

Statement of Opinion on Recommended Measures to be taken on the Conclusion
of the Convention on the Civil Aspects of International Child Abduction (the
Hague Convention)

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Japan Federation of Bar Associations (JFBA)

Part I Outline of Opinion

There has been a wide range of discussion and debate on the Convention on the Civil Aspects of International Child Abduction (hereinafter, the “Hague Convention”), which is currently under consideration by the Japanese government. The following measures should be adequately taken when Japan concluding the said Convention.

1. Domestic law implementing the Hague Convention (hereinafter, “Domestic Law”) that provides necessary matters to ensure appropriate implementation of the Hague Convention in compliance with the “best interests of the child” as stipulated in the Convention on the Rights of the Child should be enacted. In regard to this, the Domestic Law must provide the following:

(1) Return order or enforcement thereof can be refused in situations including where domestic violence or child abuse is found, or where the taking parent is likely to be subject to criminal prosecution upon return to the country of habitual residence together with the child.

(2) Views of the child is adequately heard and respected in the proceedings for return.

(3) The Domestic Law must provide matters including relating to the central authority under the Hague Convention, adjudication by judicial body on the return of the child, procedural rules as well as evidence rules, rules on enforcement of and appeal against the return order.

(4) The Domestic Law must provide clearly that the Hague Convention does not retrospectively apply nor does it apply to the cases of removal or retention of the child or disputes on access occurring within Japan and that should be made known.

(5) Approximately three years must be given before the Hague Convention and the Domestic Law take effect, during which period preparation for and notification to the public of the implementation of the Hague Convention.

2. When concluding the Hague Convention, Japan should also ratify the First Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women to accept individual complaint procedures under such Conventions.

3. Information should be provided (both prior to and after entry into force of the Hague Convention) for Japanese nationals living abroad, especially in the Contracting States of the Hague Convention, on the following areas for each state: child custody and divorce laws, whether or not removal of a child by a parent constitutes a crime, legal aid systems, lawyers with expert knowledge on child custody and divorce, etc. Also, it should be considered to provide support at the Japanese Consulates.

4. Japan should consider offering training on international human rights law, including the Convention on the Rights of the Child, for lawyers, judges, staff of the central authority and all other persons involved in the implementation of the Hague Convention.

5. Japan should make requests to and engage in dialogue and discussion with the Contracting States of the Hague Convention that have legal systems for the criminal prosecution of a parent who takes a child out of the country without the consent of the other parent or the permission of the court so that taking parents are not subject to prosecution in case the parent voluntarily returns the child and goes back to the state of habitual residence with the child.

Part II Reasons for this Opinion

1. Introduction

It has been reported that the Japanese government is currently considering concluding the Hague Convention. The JFBA has previously expressed its opinion requesting the

conclusion of the Hague Convention from the perspective of ensuring the protection of the rights of the child internationally¹. As conclusion of this Convention is a live issue in Japan, we are further proceeding with the collection of information and research on the Hague Convention.

The Hague Convention provides the prompt return of children in the case of wrongful removal or retention across borders to the State of their habitual residence and procedures for that purpose. It provides the mechanism aimed at protecting children from the harmful effects of their wrongful removal or retention across borders and ensuring that the issue of custody of the children is properly determined by the judicial or other authorities in the State of habitual residence. As such, it is hoped that this Convention also expects deterrence of abduction and its recurrence by parents as self-help measures in the disputes over the custody or the residence of the children and thus constitutes a reasonable international rule. It is also expected that the prompt return of a child wrongfully removed from Japan to a signatory State of the Hague Convention will be realized, and situations where the temporary return of a child to Japan from a signatory State is difficult or the Japanese nationals receive unfair treatment in the child custody and other proceedings in signatory States because Japan is not a signatory to the Hague Convention will be improved to some degree. The Hague Convention has already been concluded by 84 countries including many advanced Western countries, and Japan is being pressed by these countries to also conclude this Convention.

On the other hand, there are some concerns and points at issue raised with regard to conclusion of the Hague Convention, as pointed out in 2(1). Based on these, the JFBA adopted and publicized this statement to presents its opinion on the necessary measures in the event that Japan concludes the Hague Convention for ensuring the appropriate

¹ “In order to retrieve a child brought to Japan, or a child sent overseas as a result of arguments between the child’s father and mother, the Japanese government should accede to the 1980 Hague Convention on Civil Aspects of International Child Abduction.” JFBA Alternative Report to the Second Report of the Japanese Government on the Convention on the Rights of the Child (May, 2003) “The Japanese Government should undertake a fact-finding survey and reveal the results of cases where children have been wrongfully transferred to Japan from other countries and from Japan to other countries, and where returning children to Japan from other countries has been restricted because Japan is not a member state of the Hague Convention. Furthermore, with a view to ratifying the Hague Convention, the Government should immediately initiate in-depth discussion and consultation on the need to determine whether domestic legislation must be put in order for ratification, either within the Government or in a study group that would include researchers and practitioners.” JFBA Report on the Japanese Government's Third Report on the Convention on the Rights of the Child and the Initial Reports on OPAC&OPSC (July, 2009)

implementation and operation of this Convention to realize the “best interests of the child”. We consider that these points should be reflected in upcoming discussions by the Japanese government on the pros and cons of the conclusion of the Hague Convention.

Regarding consideration of the pros and cons of conclusion of the Hague Convention and of measures for enactment of the Domestic Law, the JFBA requests that in the case that Japan concludes this Convention, the Japanese government undertake a fact-finding survey on the circumstances of the removal or retention of children across borders and on the implementation of the Hague Convention in signatory States, as well as listen to and pay careful consideration to the opinion of all sides related to this issue including practicing lawyers.

2. Enactment of the Domestic Law for Ensuring the Appropriate Implementation and Operation of the Hague Convention

(1) Concerns and Points at Issue on the Hague Convention

There are some points at issue that have been highlighted regarding the structure and operation of the Hague Convention. The structure of the Hague Convention is that it in principle considers all actions of removal or retention of a child across borders in breach of rights of custody as being wrongful and requires the prompt return of the child to his/her State of habitual residence. The reasons behind the removal or retention of the child and the effect of its return to the State of habitual residence on the caring parent or the child are, in principle, not to be taken into account. Regarding how the Hague Convention is framed, and the policy that with regard to the issue of custody of the child decisions of the judicial or other authorities of the States of habitual residence should in principle ensured has been pointed out as not always being in the interests of the child and of the caring parent who has left the State of habitual residence together with the child. Further, as the scope of wrongful removal and retention provided in this Convention is quite broad², there are many cases in which return may be ordered even if the primary caretaker leaves the State of habitual residence and return to Japan with the child without the consent of the other parent. This has also been pointed out as a problem of the

² The Hague Convention protects the right of custody in terms of the right to determine the place of residence according to Article 3 (1) (a) and Article 5 (a) of the Convention.

structure of the Hague Convention.

Although the Hague Convention also provides exceptions to the obligation of returning the child from the perspective of the interests of the child, looking at the implementation of this Convention by signatory States so far, some practice concerned from the viewpoint of the interests of the child are observed. For instance, as a result of restrictive interpretation and application of exceptions in prioritizing the prompt return of the child to the State of habitual residence, return of the child may be ordered even in the cases where the parent returns to his/her home country with the child to escape from domestic violence and the parent will face criminal charge for the child abduction if s/he return to the State of habitual residence with the child and thus cannot reasonably be expected to return or even when the child objects to returning to the State of habitual residence.

We do not consider that such measures as outlined below including the enactment of the Domestic Law will eliminate all of these abovementioned concerns regarding the structure of the Hague Convention. However, these various concerns and points at issue should be taken into account in considering the measures mentioned in this statement of opinion in the case of conclusion of this Convention. Measures also need to be considered that address to a certain degree the concerns and problems in the implementation of the Hague Convention. These measures should also be discussed along with the pros and cons of concluding the Convention.

(2) Enactment of the Domestic Law in conformity with the “Best Interests of the Child”
The preamble of the Hague Convention states, “the interests of children are of paramount importance in matters relating to their custody”. Also, as an obligation under the Convention on the Rights of the Child, which almost all countries around the world including Japan have concluded, it is provided that the “best interests of the child” shall be a primary consideration in all actions concerning children (Article 3 of the Convention on the Rights of the Child). This has been widely accepted human rights norm in the international community. Accordingly, international law also requires interpretation and application of the Hague Convention in conformity with the principle of primary consideration of the “best interests of the child” regarding whether or not to return a

child³.

In the event of concluding the Hague Convention, Japan needs to enact Domestic Laws for implementing this Convention to provide the procedures for the return proceedings, exceptions to return, and enforcement of the return order. In this Domestic Laws, provisions should be introduced to ensure the implementation of the Convention to realize the best interests of the child.

For example, there should be a provision in the Domestic Law that appropriately interprets and clarifies the "intolerable situation" from the viewpoint of ensuring the "best interests of the child" to implement the exception of the Article 13 (1) (b) of the Convention⁴ that states "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" Doing so would make for a legal system that return order or enforcement thereof can be refused when such a return could be expected to expose the taking parent and/or the child to harm from abuse or domestic violence, or when the taking parent will face criminal charge upon return⁵.

Similarly, recognizing that the Convention on the Rights of the Child guarantees the right of the child to be heard, the provisions in the Domestic Law corresponding to Article 13(2) of the Convention that provides that the child's objection as an exception to return should be made effective so that the views of the child would be appropriately heard and respected by involving the family court investigators or in other ways in the return

³ This was also confirmed in *Neulinger & Shuruk v Switzerland*, Judgment of the Grand Chamber of the European Court of Human Rights (July 6, 2010, App. No. 41615/07)

⁴ The following provisions of the Hague Convention Relevant Domestic Law of Switzerland, 2007, "Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults" can be referred to:

Art.5 Return and best interests of the child

Under Article 13 paragraph 1 letter b of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:

- a. placement with the parent who filed the application is manifestly not in the child's best interests;
- b. the abducting parent is not, given all the circumstances, in a position to take care of the child in the state where the child was habitually resident immediately before the abduction or this cannot reasonably be required from this parent; and
- c. placement in foster care is manifestly not in the child's best interests.

⁵ In this regard, taking note of the fact that the report of the independent expert for the UN Secretary General study on violence against children (UN Doc. A/61/299) recognizes domestic violence as a form of violence against children in the households and the provision of Article 2 (4) of the Child Abuse Prevention Act of Japan, a legal system should be established so as to ensure the protection of children from households in which there is domestic violence.

proceedings.

These are Domestic Law measures that must be carried out within the scope of the interpretation of the Hague Convention. However, as stated above, it should be noted that the Hague Convention needs to be interpreted so as to ensure the “best interests of the child”⁶.

(3) Other Provisions of the Domestic Law

In the Domestic Law for the Hague Convention, the designation of the central authority and the return proceedings are to be conducted by the courts as the judicial authority. There should also be provisions that designate the courts that have jurisdiction over the return proceedings, provisions on return proceedings, and provisions on the right of appeal against rulings made.

Methods relating to evidence in the proceedings should not be limited to only documentary evidence but also allow for the adoption of other methods as required, provided that they do not infringe on the requirement for a expedite proceedings called for in the Hague Convention. Further, when deemed necessary for determination on the exceptions to the obligation of returning a child, measures to ensure fair proceedings in terms of method and lengths should be considered.

In addition, the provisions on the following matters should also be considered: procedures for locating the child taking into account the protection of its privacy and that of the parent who is a victim of domestic violence; mediation for the return of the child or other issues; the involvement of experts such as family court investigators, child welfare officers and child psychologists; legal support for the parties including providing legal aid and appointing lawyers; the establishment of provisions for measures to prevent the wrongful removal of the child to another country.

⁶ Although it is stated that the Hague Convention should be interpreted and implemented in conformity with the “best interests of the child”, it does not mean that there should be an investigation of issues related to the merits of custody decisions, such as asking questions of “Which parent should have custody of the child?” and “Which country and environment will be in the interests of the child to live in?” This statement of opinion does not alter the understanding of the basic framework of the Hague Convention, which respects the decisions on the merits of the custody, and does not interfere into the examination on the merits of custody in the return proceedings under the Hague Convention.

(4) Scope of Application for the Hague Convention

The scope of application of the Hague Convention covers removal or retention of a child across borders or access to a child of the parent in another country, and does not cover these matters occurring within Japan. Further, the Hague Convention only applies to the cases occurring after its entry into force and there is no retrospective application of the obligation to return for cases of the child abduction across borders that occurred before its entry into force.

To prevent any confusion in the interpretation and application on these points, there should be appropriate measures taken by the government to provide accurate information to dispel the concerns and misunderstandings regarding the abovementioned points, as well as to make the provisions in the Domestic Law on the scope of application of these points clear.

(5) Necessary Period for Notification and Preparation, and Verification

A period of around three years should be set aside following the enactment of the Hague Convention Domestic Law and Diet approval for concluding this Convention to allow for preparations sufficient to ensure the appropriate implementation of the Domestic Law and Hague Convention and to properly inform the people of this Convention. The conclusion of the Hague Convention should be timed with the enforcement of the Domestic Law.

In the event of the conclusion of the Hague Convention, there needs to be proper examination of the state of implementation of this Convention and the Domestic Law⁷, and this examination should be reflected in the dialogues with other signatory States and for review of the Domestic Law.

3. The JFBA has thus far strongly requested the Japanese government to accept the individual complaint procedures including the First Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

⁷ There should also be consideration of investigating as much as possible and with the cooperation of the signatory States of the results of the custody proceedings and the status of the child being taken care of following the return of the child under the Hague Convention or a ruling of non return.

The individual complaint procedures are the mechanisms that provide remedies by enabling the individuals whose human rights enshrined by the international human rights treaties are violated to bring the cases to the human rights treaties to seek their views if they did not receive remedies at the national level. The Japanese government should ratify the abovementioned Optional Protocols concurrently with the conclusion of the Hague Convention as one of the measures for ensuring at the international level that the Hague Convention is implemented in conformity with the international human rights treaties,.

4. Improving the Support System and Provision of Information for Japanese Nationals Living Abroad

In the event that Japan concludes the Hague Convention, any Japanese national residing in a signatory State who returns to Japan with a child without the consent of the other parent or permission of the court or without taking any other necessary procedures in the said State may be held breaching the rights of custody and would be required to return the child to the said State (State of habitual residence). In this regard, to provide appropriate assistance to Japanese nationals living abroad, in particular those residing in a signatory State, so that they can handle the matters properly if they are involved in a custody dispute over the child in the said State, the Japanese government should take measures to collect relevant information on the legal systems for custody and parental rights in signatory States, legal aid systems and lawyers and widely disseminate such information via websites and other media.

In particular, in the case that Japanese nationals experience child abuse or suffer domestic violence in foreign countries, so that they can receive proper protection in the said countries, the Japanese government should take measures such as collecting relevant information on the legal systems concerning child abuse and domestic violence in each country, procedures and authorities for providing protection, and non-governmental organizations providing support, and widely disseminate such information via websites and other media. Also, the government should consider offering available support at the Japanese Consulates in each country for Japanese nationals living abroad.

5. Measures for Ensuring Implementation of the Hague Convention in Conformity with the International Human Rights Treaties

There are cases where human rights violations, such as domestic violence and child abuse,

result in the removal or retention of a child across borders.

In such cases, there are concerns that a standardized and mechanical application of the Hague Convention may violate the human rights of the parent who had practically no choice but to return with the child to the State of habitual residence and of the child himself/herself if an order of return of the child to the State of habitual residence is made. In order to prevent such a situation and ensure the implementation of the Hague Convention in conformity with the international human rights treaties, to which Japan is a State party, in addition to the previously mentioned introduction of the provisions for securing the “best interests of the child” in the Domestic Law for the Hague Convention, providing training on the international human rights law including the Convention on the Rights of the Child needs to be considered as an essential element of training on the Hague Convention for all relevant staff and experts involved in its implementation (central authority officers, judges, lawyers, court execution officers, child welfare staff, immigration officers, etc.).

6. Requests to each Signatory State and Collection of Information on Concerns of Criminal Charges

There are concerns that, as the actions of a parent who takes a child out of the country without the consent of the other parent or permission of the court are criminalized in the domestic law of some signatory States of the Hague Convention, the parent who returns to Japan with the child from the said state will face the possibility of criminal prosecution or punishment by the domestic law of the said State upon return to it with the child under this Convention.

To address these concerns of the parties involved, the Japanese government should take measures to collect relevant information on legal systems and their actual application in the signatory States to on these points and widely disseminate such information via websites and other media. In addition, the government should engage dialogue and discussion with these States in order for the criminal charges against such parents are not proceeded in the case that the parent voluntarily returns the child and goes back to living in the state of habitual residence with the child.

7. Future Initiatives

The JFBA will continue to disseminate information among its members on the issue of the removal or retention of children across borders, and express its opinion on and give consideration to the development of appropriate actions in such circumstances from the perspective of the protection of human rights.