms and earthquakes,⁴ such as the one that occurred in 2010 which left more than 200,000 people dead and thousands more injured.⁵

These factors have all contributed to the migration from Haiti, especially during the last two decades. What is new in this migration flow is the change of destination to countries such as Brazil. After the 2010 earthquake, in particular, high levels of Haitian migration to Brazil increased significantly, despite it not having been a traditional destination in the past. Indeed, since 2010, Brazil has become the third most important country of destination for Haitians, preceded only by the Dominican Republic and the United States of America (USA)⁶ and it is now seen as an important option for Haitians continuing to leave the country in the wake of the 2010 earthquake.⁷ It has been estimated that, by April 2012, approximately 6,500 Haitians, who had suffered the devastating consequences of that disaster, had arrived in Brazil.⁸

There are numerous reasons why Brazil appears to have become an important destination of choice for Haitian emigrants. Some of these pull factors relate to the country's economic growth. This is particularly significant when compared with developed countries' economies. There are also relatively low

1 Matijascic, 'Haiti: uma história de instabilidade política', p. 5.

2 Gauthier and Moita, 'Vulnerability and causes of fragility in Haiti'.

3 Valler Filho, *O Brasil e a Crise Haitiana*, p. 159.

4 CIA, *The World Fact Book: Haiti*.

5 Télémaque, *Imigração haitiana na mídia brasileira*, p. 18.

6 IOM, *World Migration Map*.

7 Farias et al., 'Do Haiti para o Brasil: o novo fluxo migratório', pp. 73–82.

8 IMDH, 'List of Haitians granted permanent residence in Brazil [2012]'.

unemployment and inequality rates between social classes.⁹ Brazil has become the third most important country for attracting priority foreign investments, surpassing the United States and lagging behind only China and India, as the listing prepared by the United Nations Conference on Trade and Development (UNCTAD) shows.¹⁰

The recent 2014 World Cup held in Brazil and the forthcoming Olympic Games it is due to host in 2016 carry with them expectations that the Brazilian economy will grow further.¹¹ Indeed, Brazil needs to boost its workforce to meet the demands of hosting these events, meaning job creation has increased, particularly in the civil construction area. This factor attracts Haitian migrants who are participating directly in this sector, as a Federal University of Minas Gerais (UFMG) survey demonstrates.¹² It reports that 38.4 per cent of the Haitians in Brazil are working in the field of civil construction and 24.4 per cent are working in related service industries. This fact has not passed unnoticed in the Brazilian media, with *O Globo*, a Brazilian newspaper, proclaiming that ‘civil construction is one of the sectors that employs most Haitians in Brazil. However, for them, a job is not only an opportunity to improve their lives. Foreigners have helped the World Cup to become a reality.’¹³

These predominantly economic factors, taken together, are responsible for the increase in Brazil’s international visibility. However, along with economic growth, a determined political project also aims to project a positive image of Brazil as a country capable of discharging important responsibilities on the international stage, particularly in areas such as security, human rights and regional leadership. One example of this is the Brazilian leadership of the United Nations Stabilisation Mission in Haiti (MINUSTAH), a mission created by United Nations Security Council (UNSC) Resolution 1542 and established on 1 June 2004.¹⁴ The peacekeeping mission in Haiti has given Brazil the opportunity to upgrade its military force, increase its international

9 In 2010, there was a significant reduction in the percentage of the population registered as unemployed – down to 6.7% as against rates of 20% unemployment in Spain, for example. See Szklarz, ‘A ascensão do Brasil: os dois lados da realidade’, pp. 10–11.

10 Ibid.

11 Domingues et al., ‘Predicting the economic impact of the 2014 FIFA World Cup in Brazil’, pp. 409–39.

12 Quoting Milesi in Frabasile, ‘Interview with Rosita Milesi: Brasil, haitianos e os desafios da Lei de Migrações’.

13 *O Globo*, ‘Haitianos fogem do país devastado e trabalham como operários no Brasil’.

14 See www.un.org/en/peacekeeping/missions/minustah/ (accessed 30 Oct. 2014); Cannabrava, ‘O Brasil nas operações de manutenção de paz’, pp. 93–105. This Brazilian diplomat considers his country’s participation in this international concern to be an important foreign policy instrument.

visibility and reinforce its efforts to get a permanent seat on the UNSC – its main objective in pushing for UNSC reform in recent years.¹⁵

In the aftermath of the 2010 earthquake, Haitians started travelling to Brazil on distinctive migration routes. The main one initially identified went from Port-au-Prince to the Dominican Republic, as first transit point, continued to Panama as a second transit point, then went via Ecuador, Peru or Bolivia, before finally crossing one of the Amazonian land borders into Brazil.¹⁶ The main gateway for Haitians to enter Brazil has thus been the northern Brazilian states of Acre and Amazonas. More recently, Argentina has also become a new transit country in this migratory process, thereby diversifying Haitians' gateways into Brazilian territory.

Brazilian migration law and policy

Within Brazil, the governmental response to the Haitian crisis and ensuing migration took place against an unusual backdrop of law and policy. Brazil is distinctive in having few provisions concerning migrants in its national legislation. As a result, the issue of migrants' rights tends to be addressed through federal resolutions issued by administrative bodies. These resolutions do not have the same legal strength in Brazilian law as federal laws. The legal protection for any kind of migrant – whether labour migrant, refugee, asylum-seeker and so on – is thus weak in nature. This deficiency, combined with the lack of any centralised migration policy within the country, results in a situation of little-to-no real governance of migration issues.¹⁷

Existing legal and policy framework

The applicable legislation is based around the 1980 Brazilian Migration Law,¹⁸ which frames immigrants largely as a labour resource to be exploited in order to advance the industrialisation of the country.¹⁹ Alongside the concern with economic interests in relation to the admission and the residence of foreigners within the country, the provisions of this law clearly reflect its two decades of dictatorship with their focus on national security concerns. Thus, migrants are treated with suspicion and almost as criminals; humanitarian considerations relating to protection are largely absent. Although the 1980 Migration Law remains in force up to the present day, the rapid political changes taking place

15 Mathias and Pepe, 'Segurança e democracia: a atuação do Brasil no Haiti'.

16 Farias et al., 'Do Haiti para o Brasil'.

17 G1.Globo, 'Haitianos fogem do país devastado e trabalham como operários no Brasil'; Badie et al., *Pour un autre regard sur les migrations*.

18 Brazil Act 6815, *Diário Oficial da União*, Section 1, 21 Aug. 1980, p. 16534.

19 Bueno and Cervo, *História da Política Exterior do Brasil*.

in Brazil mean that its rationale and provisions became obsolete almost from the day they were published.²⁰

By contrast, the 1988 'citizen' Constitution celebrates the end of the dictatorship and repositions Brazil internationally by implementing a more humane policy in line with the constitutional principle of protecting human dignity. As such, it seeks to give regular immigrants the same rights as those afforded to citizens. Indeed, the post-dictatorship legislation in Brazil seeks especially to link the issue of migration to human rights law treaties in this area. This is most apparent in the Brazilian Constitution which, at Article 5, provides a minimum level of protection for foreigners in order not to breach these treaties.²¹ However, in general, the manner in which such international standards are incorporated into Brazilian law is rather vague and lacks a clear human rights orientation, particularly in relation to issues such as undocumented migrants and human trafficking.²²

Specifically in relation to refugees, the refugee law adopted in 1997 seeks to tie the admission, legal status, and integration of asylum-seekers and refugees to the standards in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.²³ It also promoted a new model in the Brazilian legal order by framing the stable civilian government and the Catholic church as partners in the task of refugee protection. When the Labour party came to power in 2003, it focused on further shaping this collaboration as well as developing protective social policy for both citizens and foreigners as a means of bolstering its democratic and human rights credentials on the international stage. Within this broader legal and policy context, the arrival of the Haitians in the aftermath of the 2010 earthquake was to provoke a further shift in this policy field.

Response to the 'Haitian crisis' in law and policy

The increasing migration of Haitians to Brazil, described above, provoked the need for a coherent legal and policy response from the Brazilian government. The form this response should take was itself the subject of intense debate among the Brazilian refugee and immigration authorities.

It would appear to us that a conscious decision was made not to characterise the mass arrival of Haitians as a refugee flow. It is important to note that the 1997 National Refugee Act allows for the possibility of recognising a person

20 Carvalho Ramos, 'Direitos dos estrangeiros no Brasil: a imigração, direito de ingresso e os direitos dos estrangeiros em situação irregular'.

21 Ibid.

22 Note, however, that documented and undocumented immigrants in Brazil have the right to healthcare, retirement and property, among other social benefits.

23 Law no. 9474, 1997. For further comment on the development of refugee law and policy in Brazil, see chapter 7, this volume.

as a 'refugee' if they flee from 'gross and generalised human rights violations.'²⁴ This definition could well have been applied to many of the Haitians in order to regularise their situation as 'refugees' under the terms of Brazilian law. Yet this expanded refugee definition was not applied to the Haitians, apparently in order to avoid creating precedents for similar situations that might arise in the future. This body of national law was thus largely disregarded as a tool for dealing with Haitian immigrants.

Instead, in 2012, the Brazilian government created a special migratory protection regime for Haitians. It did so through applying the existing legal figure of 'permanent residence for humanitarian reasons', which had been previously implemented in deserving individual cases, to a defined national group, in this case Haitians. This new mode of protection allowed Haitian recipients a form of legal residency within Brazil for a period of five years and took the form of a special residence permit with similar rights to those of refugees, including the right to work. It was adopted expressly in view of the gravity of the humanitarian crisis and its effects on the population and on the state of Haiti, as well as the great human suffering and damage to human rights if Haitians were to be returned to their country.

Initially, it was only the Brazilian embassy in Port-au-Prince that was authorised to issue visas for permanent residence on humanitarian grounds ('humanitarian visas' hereafter) to Haitian citizens.²⁵ Moreover, a limit of one hundred visas per month was imposed in an attempt to contain the flow.²⁶ However, in 2013, the restriction on the numbers of visas was lifted, as was the exclusive prerogative of the Port-au-Prince embassy in issuing them.²⁷ Applications to the Haitian humanitarian visa scheme could now be received by Brazilian embassies across the region. This change responded to the perception that 1,200 visas per year were not enough to meet the demand for emigration from Haiti and the excess demand might encourage the illegal immigration of Haitians through the use of 'coyotes' (smugglers). The feared competition between Haitians and Brazilian citizens for jobs had also not materialised. Finally, in view of the vulnerability to which groups of Haitians travelling to Brazil were exposed in transit, a new policy was announced whereby the request for permanent residence based on humanitarian reasons could also be lodged upon arrival in Brazil.²⁸

24 Art. 1, III, Act 9474/97. This expanded refugee definition was inspired by the 1984 Cartagena Declaration on Refugees.

25 Brazil National Council of Immigration. Normative Resolution 97 (CNIg, 12 Jan. 2012), *Diário Oficial da União*, Section 1, 13 Jan. 2013, p. 74.

26 Ibid.

27 Brazil National Council of Immigration. Normative Resolution 102 (CNIg, 26 April 2013), *Diário Oficial da União*, Section 1, 29 April 2013, p. 96.

28 Foreque and Nery, 'Brasil deverá dar mais vistos a haitianos'.

Implementation of the policy to date

As of 9 September 2013, 6,519 permanent residence permits had been issued under the humanitarian scheme to Haitian applicants and one hundred to their dependants.²⁹ These figures represent a substantial change in the composition of the population of documented migrants with protection concerns officially settled in Brazil. The political relevance of this new immigrant population becomes evident when one considers that, in October 2012, the National Committee for Refugees (CONARE) only recorded 4,656 recognised refugees in the country.³⁰ That is, the number of Haitians protected under the 'permanent residency on humanitarian grounds' scheme after one year of operation was significantly greater than the total number of refugees of all nationalities in the country.

Although the legal framework exists to facilitate the integration of migrants by granting beneficiaries permanent residency on humanitarian grounds, challenges have already arisen in implementing these provisions. So far, many of the Haitians have remained in the Brazilian states which originally hosted them, such as Acre and Rondonia. Despite Brazil's general positive economic growth, Haitian immigrants face social and financial problems, mainly in relation learning Portuguese and accessing jobs.

The situation in the western Amazonian state of Acre is particularly alarming. Authorities have been overwhelmed by the requirement to provide basic assistance to Haitians and are unable to offer job prospects. According to NGO reports, a 'refugee camp' built to host 200 persons houses 830 Haitians in inhumane conditions, with only ten toilets, eight showers and disease-generating, untreated sewage.³¹ The local community has been feeling the impact of this flow, particularly in Brasileia (Acre), a city with about 20,000 inhabitants where camp residents compete for access to hospitals, post offices and other public services. The state of Acre bears the costs of this aid, with the federal government providing little assistance. Yet the camp still receives about 40 new migrants daily and, together with reduced job prospects, adaptation is difficult and social chaos a real concern.³²

The chaotic situation in Acre has led to Haitians spilling over into other Brazilian states, especially Rondonia, which is on the city's eastern border. Haitians began arriving in Rondonia in February 2011,³³ seeking better job

29 IMDH, 'List of Haitians granted permanent residence in Brazil'.

30 UNHCR, 'Brasil troca refúgio de angolanos e liberianos por residência permanente no país'.

31 CDH, 'Brasil esconde emergência humanitária no Acre'.

32 This 'refugee camp' was closed by the state of Acre in April 2014.

33 Cotinguiba and Pimentel, 'Apontamentos sobre o processo de inserção social dos haitianos em Porto Velho'.

opportunities than existed in Acre.³⁴ It is estimated that about 2,500 Haitians have arrived in Porto Velho from 2011–13, of whom more than 800 moved on to states like São Paulo and Rio Grande do Sul to seek other job opportunities. Of the 1,700 Haitians who remained in Porto Velho, only 20 per cent are unemployed.³⁵ The relatively lower numbers of Haitians in Rondonia compared with Acre means that the Rondonia state authorities have had greater success in implementing policies to respond to this flow. Civil society has also provided support in terms of finding jobs, learning Portuguese and obtaining information about migrants' rights.³⁶ Nonetheless, although it is less alarming than in Acre, most Haitians still encounter prejudice in the job market and end up with insecure and short-term forms of work.³⁷

Finally, it has become evident that the Brazilian humanitarian visa scheme has not entirely achieved its objective of preventing irregular migration, human smuggling and the various risks faced by Haitians en route. The practical difficulties attendant on securing a humanitarian visa – particularly while the quota system was in operation – meant that large numbers of Haitians still resorted to expensive 'coyotes' to help them reach Brazil and thus continued to be vulnerable to great dangers on their journey.³⁸ Nonetheless, with the removal of visa quota numbers, it is hoped this unmet demand on the part of Haitians will to some extent be addressed. Greater collaboration between the countries of transit and Brazil may also be a viable proposition.³⁹

Law, policy and mixed motives in the Brazilian context

The legal/policy response of the Brazilian authorities was, in essence, ad hoc in nature. Although refugee law offered a means of responding to the flow, this particular framework was not applied. Instead, an ad hoc measure which afforded the authorities a much greater degree of discretion in determining the scope and conditions of the scheme was employed. The use of ad hoc 'humanitarian' policy measures is not unusual in the Brazilian migration

34 Rondonian State Secretary for Social Assistance, Marcio Felix Ribeiro. According to Cotinguiba and Pimentel, this state has a long history of economic cycles, such as the rubber and gold ones, which have attracted thousands of people from other places in search of jobs. Recently, two hydroelectric plants have been built in Porto Velho, the state capital, creating a new economic cycle and drawing in new workers, particularly in the field of civil construction.

35 Portal da Amazônia, 'Haitianos: até 80% dos imigrantes conseguem emprego em Porto Velho'.

36 Cotinguiba and Pimentel, 'Apontamentos sobre o processo de inserção social dos haitianos em Porto Velho'.

37 Interview with Sister Maria Ozania, coordinator of the Pastoral of Migrants, conducted by news portal G1 in 2013.

38 Information from the NGO, Conectas Human Rights.

39 Quoting Milesi in Frabasile, 'Interview with Rosita Milesi'.

context, as with the current government's de facto amnesty and two formal amnesties for irregular migrants since coming to power in 2003.⁴⁰ The same tendency can also be discerned in the current administration's response to the Syrian refugee crisis.⁴¹

As in eras past, the shift in migration law and policy which the Haitian humanitarian visa scheme represents, is as much a response to the economic, political and security interests of the incumbent national government as a principled treatment of the issue. Some of these interests are undoubtedly domestic or inward-facing in nature. On the one hand, the visa scheme responds to national security concerns about the practical impossibility of detaining the uncontrolled immigration of Haitians. This is mainly due to their movement through Brazil's extensive and relatively porous land borders via the territory of smaller politically unstable neighbours, especially towards the poorer states of the country's northern region. On the other hand, it is likely that the source of cheap labour, which the mass of Haitian immigrants represents, is useful for the construction industry at a time when the Brazilian government has been preparing the country for the recent World Cup and the forthcoming Olympic Games.

By qualifying the visa scheme with the adjective 'humanitarian', the policy also speaks directly to Brazil's foreign policy objectives. Indeed, it is clear that the Partido Trabalhista Brasileiro (Labour Party - PTB) – since coming to power in 2003 – has positioned Brazilian foreign policy more firmly towards international cooperation. It is relevant to note that, in the field of international migration, Brazil has recently joined the International Organization for Migration (IOM), its previous partner in data-gathering on the subject of illegal migration flows by Haitians.⁴² The measures Brazil adopted were also highlighted in the speech by the National Secretary of Justice at the UN High Level Dialogue in September 2013, aimed at finding practical measures to enhance cooperation on international migration.⁴³ By describing the visas in humanitarian terms, the Brazilian government was thus able to bolster its

40 *Repórter Brasil*, 'Anistia a estrangeiros beneficia mais de 40 mil pessoas'.

41 In late 2013, the Brazilian National Committee for Refugees adopted its Resolution 17, authorising – on humanitarian grounds – any person affected by the Syrian conflict (even if not a Syrian national) to apply for a special visa at a Brazilian consulate close to their region for entry to Brazil and the chance to apply for refugee status. Even if this measure owes much to pleasing Brazil's Syrian population, the numbers expected to arrive through this scheme are fractional in comparison with the numbers of Haitians. See UNHCR, 'Refúgio no Brasil – Uma análise estatística (Janeiro de 2010 à Outubro de 2014)'.

42 *Repórter Brasil*, 'Anistia a estrangeiros'.

43 Brazil Justice Ministry, 'Na ONU, Brasil expõe política de migração baseada em direitos humanos'. This full-text announcement by the National Secretary of Justice, Paulo Abrão, at the Second High-Level UNHCR Dialogue, emphasised Brazilian responsibility and solidarity in relation to the new migration flows, especially those of a south-south character, or which were motivated by environmental changes.

positive image and human rights credentials on the international political stage and to assert its role as a leader among its peers in the southern hemisphere. These policies have to be understood in the context of its ultimate political objective of securing a permanent seat on the UN Security Council.

Conclusion

Brazil's migration policy is based predominantly on economic and political interests, such as the country's international reputation, rather than upon a principled treatment of the subject area. Nowhere is this tendency more clearly illustrated than in relation to the flow of Haitians arriving in Brazil following the 2010 earthquake and the humanitarian crisis that it provoked in Haiti. This is not to suggest that the regime of permanent residency on humanitarian grounds, created for the Haitians, has not had positive effects in providing aid to those fleeing the conditions in Haiti, producing a positive precedent for future migration policy, and relieving the burden imposed by irregular Haitian migrants on the poorer border states of Brazil.

Nonetheless, the ad hoc nature of the Brazilian response to the outflows from Haiti goes back to the lack of a coherent and human rights-driven policy on migration and asylum, which reflects the actual dynamics of the phenomenon rather than other instrumental interests.⁴⁴ Indeed, at present, the adoption of such ad hoc measures is really the only option open to Brazilian immigration bodies – such as the National Committee for Refugees, National Committee for Immigration and Brazilian Ministry of Justice – in view of the outdated migration law framework within which they have to operate. Ultimately, the absence of a coherent and rights-oriented policy in Brazil impacts negatively on migrants' rights. Moreover, crises, like that of the Haitian outflow, are addressed only when the situation has reached the point of being almost uncontrollable.

If Brazil really wants to be a major player in the Americas and on the global stage among its peers in Africa and Asia, it needs to respect human rights treaties and principles, as well as promote international cooperation in areas other than just economic and state security. Rather than simply responding to each new migration flow as a crisis, it is necessary to create a consistent mechanism for the protection of such migrants, ensuring that they are provided with the rights pertaining to them. Undoubtedly, this would involve the repeal or adjustment of the 1980 Migration Law, replacing it with a modern framework capable of adequately responding to contemporary migration flows.

In this regard, a new Brazilian migration law is being discussed in the Chamber of Deputies, although the National Congress has shown little interest

44 Quoting Milesi in Frabasile, 'Interview with Rosita Milesi'.

thus far in approving it. Instead, the Brazilian government has started the process of legislative reform through two other processes: 1) the creation of a working group for the National Conference on Migration and Refugees in 2014, based on the need for effective public policy which affords migrants in the national territory the rights and guarantees provided for in the treaties to which Brazil is a party and involving the participation of a wide range of actors;⁴⁵ and 2) the formation of a committee of experts to propose a draft law on Migration and Promotion of the Rights of Migrants in Brazil.⁴⁶ There are indications that these processes may result in the creation of a National Agency for Migration and new criteria for the granting of visas on humanitarian grounds.

Finally, there is a growing recognition within the region that the form of irregular migration exemplified by the Haitian case post-2010 requires a response at the regional level, which is based on principles of respect for the human rights of the migrants involved. In relation to this, 'The Mercosur Declaration of Principles on International Protection of Refugees', adopted on 23 November 2012, seems positive. It not only recognises the importance of *non*-restrictive migration policies, but addresses policy alternatives for identifying and assisting those who need protection in situations which may fall outside the scope of traditional refugee law, and also addresses the need to strengthen regional cooperation in this field. It is in this way that an outward-facing Brazilian foreign policy might lead in the development of appropriate humanitarian responses to such new and complex migratory flows.

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45 Brazil Justice Ministry 'Na ONU, Brasil expõe política de migração'.

46 Brazil Justice Ministry, Ordinance no. 2662-22, 2013. Diário Oficial da União, Section 2, 30 Oct. 2013, p. 41.

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