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zum 60. Geburtstag

Herausgegeben von

Andrea Büchler
Markus Müller-Chen

Stämpfli Verlag AG Bern

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The Promise and Perils of a Protocol to the 1980 Convention on the Civil Aspects of International Child Abduction

Carol Bruch

The 1980 Hague Convention on the Civil Aspects of International Child Abduction[1] is under review. The feasibility and desirability of a possible amendment to the treaty, known as a protocol, is on the agenda for consideration at intergovernmental meetings to be held at The Hague in January 2012.[2]

The negotiation of a successful protocol will require thoughtful innovations. The fact that INGEBORG SCHWENZER's comparative family law scholarship demonstrates great skill in preserving what is important while adapting to change prompts me to offer this essay in her honor – a decision that was reinforced by the pleasant coincidence that it was Switzerland, her professional home, which first proposed a protocol.[3] Allow me, then, to share some thoughts that are drawn from my research on the Convention and my role as an observer at the intergovernmental meetings that have reviewed its operations.

I. The drafters' understanding and its consequences

Any consideration of amendments to the Convention must begin with a firm grasp of the drafters' understanding of children's needs and the extent to which advancements in knowledge since 1980 sustain or countermand their views.

The Convention's procedure that returns children who were wrongfully removed from a custodial parent to their countries of habitual residence is well known. Less clearly understood is the drafters' conviction that, absent unusual circumstances, children's interests are best served by remaining with (or being restored to) the parent who was providing their day-to-day care.[4] The Convention's remedies reveal this aspect of their understanding most clearly.

1 The text is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=24. All references to «Convention» or «Articles» are to this Convention.

2 See http://www.hcch.net/upload/wop/sc2011info1e.pdf.

3 It did so in 2006, seeking several excellent amendments. See BUCHER, The New Swiss Federal Act on International Child Abduction, 4 J. Private Int'l Law 139, 144 (2008) (a thoughtful exposition of the issues and of a related domestic enactment).

4 The Preamble explains that the return remedy is intended «to protect children … from the harmful effects of their wrongful removal or retention [from a person with custody rights who

Return is directed only when a noncustodial parent removes the child – the evil that was the focus of their attention in 1980. If, instead, the parent with rights of custody who provides the child's daily care moves away with the child, no return is prescribed, even if the taking was wrongful.[5] In this case, the child is expected to remain with its caregiver unless the other parent wins custody in litigation on the merits at the child's new location.

This belief in the importance to the child of remaining in the household of the parent who has provided its day-to-day care has been proven wise by a growing body of scholarly research, particularly as to young children.[6] Yet some courts and even the secretariat of The Hague Conference (the Permanent Bureau) now support interpretations of the Convention that blur this clear line between custody and visitation.

An early, poorly reasoned decision from the English courts, *C v. C*,[7] was embraced by the Permanent Bureau, but was later greeted with consternation by an Australian court when it learned how its law had been misread.[8] A comment on the Permanent Bureau's website, however, compounded the error by dramatically overstating the degree to which *C v. C* has been followed, in part because many cases that are claimed as progeny are, in fact, joint legal custody cases, which are subject to a different legal analysis.[9] And most recently, although the Bureau is a secretariat that represents neither the The Hague Conference nor the States Parties to the Convention, it submitted an amicus brief in a United States Supreme Court case, *Abbott v. Abbott*.[10] Once again, although a more careful analysis from the Canadian Supreme Court, which refused to follow *C v. C*, was available,[11] the

has been providing their daily care].» It does not state a purpose of deterring all abductions, nor of deterring custodial parents from relocating abroad. See Convention (*supra* n. 1); see also Brief of Delegates LAWRENCE H. STOTTER and MATTI SAVOLAINEN, on the Drafting and Negotiating of the Hague Convention On the Civil Aspects of International Child Abduction, as *Amici Curiae* in Support of Respondent (No. 08-645) (*Abbott v. Abbott*, 130 S. Ct. 1983 (2010)) (JAMISON SELBY BOREK joining in part) («The Drafters' Brief»), available at http://www.abanet.org/publiced/preview/briefs/jan2010.shtml#abbott [hereafter ABA brief website].

5 See Articles 3, 5 & 21.

6 See BRUCH, Sound Research or Wishful Thinking? Lessons from Relocation Law, 40 Family Law Quarterly 281 (2006), available at http://www.law.ucdavis.edu/faculty/Bruch/files/BruchFLQSummer06.pdf (reporting the literature).

7 [1989] WLR 654 (Eng. C.A.).

8 See BRUCH/DURKIN, The Hague's Online Child Abduction Materials: A Trap for the Unwary, 44 Family Law Quarterly 65, 82 fn. 59 (2010), available at http://www.law.ucdavis.edu/faculty/Bruch/files/BruchFLQSpring2010.pdf.

9 See Article 3a (concerning joint custody); Brief Of Eleven Law Professors as *Amici Curiae* in Support of Respondent 23-25 (No. 08-645) (*Abbott v. Abbott*, 130 S. Ct. 1983 (2010)), ABA brief website (*supra* n. 4); BRUCH/DURKIN (*supra* n. 8), at 74-81.

10 130 S. Ct. 1983 (2010), available at http://www.supremecourt.gov/opinions/09pdf/08-645.pdf.

11 See *Thomson v. Thomson* [1994] E S.C.R. 551 (Can.).

Bureau's brief persisted in its interpretation that threatens the policies of the drafters.

II. The pernicious effects of treating visiting parents as custodial parents

These harmful cases represent the Western world's growing embrace of «*ne exeat* provisions» (travel restrictions). These statutes or court orders prohibit custodial parents from changing where the children will live. The legal question is whether a visiting parent becomes a parent with custody rights for Convention purposes (i.e., has the right to demand the child's return) if he or she is protected by a travel restriction but has not given day-to-day care.

Revealing a different public perception of children's needs and of fathers' rights that has developed in some parts of the world over the past three decades, some welcome these return orders, reasoning that they are an important first step on behalf of visiting fathers, whose interests they believe are inadequately served by the Convention.[12]

The upshot is that these courts read the Convention to require the return of children when noncustodial parents (who are primarily men) have a legal right to prevent their children and – *de facto* – their former partners from leaving.[13] But these features are remarkably reminiscent of practices the drafters rejected when they created the Convention's accession process.[14] Their goal was to ensure that

12 There are also those who would go further. The overriding purpose of the Convention, they say, is to deter abductions – something that can only be accomplished if visiting parents, too, are entitled to return orders. In essence, these arguments recast the Convention in terms of equal parental rights for custodial and visiting parents, displacing the goal of protecting children from the harm of being removed internationally from their primary caretakers. See Brief for the United States as *Amicus Curiae* Supporting Petitioner (No. 08-645) (*Abbott v. Abbott*, 130 S. Ct. 1983 (2010)), ABA brief website (*supra* n. 4).

13 When children are returned under the Convention, their mothers generally return with them. See Reunite Research Unit, Research Report: The Outcomes for Children Returned Following an Abduction (Sept. 2003). It is likely that these women, if they are primary caretakers (as is likely), do so out of concern for their children's emotional well-being, even if they fear for their own safety. See *id.* It is also likely that they realize that their chances of receiving custody at trial will depend on their presence during the litigation. And finally, they probably also realize that even if they are awarded custody, they will be allowed to exercise custody only in that country. In essence, these women have the same choices as do the women whose husbands live in the Arab countries that were of concern to the drafters in 1980.

14 This gate-keeping mechanism restricts access to treaty relationships for countries that did not belong to the Hague Conference on Private International Law when the Convention was promulgated, without regard to membership at a later time. A non-member State may deposit an instrument of accession that produces treaty relationships only as to States Parties, if any, that expressly accept the accession. See Article 38. The result, for an acceding country, is a collection of bilateral treaties. In contrast, when a document of ratification is deposited by a country that was a members of the Hague Conference during its Fourteenth Session (which promulgated the

the Convention would never require that children be returned to a country where men had the right to prevent them and their mothers from leaving, or to a country where departures were barred for political reasons.[15]

As is the case in the legal systems that so concerned the drafters in 1980, these travel restrictions protect the prerogatives of noncustodial parents in a gendered fashion that largely replicates *de facto* the *de jure* rules of Muslim law.

The contrast with 1980 is dramatic. When the Convention was drafted, two proposals with similar goals to the current efforts were advanced, but overwhelmingly defeated – one that would have given return orders at the request of a visiting parent,[16] and another that would have given exclusive jurisdiction over visitation matters to the country of the child's former habitual residence.[17] As these votes suggest, there was a high degree of agreement among the delegations on where and how visitation issues should be addressed:[18] at the custodial house-

Convention) and takes effect, it creates a multilateral treaty with all other States Parties that were also members of the Conference. The ratifying country is then free to enter bilateral treaties with acceding states, should it wish. See Articles 37 & 38.

15 See Article 38; BRUCH, Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction, 33 N.Y.U. J. Int'l Law & Policy 49, 49-51 (2000) (describing the process, the reasons for it, and the delayed acceptance by Austria of Hungary's accession). Some countries have since not accepted the accessions of countries that grant men automatic power over departures by their wives and children. I am unaware of any legal system that permits women a comparable right to prevent the departure of their spouses or children. Although in theory travel restrictions may preclude the departures of custodial fathers' households, they are unusual. Striking gender disparities in judicial responses when men sought to relocate were evident in a study of California's unpublished appellate cases. See BRUCH, The Use of Unpublished Opinions on Relocation Law by California Courts of Appeal: Hiding the Evidence?, Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual 225 (2006).

16 See Hague Conference on Private International Law, 3 Actes et documents de la quatorzième session (Child Abduction) 262 (1980) (Working Document No. 5, a Canadian proposal). [hereafter Actes et documents]. It was rejected by a vote of 19 to 3, with 1 abstention. Opposed were Australia, Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Japan, Luxemburg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, The United Kingdom and The United States; in favor were Canada, Ireland and Israel; and Italy abstained. *Id.* at 267.

17 *Id.* at 281 (Working Document 31, a Danish proposal). It was rejected by a vote of 18 to 2, with 4 abstentions. Opposed were Austria, Belgium, Canada, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxemburg, The Netherlands, Portugal, Spain, Switzerland, The United Kingdom and The United States; in favor were Denmark and Norway; and abstaining were Australia, Czechoslovakia, Sweden, and Venezuela. *Id.* at 334.

18 See PÉREZ-VERA, Explanatory Report on the 1980 Hague Child Abduction Convention, Actes et documents (*supra* n. 16), at 426, 465-66 paras. 125-128.

hold's new location, with the help of the Convention's offices (Central Authorities) that support Convention operations, also for the benefit of custodial parents.[19]

An unfortunate combination of forces may be contributing to these recent departures from the Convention's more child-focused roots: widespread but unfounded contemporary beliefs about human relationships («pop psychology»),[20] and increased deference to male control in Western countries. A group of authors and mental health professionals who misstate the research literature to legal audiences, whether for ideological or financial reasons, surely play a part in each development.[21]

The known risks to children's well-being of removing them from the household of a relocating primary caretaker will, of course, be exacerbated if there are additional, independent reasons why they should not be transferred into their non-custodial parent's care.

No competent research refutes the drafters' wisdom, and a great deal supports it. The first essential provision, therefore, that should be provided by protocol or a revision of the Convention is one that defines custody and access as they were originally intended and ensures that, absent unusual circumstances, children will not be returned to the location of someone who was not their primary caretaker.

19 See Article 21; see generally BRUCH, The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed, 28 Family Law Quarterly 35 (1994). Article 21 also requires that Central Authorities co-operate to promote the peaceful enjoyment of visitation and permits an Authority to assist in having legal proceedings filed to «organiz[e] or protect[t]» visitation rights.

20 See generally BRUCH (*supra* n. 6), Sound Research or Wishful Thinking?, *passim*; BRUCH, Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases, 14 Child & Family Law Quarterly 381 (2002), available at http://www.law.ucdavis.edu/faculty/Bruch/ files/bruch.pdf.

21 American psychologist and advocate of Parental Alienation doctrines, RICHARD WARSHAK, for example, requested a fee of USD 30,000 several years ago to travel from Texas to testify in California concerning an assertion of Parental Alienation, although his preparation would be limited to reviewing an expert opinion by a court-appointed professional in the case, someone who had interviewed the parents and children, interviews that WARSHAK would not be allowed to perform. If the case settled before trial, he was to retain USD 10,000. Confidential communication to the author from the litigant who had sought his services. More typical charges for such services are billed by the hour and will total approximately USD 3,000 to USD 4,000. Telephone interview with KIM M. ROBINSON, Esq., of Oakland, California, on December 29, 2010. See also an effort to conceal the lay origins of so-called Hostile Aggressive Parenting (HAP). BRUCH (*supra* n. 6), Sound Research or Wishful Thinking?, at 299 & fn. 71.

III. Improved Remedies for Visiting Parents

This, however, does not resolve what can and should be done on behalf of noncustodial parents who wish to maintain or even create satisfactory relationships with their children across the distance now between them. Although this goal is simply stated, fulfilling it is not. The challenge arises from the vast array of circumstances in visiting relationships, as an expert opinion solicited from two psychiatrists by the English Court of Appeal reveals.

Their concise yet thorough report, which was later published,[22] sets forth psychiatric and developmental principles to guide courts in visitation cases. Responding to questions, the psychiatrists identify the relevant literature and the potential advantages and disadvantages of visitation in general, then discuss domestic violence and other difficult cases. The Court of Appeal expressly accepted the tenor and conclusions of the report, which was later endorsed as a generally accepted professional view by an overwhelming majority of the mental health professionals who were asked to evaluate its content by The Lord Chancellor's Advisory Board on Family Law: Children Act Sub-Committee (CASC).[23]

As such, the STURGE and GLASER report is an extraordinary resource, with a simple lesson for the coming deliberations: there is a broad range of visiting parent-child relationships, from the most favorable to those which contraindicate care by the visiting parent or even that person's direct or indirect contact with the child.

Given this variety, it is clear that one remedy – that of a return order – cannot possibly serve all cases. And, for the reasons discussed above, return to a parent who is not a primary caretaker in all likelihood harms the child, the person the Convention is meant to protect. But what of a scheme that would define a subset of cases in which the visiting parent had been significantly involved in the child's daily care and also had a good relationship with the child? Would a return remedy make sense in these cases?

Probably not. It is difficult to see what good would be accomplished by investigating the visiting parent's pre-abduction care for and relationship with the child in a hearing on a return petition rather than simply filing an action on the merits of the custody case – the Convention's current scheme. By dealing with the entire matter at the child's new location, duplicative litigation, unnecessary expense, and what might be unnecessary disruption to the child are avoided.

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22 Dr. CLAIRE STURGE in consultation with Dr. DANYA GLASER, Contact and Domestic Violence – The Experts' Court Report, [2000] Family Law 615, available at http://www.law.ucdavis.edu/faculty/Bruch/files/AppendixD.pdf.

23 These events are described in BRUCH (supra n. 20), Alienated Children, (expanded from earlier publications to include the English authorities at pp. 390-92). The CASC vetting is discussed at page 392 fn. 64.

There are, however, other remedies that could take advantage of the many ways in which parents and children can now take an active part in each other's lives across distance, and these remedies might be applied in differing degrees, according to the circumstances of the case. In 1980, for example, international telephone calls were very expensive, and Skype did not exist. With Skype and similar programs, conversations now cost nothing or almost nothing between computers, between computers and telephones, and between telephones. Webcams, some cellular telephones, and PDAs permit face-to-face conversations. Through the use of video tapes, a parent can read a bedtime story to a child, even one chapter each night, and sharing special events is possible. Facsimile machines can send drawings and school work across the miles, even when those who will receive them are fast asleep. And, if passport and other protections are put in place, personal visits will be appropriate in some cases, particularly for willing older children.

If they are not already doing so, Central Authorities should facilitate consensual contacts like these that a secure primary caretaker might welcome or be persuaded to accept. The addition of new Convention language to authorize legal proceedings to these ends, however, might well prove counterproductive. This is because research indicates that coerced contact backfires, both with very young children and with older children.[24] However understandable a noncustodial parent's desires for more or different contact, the best long-term outcome – a lifelong relationship with the adult the child will become – appears to depend on low conflict between the parents (the opposite, of course, of confrontation and litigation) and on the noncustodial parent's patience.

IV. The implications for joint custody cases

When the Convention was drafted, joint custody was a new concept that described an arrangement in which both parents were heavily involved with their children's day-to-day care, and the parties had roughly equal periods of time with them. Accordingly, the drafters treated joint custody in the same manner as sole custody orders, and either parent was entitled to a return order if the other abducted the child.

24 See SOLOMON/GEORGE, The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables, 1 J. Attachment & Human Development 2, 9 (1999) (concluding that court-ordered visitation of infants and very young children harms maternal caregiving and leaves children without the care and protection they need); WALLERSTEIN/LEWIS/BLAKESLEE, The Unexpected Legacy of Divorce – The 25 Year Landmark Study 184 (2000) (every child who was forced to visit a parent on a rigid schedule rejected that parent when the child grew older).

Developments over the years since, however, have largely abandoned that meaning, and, with it, have undercut the Convention's original scheme. Distinctions between legal and physical custody have developed.[25] As a result, relationships that were labeled visiting relationships in 1980 are now often known as joint legal custody with physical custody to one parent and visitation to the other or – more simply in some jurisdictions – with specified time shares. Often one of the «joint» custody parents under these contemporary orders is, so far as the child's daily care and relationships are concerned, simply a noncustodial parent.[26] Yet case after case under the Convention provides return orders when these *de facto* noncustodial parents ask for them.[27]

It is time for the Convention to be amended to distinguish those who are essentially equal providers of the child's daily care (a very small number, indeed) from those who are merely visiting parents who also hold some legal rights. For the Convention's purposes, the former should be treated as having custody; the latter should be treated as parents with access rights. As discussed above in the context of travel restrictions, this is the only scheme that protects the children's welfare by protecting their primary relationship and household stability during the disruptions of inter-parental litigation.

V. The implications for Article 13b

Domestic violence now plays an increasingly important role in Convention litigation. It is, with hindsight, truly remarkable that violence against caregivers was neither discussed nor dealt with by the drafters, but the days in which the law failed to acknowledge these harsh realities are fortunately in the past. It is now essential that specific provisions to protect caregivers be articulated and that the new drafters understand that these protections are also necessary to protect the children's welfare.[28] A recent study of return petitions in which women abductors made domestic violence allegations reveals a troubling pattern. Most of the children in the cases were returned by court order, and of them, most went into the care of their allegedly abusive fathers pending trial.[29] As family lawyers realize, these orders

25 See, e.g., California Family Code §§ 3000-3007, available at http://www.supportcourt.com/california_family_law_code.htm.

26 See Articles 3b and 5a, which require more than a naked legal right to constitute a right of custody, including joint custody, which is included in Article 3a.

27 See Brief of Eleven Law Professors (*supra* n. 9).

28 Accord, BUCHER (*supra* n. 3), at 146.

29 See EDLESON/LINDHORST, Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases, Final Report, NIJ #2006-WG-BX-0006 at 62. available at http://www.haguedv.org/reports/index.html.

are likely to become permanent, particularly if a mother is not present at trial or the proceedings become protracted.

Restoring the Convention to its original scheme through faithful interpretation of existing language would greatly diminish the numbers of cases in which children and their caregivers face danger.[30]

But this is not enough. Return orders that would endanger caregivers or place children in foster care, battered women's centers, or poverty should be prohibited by express language. Similarly, so-called «undertakings,» first applied in Convention cases by the English courts to permit return orders as a matter of discretion despite proven grave risks to children of a return, should be prohibited. Taking these promises from petitioning parents at face value permits judges to avoid an honest appraisal of the dangers into which they are sending children and, *de facto*, their caregivers. In reality, undertakings are breached so often as to make them ephemeral.[31] Proposals that would make them binding on the former habitual residence are similarly destined to failure.[32] Instead, defenses should be honored when proven, and the original Convention rule, which placed the inconvenience of travel for custody litigation on noncustodial parents, should be recognized as a common sense protection for children and – also – for their caregivers.

This is particularly true now that the cases discussed above blur the line between custody and visitation, as this is certain to increase the numbers of children who will languish in foster care or seek safety with their caregivers in battered women's shelters while custody litigation drags on in a country where only the noncustodial parent now lives.

Only modest administrative steps have addressed these cases thus far, and far too many courts have returned children despite the protections established under the defenses set forth in Article 13. This need not be so. A return that would expose the children's caregivers to renewed violence should raise a valid defense under current Convention language, because it would expose the children to a grave risk of psychological harm, an express defense under Article 13b.

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30 See BRUCH, The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases, 38 Family Law Quarterly 529 (2004), available at http://www.law.ucdavis.edu/faculty/Bruch/files/38flq529.pdf; BUCHER, 4 J. Private Int'l Law 139 (2008), at 152; http://www.brisbanetimes.com.au/world/young-mother-fled-to-sydney-to-save-her-life-20090501-aq5z.html (describing murder of woman who had returned with her two young sons while under death threat).

31 See Reunite Research Report (*supra* n. 13).

32 See BANCROFT/SILVERMAN, The Batterer as Parent – Addressing the Impact of Domestic Violence on Family Dynamics (2002) (see especially Chapter 6, The Mismeasure of Batterers as Parents – A Critique of Prevailing Theories of Assessment, discussing batterers' behaviour during child custody litigation).

Independently, a return into these circumstances, or into foster care (because their caregiver cannot accompany them or does not dare to do so), surely falls into another of the Article's express defenses to return: a grave risk that the child will be returned into an intolerable situation. The theory that an abductor will not be heard to complain about the danger of returning with a child, because it permits the abductor to profit from his or her own wrong not only misunderstands the drafter's intention to allow a custodial parent to relocate with the children, it also ignores the central purpose of the Convention – to protect children, not to harm them in order to punish their caretaker.

Finally, repetitive stress in childhood is now understood to cause serious, irreversible alterations in a person's response to stressful events later in life.[33] Returning children into abusive settings therefore entails a grave risk of both physical and psychological harm over the lifespan.

An effort to ensure that judges not circumvent mandated returns by recourse to supposed (but actually unproven) defenses was understandable when the Convention was new. But rigid doctrines that now insist on discretionary returns after valid defense *have* been established, sometimes under the theory that «undertakings» offered by petitioning parents will remove the danger, have become an engine of injustice. It is time for those who implement the Convention to recognize that, however well intended, discretionary returns do not serve the legitimate purposes of the Convention.

The continuing efforts of some delegations to cut through such harmful interpretations of the Convention and to provide more realistic protections for children and their caretakers have, thus far, met with little success. It is time to change course and restore the child-protective features the drafters intended.

VI. The role of judges at Special Commission meetings and as «liaison judges»

Some of the features described above that exist in current Convention practice may result from the role the Permanent Bureau has fostered for judges in recent years.

Several years ago, the Permanent Bureau invited countries to place judges on their delegations, apparently to permit more informed discussions of how the Con-

33 See DEBELLIS et al., Developmental Traumatology Part II: Brain Development, 45 Biological Psychiatry 1271, 1271–81 (1999). See generally HEIM et al., Pituitary-Adrenal and Autonomic Responses to Stress in Women After Sexual and Physical Abuse in Childhood, 284 (5) JAMA 592 (Aug. 2, 2000) («Severe stress early in life is associated with persistent sensitization of the pituitary-adrenal and autonomic stress response, which, in turn, is likely related to an increased risk for adulthood psychopathological conditions.»).

vention was being applied in the courts of States Parties. Thus, the original concept of Special Commissions as a means to facilitate co-operation between Central Authorities has evolved into two parts. Several days of the Commission are now devoted to the original purpose – discussions by Central Authority personnel concerning their functions – and another several days are devoted to substantive discussions on Convention law, including efforts by the Permanent Bureau to persuade delegations to recommend to their countries that a new Conference program or document be supported. In recent years, the Permanent Bureau has also hosted a dinner exclusively for judges who are members of their countries' delegations.[34]

The intended role of judges as members of delegations, however, is somewhat unclear. Although reports of cases are sometimes made, the Commissions do not typically engage in serious debate about the purposes of the Convention and whether the newly reported decision is faithful to it or not. For many years, for example, those who attend Special Commissions have known that the defendants in return petitions are now most often primary caretakers (almost all of whom are mothers), a dramatic change since the Convention was drafted, when abductors were primarily noncustodial fathers.

And it has been several years since they learned of the severe conditions into which return orders have sometimes sent children and their caretakers. Yet little support has been shown for straightforward applications to domestic violence and abuse cases of the Article 13 defenses discussed above.[35] And although delegations and official observers have brought return cases that caused great harm to the Commission's attention, no re-evaluation has taken place of discretionary returns

34 At the Fifth Special Commission in 2006, a puzzling distinction was evident when two judges who were official observers for the International Association of Women Judges, an organization that had provided names for liaison judges, asked to join the dinner, but were turned away. What confidential matters might have been on the evening's agenda to explain this is unknown, but it leads to speculation that these judges may have been attempting to coordinate their countries' positions. A similar problem has become evident at sessions where countries that are now bound to a common legal position because they are members of the European Union speak as though they remain independent nations, thereby dominating the discussion and giving the impression that their mandate is instead a matter of consensus. A solution for this latter problem exists under Articles 3, and 8 of the Statute of the Hague Conference on Private International Law, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=29, but has not been used (i.e. the EU can be required to speak with only one voice on matters within its competence).

35 Many years ago, I reported to a Special Commission that my database of Hague child abduction cases revealed that 70% of abductors were now women, many of whom were returning to their families, and this observation was echoed by personnel from Central Authorities. BRUCH, 38 Family Law Quarterly 529 (2004), at 544. Professor NIGEL V. LOWE and ALISON PERRY have since provided confirming data. See *id.* at fn. 3 (discussing their 1999 report). Professor WEINER notes a likely negative impact of deterrence – it may also prevent victims of domestic violence from making efforts to escape. WEINER, The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad, 11 J. Gender, Society, Policy & Law 749, 769 (2003).

and undertakings. In my role as an observer, I have sometimes noted that maintaining judicial power over the parties is the central concern for many of the judges who participate in Commission discussions and that critical analysis is most often demonstrated by others.

A second powerful role for judges has been created by the Permanent Bureau – a network of what it calls «liaison judges,» who insert themselves into Convention litigation. The Convention contemplates no such role, and litigants may be unaware of the liaison judge's extra-legal role in their case. The scheme was prompted by the fact that in many States Parties, jurisdiction for return petitions exists in many widely scattered courts, and a judge who is assigned to hear a return petition may be reading the Convention for the first time. The liaison judge is intended to serve as an informal adviser in Convention law and practice for the sitting judge. In theory, the two will not discuss the facts of the case, but it is difficult to imagine a conversation in which the sitting judge's questions are not couched in terms of the facts of the case and what legal consequences they should have.

At least in the United States, it seems clear that use of a «liaison judge» violates parties' constitutionally protected procedural due process rights. And in many other countries as well, there may be similar legal rules that (1) ensure that judges who are not assigned to hear a case do not take part in reaching its decision, and (2) give parties a right to know and address all information the court receives in their case. Through its role in developing liaison judges, creating a magazine for judges,[36] arranging international conferences for judges, and requesting judicial membership on countries' delegations on specific dates at Special Commission meetings, the Permanent Bureau has created an increasingly powerful, yet largely extra-legal role for the judiciary that will surely influence the coming Special Commission.

To the extent that these efforts have promoted sound interpretations and constructive efforts to implement the Convention, they deserve applause. But when they diverge from the principles and wisdom of the original document and knowingly place children and their caretakers in danger, it is incumbent upon States Parties to demand a restored child-centered approach for the Convention that reflects the best of scholarship, common sense and compassion.

VII. Conclusion

The coming discussions of the feasibility and desirability of a protocol can be a time to solve problems and fill lacunae in the Child Abduction Convention. This will be possible if the Convention's original structure and language are reconsi-

36 See The Judges' Newsletter on International Child Protection (first published in Spring 1999).

dered in light of post-1980 experience and scholarship. The endeavor will bear healthy fruit, however, only if there is also a rigorous reevaluation of cases that have failed to implement the Convention's goals. Unless these challenges are met, the Convention may stagnate or be revised in ways that will harm children, its intended beneficiaries.