

REPUBLIC OF SAN MARINO
SINGLE COURT

**ANSWERS TO THE QUESTIONNAIRE CONCERNING THE HAGUE CONVENTION ON
INTERNATIONAL CHILD ABDUCTION**

I – Implementing legislation and/or regulation

(a) Implementing legislation and regulation for the Convention are neither necessary nor indispensable.

(b) This Convention on the Civil Aspects of International Child Abduction – like all international conventions – is incorporated into the domestic law by enforcement decree issued by the Captains Regent in conformity with the decision of the Great and General Council (Parliament).

This Convention was made enforceable by Parliament Decree n. 122 of 24 November 2006, entered into force on the same date.

This Convention is now in force and is therefore part of domestic law: no other incorporation mechanisms are necessary.

II – Locating children

The Republic of San Marino has a limited territorial extension (61 square kilometres) and is an enclave within the Italian territory. Therefore, locating children is quite easy.

The “agencies” involved in locating children are the Minors’ Service, the (military) Corps of the Gendarmerie and of the Border Guard and the Civil Police.

Law enforcement agencies (Gendarmerie, Civil Police and Border Guard) constantly control the territory and have fixed posts throughout the Republic. The Gendarmerie established a specific minors’ office which closely collaborates with the Minors’ Service.

Therefore, Law enforcement agencies may take any initiative useful to locate children in an expeditious manner. Moreover, worth noting is that the Republic of San Marino has recently joined the Interpol and some specific agreements have been concluded with the Italian Republic.

Therefore, locating children is extremely easy, also thanks to a considerable social control carried out with the collaboration of the citizens and various public services.

III – Central Authority

(a) San Marino designated the Single Court of the Republic of San Marino as its Central Authority under Article 6 of the Convention. The Single Court is located in Borgo Maggiore, Via Ventotto Luglio – Telephone numbers: +378 (0549) 882619 – 882604. Contact persons: see below.

(b) The following Judges of the Single Court are the contact persons:

- Mr. Gilberto Felici, Law Commissioner. Phone number: +378 (0549) 885489

- Mrs. Valeria Pierfelici, Law Commissioner. Phone number: +378 (0549) 882609.

Outside working hours, please contact the Operator of the Gendarmerie.

(c) To fulfil its tasks and functions under Article 7 of the Convention, the Central Authority relies on the cooperation and facilities of the Foreign Affairs Department, the Minors’ Service and the law enforcement agencies.

IV - Judicial procedures

(a) The San Marino authority responsible for deciding applications for return or concerning access rights under the Convention is the judicial authority, in particular the Law Commissioner (Judge), who is part of the Single Court, that is the Central Authority. In this regard, Article 1 of Qualified Law n. 145 of 30 October 2003 stipulates that "judicial bodies exercise ordinary and administrative jurisdiction within a Single Court. [...] The ordinary jurisdiction division is subdivided into civil, criminal and children's and family protection units, to which the Head Magistrate assigns the single Law Commissioners". The Law Commissioner assigned to the children's and family protection unit is therefore responsible for implementing the Convention. This provision incorporates what already provided for by Article 10 of Law n. 83 of 20 July 1999, according to which the Civil and Criminal Court (now ordinary jurisdiction division of the Single Court) includes the "Juvenile Court, composed of the Law Commissioner as Juvenile Judge. The decisions of the Juvenile Court may be appealed against to the Judge of Civil Appeals".

(b) The process by which an order for return of children to their habitual residence or for access/visitation is extremely expeditious and takes place under the rules of juvenile proceedings. The ordinary procedure (both domestic law proceedings and proceedings concerning the application of the Convention) before the Law Commissioner as Juvenile Judge is extremely expeditious and is established by customary rules governing trials in the field of friendly proceedings, which provide the Judge with broad discretionary trial powers, the only restriction being the right to defence of the interested parties. Indeed, according to San Marino law, the right to be heard in a proceeding is always guaranteed. (Article 15 of the Declaration on the Citizens' Rights).

Being juvenile proceedings exclusively aimed at protecting children, in order to enable a harmonious development of their personality, they are included in the voluntary jurisdiction category, where the conflict merely implies personal hearing of the interested parties, who are however entitled to defend themselves and provide evidence.

More specifically, and with special reference to the Convention, the process can be summarized as follows:

- a) Once the application for the return is received by the Central Authority, the Law Commissioner immediately adopts the necessary measures to protect the child, by entrusting the Minors' Service with the task of locating and taking care of him/her, as well as of finding, if necessary, an appropriate and safe placement. The Law Commissioner notifies the Central Authority thereof.
- b) Subsequently, in application of Article 15 of the Convention and through the Central Authority, the Judge orders the applicant to submit a decision or certificate issued by the competent authority of the State of habitual residence of the child attesting the wrongfulness of the child's removal or retention under Article 3 of the Convention. He/she then urgently summons (within a maximum of five days) the author of the wrongful removal, who has the right to oppose the return of the child by demonstrating the occurrence of the facts provided for by Article 13 of the Convention.
- c) After the hearing, the Judge acquires any useful information through the Central Authority, the law enforcement agencies and the Minors' Service. He/she then examines the evidence submitted by the opponent and, if necessary, informs the person requesting the child's return so that he/she can counter the evidence submitted by the opponent. If needed, the Judge hears the child and then issues a decision. This procedure can take a maximum of seven-ten days.
- d) The Judge's decision is notified to the opponent, the person requesting return and the child, for whom a guardian is appointed to represent him/her and protect his/her interests. If the

applicant is not present on the territory of the State, the notification is made to the Lawyer appointed by the Court and, at the same time, the Judge assigns the Central Authority the task of informing the applicant.

- e) If the Judge establishes the wrongfulness of the removal in application of Article 3 of the Convention, he/she orders the child's return. The opponent may appeal against this decision within the following thirty days to the Judge of Civil Appeals for legitimacy reasons. If not suspended by the Judge, the order is nonetheless executed. The same right of appeal is recognized to the child in case he/she has appealed under Article 13 of the Convention.
- f) On the contrary, if the Judge establishes the occurrence of the circumstances envisaged by Article 13 of the Convention, he/she refuses to order return and the applicant may appeal to the Judge of Civil Appeals, always for legitimacy reasons, within thirty days. As already mentioned, the Judge may refuse to order return only in the presence of the conditions under Article 13 of the Convention.

(c) In conformity with Article 2 of Regency Decree n. 157 of 1 December 2003, proceedings concerning custody of children, and more generally the rights and duties of parents towards their children, are exempt from judicial taxes. Therefore, applicants for return or access rights are not requested to pay legal costs.

In juvenile proceedings, legal assistance by an attorney is not necessary, therefore anyone is entitled to directly pose questions to the Judge.

In conformity with Law of 20 December 1884, legal aid is granted to anyone (irrespective of citizenship) in application of Article 15 of the Declaration on the Citizens' Rights (Law n. 59 of 8 July 1974, with the amendments resulting from Law n. 36 of 26 February 2002), as well as of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ratified with Decree n. 22 of 9 March 1989. To be granted legal aid, interested parties must demonstrate their "poverty status" and "well-groundedness of their request for legal aid" (Article 2).

Always in application of the above-mentioned constitutional principles, the applicant is not required to present a person guaranteeing compliance with any obligation resulting from the decision (*cautio iudicatum solvi in casum succumbentiae*).

If the party affected by the decision of the Law Commissioner as Juvenile Judge is absent (i.e. not present on the Republic's territory), the Judge designates a Lawyer *ex officio*, appointed under Law n. 131 of 20 October 1996, in order to look after the absent party's interests, with express reference to the right to appeal against the decision. Indeed, the implementation of the constitutionally guaranteed right to defence supplements a proceeding where legal aid is mandatory.

V – Enforcement mechanisms

(a) Return orders under the Convention are issued by the Judicial Authority (Law Commissioner as Juvenile Judge), following the above-described summary proceeding, and are executed by the Minors' Service with the assistance of the law enforcement agencies.

Once it receives the application directly from the person exercising the rights of custody or from the Central Authority, the Judicial Authority takes the necessary measures to locate the child through the law enforcement agencies and the Minors' Service, and initiates *ex officio* the procedure to return the child to the applicant exercising the rights of custody under the Convention. The Judge is always required to issue the return order and therefore has no discretionary power in this regard. Only under the exceptional circumstances provided for by Article 13 of the Convention may the child's return be refused.

The minor is returned or taken back by the staff of the Minors' Service to the person exercising the rights of custody to his/her habitual residence, in accordance with the Judicial Authorities' order, having heard the Central Authorities.

The Minors' Service and the law enforcement agencies are obliged to execute all decisions taken by the Judge, without being allowed to refuse or delay such execution. In this regard, Article 378 of the Criminal Code punishes "any public official who, without justified reason, delays, fails or refuses to fulfil a task of his/her own", while Article 366 of the Criminal Code punishes "anyone failing or avoiding to execute a decision taken by the Judge, concerning custody of children".

(b) Access/visitation orders are enforced in the same manner.

VI - Substantive Custody / Access Law

(a) The legal criteria by which custody and access determinations under the Convention are made are different from those set forth in the domestic law. Indeed, according to Article 5 of the Convention, rights of custody "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence", while rights of access "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence". Therefore, in the proceeding concerning return or access orders, the Judge must exclusively enquire about whether the applicant has the right described in Article 5, without making any reference to domestic law provisions, in conformity with the objectives of the Convention. The following example can clarify what stated above: an institution (different from the parents) where the child is placed has no parental authority over the child (this authority lies with the parents or the guardian), therefore such institution cannot be considered as "custodian" under domestic law. However, because it takes care of the child habitually residing within its structures, this institution is entitled to apply for return orders under the Convention.

(b) In conformity with constitutional principles prohibiting gender discrimination, there exist no differences in the treatment afforded to women and men in custody or contact cases. Indeed, Article 4 of the Declaration on the Citizens' Rights stipulates that "all shall be equal before the law, without any distinction based on sex or personal, economic, social, political and religious status". As constitutional provisions, they fulfil domestic public order principles, which are therefore applied also in relation to the Convention.

VII – Social Services and Child Protection Services

The Minors' Service, established within the Social Security Institute, is entrusted with the institutional task of carrying out "its social and psycho-pedagogical activity with regard to children up to 18 years of age" (Article 6 of Law n. 21 of 1977). Therefore, the Minors' Service plays a fundamental role in the protection of children, also in the field of international abduction. The Minors' Service provides a necessary and indispensable support to the Magistrate, who is responsible for issuing sensitive decisions concerning children, in order to avoid that such decisions cause them a psychological damage. The Minors' Service also carries out investigations in the social and family context, collects information and takes care of children, if they need to be protected from the environment they live in, and provides scientifically qualified opinions through experts in this field.

With regard to international child abduction, the Minors' Service collaborates with the Judicial Authority and the law enforcement agencies to locate the child, provides the child with psycho-pedagogical assistance, takes care of the child pending the return order and executes the return order together with the law enforcement agencies.

As already indicated, the Minors' Service, composed of psychologists and social workers, is the agency responsible for protecting children in general and, more specifically, for assisting them until

they are returned to the person exercising custody rights under the Convention. Therefore, the child will always be assisted and accompanied by the personnel of the Minors' Service.

A person exercising custody rights and applying for the child's return, or a person wishing to acquire access rights, not present on the territory of the Republic during the judicial proceeding for the issuance of return or access orders, is legally represented, whenever necessary, by the Lawyer appointed by the Court, whose related expenses are borne by the State.

VIII - Information and Training

For the purpose of effectively applying the Convention, the State of San Marino established an interdisciplinary study group to provide the Judges, Minors' Service, Central Authority and lawyers with adequate information on the application of the Convention. San Marino Government asked some expert professionals to carry out an in-depth analysis of the themes of the Convention. In this respect, they are organising information and training meetings.