

**Questionnaire concerning the practical operation of the Hague Convention of
25 October 1980 on the Civil Aspects of International Child Abduction**

Reply by Austria

Question no.1

Para. 1 and 2: No

Para.3: The Austrian Central Authority does not try to secure the voluntary return of the child because this could lead to delays of the judicial return-proceedings or have a warning effect to the abductor with the consequence that he/she goes to the underground. But the judge dealing with the individual case tries to reach an amicable solution for the voluntary return of the child in the beginning of the proceedings.

Para.4: The return-proceedings are free of costs for the applicant. He/she is granted free legal aid including an attorney-at-law for the appeal proceedings without any means test. A revision of the Act implementing the Convention is on the way to appoint an attorney-of-law free of charge - without any means test - from the very beginning of the return-proceedings. There are no delays in Austria. There are no complaints about delays in other Contracting States.

Para.5: No

Para.6: In such cases the competent court and the child welfare authorities which are administrative bodies are informed. Under the Austrian child protection system any necessary protective measure is taken by the competent bodies (especially all is done in accordance to lit.f of this paragraph).

Para.7: A request for access made by the applicant is transmitted to the competent court. Access may be granted by a court order. The conditions are fixed by the court if the parents do not agree how access is to be exercised.

Para.8: Annual statistics cannot be provided because of a lack of human resources in the Austrian Central Authority. The most important aspect is the effective handling of individual cases and not the drafting of statistics. One has to set priorities.

Para.9: Austria strongly reaffirms these conclusions.

Para.10: No

Question no.2

Para.1: At present all district courts(189) have jurisdiction as first instance courts. There are 16 appeal courts dealing with appeals in return cases. Last instance is the Supreme Court.

Para.2: A concentration is contemplated which will be put forward to the Council of Ministers and afterwards to Parliament in the middle of this year.

Para.3: Applications are dealt with in an ex-offo procedure (so-called non-contentious proceedings, in German "ausserstreitiges Verfahren") which are informal and rapid proceedings. Courts are giving high priority to such cases. The documentary evidence is normally sufficient. Usually the court hears informally (in camera) the abducting parent and the child if he/she has attained a reasonable age (about 10 years). The Austrian Central Authority (Ministry of Justice) exercises control over the time management of the proceedings taking into account the six weeks period of art.11 para.2 of the Convention. Any decision of the first instance court may be appealed within 14 days (this period starts to run with the notification of the decision to the party concerned resp. the representative). Grounds for appealing are legal defects of the decision or mistakes concerning the facts of the case. The appeal proceedings are written proceedings without any oral hearing of the parties.

Para.4: The judge has the possibility to hear the child in person. There are no legal provisions concerning relevant objections of the child. In this respect there is broad discretionary power of the judge.

Para.5: Concerning art.13 of the Convention the defendant has to "establish" that there is a ground for the non-return. These grounds are not used by the court on its own motion (ex officio). This means that the court neither requests the child welfare authority for an opinion nor orders an expertise by a child psychologist. In practice the court orders such evidence only if there are strong indications put forward by the defendant that such a ground for the non-return may exist. Even if additional evidence is necessary the court tries to stick to the six weeks period if ever possible. Art.20 of the Convention was never been applied in Austrian practice.

Para.6: To enforce a return-order the court has to fix the concrete measures of enforcement as soon as the return-order becomes enforceable. In exceptional

cases the first instance court may declare the return-order immediately enforceable (despite of a later appeal lodged by the defendant). Usually the court fixes the date when the physical transfer of the child from the defendant to the applicant or to the child welfare authority takes place. The court may request the assistance of police at that date. Other measures of enforcement are available, too (e.g.fines). The existing enforcement procedures are in nearly all cases successful in achieving the enforcement of the return-order.

Para.7:

lit.a Yes; Austria is envisaging to reach some sort of concentration of jurisdiction

lit.b Yes

lit.c Yes

lit.d Yes

lit.e Yes

lit.f Yes

lit.g Applications and appended documents should be accompanied by translations into German from the very beginning (see art.24 of the Convention). Adding to the initial application a certificate in line with art.8 para.2 lit.f of the Convention - especially in cases where custody is based on law (ex lege custody) - could expedite the proceedings considerably.

Para.8: No changes

Question no.3

Para.1: The legal institution of "undertakings" is not known to the Austrian legal system. There might be some scepticism towards promises offered by the applicant to an Austrian court. "Undertakings" could come into play only during the proceedings in the first instance court.

Para.2: "Undertakings" are unknown in Austria

Para.3: "Safe harbour orders" and "mirror orders" are unknown in the Austrian legal system. But an Austrian court could of course offer appropriate protective measures for the case that a child is returned to Austria.

Para.4: No concrete considerations at the moment

Para.5: Yes, in one case with the USA because the child (a non US-citizen) did not legally stay in the USA before the removal. The case was finally solved because the Austrian court did not order the return because of the child's strong opposition.

Para.6: To start criminal proceedings against the abducting parent, in particular the issuing of a warrant of arrest, seems to be highly counter-productive in cases of very young children. The certainty that the abducting parent, who is willing to return together with the child to the habitual residence (with the intention to go to court there asking for custody), is sent to prison after arriving in the requesting state might reduce the willingness of the judge in the requested state to order the return of the child. Sending the primary caretaker to prison and depriving the child of this person's care might lead to a "grave risk" according to art.13 para.1 lit.b of the Convention.

Para.7: No experience

Para.8: No appointment made

Para.9: Non-contentious proceedings (e.g.custody and access proceedings) are ex offo-proceedings and free of charge. A representation by an attorney-at-law is not required.

Para.10: Yes, if up-holding of such an order would lead a danger for the welfare of the child. It must be stressed that in Austria after a wrongful removal of a child custody without hearing the abducting parent is never entrusted finally to the left behind parent but only on a provisional basis.

Para.11:

lit.a Yes, but ratification is not so urgent because Austria is a Contracting State of the Hague Convention 1961 on the protection of minors

lit.b Yes, if such protective measures are specifically necessary in a given case

lit.c Yes

lit.d Yes, but a warrant of arrest against the abducting parent having joint custody with the left behind parent should be withdrawn under all circumstances before effecting a return-order, if this parent is willing to return together with the child

lit.e No, because communications can be easily made via Central Authorities;if the judges concerned are able to communicate in the same language there is no obstacle against a direct contact (e.g.by telephone)

lit.f No reply possible because of a lack of information about the results of any exploration already done

Question no.4

Para.1: Applications under art.21 of the Convention are dealt with in the same way as applications for the return of a child. Non-contentious proceedings are free of charge (see reply to question no.3 para. 9 above).

Para.2: Habitual residence of the child; during pending return proceedings an Austrian court may grant access by an interim provisional order even if the child has no habitual residence in Austria.

Para.3: Austria is a Contracting State of the Custody Convention 1980 of the Council of Europe; on 1 March 2001 specific provisions dealing with the recognition and enforcement of custody and access orders will enter into force (art.185d to 185h of the Non-contentious Proceedings Act) if there is no international treaty existing. No considerations at now concerning the implementation of the Hague Convention 1996.

Para.4: The same regime as for return applications is applied.

Para.5: No experience concerning international mediation in this area

Para.6: Yes

Para.7: This depends on the individual case (e.g. deposition of the passport, supervised access, access in the premises of a child welfare authority).

Para.8: No booklets exist; legal information in individual cases can be provided by courts or the Ministry of Justice.

Para.9: In cases of transfrontier access (where the child travels to the state where the non-custodial parent lives) there is a lack of guarantees and safeguards for the safe return of the child at the end of the access period. In the Council of Europe an important work in this field is under way (Draft Convention on contact concerning children) which could fill these gaps.

Para.10: See reply to para.7 above

Para.11: By ordering fines to be paid by the custodial parent who does not respect an access order.

Para.12: No because the attempts by the Council of Europe seem to be a satisfying solution (see reply to para.9 above).

Question no.5

Para.1: In one case the authorities of the requested state did not respect art.16 of the Convention but carried on the proceedings despite of the objections raised by the Austrian Central Authority. The requested Central Authority played no active role at all.

Para.2: Information and evaluation of the judicial system, in particular efficiency of justice; furthermore the practical importance of an accession of the state concerned vis-a-vis Austria

Para.3: There are some doubts about the usefulness of such a questionnaire

Para.4: Austria is not in favour of an increase; the present system of irregular intervals is appropriate. Austria would only be in favour of a future work of the Hague Conference in the field of access because art.21 of the Convention is not totally satisfying. The other subjects mentioned in para.4 should not be dealt with by an additional Special Commission.

Para.5: No

Question no.6

Para.1: There are some hesitations concerning the activities mentioned in footnote 26 lit.g and i; a regular periodic review of the Convention seems to be unnecessary. There are doubts too concerning lit.k: Most member states of the Hague Conference have already ratified the Convention and others should not necessarily be encouraged to accede to the Convention.

Para.2: No support for this idea

Para.3: Austria is against such a recommendation which would be too burdensome for the Central Authority taking into account the limited human resources

Para.4: In times of heavy budgetary restrictions Austria cannot support any measures which would need additional financial means.

Para.5: No

Para.6: Between Slovakia and Austria there exists a declaration on reciprocity concerning the recognition of custody orders.

Para.7: The Austrian legal system does not know any restriction of custody entrusted to one parent in regard to the determination of the place of residence of the child. This means that the custodial parent can move permanently with the child to another state without the permission of a court or the other parent. Having this system in mind Austria would regret restrictive approaches to a relocation.