UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON INTERNATIONAL RELATIONS OPEN HEARING ON THE IMPLEMENTATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Testimony of Thomas R. Sylvester

October 14, 1999

INTRODUCTION

I am Tom Sylvester, father of Carina Sylvester, my American-born daughter and only child, who was abducted by her Austrian mother from Michigan to Austria on October 30, 1995. That was her last day on American soil. She was then just 13 months old. She recently celebrated her fifth birthday in Austria. In the intervening four years, I have worked unceasingly to obtain the enforcement of the various US and Austrian court orders granted in favor of Carina's return to the US in 1995 and 1996. Unfortunately not one of the hundreds of people I have contacted and nothing they or I have done has made a difference. I spoke similar words to the Senate Committee on Foreign Relations one year ago and the situation today is the same.

For me, the Hague Convention has failed in both of its objects set out in Article 1: to obtain the prompt return of abducted children to their countries of habitual residence and to obtain access to abducted children when access is otherwise being denied. I placed my trust in the Hague Convention and the judicial system that implements it. I relied on the Hague Convention and the workings of the courts bath here and in Austria to achieve these objects to both Carina`s and my detriment. That was a mistake.

I sit here before you four years after my daughter's abduction, a person who did everything right under the Hague Convention, including getting all the right orders both here and in Austria, a person who nonetheless has lost his daughter. As to the prompt return of abducted children, the facts are that despite Austria's valid and final order in 1995 for the return of Carina to Michigan for a custody determination there, affirmed through the Austrian Supreme Court, Carina was never returned. The Austrian legal system provides no mechanism for civil enforcement of their orders rendering this and all of their orders useless pieces of paper. Carina's mother was never compelled to return her and she has not voluntarily done so. With the passage of time, the Austrian Court re-opened the Hague Convention case, an action not sanctioned by the Hague Convention, ruling that it was in Carina's best interests that the return order not be enforced and that Carina was now to stay in Austria. The Supreme Court of Austria affirmed and the case was then closed. Oddly, unlike the return

order, the order that the return order would not be enforced and the child not returned is well-respected and honored in Austria. The Austrian court thereafter proceeded to award Carina's mother custody of Carina in violation of Article 16 and further ordered me to pay child support retroactive to the very
day of the abduction.

As related to access to abducted children, my subsequent requests for access to Carina under Article 21 submitted early in 1998 have not yet resulted in a viable order for access. Incredibly, the petition presented to the Austrian trial court under Article 21 was initially denied on the grounds that the Hague Convention no longer applied in the case` Thereafter, each time the Austrian court entered an order for access for a specific date, the appellate process would extend beyond the date for the visit, rendering the exercise useless. Most recently, I submitted to the examination of a purported "expert" child psychologist in Austria on the issue of how I have accepted the present situation and whether Carina's having access to me would be appropriate. He concluded that I could not possibly have my child's best interests in mind because I ask that she be returned to the United States under the return order, or in the alternative, that she come and spend time with me and her extended family in the States. It is questionable whether I will ever have an access order since each schedule submitted to the court is unacceptable in some respect. The court will exercise no independent judgment, but instead expects me to submit a proposal precisely in line with its unarticulated opinion. The court further expressly links access to Carina under Article 21 with the payment of child support under an Austrian order (despite a Michigan order from 1996 that I have custody of Carina and pay no support), the lifting of the U.S. warrant for the abductor's arrest and MY participation in an Austrian divorce case initiated by my ex-wife from whom I was divorced here in the States in 1996. Should an order for access under Article 21 survive the appellate process, just as with the order for return, compliance by Carina's mother will never be compelled since Austria has no means for such compulsion. Whether Carina is made available for access or for return to the United States is entirely at the discretion of the abductor. In Austria therefore, the Hague Convention provides no remedy whatsoever under either the return objective or the access objective of Article 1.

After four years of continual activity to rectify the situation through legal channels, working exclusively through the system devised under the Hague Convention, I can say today that there has been absolutely nothing that has been done that has made any difference whatsoever to correct this situation. Unbelievably, it is not the law, the Austrian government and their courts, or the U.S. government and our courts who is in control of
the situation. It is the abductor who is in complete control. This is a case of the Hague Convention at its absolute worst.

My Personal Experience

There are no words to adequately describe my feelings of loss and pain. I wish that I could

convey the daily anguish and the deeper feelings of sorrow, sadness, anger, despair and hurt. These feelings are always present for me. The moment I became aware that my daughter was taken from me I felt Eke someone had reached inside my chest and ripped my heart out of my body. Since then, I think about her always. Every child I see reminds me of her. There is not a day that goes by that she is not paramount on my mind. Through Carina, I felt the joy and wonder of being a father. Then, after only 13 months, I felt the sorrow of her being taken away from me. If you are a parent yourself perhaps you can imagine the heartbreak of being without your child. I love Carina with all of my heart and soul. I am committed to a loving relationship with my daughter. I do not want to lose Carina. She is the most important part of my life.

I believe that I am doing all that I can and feel that some days I devote most of my time to obtaining some assistance in having a life with my daughter. I have sought this assistance from only those persons I believe to be holding themselves out in the United States government as those who can help—the Department of State and the Department of Justice. I have long felt ineffectual support from both.

Despite my unceasing efforts to be a part of Carina`s life, I am not at all a part of her life. I have seen my daughter in a supervised setting for ten hours from the time of her abduction in 1995 through the end of 1998, and supervised for just 10 additional days since. None of this time was associated with a court order under Article 21. All of this time was in Austria.

The harsh reality of the situation is that I have paid legal fees, travel and related expenses both here and in Austria in excess of $200,000. There is no end in sight to these expenses. This is money that I pay for Austria's non-compliance with the Hague Convention and their inability to enforce their own orders. These funds could otherwise have gone for Carina's future.

Procedural Background

-The Hague Convention Case, Article 3:

On October 31, 1995 I filed an Application for Assistance with the State Department under the Hague Convention, to which both the U.S. and Austria are party. I also filed a Complaint for Divorce in Oakland County Michigan Circuit Court. The Application for Assistance made its way through the Austrian Ministry of Justice to the court of the first instance in Graz, Austria where hearings were conducted by Judge Christine Katter. Both Carina's mother and I appeared at the hearings, and her mother raised defenses to Carina`s return under the terms of the Hague Convention. On December 20, 1995, Judge Katter entered an order for the immediate return of Carina to me in Michigan. In that order Judge Katter stated:

"The child's mother Monika Maria Sylvester is ordered by otherwise forced action to return

the minor Carina Maria Sylvester, D.O.B. 09/11/94, immediately to the further Thomas Sylvester to the previous residence in 5851 Cheerywood Drive, Apt. 1912, West Bloomfield, 48322 Michigan USA."

"Here must be considered, that in the process the custody is not to be decided, but that the condition prior to the kidnapping restored, and that the State of the prior residency can resolve the custody decision."

"It should also be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States."

Carina`s mother, however, did not comply with the return order.

Judge Katter also ordered specific supervised visitation for me at the Institute of Family Learning in Graz, Austria on Christmas Eve and December 27, 1995. Carina's mother did not bring Carina to the appointed place for visitation on either date denying Carina the opportunity to share the fun of opening Christmas presents with her father. That was the first of many Christmases we have now spent apart.

Instead, Carina's mother took an appeal to the return to the Austrian Court of Appeals. This initiated an automatic stay of enforcement of the return order which ultimately continued through May 7, 1996. The Austrian Court of Appeals affirmed the return order and again directed Carina's mother to return her to me for a custody determination here in the United States stating:

"It is the mother's freedom and is also expected of her as a responsible custody provider, that she put the welfare of the child before her interest to stay in Austria and returns together with the daughter to the United States. It is then the responsibility of the appropriate American court to decide final custody."

Rather than returning Carina at that point, Carina's mother instead took an Extraordinary Writ to the Austrian Supreme Court. That court, although rendering its decision on February 27, 1996 in favor of the return of the child, did not "deliver" its order until May 7, 1996. The Supreme Court order stated:

"According to the findings of the lower courts, which are binding for the Supreme Court, a return of the child to her father would not pose an immediate physical or psychological danger for the child. Furthermore, the appeal emphasizes problems for the child due to a separation from her mother, the main provider, if she complies with the order, is not given. The goal is to restore the original conditions until a decision about custody is made in the United States."

Once the decision of the Austrian Supreme Court was delivered, all stays were then lifted in the case and the return order of December 20, 1995 became valid and final. On May 10, 1996, my local attorney assembled a group in Graz, Austria at the direction of Judge Katter to assist in effectuating the one and only opportunity for court enforcement of the return order. That group included local police, Judge Katter herself, an enforcer from the Court and others, including my Michigan counsel and me. Unfortunately, the attempt failed when Carina`s mother stated that Carina was not at home and that she was with her grandmother somewhere "in the mountains." I believe that Carina's grandmother escaped from the house with Carina out a back window.

There was much drama in the attempted enforcement in that a gun was drawn by the child's Austrian grandfather on the court officials. However, the local police on the scene made no arrests. To date, despite efforts by my Austrian counsel, there has been no criminal matter against Carina's mother lodged by Austrian officials.

In response to this exclusive chance for court enforcement, Carina's mother admitted herself into a hospital for "injuries" allegedly sustained from her contact with court-appointed officials. She then retaliated with a barrage of actions against the trial court, including a motion for disqualification of the judge alleging an amorous connection between the judge and my Austrian counsel, and a motion to change venue based on a false change in her address, both of which were denied. She then lodged criminal charges and grievances against my attorney.

The most damaging of all, however, was her petition to "reopen" the Hague Convention case due to change of circumstances resulting from the passage of time. This motion was denied by the trial court, but was reversed and remanded on appeal. The Supreme Court of Austria determined that the order to return, entered more than a year earlier, could not itself be changed since it was both valid and final. However, with the services of an "expert" in child psychology, the trial court was to determine if circumstances had changed sufficiently due to the passage of time to wan-ant that the child not now be separated from her mother under the "grave risk of harm" analysis under Article 13(b). The trial court was further to consider if the child were to be returned, the proper mode for enforcement of the order. On remand, the trial court held that the order for return would not be enforced and the child would stay in Austria. This decision was allegedly based on the report of the Austrian "expert" child psychologist on a best interests of the child standard "since the specific welfare of the child takes precedence over the purposes of the Hague Convention."

I myself was never interviewed by the child psychologist prior to this determination and it was therefore made without benefit of any information or experience other than that provided by the abductor herself I did however at that time provide the Austrian court with a copy of a "Safe Harbor" order from the Michigan court, the scheme of which the Austrian court dismissed as not in the Carina's best interest since it would remove her from Austria and could allow for the possibility my retaining custody of her in Michigan. Both situations, the court

concluded, would be detrimental to the child. With this analysis, the court effectively determined custody in clear violation of Article 16 of the Convention. This decision was subsequently affirmed. by the Austrian Supreme Court. The Central Authority in Austria notified us shortly thereafter that it had closed their file on the abduction.

I subsequently filed two applications with respect to these matters with the European Commission on Human Rights against Austria on behalf of both Carina and me, and anticipate official word as to their acceptance for presentment to the European Court early next year.

-The Michigan Divorce Case

In Michigan, the divorce case proceeded to a Default Judgment of Divorce granting me sole physical and legal custody of Carina. Carina's mother appeared in and participated in the case to the extent of requesting that the default entered be set aside. Following an extensive hearing, the Michigan court determined that it would set aside the default on the condition that Carina`s mother return her to Michigan by a date and time certain. Carina was not returned. The Judgment of Divorce was entered on April 16, 1996. One week later, the court entered an order sealing the court records.

My attempts to obtain acknowledgment by Austria of the Michigan Judgment of Divorce have been unsuccessful to date. In fact, after three years in the various stages of appeal, the matter has not been finally determined. Initially, the Austrian Ministry of Justice denied my request for acknowledgment of the Michigan Judgment of Divorce. This decision was affirmed on appeal. While my further appeal was pending before the Supreme Administrative Court, the issue of the proper Austrian body to determine the recognition, of foreign judgments was presented to Austria's Constitutional Court. This Constitutional review has stayed consideration of my appeal to the Supreme Administrative Court. It is unknown when the Constitutional Court will decide the question. Irrespective of that decision, it will be years before a final determination of Austria recognition of the Michigan Judgment of Divorce from April 1996 will be made..

This delay in recognition of the Michigan judgment combined with the Austrian Supreme Court's order not to enforce the valid and final return order justified the Austrian trial court to determine itself vested with jurisdiction to award custody of Carina to her mother and to order me to pay child support retroactive to the day of the abduction. My appeals on both issues were denied. With the implementation of the Uniform Interstate Family Support Act here in the States, I could expect that the Austrian support order, when presented to the appropriate state agency, would be honored automatically and my income withheld, thereby violating the Michigan Judgment of Divorce and subsidizing the abductor in the process. Fortunately, HUD recently issued a statement giving local agencies discretion on the mandates of automatic enforcement of foreign support orders in international parental child abduction cases. It has become necessary for me to notify my local support enforcement

agency, provide it with a copy of the HUD statement and copies of both the 1996 Michigan Judgment of Divorce granting me custody and the 1999 Austrian support order which conflicts with it. With this, I have had some measure of success in confirming that automatic enforcement of the Austrian support order will not take place.

I have recently filed a third petition with the European Commission on Human Rights protesting both the delay in a decision and the Austrian court's proceeding with orders on custody and support prior to a final decision on the recognition of the 1996 Michigan Judgment of Divorce.

-The Hague Case, Article 21

In March 1998 when Austria closed its file on my Article 3 case, I petitioned under Article 21 for access to my daughter for visits in July, September and December of that year. The petition was presented to the trial court, by that time presided over by the new judge.

Unbelievably, the petition under Article 21 was denied in April 1998 on the grounds that the Hague Convention did not apply. In May, the Austrian Court of Appeals reversed and remanded the decision, directing the trial judge to enter an order for access as "guaranteed under Article 21" At the end of July, the new trial judge did just that, ordering visitation in Austria at the home of Carina's grandparents where she and her mother lived. Since the July dates had already passed, the order granted the request for only the September and December dates. Carina's mother appealed that decision based on the fact that the court had not secured approval for the visit from the grandparents and therefore, had no authority to order the visit in their home. It was also based on Carina's mother's articulated
fear that I would still snatch Carina back, even after four years of not having done so. In addition, she claimed that seeing me would traumatize Carina and believed that I should have no visiting rights because a warrant existed in the States for her arrest. I appealed supervision of the visits. By the time the first appeal was heard, the September dates had passed and the issue was moot as to that visit. Because of the passage of time, the court also recommended that I give a new schedule of dates. The opinion of the child psychologist would be required to determine how I have accepted the current situation and how I see Carina's future in order to determine whether it would be in Carina's best interest to have access to her father. I took a further appeal to the matter, particularly related to the use of the "expert" evaluation for the propriety of the visit. The Supreme Court affirmed.

I consequently was required to travel to Austria to meet with the "expert" child psychologist. My requests of the court to see my daughter at that time while I was in Austria were denied. I therefore took it upon myself to stand outside of her house with arm loads of presents, begging to see her. Carina's mother responded and I spent the entire day with Carina, her mother and grandparents at their home. This contact resulted in what
might be called a discussion but which is more appropriately called an ultimatum. Carina's

mother, understanding her absolute power in this matter has outlined her demands for allowing me to have a life with my daughter:

1. Written acceptance of Austrian custody court order;
2. Written acceptance of Austrian child support order;
3. Payment of remainder of the average owed on the Austrian child support order retroactive to November 1995;
4. Withdrawal of American warrant of arrest; and
5. Agreement to the entry of an Austrian judgment of divorce.

Should I do all five of the above, Carina's mother will then consider allowing me some periodic visitation, decided one visit at a time and always to be had, in her presence in Austria. Under no circumstances will she allow Carina to return to the US She is right to know that she is in control because there can be no question that she is. Even if I could obtain an access order from the Austrian court, without enforcement mechanisms, Carina's mother may comply or not as she chooses. The history is that she will not comply. Under Austrian law, there will be no sanctions for her doing so.

As a result, although Article 21 was clearly designed to protect me from these situations - I am left with the reality that I must engage in self-help if I am ever to know my daughter. Self- help however, was the device that the Convention was designed to remedy so as to afford parents like me the weight of the law and the support of the local courts in seeking the return of abducted children. In the end, the Convention and its implementation by Austria combined with a lackluster showing of support from the US, has led me inexorably to self-help on access. Had I known all of this at the start, I would have engaged in self-help in 1995 when the abduction occurred and avoided the legal, emotional and financial disaster this matter has become. Had I done that Carina would now know both her mother
and her father.

-The Criminal Case

In addition to my efforts under the Hague Convention, I sought a criminal warrant against the abductor under the International Parental Kidnapping Act. Special Agent Scott Wilson of the FBI took the information and obtained the 'warrant on May 29, 1996. Interpol issued red and yellow notices. The case was assigned to Assistant US Attorney Jennifer Gorland. To my knowledge, no action was taken on the wan-ant or the complaint for the first two years. My request to Jennifer Gorland that an extradition request be made to Austria for Carina's mother was denied by Ms. Gorland on the grounds that Austria does not extradite its own nationals. Just recently I learned a provisional arrest request was presented to Italy a short time ago. The request was denied by Italy.

Diplomatic And Political Pursuits

In an attempt to move the Austrian authorities to assist in either the civil or criminal enforcement of the return order, I sought the assistance of the American Consulate in Vienna. The US Ambassador personally delivered a US government demarche to the Austrian Ministry of Foreign Affairs in June, 1997. I asked the State Department, Bureau of Consular Affairs to correspond with the Ministry of Justice, the Central Authority in Austria. In response, the Austrian Minister of Justice has consistently and stubbornly declined to assist in the enforcement of the Hague Convention.

I have requested the involvement of literally hundreds of people including President Clinton, Mrs. Hillary Clinton, Attorney General Janet Reno, Secretary of State Madeleine Albright, Senators Abraham and Levin, Representatives Knollenberg and Portman, Nancy McLean, Nancy Hammer, Jennifer Penta and others within the International Division, National Center for Missing and Exploited Children, David Hobbs, Deputy Assistant Secretary of State for Overseas Citizens Services, US Department of State, Randy Toledo, Terri Schubert, Debra Caruth, Mary Jo Gotenrath and Ernistine Gilpin of the Office of International Affairs, US Department of Justice, Assistant US Attorney Jennifer Gorland and Saul Green, the U.S. Attorney for the Eastern District of Michigan, US Department of Justice, Scott Wilson and John Oullette, Special Agents, Federal Bureau of Investigation, in the US Department of Justice, Mary Marshall, Mary Ellen Conway, Jim Schuler, Ray Clore, Steve Sena and Bill Fleming, Bureau of Consular Affairs, Office of Children's Issues, US Department of State, Jim Preach, Interpol, John Baliff and Guyle Cavin, General Counsel, US Embassy in Vienna, and I met with Swanee Hunt, former US Ambassador to Austria in Vienna.

In addition, I have had regular correspondence and contact with Senator Mike DeWine and your office, Mr. Chairman. If I may quote from your own correspondence Mr. Chairman to Helmut Tuerk.

"Now, Mr. Sylvester is attempting to exercise his rights under the Hague Convention to be able to visit his daughter who just celebrated her fourth birthday last week. (Mr. Sylvester has been able to see the child during her entire life for a total of only six hours.) Again he is encountering delays and obstructions in his legitimate right to visit his daughter instituted by the mother, but aided and abetted by a macabre procedure in the Austrian judicial system that allows the mother to institute an unending series of appeals in simply establishing a visitation schedule for Mr. Sylvester to see his daughter."

"You know that I am a good friend of the people and the government of Austria, and I write this appeal to you in that spirit. I urge you to do everything possible to end this miscarriage and travesty of justice so that Mr. Sylvester and his daughter can enjoy the normal relationship that a child is entitled to have her father."

Nothing done has made a difference. The child was not returned because the order was not

enforced, now the order will not be enforced because the child was not returned. The delay engendered both by the stubborn refusal of the mother not to comply with the order for return and the unending number of ancillary motions and other legal maneuvers brought by the mother coupled with the unlimited number of appeals to each decision, has been fatal to my relationship with my daughter.

The Media

I have turned to the media for assistance after failing on the legal, diplomatic and political fronts. I would prefer not to pursue this forum I do not seek or enjoy the personal attention. I do not typically make my private life public. However, I have come to realize that my case is a tragedy that has resulted in spite of the purported safeguards put into place by the Hague Convention and the International Parental Kidnapping Act. Nothing can give me back these four years without my daughter and no one can give my daughter a childhood filled with memories of her father. However, this situation cannot continue and this situation must not happen again. The problems encountered under the Hague Convention by an individual parent are not just private matters.
I believe my case serves as an excellent example of how the system does not work and has failed miserably. I believe that it is important to ten my story so that the American people can have a better understanding of what can happen in these cases, and to caution those who may follow. I was told early on by a representative of the US Embassy in Vienna that it is clear that the Austrians are protecting Carina's Austrian citizenship. In response, I have asked for years, who in the States is protecting Carina's American citizenship? I am given no response.

I now have adopted a strategy to embarrass the Austrians for their handling of this case and validation of the abductor's illegal, deviant behavior. I am outraged by Austria's behavior and my government's response in this case. My rights as a parent are being denied and the Austrians are denying Carina's rights. Although Austria is our ally and claims to be a civilized society, I am getting the level of cooperation from the Austrians as one might expect to receive from our enemies. I will continue to do all I can to embarrass Austria in the media in the hopes that they will cooperate to ensure the objects of the Hague Convention are upheld.

My efforts to date on this front have including the following: Voice of America, Radio Talk Show, The Cincinnati Post, Reader's Digest, Radio and Television Broadcast International Crime Alert on Internet, Douglas Darnall, Ph.D. - October 2, 1998 (Associated Press article) - February 5, 1999 (Front Page Headline) - May 21, 1999 (Front Section Lifestyle) September 1999 Special Feature, "America's Stolen Children"

However, I am concerned that Austria will not unilaterally reform their system. They will do so only when forced to do so out of self-interest (if their children are not being returned by

foreign judges in retaliation) or embarrassment (from massive publicity and adverse human rights reports).

I contacted the media in an effort to raise awareness of my situation and the problem of international child abduction at large. This is child abuse. This is a human rights issue. I need media support. And parents like me need media support. I request today assistance and support from the media in order to compel the US government employees to assist in a meaningful, effective way. I continue to be disappointed by all of those Americans in positions to do so who have chosen not to support me by speaking up for Carina's rights. I have been told by one US government employee that he is embarrassed to be a federal government employee in view of how many people have not supported me and Carina.

Networking/Advisory Panels

I have networked extensively with other similarly-situated parents. Networking among left-behind parents and their attorneys is in fact my most valuable resource because of the immediacy and wealth of information exchanged. Our federal government should propose ways to facilitate such networking, including requests for Privacy Act waivers from the outset, so that DOS and DOJ can give a left-behind parent names and phone numbers of other parents in the same situation with the country in question.
I have attended workshops on the issue of international parental child abduction and participated in rallies in support of active government participation in the return of parentally abducted children. During the past four years I have actively participated in Parent Focus Groups and have been in contact with a large number of left-behind parents and hundreds of people involved in addressing child abduction. I am a member of many organizations, including the Committee for Missing Children, P.A.R.E.N.T., Childrens Rights Council, Parents and Children for Equality, National Fatherhood Initiative, American Coalition for Fathers and Children. I have testified before the United States Committee on Foreign Relations on matters relative to international parental child abduction, and have been recently selected to serve as a member of Project H.O.P.E.

The United States Central Authority: The Department of State

My experience with the Department of State ("DOS") has caused me grave concern as to their ability to serve effectively as Central Authority under Article 7. First, there appears to be a institutional misunderstanding of the Hague Convention by the DOS. In their publication, International Parental Child Abduction, eleventh edition, at page 4 under the heading: "What the State Department Can and Cannot Do When a Child Is Abducted Abroad," the DOS states:

"Despite the fact that children are taken across international borders, child custody disputes remain fundamentally private legal matters between the parents involved, over which the

Department of State has no jurisdiction."

Under Article 16 of the Hague Convention, an international parental child abduction is by no means a child custody dispute. Article 16 of the Convention reads as follows: After receiving notice of a wrongful removal or retention under Article 3, the judicial or administrative authorities of the contracting state to which the child has been removed or in which the child has been retained shall not decide on the merits of rights of custody until
it has been determined that the child is not to be returned under this Convention or unless an application under this convention is not lodged within reasonable time following receipt of the notice.

What the Hague Convention does provide is a remedy to a left- behind parent to assert that an abducted child be returned to its environment of habitual residence for a determination of the custody of the child in that jurisdiction. Indeed, even the Austrian courts initially understood this fundamental concept, denying Carina's mother's request for temporary custody in keeping with the provisions of Article 16 following its decision that Carina was to be returned to Michigan under Article 3 for a custody determination there.

The fact that the DOS should articulate this policy in a publication devoted entirely to the problems and remedies associated with international parental child abduction in their capacity as Central Authority under the Convention is puzzling. I myself have often heard tacit encouragement for self-help from my contacts at State: "The best thing you can do is keep working visitation out yourself " There are even explicit directives for self-help in International Parental Child Abduction : "You, as the deprived parent, must direct the search and recovery operation yourself " I am confounded by the advocation of self- help from the agency charged under Article 7 with the following responsibilities:

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;
(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
(d) to exchange, where desirable, information relating to the social background of the child;
(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangement for organizing or securing the effective exercise of rights of access;
(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

I believe this to be an abrogation of DOS duties under Article 7 by the DOS in favor of the self-help doctrine the Convention was designed to remedy.

Second, there appears to be no established protocol for the handling of outgoing cases by DOS. I can report in all honesty that my attorney and I have had dozens of conversations with personnel at the DOS that resulted in their saying something like “My hands are tied”; “What do you want me to do? or “Why are you calling me?” The procedures there seem irregular and haphazard and with the passage of time, the case workers change and the institutional memory of the case is lost.

Third, although time and effort has been expended by the DOS on my case in that ultimately after repeated requests by me, demarches have been issued, letters written to the Austrian Central Authority, and personal visits and contacts arranged between the Central Authorities, I must ask toward what end this work was done, with what level of preparedness, with what commitment? For example, at a particularly crucial time in my case when our sole attempt at court enforcement failed, my appeals to the DOS were met with the inexplicable “strategy” of waiting six months until the Hague Conference to “embarrass the Austrians.” To me this “strategy” seemed outrageous in the context of the Conventions directive for “prompt return” of abducted children. However, this was the best I could get. In fact, the six months did indeed pass with little or nothing done on the matter. Upon return from the Hague Conference six months later, I was told that Dr. Werner Schutz, the Austrian Minister of Justice, was a very arrogant and intimidating man. There was no further information or result provided. This is the end for which Carina and I were to wait half of a year.

More recently, in March of this year, a group from the DOS comprised of two newcomers to DOS, Mary Marshall and Ellen O’Connor, neither fully familiar with my case, traveled to Austria to meet with authorities there, including Dr. Werner Schutz, to discuss my case. Following the meeting, I received only an oral report from Ms. Marshall that I needed to submit yet another schedule request for access under Article 21 if I wanted the court in Austria to proceed with my petition for access. Based on my experience in the case, my expectations of the visit had been low. However, I found this outcome abominable. Moreover, after many months of written requests, just last week I received a written report of the results of the visit, a copy of which is attached to this submission in full.

This report reveals a number of missed opportunities to challenge the Austrians on false representations made by them in those discussions. First, DOS notes that the issue of the Austrian court’s knowledge of the Convention was addressed and they were told: “Austrian judges were not unfamiliar with the Hague Process. Moreover, [the Austrians] specifically called our attention to the fact that the Central Authority directly provides information, including prior

decisions that might apply, to the courts of the first instance. The [Austrian] Central Authority underscores in this information the duties of Austria under the Hague Convention."

Unfortunately, Ms. Marshall and Ms. O'Connor were apparently unaware of communication between Ray Clore, Director, Office of Children's Issues, US Central Authority, and Dr. Werner Schutz exchanged in December 1996 and attached in full to this submission. Mr. Clore on behalf of the Department had written in part to Dr. Schutz as follows:

"Is it possible for the Austrian Central Authority to file a legal brief with the courts in Austria in a pending Hague Convention Case? If so, under what circumstances will the Central Authority take this step? What can the Austrian Central Authority do to facilitate access of the father to the abducted child while this matter drags on? Can you confirm the child's location and condition? Please inform me of what specific actions the Austrian Central Authority is taking to fulfill its obligations pursuant to Article 7 section (h) and (e) of the Convention. "

In response, the Austrian Central Authority through Dr. Schutz stated:

"The Ministry of Justice has no possibility at all to interfere with the independent judiciary. It is a basic principle that the administration and the judiciary are separated and no interference whatsoever is possible. All States based on the rule of law have to respect court orders. I cannot imagine that the US Central Authority is entitled to give instructions to the courts, in particular to the Supreme Court relating the handling of the Convention. Having said this I have to reject very strongly - with all due respect - your allegations that the Austrian Central Authority does not comply with its obligations under the Convention. Such allegations are unfounded and in the field of international co- operation unusual, too. Acting in such a way does not promote international co-operation at all. For these reasons I abstain to comment on your remarks relating the proceedings in the Austrian courts. Of course it is up to the USA to make proposals for creating more appropriate legal mechanisms within the framework of the Convention in the proper international forum."

Similarly, on August 28, 1996, Dr. Schutz wrote: "And it is quite obvious that the Ministry of Justice cannot give any instructions to a court because courts are truly independent. Later, on February 5, 1997 Dr. Schutz wrote to the DOS on the issue of a legal brief as follows:

"Relating to your fax-letters of 2 January 1997 and 4 February 1997, 1 do not want to comment on issues that have been dealt with and decided by the independent courts. The only issue that I want to touch is the question of legal briefs from a third person. The submitting of legal briefs by (third) interested parties is not possible under Austrian law. It is the task of the courts, in particular the Supreme Court to interpret international conventions, theoretically a court might ask an expert-opinion on questions of private international law but the initiative must be taken by the court."

If in fact the delegation from DOS was aware of these communications, there is no evidence in the report to suggest that the comments made by Dr. Schutz were challenged on the basis of Dr. Schutz's own correspondence.

Similarly, the written report from the DOS's March 1999 meeting with the Austrians revealed that the subject of "Safe Harbor" orders was discussed generally and again our representatives were apparently unaware that a "Safe Harbor" order had been presented to the Austrian Court from the Michigan Court providing for the following safeguards for Carina's return to the US The terms of the "Safe Harbor" order were:

a. That the Father, although recognizing that under Michigan law he has right to sole custody of Carina, shall not exercise that right of sole custody upon the return of the Mother and Carina to Michigan

b. That instead, the Mother shall live with the minor child separate and apart from the Father. The Father shall provide the Mother and Carina with a suitable finished apartment for this purpose pending the outcome of an expedited custody hearing in Michigan.

c. The Father shall provide airline tickets for the return of the Mother and the minor child at his cost.

d. That upon their return, the Father shall pay all reasonable and necessary living expenses incurred by the Mother including rent, utilities, insurance, groceries, clothing, and medical expenses for Carina and incidentals for Carina, pending the outcome of an expedited custody hearing in Michigan.

e. That this Court shall conduct an expedited evidentiary hearing on the custody of Carina pursuant to her best interests as defined by the Michigan Child Custody Act.

f. That until such time as a determination is made by this Court regarding custody, the Father shall exercise visitation with the minor child supervised by a person other than the Mother, appointed by the Court, recognizing that this is neither an admission of a need for such supervised visitation nor an acknowledgment that he is not the legal custodial parent of the minor child.

g. That upon confirmation that the Mother and the minor child have boarded a direct Right to Michigan, assistant US Attorney Jennifer Gorland shall be instructed to dismiss the federal criminal warrant now outstanding, against the Mother in the case styled The United States of America vs. Monika M Sylvester. This would assure the Mother that she would not be arrested upon landing in Detroit for the crime of parental kidnapping.

The Austrian court rejected the "Safe Harbor" order out of hand. The trial court in Austria stated:

"Nor can the approach proposed by the father in his statement of April 28, 1997 within the meaning of the "Safe Harbor" judicature change anything in the evaluation of the case by this Court pursuant to the instructions of the Supreme Court, since on the one hand, a move to the United States by Carina's mother along with the child would mean a change in the environment the child has been used to for about a year and a half, and on the other hand, there would be no guarantee that Momka Sylvester would remain the child's main caregiver, which, in view of the above- mentioned facts, is indispensable for Carina's well-being."

Again, if the delegation from DOS were aware of the presentation of the "Safe Harbor" order, there is no evidence of it in the report. Obviously, tremendous opportunities by DOS to challenge the Austrians were missed at that meeting. It is questionable as to whether expensive meetings of this sort are of any benefit to American parents without adequate preparation, commitment and purpose.

Fourth, there appears to be no serious commitment in DOS to assure welfare and whereabouts checks under Article 7(a). There also appears to be no protocol established either relating to the form of the request to the authority in the country to which a child has been abducted or to the process for the welfare check itself. The DOS publication International Parental Child Abduction, eleventh edition, describes the possibilities for a welfare and whereabouts check as follows:

"If your child has been found you can request that a US counselor officer visit the child. If the consul succeeds in seeing your child, he or she will send you a report on your child's health, living conditions, schooling, and other information. Sometimes consular officers are also able to send you letters or photos from your child. If the abducting parent will not permit the consular officer to see your child, the US embassy or consulate will request the assistance of local authorities, either to arrange for such a visit or to have the appropriate local official make a visit and provide a report on your child's health and welfare. Contact the Office of Children's Issues to request such a visit."

I consider myself fortunate to have obtained one welfare and whereabouts check in the four years Carina has been gone. This check occurred only after my repeated requests to DOS over the years. Interestingly, DOS did instruct the Embassy to conduct a check at the place where Carina was understood to be living. Representatives from the US Embassy traveled from Vienna to Graz, knocked on the door of the home where Carina was living and was told that no information about the child would be provided to the US officials. Subsequently, the US Embassy received a harassment complaint for their actions. Later requests by me for a welfare and whereabouts check resulted in the U.S. Embassy in Vienna first contacting opposing legal counsel only to be told that no welfare and whereabouts check would be allowed and that the child was fine. This stopped all activity on the matter.

When a welfare and whereabouts check was finally arranged, it was done so in the presence of the trial judge at the Graz courthouse. My request that the American Embassy workers take a photo of Carina for me was denied.

Fifth, DOS is dilatory in responding to FOIA requests for personal files maintained by the Office of Children's Issues. My case is particularly enlightening in this regard as well. My attorney first filed a FOIA request for my file, among other things, from the Office of Children's Issues in 1996. Three years later, the file has not been provided. Instead, the various layers of correspondence written to inquire about the matter appears to have allowed for the classification by DOS of several separate requests each detailed below.

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INTERNATIONAL CHILD ABDUCTION: THOMAS R. SYLVESTER,
Congressional Testimony, 10-14-1999.

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON INTERNATIONAL RELATIONS
OPEN HEARING ON THE IMPLEMENTATION OF
THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Testimony of Thomas R. Sylvester
October 14, 1999

INTRODUCTION

I am Tom Sylvester, father of Carina Sylvester, my American-born daughter and only child, who was abducted by her Austrian mother from Michigan to Austria on October 30, 1995. That was her last day on American soil. She was then just 13 months old. She recently celebrated her fifth birthday in Austria. In the intervening four years, I have worked unceasingly to obtain the enforcement of the various U.S. and Austrian court orders granted in favor of Carina's return to the U.S. in 1995 and 1996. Unfortunately not one of the hundreds of people I have contacted and nothing they or I have done has made a difference. I spoke similar words to the Senate Committee on Foreign Relations one year ago and the situation today is the same.

For me, the Hague Convention has failed in both of its objects set out in Article 1: to obtain the prompt return of abducted children to their countries of habitual residence and to obtain access to abducted children when access is otherwise being denied. I placed my trust in the

Hague Convention and the judicial system that implements it. I relied on the Hague Convention and the workings of the courts both here and in Austria to achieve these objects to both Carina's and my detriment. That was a mistake.

I sit here before you four years after my daughter's abduction, a person who did everything right under the Hague Convention, including getting all the right orders both here and in Austria, a person who nonetheless has lost his daughter. As to the prompt return of abducted children, the facts are that despite Austria's valid and final order in 1995 for the return of Carina to Michigan for a custody determination there, affirmed through the Austrian Supreme Court, Carina was never returned. The Austrian legal system provides no mechanism for civil enforcement of their orders rendering this and all of their orders useless pieces of paper. Carina's mother was never compelled to return her and she has not voluntarily done so. With the passage of time, the Austrian Court re-opened the Hague Convention case, an action not sanctioned by the Hague Convention, ruling that it was in Carina's best interests that the return order not be enforced and that Carina was now to stay in Austria. The Supreme Court of Austria affirmed and the case was then closed. Oddly, unlike the return order, the order that the return order would not be enforced and the child not returned is well-respected and honored in Austria. The Austrian court thereafter proceeded to award Carina's mother custody of Carina in violation of Article 16 and further ordered me to pay child support retroactive to the very day of the abduction.

As related to access to abducted children, my subsequent requests for access to Carina under Article 21 submitted early in 1998 have not yet resulted in a viable order for access. Incredibly, the petition presented to the Austrian trial court under Article 21 was initially denied on the grounds that the Hague Convention no longer applied in the case! Thereafter, each time the Austrian court entered an order for access for a specific date, the appellate process would extend beyond the date for the visit, rendering the exercise useless. Most recently, I submitted to the examination of a purported "expert" child psychologist in Austria on the issue of how I have accepted the present situation and whether Carina's having access to me would be appropriate. He concluded that I could not possibly have my child's best interests in mind because I ask that she be returned to the United States under the return order, or in the alternative, that she come and spend time with me and her extended family in the States. It is questionable whether I will ever have an access order since each schedule submitted to the court is unacceptable in some respect. The court will exercise no independent judgment, but instead expects me to submit a proposal precisely in line with its unarticulated opinion. The court further expressly links access to Carina under Article 21 with the payment of child support under an Austrian order (despite a Michigan order from 1996 that I have custody of Carina and pay no support), the lifting of the U.S. warrant for the abductor's arrest and my participation in an Austrian divorce case initiated by my ex-wife from whom I was divorced here in the States in 1996.
Should an order for access under Article 21 survive the appellate process, just as with the order for return, compliance by Carina's mother will never be compelled since Austria has no

means for such compulsion. Whether Carina is made available for access or for return to the United States is entirely at the discretion of the abductor. In Austria therefore, the Hague Convention provides no remedy whatsoever under either the return objective or the access objective of

Article 1.
After four years of continual activity to rectify the situation through legal channels, working exclusively through the system devised under the Hague Convention, I can say today that there has been absolutely nothing that has been done that has made any difference whatsoever to correct this situation. Unbelievably, it is not the law, the Austrian government and their courts, or the U.S. government and our courts who is in control of the situation. It is the <u>abductor</u> who is in complete control. This is a case of the Hague Convention at its absolute worst.

<u>My Personal Experience</u>
There are no words to adequately describe my feelings of loss and pain. I wish that I could convey the daily anguish and the deeper feelings of sorrow, sadness, anger, despair and hurt. These feelings are always present for me. The moment I became aware that my daughter was taken from me I felt like someone had reached inside my chest and ripped my heart out of my body. Since then, I think about her always. Every child I see reminds me of her. There is not a day that goes by that she is not paramount on my mind. Through Carina, I felt the joy and wonder of being a father. Then, after only 13 months, I felt the sorrow of her being taken away from me. If you are a parent yourself, perhaps you can imagine the heartbreak of being without your child. I love Carina with all of my heart and soul. I am committed to a loving relationship with my daughter. I do not want to lose Carina. She is the most important part of my life.
I believe that I am doing all that I can and feel that some days I devote most of my time to obtaining some assistance in having a life with my daughter. I have sought this assistance from only those persons I believe to be holding themselves out in the United States government as those who can help—the Department of State and the Department of Justice. I have long felt ineffectual support from both.

Despite my unceasing efforts to be a part of Carina's life, I am not at all a part of her life. I have seen my daughter in a supervised setting for ten hours from the time of her abduction in 1995 through the end of 1998, and supervised for just 10 additional days since. None of this time was associated with a court order under Article 21. All of this time was in Austria.
The harsh reality of the situation is that I have paid legal fees, travel and related expenses both here and in Austria in excess of $200,000. There is no end in sight to these expenses. This is money that I pay for Austria's non-compliance with the Hague Convention and their inability to enforce their own orders. These funds could otherwise have gone for Carina's future.

Procedural Background

-<u>The Hague Convention Case, Article 3</u>:

On October 31, 1995 I filed an Application for Assistance with the State Department under the Hague Convention, to which both the U.S. and Austria are party. I also filed a Complaint for Divorce in Oakland County Michigan Circuit Court. The Application for Assistance made its way through the Austrian Ministry of Justice to the court of the first instance in Graz, Austria where hearings were conducted by Judge Christine Katter. Both Carina's mother and I appeared at the hearings, and her mother raised defenses to Carina's return under the terms of the Hague Convention. On December 20, 1995, Judge Katter entered an order for the immediate return of Carina to me in Michigan. In that order Judge Katter stated:

> "The child's mother Monika Maria Sylvester is ordered by otherwise forced action to return the minor Carina Maria Sylvester, D.O.B. 09/11/94, immediately to the father Thomas Sylvester to the previous residence in 5851 Chee rywood Drive, Apt. 1912, West Bloomfield, 48322 Michigan USA."
>
> * * *
>
> "Here must be considered, that in the process the custody is not to be decided, but that the condition prior to the kidnapping restored, and that the State of the prior residency can resolve the custody decision."
>
> * * *
>
> "It should also be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States."

Carina's mother, however, did not comply with the return order.

Judge Katter also ordered specific supervised visitation for me at the Institute of Family Learning in Graz, Austria on Christmas Eve and December 27, 1995. Carina's mother did not bring Carina to the appointed place for visitation on either date denying Carina the opportunity to share the fun of opening Christmas presents with her father. That was the first of many Christmases we have now spent apart.

Instead, Carina's mother took an appeal to the return to the Austrian Court of Appeals. This initiated an automatic stay of enforcement of the return order which ultimately continued through May 7, 1996. The Austrian Court of Appeals affirmed the return order and again directed Carina's mother to return her to me for a custody determination here in the United States stating:

> "It is the mother's freedom and is also expected of her as a responsible custody provider, that she put the welfare of the child before her interest to stay in Austria and returns together with the daughter to the United States. It is then the responsibility of the appropriate American court to decide final custody."

Rather than returning Carina at that point, Carina's mother instead took an Extraordinary Writ to the Austrian Supreme Court. That court, although rendering its decision on February 27, 1996 in favor of the return of the child, did not "deliver" its order until May 7, 1996. The Supreme Court order stated:

> "According to the findings of the lower courts, which are binding for the Supreme Court, a return of the child to her father would not pose an immediate physical or psychological danger for the child. Furthermore, the appeal emphasizes problems for the child due to a separation from her mother, the main provider, if she complies with the order, is not given. The goal is to restore the original conditions until a decision about custody is made in the United States."

Once the decision of the Austrian Supreme Court was delivered, all stays were then lifted in the case and the return order of December 20, 1995 became valid and final. On May 10, 1996, my local attorney assembled a group in Graz, Austria at the direction of Judge Katter to assist in effectuating the one and only opportunity for court enforcement of the return order. That group included local police, Judge Katter herself, an enforcer from the Court and others, including my Michigan counsel and me. Unfortunately, the attempt failed when Carina's mother stated that Carina was not at home and that she was with her grandmother somewhere "in the mountains." I believe that Carina's grandmother escaped from the house with Carina out a back window.

There was much drama in the attempted enforcement in that a gun was drawn by the child's Austrian grandfather on the court officials. However, the local police on the scene made no arrests. To date, despite efforts by my Austrian counsel, there has been no criminal matter against Carina's mother lodged by Austrian officials.

In response to this exclusive chance for court enforcement, Carina's mother admitted herself into a hospital for "injuries" allegedly sustained from her contact with court-appointed officials. She then retaliated with a barrage of actions against the trial court, including a motion for disqualification of the judge alleging an amorous connection between the judge and my Austrian counsel, and a motion to change venue based on a false change in her address, both of which were denied. She then lodged criminal charges and grievances against my attorney. The most damaging of all, however, was her petition to "reopen" the Hague Convention case due to change of circumstances resulting from the passage of time. This motion was denied by the trial court, but was reversed and remanded on appeal. The Supreme Court of Austria determined that the order to return, entered more than a year earlier, could not itself be changed since it was both valid and final. However, with the services of an "expert" in child psychology, the trial court was to determine if circumstances had changed sufficiently due to the passage of time to warrant that the child not now be separated from her mother under the "grave risk of harm" analysis under Article 13(b). The trial court was further to consider if the child were to be returned, the proper mode for enforcement of the order.
On remand, the trial court held that the order for return <u>would not be enforced</u> and the child would stay in Austria. This decision was allegedly based on the report of the Austrian "expert" child psychologist on a best interests of the child standard "*since the specific welfare of the child takes precedence over the purposes of the Hague Convention*."

I myself was never interviewed by the child psychologist prior to this determination and it was therefore made without benefit of any information or experience other than that provided by the abductor herself. I did however at that time provide the Austrian court with a copy of a "Safe Harbor" order from the Michigan court, the scheme of which the Austrian court dismissed as not in the Carina's best interest since it would remove her from Austria and could allow for the possibility my retaining custody of her in Michigan. Both situations, the court concluded, would be detrimental to the child. With this analysis, the court effectively determined custody in clear violation of Article 16 of the Convention. This decision was subsequently affirmed by the Austrian Supreme Court. The Central Authority in Austria notified us shortly thereafter that it had closed their file on the abduction.

I subsequently filed two applications with respect to these matters with the European Commission on Human Rights against Austria on behalf of both Carina and me, and anticipate official word as to their acceptance for presentment to the European Court early next year.

-The Michigan Divorce Case

In Michigan, the divorce case proceeded to a Default Judgment of Divorce granting me sole physical and legal custody of Carina. Carina's mother appeared in and participated in the case to the extent of requesting that the default entered be set aside. Following an extensive hearing, the Michigan court determined that it would set aside the default on the condition that Carina's mother return her to Michigan by a date and time certain. Carina was not returned. The Judgment of Divorce was entered on April 16, 1996. One week later, the court entered an order sealing the court records.

My attempts to obtain acknowledgment by Austria of the Michigan Judgment of Divorce have been unsuccessful to date. In fact, after three years in the various stages of appeal, the matter has not been finally determined. Initially, the Austrian Ministry of Justice denied my request for acknowledgment of the Michigan Judgment of Divorce. This decision was affirmed on appeal. While my further appeal was pending before the Supreme Administrative Court, the issue of the proper Austrian body to determine the recognition of foreign judgments was presented to Austria's Constitutional Court. This Constitutional review has stayed consideration of my appeal to the Supreme Administrative Court. It is unknown when the Constitutional Court will decide the question. Irrespective of that decision, it will be years before a final determination of Austria's recognition of the Michigan Judgment of Divorce from April 1996 will be made..

This delay in recognition of the Michigan judgment combined with the Austrian Supreme Court's order not to enforce the valid and final return order justified the Austrian trial court to determine itself vested with jurisdiction to award custody of Carina to her mother and to order me to pay child support retroactive to the day of the abduction. My appeals on both issues were denied. With the implementation of the Uniform Interstate Family Support Act here in the States, I could expect that the Austrian support order, when presented to the

appropriate state agency, would be honored automatically and my income withheld, thereby violating the Michigan Judgment of Divorce and subsidizing the abductor in the process. Fortunately, HUD recently issued a statement giving local agencies discretion on the mandates of automatic enforcement of foreign support orders in international parental child abduction cases. It has become necessary for me to notify my local support enforcement agency, provide it with a copy of the HUD statement and copies of both the 1996 Michigan Judgment of Divorce granting me custody and the 1999 Austrian support order which conflicts with it. With this, I have had some measure of success in confirming that automatic enforcement of the Austrian support order will not take place.

I have recently filed a third petition with the European Commission on Human Rights protesting both the delay in a decision and the Austrian court's proceeding with orders on custody and support prior to a final decision on the recognition of the 1996 Michigan Judgment of Divorce.

-The Hague Case, Article 21

In March 1998 when Austria closed its file on my Article 3 case, I petitioned under Article 21 for access to my daughter for visits in July, September and December of that year. The petition was presented to the trial court, by that time presided over by the new judge. Unbelievably, the petition under Article 21 was denied in April 1998 on the grounds that the Hague Convention did not apply. In May, the Austrian Court of Appeals reversed and remanded the decision, directing the trial judge to enter an order for access as "guaranteed under Article 21." At the end of July, the new trial judge did just that, ordering visitation in Austria at the home of Carina's grandparents where she and her mother lived. Since the July dates had already passed, the order granted the request for only the September and December dates. Carina's mother appealed that decision based on the fact that the court had not secured approval for the visit from the grandparents and therefore, had no authority to order the visit in their home. It was also based on Carina's mother's articulated fear that I would still snatch Carina back, even after four years of not having done so. In addition, she claimed that seeing me would traumatize Carina and believed that I should have no visiting rights because a warrant existed in the States for her arrest. I appealed supervision of the visits. By the time the first appeal was heard, the September dates had passed and the issue was moot as to that visit. Because of the passage of time, the court also recommended that I give a new schedule of dates. The opinion of the child psychologist would be required to determine how I have accepted the current situation and how I see Carina's future in order to determine whether it would be in Carina's best interest to have access to her father. I took a further appeal to the matter, particularly related to the use of the "expert" evaluation for the propriety of the visit. The Supreme Court affirmed.

I consequently was required to travel to Austria to meet with the "expert" child psychologist. My requests of the court to see my daughter at that time while I was in Austria were denied. I therefore took it upon myself to stand outside of her house with arm loads of presents, beg-

ging to see her. Carina's mother responded and I spent the entire day with Carina, her mother and grandparents at their home. This contact resulted in what might be called a discussion but which is more appropriately called an ultimatum. Carina's mother, understanding her absolute power in this matter has outlined her demands for allowing me to have a life with my daughter:

1. Written acceptance of Austrian custody court order;
2. Written acceptance of Austrian child support order;
3. Payment of remainder of the arrearage owed on the Austrian child support order retroactive to November 1995;
4. Withdrawal of American warrant of arrest; and
5. Agreement to the entry of an Austrian judgment of divorce.

Should I do all five of the above, Carina's mother will then consider allowing me some periodic visitation, decided one visit at a time and always to be had in her presence in Austria. Under no circumstances will she allow Carina to return to the U.S.

She is right to know that she is in control because there can be no question that she is. Even if I could obtain an access order from the Austrian court, without enforcement mechanisms, Carina's mother may comply or not as she chooses. The history is that she will not comply. Under Austrian law, there will be no sanctions for her doing so.

As a result, although Article 21 was clearly designed to protect me from these situations – I am left with the reality that I must engage in self-help if I am ever to know my daughter. Self-help however, was the device that the Convention was designed to remedy so as to afford parents like me the weight of the law and the support of the local courts in seeking the return of abducted children. In the end, the Convention and its implementation by Austria combined with a lackluster showing of support from the U.S., has led me inexorably to self-help on access. Had I known all of this at the start, I would have engaged in self-help in 1995 when the abduction occurred and avoided the legal, emotional and financial disaster this matter has become. Had I done that Carina would now know both her mother and her father.

<u>-The Criminal Case</u>

In addition to my efforts under the Hague Convention, I sought a criminal warrant against the abductor under the International Parental Kidnapping Act. Special Agent Scott Wilson of the FBI took the information and obtained the warrant on May 29, 1996. Interpol issued red and yellow notices. The case was assigned to Assistant U.S. Attorney Jennifer Gorland. To my knowledge, no action was taken on the warrant or the complaint for the first two years. My request to Jennifer Gorland that an extradition request be made to Austria for Carina's mother was denied by Ms. Gorland on the grounds that Austria does not extradite its own nationals. Just recently I learned a provisional arrest request was presented to Italy a short time ago. The request was denied by Italy.

Diplomatic And Political Pursuits

In an attempt to move the Austrian authorities to assist in either the civil or criminal enforcement of the return order, I sought the assistance of the American Consulate in Vienna. The U.S. Ambassador personally delivered a U.S. government demarche to the Austrian Ministry of Foreign Affairs in June, 1997. I asked the State Department, Bureau of Consular Affairs to correspond with the Ministry of Justice, the Central Authority in Austria. In response, the Austrian Minister of Justice has consistently and stubbornly declined to assist in the enforcement of the Hague Convention.

I have requested the involvement of literally hundreds of people including President Clinton, Mrs. Hillary Clinton, Attorney General Janet Reno, Secretary of State Madeleine Albright, Senators Abraham and Levin, Representatives Knollenberg and Portman, Nancy McLean, Nancy Hammer, Jennifer Penta and others within the International Division, National Center for Missing and Exploited Children, David Hobbs, Deputy Assistant Secretary of State for Overseas Citizens Services, U.S. Department of State, Randy Toledo, Terri Schubert, Debra Caruth, Mary Jo Gotenrath and Ernistine Gilpin of the Office of International Affairs, U.S. Department of Justice, Assistant U.S. Attorney Jennifer Gorland and Saul Green, the U.S. Attorney for the Eastern District of Michigan, U.S. Department of Justice, Scott Wilson and John Oullette, Special Agents, Federal Bureau of Investigation, in the U.S. Department of Justice, Mary Marshall, Mary Ellen Conway, Jim Schuler, Ray Clore, Steve Sena and Bill Fleming, Bureau of Consular Affairs, Office of Children's Issues, U.S. Department of State, Jim Preach, Interpol, John Baliff and Guyle Cavin, General Counsel, U.S. Embassy in Vienna, and I met with Swanee Hunt, former U.S. Ambassador to Austria in Vienna.
In addition, I have had regular correspondence and contact with Senator Mike DeWine and your office, Mr. Chairman. If I may quote from your own correspondence Mr. Chairman to Helmut Tuerk.

> "Now, Mr. Sylvester is attempting to exercise his rights under the Hague Convention to be able to visit his daughter who just celebrated her fourth birthday last week. (Mr. Sylvester has been able to see the child during her entire life for a total of only six hours.) Again he is encountering delays and obstructions in his legitimate right to visit his daughter instituted by the mother, but aided and abetted by a macabre procedure in the Austrian judicial system that allows the mother to institute an unending series of appeals in simply establishing a visitation schedule for Mr. Sylvester to see his daughter."
>
> "You know that I am a good friend of the people and the government of Austria, and I write this appeal to you in that spirit. I urge you to do everything possible to end this miscarriage and travesty of justice so that Mr. Sylvester and his daughter can enjoy the normal relationship that a child is entitled to have her father."

Nothing done has made a difference. The child was not returned because the order was not enforced, now the order will not be enforced because the child was not returned. The delay engendered both by the stubborn refusal of the mother not to comply with the order for

return and the unending number of ancillary motions and other legal maneuvers brought by the mother coupled with the unlimited number of appeals to each decision, has been fatal to my relationship with my daughter.

The Media

I have turned to the media for assistance after failing on the legal, diplomatic and political fronts. I would prefer not to pursue this forum. I do not seek or enjoy the personal attention. I do not typically make my private life public. However, I have come to realize that my case is a tragedy that has resulted in spite of the purported safeguards put into place by the Hague Convention and the International Parental Kidnapping Act. Nothing can give me back these four years without my daughter and no one can give my daughter a childhood filled with memories of her father. However, this situation cannot continue and this situation must not happen again. The problems encountered under the Hague Convention by an individual parent are not just private matters.

I believe my case serves as an excellent example of how the system does not work and has failed miserably. I believe that it is important to tell my story so that the American people can have a better understanding of what can happen in these cases, and to caution those who may follow. I was told early on by a representative of the U.S. Embassy in Vienna that it is clear that the Austrians are protecting Carina's Austrian citizenship. In response, I have asked for years, who in the States is protecting Carina's American citizenship? I am given no response.

I now have adopted a strategy to embarrass the Austrians for their handling of this case and validation of the abductor's illegal, deviant behavior. I am outraged by Austria's behavior and my government's response in this case. My rights as a parent are being denied and the Austrians are denying Carina's rights. Although Austria is our ally and claims to be a civilized society, I am getting the level of cooperation from the Austrians as one might expect to receive from our enemies. I will continue to do all I can to embarrass Austria in the media in the hopes that they will cooperate to ensure the objects of the Hague Convention are upheld. My efforts to date on this front have including the following:
Voice of America: Radio and Television Broadcast
International Crime Alert on Internet
Radio Talk Show: Douglas Darnall, Ph.D.
The Cincinnati Post: - October 2, 1998 (Associated Press article)
- February 5, 1999 (Front Page Headline)
- May 21, 1999 (Front Section Lifestyle)
Reader's Digest: September 1999 Special Feature, "America's Stolen Children"

However, I am concerned that Austria will not unilaterally reform their system. They will do so only when forced to do so out of self-interest (if their children are not being returned by foreign judges in retaliation) or embarrassment (from massive publicity and adverse human

rights reports).

I contacted the media in an effort to raise awareness of my situation and the problem of international child abduction at large. This is child abuse. This is a human rights issue. I need media support. All parents like me need media support. I request today assistance and support from the media in order to compel the U.S. government employees to assist in a meaningful, effective way. I continue to be disappointed by all of those Americans in positions to do so who have chosen not to support me by speaking up for Carina's rights. I have been told by one U.S. government employee that he is embarrassed to be a federal government employee in view of how many people have not supported me and Carina.

Networking/Advisory Panels

I have networked extensively with other similarly-situated parents. Networking among left-behind parents and their attorneys is in fact my most valuable resource because of the immediacy and wealth of information exchanged. Our federal government should propose ways to facilitate such networking, including requests for Privacy Act waivers from the outset, so that DOS and DOJ can give a left-behind parent names and phone numbers of other parents in the same situation with the country in question.

I have attended workshops on the issue of international parental child abduction and participated in rallies in support of active government participation in the return of parentally abducted children. During the past four years I have actively participated in Parent Focus Groups and have been in contact with a large number of left-behind parents and hundreds of people involved in addressing child abduction. I am a member of many organizations, including the Committee for Missing Children, P.A.R.E.N.T., Children's Rights Council, Parents and Children for Equality, National Fatherhood Initiative, American Coalition for Fathers and Children. I have testified before the United States Committee on Foreign Relations on matters relative to international parental child abduction, and have been recently selected to serve as a member of Project H.O.P.E.

The United States Central Authority: The Department of State

My experience with the Department of State ("DOS") has caused me grave concern as to their ability to serve effectively as Central Authority under Article 7. First, there appears to be a institutional misunderstanding of the Hague Convention by the DOS. In their publication, *International Parental Child Abduction,* eleventh edition, at page 4 under the heading: "What the State Department Can and Cannot Do When a Child Is Abducted Abroad," the DOS states:

> "Despite the fact that children are taken across international borders, *child custody disputes* remain fundamentally *private legal matters* between the parents involved, over which the Department of State has no jurisdiction."

Under Article 16 of the Hague Convention, an international parental child abduction is by no

means a child custody dispute. Article 16 of the Convention reads as follows:

> After receiving notice of a wrongful removal or retention under Article 3, the judicial or administrative authorities of the contracting state to which the child has been removed or in which the child has been retained *shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention* or unless an application under this convention is not lodged within reasonable time following receipt of the notice.

What the Hague Convention does provide is a remedy to a left-behind parent to assert that an abducted child be returned to its environment of habitual residence for a determination of the custody of the child in that jurisdiction. Indeed, even the Austrian courts initially understood this fundamental concept, denying Carina's mother's request for temporary custody in keeping with the provisions of Article 16 following its decision that Carina was to be returned to Michigan under Article 3 for a custody determination there.

The fact that the DOS should articulate this policy in a publication devoted entirely to the problems and remedies associated with international parental child abduction in their capacity as Central Authority under the Convention is puzzling. I myself have often heard tacit encouragement for self-help from my contacts at State: "The best thing you can do is keep working visitation out yourself." There are even explicit directives for self-help in *International Parental Child Abduction* : "You, as the deprived parent, must direct the search *and recovery operation yourself*." I am confounded by the advocation of self-help from the agency charged under Article 7 with the following responsibilities:

> (a) to discover the whereabouts of a child who has been wrongfully removed or retained;
> (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
> (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
> (d) to exchange, where desirable, information relating to the social background of the child;
> (e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
> (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangement for organizing or securing the effective exercise of rights of access;
> (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
> (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
> (i) to keep each other informed with respect to the operation of this Convention

and, as far as possible, to eliminate any obstacles to its application.

I believe this to be an abrogation of DOS duties under Article 7 by the DOS in favor of the self-help doctrine the Convention was designed to remedy.
Second, there appears to be no established protocol for the handling of outgoing cases by DOS. I can report in all honesty that my attorney and I have had dozens of conversations with personnel at the DOS that resulted in their saying something like "My hands are tied"; "What do you want me to do?; or "Why are you calling me?" The procedures there seem irregular and haphazard and with the passage of time, the case workers change and the institutional memory of the case is lost.

Third, although time and effort has been expended by the DOS on my case in that ultimately after repeated requests by me, demarches have been issued, letters written to the Austrian Central Authority, and personal visits and contacts arranged between the Central Authorities, I must ask toward what end this work was done, with what level of preparedness, with what commitment? For example, at a particularly crucial time in my case when our sole attempt at court enforcement failed, my appeals to the DOS were met with the inexplicable "strategy" of waiting six months until the Hague Conference to "embarrass the Austrians." To me this "strategy" seemed outrageous in the context of the Convention's directive for "prompt return" of abducted children. However, this was the best I could get. In fact, the six months did indeed pass with little or nothing done on the matter. Upon return from the Hague Conference six months later, I was told that Dr. Werner Schutz, the Austrian Minister of Justice, was a very arrogant and intimidating man. There was no further information or result provided. This is the end for which Carina and I were to wait half of a year.

More recently, in March of this year, a group from the DOS comprised of two newcomers to DOS, Mary Marshall and Ellen O'Connor, neither fully familiar with my case, traveled to Austria to meet with authorities there, including Dr. Werner Schutz, to discuss my case. Following the meeting, I received only an oral report from Ms. Marshall that I needed to submit yet another schedule request for access under Article 21 if I wanted the court in Austria to proceed with my petition for access. Based on my experience in the case, my expectations of the visit had been low. However, I found this outcome abominable. Moreover, after many months of written requests, just last week I received a written report of the results of the visit, a copy of which is attached to this submission in full.

This report reveals a number of missed opportunities to challenge the Austrians on false representations made by them in those discussions. First, DOS notes that the issue of the Austrian court's knowledge of the Convention was addressed and they were told:

> "Austrian judges were not unfamiliar with the Hague Process. Moreover, *[the Austrians] specifically called our attention to the fact that the Central Authority directly provides information, including prior decisions that might apply, to the courts of the first instance*. The [Austrian] Central Authority underscores in this

> information the duties of Austria under the Hague Convention."

Unfortunately, Ms. Marshall and Ms. O'Connor were apparently unaware of communication between Ray Clore, Director, Office of Children's Issues, U.S. Central Authority, and Dr. Werner Schutz exchanged in December 1996 and attached in full to this submission. Mr. Clore on behalf of the Department had written in part to Dr. Schutz as follows:

> "Is it possible for the Austrian Central Authority *to file a legal brief* with the courts in Austria in a pending Hague Convention Case? If so, under what circumstances will the Central Authority take this step? What can the Austrian Central Authority do to facilitate access of the father to the abducted child while this matter drags on? Can you confirm the child's location and condition? *Please inform me of what specific actions the Austrian Central Authority is taking to fulfill its obligations pursuant to Article 7 section (h) and (e) of the Convention."*

In response, the Austrian Central Authority through Dr. Schutz stated:

> "2. *The Ministry of Justice has no possibility at all to interfere with the independent judiciary. It is a basic principle that the administration and the judiciary are separated and no interference whatsoever is possible.* All States based on the rule of law have to respect court orders. *I cannot imagine that the U.S. Central Authority is entitled to give instructions to the courts, in particular to the Supreme Court relating the handling of the Convention.*
> *Having said this I have to reject very strongly – with all due respect – your allegations that the Austrian Central Authority does not comply with its obligations under the Convention. Such allegations are unfounded and in the field of international co-operation unusual, too. Acting in such a way does not promote international co-operation at all.*
> *For these reasons I abstain to comment on your remarks relating the proceedings in the Austrian courts.*
> *Of course it is up to the USA to make proposals for creating more appropriate legal mechanisms within the framework of the Convention in the proper international forum."*

Similarly, on August 28, 1996, Dr. Schutz wrote: *"And it is quite obvious that the Ministry of Justice cannot give any instructions to a court because courts are truly independent."*
Later, on February 5, 1997 Dr. Schutz wrote to the DOS on the issue of a legal brief as follows:

> "Relating to your fax-letters of 2 January 1997 and 4 February 1997, I do not want to comment on issues that have been dealt with and decided by the independent courts. *The only issue that I want to touch is the question of legal briefs from a third person. The submitting of legal briefs by (third) interested parties is not possible under Austrian law. It is the task of the courts, in particular the*

Supreme Court to interpret international conventions; theoretically a court might ask an expert-opinion on questions of private international law but the initiative must be taken by the court."

If in fact the delegation from DOS was aware of these communications, there is no evidence in the report to suggest that the comments made by Dr. Schutz were challenged on the basis of Dr. Schutz's own correspondence.

Similarly, the written report from the DOS's March 1999 meeting with the Austrians revealed that the subject of "Safe Harbor" orders was discussed generally and again our representatives were apparently unaware that a "Safe Harbor" order had been presented to the Austrian Court from the Michigan Court providing for the following safeguards for Carina's return to the U.S. The terms of the "Safe Harbor" order were:

a. That the Father, although recognizing that under Michigan law he has right to sole custody of Carina, shall not exercise that right of sole custody upon the return of the Mother and Carina to Michigan

b. That instead, the Mother shall live with the minor child separate and apart from the Father. The Father shall provide the Mother and Carina with a suitable furnished apartment for this purpose pending the outcome of an expedited custody hearing in Michigan.

c. The Father shall provide airline tickets for the return of the Mother and the minor child at his cost.

d. That upon their return, the Father shall pay all reasonable and necessary living expenses incurred by the Mother including rent, utilities, insurance, groceries, clothing, and medical expenses for Carina and incidentals for Carina, pending the outcome of an expedited custody hearing in Michigan.

e. That this Court shall conduct an expedited evidentiary hearing on the custody of Carina pursuant to her best interests as defined by the Michigan Child Custody Act.

f. That until such time as a determination is made by this Court regarding custody, the Father shall exercise visitation with the minor child supervised by a person other than the Mother, appointed by the Court, recognizing that this is neither an admission of a need for such supervised visitation nor an acknowledgement that he is not the legal custodial parent of the minor child.

g. That upon confirmation that the Mother and the minor child have boarded a direct flight to Michigan, assistant U.S. Attorney Jennifer Gorland shall be instructed to dismiss the federal criminal warrant now outstanding, against the Mother in the case styled *The United States of America vs. Monika M. Sylvester*. This would assure the Mother that she would not be arrested upon landing in Detroit for the crime of parental kidnapping.

The Austrian court rejected the “Safe Harbor” order out of hand. The trial court in Austria stated:

> “Nor can the approach proposed by the father in his statement of April 28, 1997 within the meaning of the “Safe Harbor” judicature change anything in the evaluation of the case by this Court pursuant to the instructions of the Supreme Court, since on the one hand, a move to the United States by Carina’s mother along with the child would mean a change in the environment the child has been used to for about a year and a half, and on the other hand, there would be no guarantee that Monika Sylvester would remain the child’s main caregiver, which, in view of the above-mentioned facts, is indispensable for Carina’s well-being.”

Again, if the delegation from DOS were aware of the presentation of the “Safe Harbor” order, there is no evidence of it in the report. Obviously, tremendous opportunities by DOS to challenge the Austrians were missed at that meeting. It is questionable as to whether expensive meetings of this sort are of any benefit to American parents without adequate preparation, commitment and purpose.

Fourth, there appears to be no serious commitment in DOS to assure welfare and whereabouts checks under Article 7(a). There also appears to be no protocol established either relating to the form of the request to the authority in the country to which a child has been abducted or to the process for the welfare check itself. The DOS publication *International Parental Child Abduction,* eleventh edition, describes the possibilities for a welfare and whereabouts check as follows:

> “If your child has been found you can request that a U.S. counselor officer visit the child. If the consul succeeds in seeing your child, he or she will send you a report on your child’s health, living conditions, schooling, and other information. Sometimes consular officers are also able to send you letters or photos from your child. If the abducting parent will not permit the consular officer to see your child, the U.S. embassy or consulate will request the assistance of local authorities, either to arrange for such a visit or to have the appropriate local official make a visit and provide a report on your child’s health and welfare. Contact the Office of Children’s Issues to request such a visit.”

I consider myself fortunate to have obtained one welfare and whereabouts check in the four years Carina has been gone. This check occurred only after my repeated requests to DOS over the years. Interestingly, DOS did instruct the Embassy to conduct a check at the place where Carina was understood to be living. Representatives from the U.S. Embassy traveled from Vienna to Graz, knocked on the door of the home where Carina was living and was told that no information about the child would be provided to the U.S. officials. Subsequently, the U.S. Embassy received a harassment complaint for their actions. Later requests by me for a

welfare and whereabouts check resulted in the U.S. Embassy in Vienna first contacting opposing legal counsel only to be told that no welfare and whereabouts check would be allowed and that the child was fine. This stopped all activity on the matter.
When a welfare and whereabouts check was finally arranged, it was done so in the presence of the trial judge at the Graz courthouse. My request that the American Embassy workers take a photo of Carina for me was denied.

Fifth, DOS is dilatory in responding to FOIA requests for personal files maintained by the Office of Children's Issues. My case is particularly enlightening in this regard as well. My attorney first filed a FOIA request for my file, among other things, from the Office of Children's Issues in 1996. Three years later, the file has not been provided. Instead, the various layers of correspondence written to inquire about the matter appears to have allowed for the classification by DOS of several separate requests each detailed below.
FOIA REQUEST NO. 9604263

1. On October 30, 1996, my attorney filed the original request on my behalf for all records in the State Department's possession or control relating to the return of any children to the Republic of Austria from the United States pursuant to the Hague Convention on the Civil Aspects of International Child Custody since October of 1995.
2. On December 4, 1996, she received a letter of acknowledgement of that letter assigning it Request No. 9604263.
3. On March 5, 1997, she received a letter from Karen A.H. French concerning certain record systems which had initially been searched for the requested documents. These were listed as:

-The Bureau of European and Canadian Affairs;
-The Office of Overseas Citizens Services;
-The Office of the Assistant Legal Advisor for Consular Affairs;
-The Office of the Assistant Legal Advisor for European and Canadian Affairs; and
-The Office of the Assistant Legal Advisor for Private International Law.

4. On March 12, 1997, my attorney wrote Ms. French explaining that the files she was requesting were maintained: "by the United States Central Authority under the Hague Convention, that being the **Bureau of Consular Affairs, Office of Children's Services [Issues]**." She further stated that Ms. French did not mention that this as an office in which Ms. French had conducted a search. She concluded with the statement "**All files referenced in my request should be available there."**
5. On March 21, 1997, my attorney sent a similar letter to Patrick Scholl, Information Response Branch stating as follows:

> "Enclosed please find a copy of my letter to Karen A.H. French sent pursuant to our FOIA request. Please note that the office you need to search is the **Bureau of Consular Affairs, Office of Children's Issues** since all

information requested deals with records kept by the Central Authority of the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abductions Remedy Act. Please provide this information as soon as possible."

6. Finally, on January 19, 1999, my attorney received a letter from Margaret P. Grafeld stating that she searched the same record systems, those being

-The Bureau of European and Canadian Affairs;
-The Office of Overseas Citizens Services;
-The Office of the Assistant Legal Advisor for Consular Affairs;
-The Office of the Assistant Legal Advisor for European and Canadian Affairs; and
-The Office of the Assistant Legal Advisor for Private International Law.

Ms. Grafeld's conclusion was that the Department of State did not have records responsive to my request. Once again, the Bureau of Consular Affairs, Office of Children's Issues was not identified as a department searched.

FOIA REQUEST NOS. 9604264 and 9604265

7. On November 25, 1996, my attorney filed a separate request on my behalf specifically requesting the Department of State file concerning the abduction of Carina Maria Sylvester to Austria on October 30, 1995. She also requested a copy of the full file of the Barlow child abduction to Olten, Switzerland in May 1991. This was intended to supplement the October 30, 1996 request for records about children returned to Austria under the Hague Convention since October 1995.

8. On December 4, 1996, my attorney received acknowledgement that the above request had been converted into two new request numbers: copies of the documents concerning the abduction of Carina M. Sylvester as Request No. 9604264, and copies of documents pertaining to the Barlow child abduction to Olten, Switzerland in May 1991 as Request No. 9604265.

9. On July 14, 1998, Ms. Grafeld sent a letter producing 116 documents from the American Embassy, Vienna.

10. On July 17, 1998, my attorney received a letter from Lois S. Chichester advising of the production of the American Embassy file and reciting the other record systems as yet to be searched as:

-The Bureau of European and Canadian Affairs;

-The Office of Overseas Citizens Services;

-The Office of the Assistant Legal Advisor for Consular Affairs; and

-The Office of the Assistant Legal Advisor for European and Canadian Affairs.

The Bureau of Consular Affairs, Office of Children's Issues was not a record system listed.

FOIA REQUEST NO. 9802377

11. On June 4, 1998, I wrote directly to Ellen Conway at the United States Department of State Bureau of Consular Affairs, Office of Children's Issues concerning the October 30, 1996 request explaining to Ms. Conway that documents were well overdue at that time and seeking her assistance in preparing a response.

12. On July 1, 1998, a letter was sent directly to me under Request No. 9802377 from John Livornese identifying that correspondence as a new request for copies of State Department documents pertaining to me, Carina and my case in Austria in addition to U.S. government demarche published and distributed in June 1997. Mr. Livornese asked for further information from me.

13. On July 14, 1998, I responded to Mr. Livornese's letter providing the information requested. At the end of that letter, I indicated that I also requested copies of all documents and records relating to a State Department file on Carina's abduction to Austria and any further demarches issued in my case. I also made reference to my original request on October 25, 1996 and further requested an explanation as to the October 30, 1995 request made by my attorney had not been finalized.

14. On July 14, 1998, Representative Rob Portman wrote a letter to John Livornese requesting a prompt response to my FOIA requests.

15. On August 17, 1998, I received a letter from Lois Chichester informing me that records were to be produced from the *Central Foreign Policy Records System*. She further identified The American Embassy in Vienna, the Office of Overseas Citizens Services and the Office of the Legal Advisor as other areas in which searches were underway. She did not mention the Bureau of Consular Affairs, Office of Children's Issues as such an area.

16. On August 28, 1998, I received Ms. Grafeld's letter and a document production of 30 items believed to be from the *Central Foreign Policy Records System*. Although these documents pertain to the abduction of Carina, these documents are not the office file of the Bureau of Consular Affairs, Office of Children's Issues files on Carina and me, nor are they the files of all children abducted to Austria since 1988.

17. On October 4, 1999 Representative Rob Portman sent a letter to Mary Ryan, Assistant Secretary to Foreign Affairs, DOS requesting an expeditious response to my FOIA requests.

FOIA NO. 437835

18. On August 18, 1998, my attorney received a letter from the Department of Justice apparently denying the production of its records under the Request No. 437835. Neither she nor I had ever requested any FBI records and do not know the origin of this request number and further do not understand the contents of

the letter.
NEW REQUEST AS YET UNACKNOWLEDGED
19. On March 12, 1999, my attorney submitted a new FOIA request directly to Bill Fleming, my case worker at the Bureau of Consular Affairs, Office of Children's Issues repeating the request for what now appear to be Request Nos. 9604263, 9604264, 9604265, and 9802377 directly addressed to the **Bureau of Consular Affairs**, **Office of Children's Issues**. To date, I have had no acknowledgement of that request.

Oddly, my attorney sat in Bill Fleming's office at the DOS over one year ago and was told that the file had been pulled for copying. I myself was later told that the fact that it hadn't yet been copied was "mysterious."

Finally, I would address the DOS's Report on Compliance with the Hague Convention submitted in April of this year. Naturally, I approve of Austria's inclusion as a country that has demonstrated a pattern of non-compliance with the obligations of the Convention with respect to applications for the return of children. The short exemplary paragraph on the matter however touches upon only a smallest part of the problem. Ironically, it also demonstrates some level of institutional knowledge of the communications referenced above between the U.S. and Austrian Central Authorities and the subsequent meeting which followed where, unfortunately, the delegates were apparently not aware of such communications.
Further, since my case is not one of the 56 identified as unresolved after 18 months, I can only infer that my case has been closed by the U.S. Central Authority as "resolved."

The Department of Justice
My experiences with the Justice Department ("DOJ") began well with the entry of an international warrant in May of 1996 under the International Parental Kidnapping Crime Act. This led to the red and yellow notices by Interpol. However, that is essentially where the participation of DOJ ended. Even my inquiries into the matter were surprisingly met with contention and hostility. The sole exception was Mary Jo Grotenrath at the Office of International Affairs who was uniformly pleasant and informative. Initially however, I was told that the criminal approach would be put on hold to see how the civil proceedings under the Hague Convention would unfold. I was told that Austria does not extradite its citizens but the U.S. does. So that if I were to go over to Austria to retrieve Carina myself, that I would run the risk of being extradited to Austria to face criminal charges there. The excuse of Austria's refusal to extradite its own nationals was used to explain away any further work on the warrant. After three years we had well seen how the civil proceedings have unfolded and still nothing was forthcoming from DOS on the warrant. In fact, after a very short period of time it became clear that the official position of the Department of Justice was to "remain neutral" on the warrant.

Neither understanding this position nor being satisfied with this situation, I continued to

press for information and answers or even some interest in the warrant of any kind. For example, last year I made a request to the Assistant U.S. Attorney on the case that an extradition request be issued to Austria– even if impossible to achieve. I was denied that request. Just recently I have learned that a provisional arrest request was presented a short while ago to Italy. Italy denied the request.

I believe the United States is not responding adequately through law enforcement tools to assist American parents and internationally abducted U.S. children. Such legal action by the DOJ would serve to apply pressure on the Austrians to comply with its international treaty obligations, and perhaps the abductor to take accountability for the wrongful, illegal behavior. With the current situation of lack of support on international parental kidnapping warrants from DOJ, Carina's abductor continues to get away with complete impunity. Ironically, the existence of the international parental kidnapping warrant, as useless as it is as a law enforcement tool, is however used as a weapon by the abductor and the Austrian courts to justify their not returning Carina to the U.S. In theory, the Austrians believe the abductor must accompany the child here upon her return or on a visit. At that time, theoretically, the abductor would be arrested and jailed and I would have free reign to enforce my valid Judgment of Divorce giving me custody of Carina. The "Safe Harbor" order to the contrary has been completely ignored by the Austrians, despite the recent statements to the U.S. Central Authority at their meeting in March.

As a result, the warrant on which very little has been attempted and nothing accomplished is in fact a detriment to Carina's return. Swift action on the warrant on the part of DOJ could have restored the balance of power in the case early and would also have been perfectly in keeping with DOJ's role as our federal law enforcement agency.
Senator Mike DeWine has recently stated:

> "I am concerned that a small child would be taken from a parent in violation of the law without any law enforcement intervention." . . . "We go after countries that steal our products or violate patent and copyright laws, but not when they are supporting the theft of American children. What does that say about us as a country?"

The recent report to the Attorney General from the joint task force on the DOJ's response to international parental kidnapping cases was a disappointment to me and other similarly situated parents. It lacks backbone, relying essentially on fact that the International Parental Kidnapping Act was meant as a last resort after civil recourse under the Hague Convention failed. I perceive at least two problems with this approach.

First, a prompt criminal response allowing for the arrest of the abductor, even though theoretically leaving the child behind, is essential for re-establishing the balance of power. As time drags on, the American laissez-faire policy on these warrants looks weak and insincere. The warrant is also used as a weapon in the argument against return. Therefore, if it is to be avail-

able and of any benefit whatsoever to left behind parents, it must be utilized swiftly to its maximum effect.

Second, the proposals for law enforcement response to international parental kidnapping under the International Parental Kidnapping Act are weak and will result in no further assistance to parents of America's stolen children. For example:

a. The report does not adequately reflect existing difficulties that reduce the efficacy of these arrest warrants when abductors flee to countries such as Austria from which nationals are not extradited;

b. The report focuses on the fact that the arrest and extradition of the abductor does not return the abducted child. This reads as justification for not vigorously pursuing the warrant, since it is assumed that the primary purpose of the warrant and the criminal act on which it is based is the return of the child. Naturally, left-behind parents are desperate for the return of their lost children. In many cases however, the civil remedy under the Hague Convention has been so abominable an arrest and incarceration under the act may provide the only means by which to resolve the balance of power between the parents to allow for a negotiation as to how the child will be cared for.

It appears never to have been the intention of the legislature to seek the return of the child with the implementation of the International Parental Kidnapping Act. The perpetrator under the act is the abductor. The International Parental Kidnapping Act criminalized the abduction itself and seeks redress for the criminal behavior. There should be no concern by DOJ in pursuing criminals under the International Parental Kidnapping Crime Act as to whether or not the child is returned. This simply isn't relevant to the performance of the job of our federal law enforcement agency;

c. The emphasis by DOJ in the report on the fact that a conviction under the crime act does not return the child reinforces the same institutional misunderstanding held by DOS – that being that the remedy sought by the Hague Convention and the International Parental Kidnapping Act is a private custody matter; and

d. The report fails in providing a swift and defined protocol for prosecuting cases and pursuing warrants under the International Parental Kidnapping Act.

The Problem of Austria

Austria plays a significant role in the bizarre result of my case that looked so hopeful from the start. As a treaty partner to the Hague Convention, Austria has committed to complying with the terms of the Convention and its implementation there. Nonetheless, its legal system works in direct opposition to the two objects of the Convention – the prompt return of the

parentally abducted child into its environment of habitual residence and the provision of access by left-behind parents to parentally abducted children. The problems that arose in my case are of such a voluminous nature that they are addressed below in turn.

1. ENFORCEMENT. The most pronounced problem and that which was fatal to the return of Carina to the U.S. is the Austrian legal system's failure to provide for any significant and hard-hitting enforcement procedures for its own orders, relying instead on the polite knock on the door and a request for voluntary compliance. This means that it is absolutely impossible for Austria to consistently comply with the Convention since Austria cannot control the conduct of its citizens or protect the parental rights of foreign parents through their own court orders. This fact is well understood by Carina's mother who recently said to me: "Even if the courts here [in Austria] tell me what to do . . . I don't have to do it." She learned this from the successful results of her direct disregard of the initial set of orders of the Austrian courts which stated:

> "The child's mother Monika Maria Sylvester is ordered by otherwise forced action to return the minor Carina Maria Sylvester immediately to the father, Thomas Sylvester to the previous residence in Michigan, USA" (December 20, 1995, Trial Court)
>
> "It should also be expected from the child's mother, if she puts the well-being of the child higher than her own, that she returns with the child to the United States." (December 20, 1995, Trial Court)
>
> "It is the mother's freedom and is also expected of her as a responsible custody provider, that she put the welfare of the child before her interests to stay in Austria and return together with the daughter to the United States. It is then the responsibility of the appropriate American court to decide final custody." (February 19, 1996, Austrian Court of Appeals).

Despite the strong language of these orders, Carina's mother felt completely comfortable not complying with their directives. Lack of enforcement of the early Austrian orders meant that Carina would be returned only if her mother chose to do so. This fatal shortcoming puts the effectiveness of any Austrian return or access order in the hands of the abductor, who obviously chose to take the child impermissibly in the first place.

For recipients of return orders under the Hague Convention, this defect in the Austrian system means that Austria gives the abductor complete control over the situation including, every aspect of the child's relationship with the left-behind parent. This is the antithesis of what the Hague Convention is all about. This not only limits the value of Austria as a partner to the Convention, but renders Austria a very dangerous treaty partner when American parents rely upon Austria's participation in the Convention to their detriment.

Austria is not alone in this regard. Germany and other civil law countries are treaty partners with no means to enforce court orders rendered under the Convention or otherwise.

2. RE-OPENING OF CONCLUDED HAGUE CASES. The defect of non-enforceability of return orders allows for the "re-opening" of Hague Convention cases in Austria years after a valid and final return order is entered. The "re-opening" of a Hague Convention case is not only unprecedented, but also runs counter to the inherent philosophy of the Hague Convention that a child's best interests are served when it is immediately returned to its country of habitual residence following an international parental child abduction.

The Austrian court's determination in my case to devaluate the original valid and final order for return of Carina metamorphosing it into an order that Carina will not be returned is an amazing fete of legal logic. On the one hand, the order for Carina's immediate return to Michigan for a custody determination there is valid and final, but on the other hand, since the order hasn't been complied with voluntarily, the return of the child is no longer necessary. The child was not returned because the order was not enforced. Therefore, the order will not be enforced because the child was not returned. In the end, the custody determination was said to take precedence over the Hague Convention.

3. ENDLESS APPEALS ON ANY ISSUE. The Austrian legal system seemingly provides no end to any issue before it, allowing for unlimited appeals and motions until an original decision is bent so far out of shape that it is no longer the same decision. An end can be achieved as in my case, when the Austrian national finally obtains an order legally sanctioning the abduction. This creates the serious problem of extensive delay, i.e., when the file is in a higher court, no proceedings can be had on even interim matters requiring resolution such as access not related to the issue on appeal.

4. THE AUSTRIAN CENTRAL AUTHORITY DOES NOT MEET ARTICLE 7 OBLIGATIONS. The Austrian Central Authority is intractable. There is no real evidence of any interest or dedication to compliance with its duties under Article 7 despite the Austrian delegation's attempt to have the situation appear otherwise in its meeting with the U.S. Central Authority in March of this year, as referenced above.

5. GENDER AND NATIONAL BIAS IN HAGUE CASES. There exists extreme gender and national bias in favor of mothers and Austrian nationals in the Austrian courts. This is evident even in Hague Convention cases. According to the U.S. Embassy report on the March 2, 1999 meeting: "This potential scenario [custody to the father] was most culturally abhorrent when it seemed likely that the mother (rather than the father) would be separated from her child." In my access case under Article 21, the court-appointed child "expert" submitted a report to the court stating that any child between the age of six months and six years would be psychologically harmed if separated from the mother even temporarily. This opinion is maintained and advocated irrespective of Austria's participation in the Hague Convention. The social worker who supervised my first meetings with Carina following the abduction stated the situation quite plainly—I give the mother whatever it is she wants legally, including custody under an Austrian order, and then everyone else in Austria will be in a position to

consider my having access to Carina. Based on my experience, it is impossible to conceive of circumstances under which an Austrian court would award custody of a small child to an American father in the United States over an Austrian mother in Austria.

This national bias is also exemplified by the undignified but not uncommon practice of Austrian judges granting non-Austrian fathers visitation of their children only in small bits, only in Austria, and often only under supervision of the mother or a third person authorized by the mother. This bias is most startling in light of the recent European trend toward mandating family courts to preserve joint physical custody of a child.

6. ABSENCE OF COMITY FOR FOREIGN ORDERS. Austria is disrespectful of the principle of comity. In its initial determinations, Austria was quick not to acknowledge my Michigan Judgment of Divorce stating that the judicial process in the United States was lacking in even the most basic Constitutional safeguards, despite the abductor's active participation in the case through counsel. It is now three years later and the matter of Austria's acknowledgement of the Michigan Judgment of Divorce is still not resolved. Instead, the issue of the proper authority to determine Austria's recognition of foreign orders has moved to its Constitutional Court. It is difficult for me as a layman to understand this lack of respect for and consideration of court orders of other nations, particularly when the principle of comity is a well-established element of American law.

Particularly offensive is the Austrian court's assumption of jurisdiction over matters such as custody and child support in advance of an official determination as to Austria's recognition of the Michigan Judgment entered in 1996 resolving those same issues. This exercise of jurisdiction is without question premature, contradictory to established legal procedure, aggressively arrogant and revealing of the compelling drive to favor their own nationals in court proceedings.

7. FAILURE TO EXTRADITE ITS NATIONALS UNDER AMERICAN ARREST WARRANTS. Austria provides a sanctuary for child abductors wanted under internal parental kidnapping warrants. In international child abduction and wrongful retention cases, Austria refuses to extradite or prosecute Austrian nationals. This combined with the complete inability to enforce their civil orders means that an abductor can flee to Austria with complete impunity both civilly and criminally.

8. LINKING OF ARTICLE 21 HAGUE CONSIDERATION WITH ISSUES IN OTHER PENDING CASES OR LIFTING OF U.S. ARREST WARRANT. Austrian courts link the granting of access under Article 21 with other non-related issues. Carina's rights are completely independent of any other proceedings in which her parents are involved. The trial court judge in my case has told me if I accept an Austrian divorce, I will get more access to Carina. He calls it a "factual relationship." I call it "blackmail." At a recent access hearing under Article 21, the Austrian judge discussed such matters as my lifting the international

warrant for the abductor's arrest and my modification of the terms of the Michigan Judgment of Divorce to comport with what is happening in the Austrian courts.

9. DISCOURAGEMENT OF SETTLEMENTS. The Austrian system discourages amicable settlements by not providing for the possibility for joint custody, contrary to the trend of most of its other European neighbors. Therefore, it eliminates the possibility of the use of "mirror orders," those being the same orders entered in the courts of both countries incorporating terms that might reflect a compromise position of both parties.

10. NO SANCTION FOR FAILURE TO COMPLY WITH HAGUE CONVENTION. Austria has been able to benefit from the Hague Convention while systematically failing to comply with its terms and thus failing to reciprocate. According to statistics from the National Center for Missing and Exploited Children, Austria has realized the return of four children from the United States to Austria under the Hague Convention since September 1995. This covers the time that the Austrian courts had ordered Carina's return to the United States. To date, Carina still has not been returned. Why is her heart considered any different than those of the Austrian children? It is a sad fact that some countries have been able to benefit from the Convention while systematically failing to comply with its terms and thus failing to reciprocate.

11. VIOLATES U.N. CONVENTION ON RIGHTS OF THE CHILD. Austria is systematically violating its obligations of the Convention on the Rights of the Child. Austria ratified this Convention in 1992. The United States has signed, but not ratified the Convention. Specifically, the denial of Carina's right to know her father and her extended family here in the States contravenes Article 9 of the Convention on the Rights of the Child. In addition Austria violates Article 10, Carina's right to contact with parents who live in different countries; Article 18, the right of both parents to have common responsibilities for the upbringing and development of the child; and Articles 2, 5, 8, 11, 16 and 29 which also impose pertinent obligations. These obligations are systematically violated by Austria, a loud proponent of the Convention on the Rights of the Child. Austria is a country with legal systems that do not provide effective enforcement mechanisms for access/visitation and therefore, cannot comply with their obligations under either the Hague or Rights of the Child Conventions.

Recommendations

Unfortunately for parents who put their faith in the legal system, as in my case, the Hague Convention sometimes does not work even between parties to the Convention and even when orders for immediate return of the child are entered. It is because of this failure that American parents desperately need the assistance of the Department of State and the U.S. Central Authority, and the Department of Justice as our federal law enforcement agency.

There is an immediate need for both the Department of State and the Department of Justice to prioritize these parental child abduction matters and assist with the enforcement of American orders and American arrest warrants to give some support to parents like me who obtain affirmed valid and final orders for return under the Hague Convention which don't them-

selves bring the children home. A strongly staffed U.S. Central Authority must take an aggressive, non-diplomatic posture with uncooperative Central Authorities like the Austrian Ministry of Justice. The Department of Justice must vigorously pursue these fugitives from justice as they would "serious" criminals and never again remain neutral on a warrant for arrest of an abductor. Extradition should be requested in every appropriate case whether it is believed it will be granted or not. Possible solutions include:

1. The immediate organization of a conference of judges and administrators from the U.S. and each of the five countries identified in the DOS report to discuss the violations of their obligations under the Hague Convention. The model used by France and Germany could be explored.
2. Correct the institutional mind set for both DOS and DOJ that actions under the Hague Convention and criminal warrants for the arrest of abductors under the International Parental Kidnapping Act are not private child custody matters.
3. The U.S. Central Authority under Article 7 should supply valuable information such as the legal procedure of problematic cases in those five countries identified as non-compliant under the Hague Convention to the courts of the U.S. dealing with return cases to those particular countries.
4. Privacy Act waivers should be obtained from all interested left-behind parents to facilitate networking between parents. An applicant parent should be assigned a mentor from these left-behind parents and immediate contact should be made through DOS/DOJ.
5. Hague non-compliance should be incorporated in the DOS Human Rights report of each recalcitrant country.

DOS should prepare an annual Hague Compliance Report, covering both return and access cases, with more meaty information on case examples presented.

Modify UIFSA to specifically eliminate automatic enforcement of foreign child support when the case involves an international parental child abduction.

Apply political and moral pressure on the non-compliant countries to improve the performance of the Hague Convention. It is important for countries to be persuaded to introduce mechanisms to ensure the principles of the Hague Convention are enforced. Now that non-compliant countries have been identified, specific measures should be taken to correct non-compliance. For example, pass new immigration legislation to limit visas issued to nationals of non-compliant Hague countries. Similar legislation could be passed to that of America's trade agreements with those countries to provide for sanctions for non-compliance. In addition, actions could be taken to limit the United States participation in any other bi-lateral treaties with non-compliant countries until compliance is achieved under the Hague Convention.

Closing Remarks

I relied on the Hague Convention to my detriment. I believed that Austria was a civilized society as I had been told by Monika. However, I have discovered one fundamental difference between Austria and the United States. Austria forsakes international relations for the sake of its nationals whereas the United States forsakes its nationals for the sake of international relations. Or, as my ex-wife put it: "Tom, the difference between us is that my government protects me."

Under its current legislation, policy and practices, Austria does not fully implement or comply with the Articles of the Hague Convention. In addition to addressing the cruel impact of Austria's current violations of the Convention on the children affected today, it is hoped that the Committee will also be particularly concerned with the absolute certainty of continuing Austrian violations of the Hague Convention.

According to the U.S. Embassy report of the March 2, 1999 meeting, "the Austrians agreed that the very difficult Sylvester case had certainly highlighted many of the contentious areas of the Hague process." There has been no remedy to the wrongful removal of Carina. The abductor has gotten away with complete impunity. Now I am being confronted with demands from the abductor. I am told that I must meet these demands or I risk never seeing my daughter again. As an FBI agent said to me, I am being extorted for my own child. The real choice for me now is to "write off" the child, carry out a rescue operation, or participate in hostage-like negotiations with the person who committed the hostile, deviant and illegal behavior. The system has failed miserably. For me, the implementation of the Hague Convention is completely dependent upon the cooperation of the abductor.

Carina is being denied her most basic human right - that of having both parents in her life. If you have rights that are not able to be exercised, it is as if you have no rights at all. She is not being exposed to this country, her native language or her extended family. She has the right to have a continuing relationship with me, her father.

Although Islamic countries deserve to be criticized for not participating in the Hague Convention and the United Nations Convention on the Rights of the Child, they are no worse than Austria (and a good deal more honest than many European civil law countries, including Austria) and are in fact more honest in their approach. A parent knows what to expect from the Islamic courts when a child is abducted to an Islamic country. Much more dangerous is a country like Austria, which portends to participate in the Convention, only to be fully unable to fulfill their obligations in the end. The end result is often the same whether a left-behind parent is dealing with Iran or Austria. The truth is that Austria has rewarded child abduction. I hope and pray that productive action will result for our children from these hearings here today. I thank you for listening to my story and my concerns. I ask for your continued interest and support.