

**Presentation of the MERCOSUR Institute for Human Rights Policies  
Side Event Platform for International Cooperation on Undocumented Migrants  
(PICUM)  
Children and Irregular migration  
September 27, 2012**

The MERCOSUR Institute for Human Rights Policies is a regional organization created in 2009 with the aim of providing technical cooperation and assistance in the formulation, design, implementation and articulation of public policies on human rights to the members of the Southern Common Market, Argentina, Brazil, Paraguay, Uruguay and Venezuela.

**1. THE MERCOSUR AND THE COMMITMENTS IN MIGRATION AND HUMAN RIGHTS: THE ADVISORY OPINION**

The respect for human rights in policies on migration is an important topic in the agenda of the member states of MERCOSUR. In this sense, one of the working focus of this institute since its creation is migration and human rights law. Mercosur countries have introduced these topics in different meetings and spaces of international dialog. They have also signed bilateral, regional and sub-regional agreements that recognize the human rights of migrants independently of their immigration status. In addition, they have ratified the main international treaties on human rights and, in particular, on the rights of the child.

This framework allowed the presentation of a unique initiative in the region that was a request for an advisory opinion about the rights of migrant children before the Interamerican Court of Human Rights made by the Mercosur countries on July 2011. The request has been declared admissible and it has received more than 30 presentations.

The document presents the countries' consensus about different topics, in particular those related to human rights standards that should be applied for the protection of undocumented children. I will try to summarize them in the following minutes.

**2. STANDARDS FOR THE PROTECTION OF THE RIGHTS OF MIGRANT CHILDREN IN IRREGULAR CONDITIONS**

According to the opinion of different international human rights organizations migrant children without a regular immigration status (or if their parents have an irregular immigration status), are exposed to a lack of protection due to the combination of age and immigration status. In this sense, they require specific and adequate protection of their rights from the State (of origin, of transit, and destination of migrants) and other concerned actors.

Apart from the important progress made in the adaptation of the immigration laws to the standards of the international human rights, the request of the advisory opinion is based on a grave and pending situation in the continent of violation of the human rights of children, in particular those who are undocumented.

In the first place, it could be pointed out that a still-frequent feature in some laws and migratory policies is the lack of the corresponding interrelation with the system of protection of the rights of the child. This limits the capability of public institutions to adequately define the measures that they must adopt whenever a child enters a country in an irregular manner.

Moreover, one of the most urgent problems caused by this lack of interrelation between migratory policies and child protection policies is the absence of adequate procedures to identify the different risk situations faced by those children in mixed migration flows. The determination of what is, in each case, the best interest of the child, necessarily implies the establishment of procedures and institutional agreements suitable to this end. For instance, in different countries of the region, a child may be deported based on his or her immigration status or the immigration status of his or her family regardless of the analysis of other issues based on the child's best interests and affecting the child's fundamental rights.

In the second place, due process of law is a right that must be ensured to all persons subject to the jurisdiction of a State regardless of their migratory status, especially when dealing with children.

The third issue follows the standards established by the Interamerican Court. The Mercosur countries believe that when it comes to children the rule should be the non-detention or deprivation of liberty. When migrant children are with their parents, in the decision-making process competent authorities should consider the child's right to family unity, to an adequate level of development, to education, to health, to recreation and game, among others. Therefore, in order to guarantee the rights of the child and to avoid the detention of the family, respect for family unity should be maintained without resorting to a custodial measure. As to children who are separated from their parents, international organizations emphasize that, as a general principle, they should never be detained. In this case, States must adopt measures of protection of rights and provide adequate responses to solutions based on the family and the community.

The next point refers to the principle of non-refoulement. The Committee on the Rights of the Child highlighted the prohibition to return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm. According to this affirmation, the Mercosur notes that no child may be deported to a territory in which his or her life, survival, development or freedom are at risk. Therefore, the goal is the identification of the solution that adequately respects the rights of the child that are threatened or affected.

The last topic is related to the right to a family life. It is impossible to conclude that the separation as a result of the removal of the parents due to their migratory status is the measure that most respects the child rights. The right of a child not to be separated from his or her parents and the principle of family unity must be strictly taken into account in the assessment of the migratory situation of the parents, especially when ordering measures such as deportation.

### 3. THE MERCOSUR LAW FRAMEWORK AND ITS IMPLEMENTATION

#### a. At the regional level: The Residence Agreement

The region has had a lot of progress in terms of protection of fundamental rights of migrant persons. A good example is the Residence Agreement for the Mercosur States, the main treaty for migratory issues. It is based on equal treatment and the recognition of equal rights between local people and immigrants, as an essential step to strengthen the regional integration process.

This agreement promotes the regularity migration, establishes equal treatment with nationals, and recognizes fundamental rights to foreigners regardless of their status. It is

important to mention, that there are also other specific regional agreements granting rights to migrants regardless of their status, for example the right to education.

This Mercosur Institute has elaborated report, with the technical assistance of three experts (Marcela Cerrutti, Alejandro Morlachetti y Deisy Ventura) about the implementation of some of the Mercosur's regional treaties related to the protection of the rights of migrant children.

In the following part of this presentation we will mention the main conclusions of this report.

b. At the national level

The countries of Mercosur have made significant efforts in this area, enacting laws that are international models. For example, some countries have adapted their migration legislation according to international standards in the field, and have ensured the human right to migrate as well as the protection of certain rights regardless the person's migratory status. The rest of the countries in the region are in a reforming process of their migration laws according to these standards. However, it can still be brought to the regional level the need to harmonize the domestic legislation of countries with multilateral and international agreements.

It should be pointed out that, although the specific derivations of irregular migration depends on local legislation, the situation of children should respect international standards established in human rights treaties ratified by Mercosur countries. However, in some of them there is a significant gap between the legal recognition of the rights of migrants in irregular status and the ability of States to guarantee them.

The first obstacle is the lack of information systems and database registration as well as mechanisms for public information dissemination. This situation has many negative effects, such as: the absence of production data for the formulation of public policies for the promotion and protection of human rights of migrant persons; the difficulties for an effective social participation and the implementation of mechanisms to control public decisions; finally, the difficulties for obtaining information about the status of implementation of regional and local regulations.

The second issue in most countries is linked with difficulties in the processing of documents which are essential to have access to the regular migrant status and, therefore, to the rights conferred. For instance, there have been complaints about the lack of information and advice for migrant persons, the difficulties in obtaining certifications in countries of origin, the slow filing procedures, and the problems to register children with the consent of only one of the parents.

This situation brings a set of problems, such as obstacles in the exercise of certain rights like education and health, resulting from the negligence or ignorance of the law by public actors.

Moreover, the irregular situation of children and their parents have negative effects for the access to social policies, like social security programs. Some of the exclusions are subtle because the difficulties for the access to the right are a consequence of excessive requirements imposed by the offered services or programs.

In addition, there are still legislations that contradict some of the basic principles of human rights in the field, such as the principle of non-refoulement, family reunification, not

criminalization of irregular migration, standards on deportation and expulsion measures, and due process, among others.

Finally, it is essential to strengthen in the region the link between the immigration system and the system of protection of children's rights. The joint work of both systems would avoid a set of problems that nowadays children in irregular situations face. This necessary articulation will also promote the implementation of procedures to identify the different situations in which migrant children are as well as the correct measures that the States should take in those cases, respecting their fundamental rights.

Besides these mentioned obstacles, it is important to highlight that inside Mercosur countries there have been many progresses in terms of social rights protection for migrant children no matter their status. Most of these laws and policies have been successful.

#### 4. SOME REGIONAL INITIATIVES

There is a new and really interesting regional initiative that the Mercosur countries have recently approved.

They have identified the need of strengthen certain practices, policies and laws with the aim of promoting an effective implementation of the existing agreements for the protection of the rights of migrant children.

In this regard, they have adopted an action plan for the protection of migrant children and their families in the region. Some of the main objectives of this proposal are: track on the effective implementation of existing regional agreements in this field, in particular the Residence Agreement; strengthen existing mechanisms to protect rights of migrant children and their families; coordinate joint actions that are carried out in the different areas of Mercosur; promote the exchange of information between countries as well as the international cooperation; and finally, identify good practices and barriers for the implementation of existing regional agreements.

It is a new project that should be developed and the Mercosur Institute will cooperate with the countries in its implementation.