

# **ACCESS TO JUSTICE FOR CHILDREN: MONACO**

*This report was produced by White & Case LLP in March 2014 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.*

## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Ratified international instruments do not automatically have the force of law in Monaco; rather, they must be incorporated through implementing legislation. The “Ordonnance Souveraine” n. 11.003 of 1 September 1993 declared the CRC executive in domestic law.<sup>1</sup>

### **B. Does the CRC take precedence over national law?**

The CRC theoretically takes precedence over national law as it was declared executive by the Ordonnance n. 11.0003. However, courts have favored domestic law over the CRC (see part I.E below).

### **C. Has the CRC been incorporated into national law?**

Yes, Ordonnance n. 11.003 incorporates the CRC into national law, however, Monaco has entered a reservation to Articles 7 and 40 of the Convention. The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography was also incorporated.<sup>2</sup>

### **D. Can the CRC be directly enforced in the courts?**

As in French law, the CRC can be directly enforced in the courts if the provisions have been deemed self-executing.<sup>3</sup>

### **E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?**

As Monaco is a small country with a tiny population, extensive research produced only two cases in which the courts cited the CRC. The first

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<sup>1</sup> Ordonnance Souveraine n. 11.003 rendant exécutoire la convention des Nations Unies relative aux droits de l'enfant, 1 September 1993, available in French at : <http://www.legimonaco.mc/305/legismclois.nsf/ViewTNC/9EF9AE814170BB2AC125773F003BEDC0!OpenDocument>.

<sup>2</sup> See <http://www.legimonaco.mc/305/legismc.nsf> (Loi n. 1.335 du 12/07/2007 portant approbation de ratification du protocole facultatif à la convention relative aux droits de l'enfant concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants).

<sup>3</sup> Information provided to CRIN by Bernard Gastaud, member of the Committee on the Rights of the Child.

case—a court of appeals decision, dated November 3, 2006—concerns parental visitation rights.<sup>4</sup> The court concluded that the mother’s right to maintain parental ties with the child overrode the child’s right under Ordonnance n. 11.0003 to voice an opinion on any matter affecting the child and to have that opinion taken into consideration. Thus, although the child did not want to communicate with the mother, the court ruled in favor of the mother’s right to visitation. The second court of appeals decision, a criminal case dated October 22, 2007, merely mentions Ordonnance n. 11.003 in connection with the abandonment and mistreatment of a child.<sup>5</sup> Both cases indicate that the CRC and related legislation is relevant and enforceable in Monaco’s courts, but not frequently litigated.

## II. What is the legal status of the child?

### A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

According to Article 334 of the Civil Code of Procedure,<sup>6</sup> children who are 15 years old and older make full use of the court system as if they were of majority age. Moreover, pursuant to Article 830 of the Civil Code of Procedure, a judge can hear a civil case on its own motion in order to protect minors (children under the age of eighteen).<sup>7</sup>

### B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Children below fifteen years old are deemed “incompetent” and must engage a representative to assert a claim.<sup>8</sup> When the representative is conflicted (e.g. a parent when the parent is a party or central to the matter that gave rise to the lawsuit)<sup>9</sup> then the presiding judge will nominate an ad hoc representative.

### C. In the case of infants and young children, how would cases typically be brought?

Under Article 307 of the Civil Code,<sup>10</sup> a legal representative must be appointed to enable the minor to pursue civil claims on their own behalf.

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<sup>4</sup> Monaco Court of Appeals, 3 November 2006, C. R. v. S. M.. Available in French at : <http://www.legimonaco.mc/305/legismc.nsf/c6f35024080d6561c1257a4b003c5f22/b638eb128440423dc1257de4002f3819!OpenDocument>.

<sup>5</sup> Monaco Court of Appeals, 22 October 2007, M. S. and J. S. v. C. B.. Available in French at : <http://www.legimonaco.mc/305/legismc.nsf/c6f35024080d6561c1257a4b003c5f22/4ccca87933e8899fc1257de4002f39d1!OpenDocument>.

<sup>6</sup> Loi n. 1.135 du 16 juillet 1990.

<sup>7</sup> Loi n. 894 du 14 juillet 1970.

<sup>8</sup> See Article 334 (Loi n° 1.135 du 16 juillet 1990).

<sup>9</sup> Id.

<sup>10</sup> Loi n. 1.278 du 29 décembre 2003.

- D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal aid is available to anyone, including children and their representatives, who meets the eligibility requirements and who applies to the Legal Aid Office.<sup>11</sup> For further detail, please see part IV.B below.

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

Research did not reveal any additional conditions or limits.

### III. **How can children's rights violations be challenged before national courts?**

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

With respect to administrative and Constitutional matters, any natural person or legal entity that has legal capacity and can demonstrate an interest in the matter may refer a case to the Supreme Court.<sup>12</sup> Sovereign Ordinance No. 2.984 (16 April 1963) sets forth the procedural rules for the Supreme Court.<sup>13</sup> For all other civil or criminal matters, a legal challenge can be brought before the Justice of the Peace—who can only adjudicate those matters specifically designated to him by law—or the court of first instance which has general jurisdiction over claims.<sup>14</sup>

Once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child under the third Optional Protocol to the CRC,<sup>15</sup> which Monaco has ratified. Complaints can be made directly by both an individual child or a group of children, or indirectly, on their behalf by an adult or an organisation.<sup>16</sup> The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children or the Optional Protocol on the involvement of children in armed conflict<sup>17</sup> and must have occurred after the entry into force of the Protocol on 24 December 2014.<sup>18</sup>

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<sup>11</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/Legal-aid>.

<sup>12</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Supreme-court>.

<sup>13</sup> Id.

<sup>14</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Justice-of-the-Peace>.

<sup>15</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en).

<sup>16</sup> Ibid., Article 5.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., Article 7(g).

Anonymous complaints are inadmissible and so are complaints not made in writing.<sup>19</sup> In addition, only complaints made in one of the working languages of the UN will be accepted.<sup>20</sup> After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.<sup>21</sup>

B. What powers would courts have to review these violations, and what remedies could they offer?

The Supreme Court may declare a law null and void on grounds of unconstitutionality and award compensation.<sup>22</sup> In administrative matters, the Supreme Court may annul decisions by administrative authorities and Sovereign Ordinances in the enforcement of the law as an abuse of power and award compensation.<sup>23</sup> Pursuant to different procedures, the Justice of the Peace is empowered to issue orders to pay, garnish salaries and wages, award compensation and fine or imprison criminal offenders.<sup>24</sup> The court of first instance is not limited in the types of remedies it offers and includes specialized judges such as the guardianship judge who may take those measures necessary to protect minors and has the power to adjudicate cases dealing with family law.<sup>25</sup>

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

It does not appear to be possible to bring an action without naming a specific victim because of the requirement that the full identity and domicile of the plaintiff are included in the summons to the civil court of first instance.<sup>26</sup> With regards to challenging a law or an administrative decision, legal entities are allowed to refer a case to the Supreme Court, as long as they can demonstrate an interest in the case. They can do so without naming a specific victim.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Research did not produce any results.

E. Are non-governmental organisations permitted to file challenges to potential

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<sup>19</sup> Ibid.

<sup>20</sup> Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at: <http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

<sup>21</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

<sup>22</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Supreme-court>.

<sup>23</sup> Id.

<sup>24</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Justice-of-the-Peace>.

<sup>25</sup> See

[http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance#eztoc1011733\\_3\\_5](http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance#eztoc1011733_3_5).

<sup>26</sup> Id.

children's rights violations or to intervene in cases that have already been filed?

Article 28 of the Civil Code<sup>27</sup> permits duly authorized proxies, such as associations given a power of attorney, to represent parties to an action.

Article 18 of the “Ordonnance sur l'organisation et le fonctionnement du Tribunal Suprême” (regulating the functioning of the Supreme Court) allows parties to the case to ask the Court to inform a third party<sup>28</sup> of the proceeding. The interested third party may then submit observations.

Furthermore, the Supreme Court tacitly allows voluntary, unsolicited interventions by third parties interested in the case, although there is no provision in the legislation regulating the Court.

**IV. Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

To institute a civil proceeding at the civil court of first instance, a summons must be served by a court bailiff referring the case to the court that stipulates: (i) the name of the tribunal to hear the claim, (ii) the date and time of the court appearance, (iii) the name and domicile of the plaintiff and addressee of the summons, (iv) the name of the recipient of the summons, (v) the name, place of residence and signature of the bailiff and (v) a brief statement that explains the nature of, and grounds for, the claim.<sup>29</sup> The guardianship judge is a specialized judge who may claim jurisdiction over all matters concerning the protection of minors.<sup>30</sup>

Criminal cases are referred to the correctional court of first instance (i) as a result of a referral from the examining judge<sup>31</sup> or from higher courts in the event of an appeal, (ii) by direct referral from the Public Prosecution Department or the plaintiff, (iii) as a result of voluntary appearance by both parties or (iv) through appearance<sup>32</sup> of the accused upon notification by the Public Prosecution Department. Crimes committed by minors are tried

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<sup>27</sup> Modifié par la loi n. 1.278 du 29 décembre 2003; remplacé par la loi n. 1.284 du 7 juin 2004.

<sup>28</sup> Ordonnance n. 2.984 du 16/04/1963 sur l'organisation et le fonctionnement du Tribunal Suprême

<sup>29</sup> See

<http://en.gouv.mc/Gouvernement-et-Institutions/Les-Institutions/La-Justice/Le-Tribunal-de-Premiere-Instance>

<sup>30</sup> See

[http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance#eztoc1011733\\_3\\_5](http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance#eztoc1011733_3_5).

<sup>31</sup> The examining judge is a judge who specializes solely in criminal issues. Cases are referred via request of the Public Prosecution Department or complaint by an injured party. Id.

<sup>32</sup> Id.

before the correctional court.<sup>33</sup> Alternatively, a criminal case is brought before the Justice of the Peace, who presides over the police court, pursuant to a referral or summons issued to the accused by the Public Prosecution Department or plaintiff seeking damages.<sup>34</sup>

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Legal aid is available for all legal matters so long as there are grounds for legal action and the Monegasque court does not lack jurisdiction.<sup>35</sup> In criminal cases, however, legal aid is only granted to the party claiming damages.<sup>36</sup> Furthermore, legal aid is limited to those individuals whose income does not meet a threshold amount specified by Sovereign Ordinance and whose application is approved by majority vote of the Legal Aid Office.

<sup>37</sup> Provisional legal aid is available in urgent matters by submitting a letter in lieu of the application when conditions exist that threaten the applicant's life.

<sup>38</sup> Once approved, an applicant receives fees for registration, expert reports, translation, interpretation, insertion, witnesses and any fees necessary to maintain the proceeding in addition to the amounts owed to the Treasury for stamp duties.<sup>39</sup> The recipient of legal aid is also entitled to the services of an avocat-défenseur and lawyer or junior lawyer who are compensated by the State.<sup>40</sup>

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

The relevant statute<sup>41</sup> that governs the legal profession is silent with respect to pro-bono representation. As above, however, a children's rights organization could qualify as an association under Article 28 of the Civil Code and thus could represent a child complainant if duly authorized.<sup>42</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about

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<sup>33</sup> Id.

<sup>34</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Justice-of-the-Peace>.

<sup>35</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/Legal-aid>.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Loi n. 1.047 du 28/07/1982 sur l'exercice des professions d'avocat-défenseur et d'avocat.

<sup>42</sup> See Modifié par la loi n. 1.278 du 29 décembre 2003; remplacé par la loi n. 1.284 du 7 juin 2004.

violations of their rights that occurred when they were children?

Monaco's statute of limitations varies from 1-10 years depending on the nature of the crime, infraction, or contravention. Research did not produce any special provisions with respect to young adults.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

It appears there are no standard rules of evidence for either the Civil Code or the Penal Code, and case law indicates that questions of fact are investigated and settled before trial. A social worker assists the guardianship judge in acquiring information for trial.<sup>43</sup> The examining judge is empowered to take all measures necessary to establish the truth, such as visiting a crime scene, interviewing witnesses, ordering<sup>44</sup> or undertaking for himself a search and issuing subpoenas or warrants.<sup>44</sup> Based off of the two cases that reference the CRC, furthermore, it looks as though written testimony is admissible in civil cases.

In divorce proceedings before the court of first instance, article 202-203 of the Civil Code authorizes the judge to hear minor children or request a third person to ask children their opinions.<sup>45</sup> Monaco has also signed the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and has passed Bill No. 869 on controlling and preventing specific types of violence that stipulate that a judge must take into consideration the child's views to make a determination.<sup>46</sup>

In both civil and criminal proceedings, children over the age of 15 can testify on the same footing as adults, whereas children under that age are not required to take oath.<sup>47</sup> The normal practice of the courts is to hear testimony from children from the age of 13, however, there is no obligation on children to testify.<sup>48</sup>

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

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<sup>43</sup> See "The Guardianship Judge" at

<http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance>.

<sup>44</sup> See "The Examining Judge" at

<http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance>.

<sup>45</sup> See "Effects of divorce on children" in the combined second to third periodic report of Monaco, available at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMCO%2f2-3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMCO%2f2-3&Lang=en).

<sup>46</sup> See "Respect for the views of the child" at id.

<sup>47</sup> UN Committee on the Rights of the Child, *Concluding Observations to the initial report of Monaco*, CRC/C/28/Add.15, 9 June 1999. Available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f28%2fAdd.15&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f28%2fAdd.15&Lang=en).

<sup>48</sup> Ibid.

The court of first instance generally reaches a decision within 1-8 weeks.<sup>49</sup>  
The Supreme Court reaches a decision within 18 months.<sup>50</sup>

G. Appeal. What are the possibilities for appealing a decision to a higher court?

With respect to civil or administrative matters, any decision made by the court of first instance may be appealed to the court of appeal within thirty days of the judgment.<sup>51</sup> The Court of Appeal also handles appeals in criminal cases from the correctional court within ten days of the judgment.<sup>52</sup> The court of revision is empowered to hear appeals from the court of first instance and from the court of appeal; it is the court of last resort.<sup>53</sup>

The Supreme Court decides as first and last instance.<sup>54</sup>

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Monaco courts are not bound by precedent, but any relevant positive or negative decision would be highly persuasive.<sup>55</sup> Ultimately, it is the Prince's prerogative to initiate any change to the laws in response to any negative or positive decision.<sup>56</sup>

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

There should be no concerns or challenges. The enforcement of positive decisions is likely a straightforward process and governed by numerous procedural rules.

V. **Additional factors**. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Monaco has appointed an Ombudsperson who is responsible for all human rights protection activities and addressing all questions concerning human rights.<sup>57</sup>

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<sup>49</sup> See "Conduct of Proceedings before the Court of First Instance" at <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-First-Instance>.

<sup>50</sup> See "Procedure before the Supreme Court" at <http://en.gouv.mc/Portail-du-gouvernement/Government-Institutions/Institutions/Justice/The-Supreme-court>.

<sup>51</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-Appeal>.

<sup>52</sup> Id.

<sup>53</sup> See <http://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Court-of-Revision>.

<sup>54</sup> See "Jurisdiction of the Supreme Court" at [http://en.gouv.mc/Portail-du-gouvernement/Government-Institutions/Institutions/Justice/The-Supreme-court#eztoc297517\\_3](http://en.gouv.mc/Portail-du-gouvernement/Government-Institutions/Institutions/Justice/The-Supreme-court#eztoc297517_3).

<sup>55</sup> See <http://www.lowtax.net/lowtax/html/jmccfir.html>.

<sup>56</sup> See <http://monacodc.org/institutions.html>.

<sup>57</sup> See



The Ombudsperson has the power of investigation within the Monegasque administration and can request documents or schedule hearings with government officials.<sup>58</sup> Furthermore, to ensure effectiveness, the office of the Ombudsperson is financially and administratively independent.<sup>59</sup> The Ombudsperson cannot however intervene or submit observations in Court proceedings.

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<http://service-public-particuliers.gouv.mc/Relations-avec-l-Administration/Protection-des-droits-et-Mediation/Protection-des-droits-et-Mediation/Le-Haut-Commissariat-a-la-Protection-des-Droits-des-Libertes-et-a-la-Mediation>.

<sup>58</sup> See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13812&LangID=E>.

<sup>59</sup> Id.