

NOTE

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If Japan Signs the Hague Convention on the Civil Aspects of International Child Abduction: Real Change or Political Maneuvering?

I.	A Brief History: The Hague Convention on the Civil Aspects of International Child Abduction and Japan as a Nonmember State.....	370
	A. Japan’s desire to protect Japanese nationals fleeing from domestic violence.....	371
	B. Japan expresses that cultural differences make Japanese law and custom incompatible with the Convention.....	374
II.	Japan’s Likely Accession to the Convention: Recent Developments and Incentives.....	379
III.	Is Japan Ready for the Convention?: Predictions About Interpretation and Enforcement Immediately Following Ratification.....	385
	Conclusion.....	388

The Hague Convention on the Civil Aspects of International Child Abduction¹ entered into force on December 1, 1983,² and currently

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¹ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98, available at <http://www.hcch.net/upload/conventions/txt28en.pdf> [hereinafter *Convention*].

² D. MARIANNE BLAIR & MERLE WEINER, INTERNATIONAL FAMILY LAW: CONVENTIONS, STATUTES, AND REGULATORY MATERIALS 247 (2d ed. 2010).

has eighty-two member states.³ Japan is the only G7 nation that has not signed the Convention.⁴ The purpose of the Convention is to secure the return of children who have been wrongfully removed to another contracting country.⁵ In short, a removal is wrongful where the removal violates a person's custody rights and that person was exercising his or her custodial rights at the time of removal.⁶ Part I of this Article provides the reader with the background information necessary to understand why Japan has not yet joined the Convention. Part II explains why Japan will likely join the Convention by 2012. Lastly, Part III explores and predicts (1) how the Japanese judiciary will interpret and implement the Convention should Japan accede, (2) whether accession will be followed by Parliamentary action amending Japan's civil law, and (3) the benefits of a bilateral parental child abduction agreement between the United States and Japan.

I

A BRIEF HISTORY: THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND JAPAN AS A NONMEMBER STATE.

The Convention entered into force in the United States on July 1, 1988.⁷ Between that time and the late 1990s many states became signatories to the Convention,⁸ and there was minimal documentation to suggest pressure on Japan to join until near the turn of the century.

³ See *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—status on: 1 September 2010*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/upload/abductoverview_e.pdf.

⁴ Joint Press Statement Following the Symposium on Int'l Parental Child Abduction, Tokyo, Japan (May 21, 2009), available at <http://tokyo.usembassy.gov/e/p/tp-20090521-79.html>.

⁵ *Convention*, *supra* note 1, art. 1. ("The objects of the present Convention are—(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.").

⁶ *Id.* art. 3.

⁷ D. MARIANNE BLAIR, ET. AL, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 432 (2009). The Convention is a non-self-executing treaty that became effective upon implementation of domestic legislation, the International Child Abduction Remedies Act, 42 U.S.C. § 11601 (2005). *Id.* Because any given custody dispute will play out between only two nations at a time (the country requesting a child's return and the country from which return is requested), Article 38 specifies that when one nation accedes, the other must accept the accession for the Convention's terms to apply between them. *Id.*

⁸ See Status Table, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last updated Jan. 3, 2011).

Even at that time, during the late 1990s and early 2000s, concerns about Japan not yet acceding to the Convention were prevalent among scholars and journalists;⁹ however, there is no notable documentation to suggest that member states put any significant pressure on Japan to accede until approximately 2007.¹⁰

Although there is no official statement from the Japanese government on why it has not yet joined the Convention, the U.S. State Department and Japanese government officials have shed some light on the subject. U.S. and Japanese officials have identified two obstacles to Japan's accession. First, Japan is concerned that many of the women fleeing the child's habitual residence and returning to Japan may be trying to escape domestic violence.¹¹ Second, Japan has expressed that cultural differences make Japanese law and custom incompatible with the Convention.

A. Japan's desire to protect Japanese nationals fleeing from domestic violence

Japan is concerned that many of the Japanese mothers who abduct their children and return to Japan may be trying to escape domestic violence. However, the United States has not recognized this as a legitimate concern.¹² Indeed, when confronted with a question on the concerns of the Japanese people to protect Japanese domestic violence victims from foreign abusers, Kurt Campbell, the assistant

⁹ See, e.g., Caroline Berndt, Note, *United States v. Amer and the International Parental Kidnapping Crime Act—The Final Answer to the Problem of International Parental Abductions?*, 23 N.C. J. INT'L L. & COM. REG. 405, 443–44 (1998); Paul Baylis, *Estranged Parents Snatch Own Kids in 'Abduction Friendly' Japan*, ASAHI SHIMBUN NEWS SERVICE, Jan. 26, 2002, available at 2002 WLNR 7356190; *Innocents Abroad*, NEWSDAY, May 3, 2003, available at 2003 WLNR 907249; Zaz Hollander, *Envoy's wife tells of child abduction, MISSING: Her own case turned Catherine Meyer into a crusader*, ANCHORAGE DAILY NEWS, May 25, 2001, available at 2001 WLNR 11274788; Doug Struck & Sachiko Sakamaki, *Divorced from Their Children: In Japan, Foreign Dads Have Few Custody Options*, MIAMI HERALD, July 27, 2003, available at 2003 WLNR 14810569.

¹⁰ Compare with *infra* note 46.

¹¹ Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Press Availability on International Parental Child Abduction: Official Underscores Need to Resolve U.S.-Japanese Child Abduction Cases (Feb. 2, 2010), available at <http://www.state.gov/p/eap/rls/rm/2010/02/136416.htm>. In this press conference, Secretary Campbell was asked by a Japanese reporter, “. . . some Japanese citizens are very concerned because this issue includes some of the domestic violence cases where some spouses or ex-spouses have actually fled from the spouses and had no choice but to take the children with them. How do you answer that question?”

¹² *Id.*

secretary for the Bureau of East Asian Affairs, dismissed this as a legitimate reason for Japan's hesitation to accede to the Convention.¹³ In fact, he referred to the multitude of concerns as a "phenomenon," stating that,

These allegations caused extraordinary unhappiness among [members of] this community, most of whom in the United States already had legal custody, [and] some [of whom] had gone through divorce or were separated. We can find almost no cases of alleged or actual substantiated claims of violence and where those apply, we of course, understand and support that. But because of the legal situation in Japan, I think that this allegation [of physical child abuse] is used very loosely and oftentimes inappropriately without any supporting criteria whatsoever¹⁴

There are two snags with Mr. Campbell's statement and reasoning. First, he states that the U.S. State Department can find "almost no cases" of parental child abduction that involve domestic violence between the parents. Following this statement is a discussion about allegations of domestic violence that the U.S. State Department finds unsubstantiated. One might infer from Mr. Campbell's statement that there are domestic violence allegations that concern Japan, but that the United States does not find merit further examination or attention. It therefore makes sense that Japan would be hesitant to partner with the United States and offer comity on these matters, since the two countries may have different standards by which to define domestic violence. Second, at the time Mr. Campbell's statement was given, the United States had over seventy outstanding cases of child abduction involving Japanese families,¹⁵ almost all of which involved Japanese mothers fleeing home to Japan with their children.¹⁶ Among over seventy families, it is statistically improbable not to have at least one legitimate case of domestic violence, if not far more.¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *The Issue of International Parental Child Abduction: An Interview with Michele T. Bond, Deputy Assistant Secretary for Overseas Citizen Services, U.S. Dep't of State, AMERICAN VIEW, Fall 2007, available at <http://japan.usembassy.gov/amview/e/amview-e20071127-81.html> (hereinafter *Interview*).*

¹⁷ In the United States, approximately one in four women will experience domestic violence in her lifetime. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (reporting 24.8% of women were raped and/or physically assaulted by an intimate partner). See also Meiko Yoshihama & Julie Horrocks, *Posttraumatic Stress Symptoms and Victimization Among Japanese American Women*, 70 J. CONSULTING & CLINICAL

Arguably, the Convention's grave risk exception to returning the child to his or her habitual residence may aid domestic violence victims; however, this depends on how the exception is interpreted.¹⁸ The grave risk exception can be found in Article 13 of the Convention; if the exception applies, the court may opt not to return the child to his or her habitual residence.¹⁹ Specifically, Article 13 states:

Notwithstanding the provisions of [Article 12, which directs contracting states to return the child to his or her habitual residence if less than a year has passed since the date of the wrongful removal], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

...

b) 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.²⁰

Scholars have questioned whether this Article may be applied in domestic violence situations, particularly where the children have not been abused but have lived in an abusive household.²¹ This conflict is really a matter of interpretation left for the courts of the member

PSYCHOL. 205, 210 (2002) summarized at http://www.musc.edu/vawprevention/research/pss_jap.shtml (recording the prevalence of domestic violence experienced by Japanese American women in Los Angeles County where 50% of the women who participated in the study reported being physically abused by their partners. The report indicates that 109 out of 211, from a pool of randomly selected Japanese American women in heterosexual relationships, reported some level of physical abuse); BLAIR, ET AL., *supra* note 7, at 473 n.7 (noting many abductors claim to be fleeing from domestic violence (citing HAGUE CONF. ON PRIVATE INT'L LAW, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prelim. Doc. No. 2 for the Special Comm. of Oct./Nov. 2006, at 309, 318–19. (Oct. 2006))).

¹⁸ For a more detailed discussion of domestic violence and the Convention, see generally Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335 (2008) [hereinafter *Intolerable Situations*]; Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 601–02 (2000) [hereinafter *Escape*].

¹⁹ *Convention*, *supra* note 1, art. 13.

²⁰ *Id.*; U.S. courts have held that this exception must be proven by clear and convincing evidence. *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999).

²¹ See, e.g., Weiner, *Intolerable Situations*, *supra* note 18, at 342–43; Weiner, *Escape*, *supra* note 18, at 651–53.

states to determine.²² Courts must determine whether there is a grave risk that may cause the child physical or psychological harm, or may put the child in an intolerable situation. Indeed, in determining whether domestic violence poses a grave risk to the child, courts have reached various conclusions. Some courts have recognized that conditions of domestic violence pose a grave risk to the child; others observe that exceptions should be interpreted narrowly and that where domestic violence is present but the children were not abused, there is no grave risk to the child.²³

Although there is a remedy to alleviate Japan's concerns over domestic violence committed upon Japanese nationals through a liberal interpretation of the Convention's grave risk exception, it is still important that the United States recognize Japan's legitimate concerns on this matter. Although the United States may, as the State Department has expressed, be frustrated with the liberal protections currently afforded to Japanese mothers abducting their children and taking them to Japan, the United States should not rashly deny that any of the parental child abduction cases involve legitimate instances of domestic violence. The inability of the United States and Japan to speak openly and honestly about this matter leads the states farther away from finding a mutually satisfactory conclusion to this problem.

B. Japan expresses that cultural differences make Japanese law and custom incompatible with the Convention

The second major concern and hindrance to Japan's accession is that Japanese law and culture runs contrary to the principles of the Convention.²⁴ Here again, the West dismisses the concerns of the

²² See Michele Thoren Bond, Deputy Assistant Sec'y of State for Overseas Citizens Services, Remarks at the Symposium on International Parental Child Abduction, Tokyo (May 21, 2009), http://travel.state.gov/pdf/das_bond_remarks_at_may_2009_symposium_on_ipca_and_japan.pdf (urging Japan to join the Convention, Ms. Bond reminded those in attendance that the Japanese judiciary will be able to consider "legitimate defenses, like domestic abuse or intolerable circumstances" and use these to preclude an order to return the child).

²³ BLAIR, ET AL., *supra* note 7, at 473 n.7 (discussing and comparing two cases, one in which domestic violence solely against the mother was relevant to an Article 13(b) defense and another where the court held that violence solely against the mother did not present enough evidence to determine that return of the children would pose a grave risk to the child comparing *Finizio v. Scoppio-Finizio* (1999), 46 O.R. 3d 226 (Can. Ont. C.A.) with *Pollastro v. Pollastro* (1999), 43 O.R. 3d 169 (Can. Ont. C.A.)).

²⁴ See Mark Willacy, *Japan Urged to Sign Child Abduction Treaty*, AUSTRALIAN BROADCASTING CORP. (ABC), Jan. 31, 2010, <http://www.abc.net.au/news/stories/2010/01/31/2806042.htm> (citing Japanese Foreign Minister Katsuya Okada's statement that Japan acknowledges the seriousness of the child abduction issue but also has a very

Japanese. William Duncan, deputy secretary general of the Hague Conference on Private International Law, said at a press conference, “[t]here is no technical reason why Japan should not’ join the Convention.”²⁵ Mr. Duncan went on to add, “[t]here seems to be an idea in certain quarters in Japan that for Japan to come into the [C]onvention would require changes in domestic law relating to custody . . . and that’s not true.”²⁶ In addition, one U.S. State Department official said simply,

Our cultural differences are important, but respect for cultures is a two-way street. [U.S.] family law courts are challenged each day to respect diverse and divergent cultures as they carefully hand down rulings in the best interest of the children . . . I firmly believe that one cultural value that Japan and the United States share is a healthy respect for the rule of law. Hague accession gives us a common ground to share that value . . . so that the best interests of the child can be determined²⁷

In contrast, a spokesperson from the Japanese embassy offered this explanation:

We must point out that (the) Japanese legal system related to child custody is quite different from the underlying concept of the Hague Convention Japanese courts always take into consideration what the best interest of a child is with respect to each individual case, while the Convention provides the relevant judicial or administration authorities in principle (to) order the return of the child, unless limited exceptions apply.²⁸

different legal system than that of the West). See also Colin P.A. Jones, *In the Best Interest of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 ASIAN-PAC. L. & POL’Y J. 166 (2007); Campbell, *supra* note 11; Thoren Bond, *supra* note 22.

²⁵ *Japan Urged to Join Hague Convention on International Parental Abduction*, KYODO NEWS, Mar. 19, 2010, 6:50 AM, <http://www.japantoday.com/category/national/view/japan-urged-to-join-hagueconvention-on-intl-parental-abduction>.

²⁶ *Id.*

²⁷ Bond, *supra* note 22.

²⁸ Levi Pulkkinen, *Seattle Father Fights For 5-Year-Old Son Abducted by Mother to Japan*, SEATTLE POST-INTELLIGENCER, Mar. 22, 2009, 10:13 PM, http://www.seattlepi.com/local/404093_custody23ww.html (alterations in original); see also William Duncan, International Symposium on Child Abductions, *Report of the Panel Session on Experiences with Child Abduction with Non-Member States of the Hague Convention*, Berlin (Dec. 4, 2009), available at <http://www.auswaertigesamt.de/diplo/de/Aussenpolitik/InternatRecht/Downloads/Conclusions2.pdf> (noting that Japan has expressed concerns that parts of the Convention may not operate in the best interest of the child).

Statements on this issue are limited and all involved parties appear to both want to acknowledge the cultural differences, but also desire to maintain similarities and strong alliances.

Although Japan follows a best interest of the child model, its interpretation of what is in the best interest of the child is very different than what one might find in many of the Convention's member states. Section 766 of the Japanese Civil Code states,

If parents divorce by agreement, the matter of who will have custody over a child and any other necessary matters regarding custody shall be determined by that agreement. If [an] agreement has not been made, or cannot be made, [custody arrangements] . . . shall be made by the family court. . . . If the family court finds it necessary for the child's interests, it may change who will take custody over the child and order any other proper disposition regarding custody.²⁹

The plain language of the statute suggests that only one parent may take custody of the child. Indeed, in Japan after divorce it is only legally possible for one parent to retain custody of the child; there is no legally recognized joint or partial custody in Japan.³⁰ Individuals choosing to divorce may do so outside of the court; if this avenue is chosen, parents may peacefully resolve custody among themselves.³¹ It is only when parents are unable to agree on custody, division of assets, or other points of contention that the parties will turn to the family court by filing a simple divorce registration.³²

The problem once in family court, however, is that the statute on point provides no guidance on how the best interest of the child shall be determined. Up until this point, the Japanese law appears similar to that of many of the Convention's member states. However, when the judiciary determines the best interest of the child, there is a strong

²⁹ MINPŌ art. 766, ¶ 1-2 (Japan). [MINPO Civ. C.] (as translated in Mikiko Otani, International Symposium on Child Abductions, *Experiences with Child Abduction with Non-Member States of the Hague Convention: Situation of Child Abduction in Japan*, Berlin (Dec. 4, 2009)), available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/383434/publicationFile/4324/RedeOtani.pdf>; see also, Jones, *supra* note 24, at 218 (describing the interest of the child analysis as really a “best interest of the child” analysis).

³⁰ Jones, *supra* note 24, at 212.

³¹ *Id.* at 204–05 (explaining that 90% of divorces are resolved outside of the Japanese family court; if there are children, custody is all-or-nothing in these mutually consensual divorces). See also D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247, 254–55 (2005).

³² Jones, *supra* note 24, at 189–96.

focus on Japanese custom and Japanese family values.³³ There is no public policy or official government statement that articulates that maintaining contact between a child and his or her parents is in the best interest of the child.³⁴

It is noteworthy that Japan has ratified the Convention on the Rights of the Child,³⁵ which emphasizes the right of the child to grow up in the care of his parents, and also states “[t]he best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.”³⁶ However, it is questionable how the Japanese judiciary interprets and applies the Convention of the Rights of the Child given the one consistently applied standard best interest factor considered by the Japanese family law courts: the preference for maternal custody.

The preference for giving custody to the mother is the one common, long-standing preference that the family courts consistently apply.³⁷ One Japanese family law expert explains that in Japan, “[w]hen a child is small, it is thought that the mother should generally be designated custodian. For a young child, the mother’s existence is irreplaceable.”³⁸ The expert notes that when a father does fight for custody it is not uncommon for him to base his argument on the fact

³³ Jones, *supra* note 24, at 188 n.83 (arguing that the family values being effectuated by the judiciary are actually those of an elite class, and not the common people. To support his argument he cites the small pool of an elite class from which judges are pulled and argues that the customs, gender biases, and social expectations within this class are unique and not reflective of the general values of the Japanese public).

³⁴ *Id.* at 219–20.

³⁵ *Id.* at 197–98.

³⁶ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354, Principle 7 (Nov. 20, 1959), reprinted in BLAIR & WEINER, *supra* note 2, at 165–67.

³⁷ *Divorce in Japan*, EMBASSY OF THE UNITED STATES: JAPAN, <http://tokyo.usembassy.gov/e/acs/tacs-7117.html> (last visited Jan. 8, 2011) (“Q: How is the custody of children determined [in Japan]? A: The general practice is to award custody to the mother unless there is an overriding reason to award custody to the father.”). See also *Divorce in Japan*, BRITISH EMBASSY TOKYO, <http://ukinjapan.fco.gov.uk/en/help-for-british-nationals/living-in-japan/general-advice/divorce-in-japan> (last updated Sept. 10, 2008) (responding to a question regarding how child custody is determined in Japan, the U.K. provides an answer identical to that of the U.S. embassy).

³⁸ Jones, *supra* note 24, at 221–22 (translating Takao Sato, *Shinkensha Shitei/Henkō no Kijun* [Criteria for Making and Changing Custody Awards], in GENDAI KAJI CHŌTEI MANYUARU [A MANUAL FOR MODERN FAMILY MEDIATION], 220 (Numabe et al. eds., 2002), and noting the manual was specifically directed to court personnel so Professor Sato’s commentary may carry persuasive authority).

that his parents, and importantly, the child's grandmother, will be available to be with the child while he is at work.³⁹

Although many scholars and journalists have noted the strong preference Japanese family law courts give to mothers,⁴⁰ it is important to recognize that this is a somewhat recent development in Japan's long history. Until the mid-1960s it was typically the father who took custody of the children upon separation.⁴¹ Therefore, the Convention's member states hoping to persuade Japan to accede to the Convention must have an understanding of the Japanese family courts: that the maternal custody preference does exist, to some extent, and is reflected by long-standing custom, but is not so deeply-rooted as to make accession to the Convention impossible.

Although the best interest of the child model is used, it is applied in a very unique way. Member states to the Convention trying to pressure Japan to accede to the Convention should not pretend these differences do not exist. In Japan, the best interest of the child is to remain only with one parent, not to be caught between two bickering parents.⁴² Because Japanese custom holds that the mother is indispensable to the child, it is typically the mother who is granted full custody of the child.⁴³

However, given that the standard for determining the best interest of the child is not written in the Japanese Civil Code and the judicial preference is relatively recent, there is hope that the best interest of the child standard could be adopted by the Japanese courts in a

³⁹ *Id.*

⁴⁰ See e.g., Jones, *supra* note 24, at 220–25; Emiko Miki, *Divorce and Child Custody Issues in International Cases in Japan*, (trans. Brian Strawn 1997), available at <http://www.tuj.ac.jp/newsite/main/law/lawresources/TUJonline/FamilyandDivorce/miki-divorce.html>; Satoshi Minamikata, *Resolution of Disputes Over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L.Q. 489, 497–99 (2005).

⁴¹ Jones, *supra* note 24, at 224. *C.f.* Japanese proverb *Otoko no ko wa chichi ni shitagai, onna no ko wa haha ni shitago*: “Let sons follow their fathers and daughters their mothers,” in DANIEL CRUMP BUCHANAN, *JAPANESE PROVERBS AND SAYINGS* 102, (1987) (explaining that upon separation of the parents, children do not typically maintain contact with both parents, but that traditionally the preference was not for the mother to take both children).

⁴² *Contra* Masami Ito, *Ambassadors Urge Action on Child Abductions*, THE JAPAN TIMES, Mar. 19, 2010, (quoting William Duncan, Deputy Sec’y Gen. of The Hague Conference on Private Int’l Law, who said of the Convention, “[t]he idea is to protect the child’s right to continuing contact with both parents.”).

⁴³ When questioned about this standard, Michele Thoren Bond stated, “[w]hen the status quo so favors one parent over another and invariably leads to a conclusion that totally excludes one parent, it cannot be said to be fair by any measure.” *Interview, supra* note 16.

manner that is more consistent with those of the Convention's member states. Another beacon of hope may be found in Japan's accession to the Convention on the Rights of the Child, which states that the child shall be entitled to the rights of the Convention without distinction or discrimination on the basis of the child or his parents' sex.⁴⁴

II

JAPAN'S LIKELY ACCESSION TO THE CONVENTION: RECENT DEVELOPMENTS AND INCENTIVES

Uchi hodo ii tokoro nai: "No place is as desirable as home."⁴⁵

Although Japan has considerable reason to hesitate in joining the Convention on the Civil Aspects of Child Abduction, there have been several developments that make accession likely by 2012. In fact, former Japanese Prime Minister Yukio Hatoyama said in February 2010 that he was willing to sign the Convention but that Tokyo needed at least another year before signing it.⁴⁶ Mr. Hatoyama expressed his concerns that "Japan is being seen as an unusual country. To show that it is not the case, it is important that we reach a conclusion over the Hague Convention as soon as possible."⁴⁷ Since Mr. Hatoyama's resignation, Japan appears to remain on the same track, moving toward becoming a member state by 2012.⁴⁸

There is no doubt that Japan is concerned about heightened international pressure to join the Convention. In part, this pressure is a result of increased attention to the subject. This could be due to the media highlighting international child abduction during the past

⁴⁴ Declaration, *supra* note 36, at Principle 1.

⁴⁵ BUCHANAN, *supra* note 41, at 104. *See also id.* at 98, *Oya wa senri yuku tomo ko wo wasurezu*: "Although parents may go a thousand 'ri' away they do not forget their children." (explaining also that a "ri" is a Japanese measurement equivalent to one half mile).

⁴⁶ *Japan Says Willing to Sign Treaty on Child Abduction*, AFP NEWS AGENCY, Feb. 2, 2010, <http://www.bangkokpost.com/news/asia/169740/japan-says-willing-to-sign-treaty-on-child-abduction>. Specifically, Mr. Hatoyama stated that it was doubtful parliament would reach the issue during the session ending June 2010, and therefore would likely not reach the issue until 2011 at the soonest.

⁴⁷ *Id.*

⁴⁸ *See Japan to Join the Hague Convention on Child Custody*, JAPAN TODAY, Aug. 15, 2010, <http://www.japantoday.com/category/national/view/japan-to-join-the-hague-convention-on-child-custody>.

several years.⁴⁹ The heightened international pressure may also be due to the exponential increase of child abductions to Japan from member states such as the United Kingdom, the United States, Australia, Canada, and France.⁵⁰ In all five of these countries, child abduction to Japan doubled from 2007 to 2009 and quadrupled from 2005 to 2009.⁵¹ Christophe Penot, deputy head of mission to the French Embassy in Japan, also stated that the French government predicts that the “increasing number of marriages between Japanese and foreign nationals will further intensify the problem on both sides.”⁵²

In response, on May 21, 2009, the United Kingdom, the United States, Canada, and France issued a joint press statement urging Japan to join the Convention.⁵³ In the statement, the member states explained, “Japan is an important ally and partner and we share many common values. This makes our failure to develop a tangible solution to most cases of parental child abduction in Japan particularly troubling.”⁵⁴ The statement concludes, “[w]e are eager for our relationship with Japan on this important issue to improve through Japan’s accession to the Convention.”⁵⁵ Michele Bond, deputy assistant secretary for consular affairs for overseas citizen services at the U.S. Department of State, said of the statement, “[it] demonstrates that very clearly Japan’s allies are united in their concern regarding this tragic issue of international child abduction.”⁵⁶ The joint statement is not the only joint action among member states. Envoys from eight countries met with Japanese Foreign Minister Katsuya Okada to further explain the importance of Japan’s accession.⁵⁷

In addition, the U.S. State Department is independently urging Japan to join the Convention. Both Secretary Thoren Bond and Secretary Campbell have held press conferences publically urging

⁴⁹ See, e.g., Michael Inbar, *U.S. Dad Jailed in Japan in Child Custody Battle*, THE TODAY SHOW, Sept. 30, 2009, available at http://today.msnbc.msn.com/id/33086856/ins/today-parenting_and_family; Pulkkinen, *supra* note 28.

⁵⁰ *Rapid Increase in Child Abductions to Japan, U.S. Dep’t of State*, AMERICAN VIEW, Winter 2010, available at <http://tokyo.usembassy.gov/e/p/tp-20100122-85.html>.

⁵¹ *Id.*

⁵² Kazuaki Nagata, *Japan’s Allies Urge Government to Sign Hague Convention on Child Abduction*, JAPAN TIMES, May 22, 2009, available at <http://search.japantimes.co.jp/cgi-bin/nm20090522a4.html>.

⁵³ Joint Press Statement, *supra* note 4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Nagata, *supra* note 52.

⁵⁷ Willacy, *supra* note 24.

Japan to join the Convention.⁵⁸ Both U.S. officials reported during their statements that Congress is putting increased pressure on the U.S. State Department to urge Japan to join the Convention.⁵⁹ Secretary Thoren Bond explained the pressure from Congress as follows:

[A week prior to the press conference], I briefed an important Congressional committee on . . . compliance and the Hague Convention on Abduction. After we explained the report and answered questions about . . . Hague partners mentioned in the report, they took the time to ask “What about Japan?” They were intensely curious about my travel to [the Symposium on International Parental Child Abduction on May 21, 2009]. We believe firmly that this is a question we will hear more frequently: “What about Japan?”⁶⁰

Secretary Thoren Bond also reported that the U.S. State Department’s Office of Children’s Issues gets a “steady stream of Congressional inquiries” ranging from questions about specific abduction cases to broader questions about the U.S.’s relationship with Japan on the issue of international parental child abduction.⁶¹ Similarly, during his press conference, Secretary Campbell confessed,

it’s been striking to me how rapidly this issue has gained support in Congress, and how much concern it’s raised. And so I would just say that I’m a person who believes deeply and profoundly in the U.S.-Japan relationship . . . [b]ut at the same time, like in all complex, important relationships, there are issues that pose challenges to the health and well-being. And this is an issue that has been left unaddressed for a long period of time and is gaining momentum in the United States in terms of its overall focus.⁶²

The overall focus mentioned by Secretary Campbell includes numerous news articles and websites dedicated to the topic of parental child abduction.⁶³ Congress has not overlooked the concerns of its

⁵⁸ See Thoren Bond, *supra* note 22. See also Campbell, *supra* note 11.

⁵⁹ See *id.*

⁶⁰ Thoren Bond, *supra* note 22.

⁶¹ *Id.*

⁶² Campbell, *supra* note 11.

⁶³ See, e.g., Pulkkinen, *supra* note 28; Inbar, *supra* note 47; Lee Jay Walker, *Randy Collins and Child Abduction in Japan*, MODERN TOKYO TIMES, Mar. 26, 2010, <http://thomodertokyotimes.wordpress.com/2010/03/26/andy-collins-and-childabduction-in-japan/>; Justin McCurry, *Family: Custody Battle in Japan Highlights Loophole in Child Abduction Cases*, GUARDIAN (London), Sept. 15, 2008, at 25, available at <http://www.guardian.co.uk/world/2008/sep/15/japan.childprotection>; HELP BRING ERIKA TOLAND HOME, <http://bringerikahome.com/> (last visited Jan. 8, 2011) (focusing particularly on the risk to U.S. citizens in the armed services who are stationed in Japan).

constituents. Both houses of Congress have been actively engaged in pressuring Japan to join the Convention and to deal with the problem of international parental child abduction. The House of Representatives held a Human Rights Commission hearing on the issue on December 2, 2009.⁶⁴ In addition, Representative Chris Smith introduced a bill called the International Child Abduction Prevention Act of 2009; if passed, this law would penalize States that consistently fail to act to resolve cases of international parental child abduction.⁶⁵ Representative Smith explained that penalties under the bill could include the U.S. denying financial or military aid to uncooperative States.⁶⁶

Early November of 2009 was particularly busy for Congress as they prepared for President Obama's visit to Japan scheduled for November 12th and 13th. On November 5th, twenty-two U.S. Senators signed a letter to the President urging him to address the issue of international parental child abduction during his meeting with Japanese Prime Minister Yukio Hatoyama.⁶⁷ There was another surge of Congressional action in April 2010 when Senator James M. Inhofe, a ranking member of the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs, reported to the Subcommittee on the

⁶⁴ Hearing Announcement: International Child Abduction, Dec. 2, 2009, 2009 WLNR 24260425.

⁶⁵ *The International Child Abduction Prevention Act of 2009*, H.R. 3240, 111th Cong. (2009). This bill was introduced July 16, 2009, and in the past year, has made no progress through the following House committees: Foreign Affairs; Ways and Means; Financial Services; Oversight and Government Reform; and Judiciary, as well as, Judiciary Subcommittees on Crime, Terrorism, and Homeland Security; and Immigration, Citizenship, Refugees, Border Security, and International Law. *Updates available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-3240>. See also H.R. Res. 1326, 110th Cong. (2010) (enacted) (showing that Japan is facing increasing pressure from the United States).

⁶⁶ *Christopher Savoie Follows Abducted Children to Japan, Gets Arrested*, CBS NEWS, Sept. 29, 2009, 4:55 PM, available at http://www.cbsnews.com/8301-504084_162-5351308-504083.html (citing the Assoc. Press).

⁶⁷ *Congressional Documents* Nov. 6, 2009, Federal Information & News Dispatch, available at 2009 WLNR 22420260. The letter to the President was signed by the following US Senators: Jim Webb, Barbara Boxer, Bob Corker, John F. Kerry, Richard G. Lugar, Russell D. Feingold, Richard J. Durbin, Bryon L. Dorgan, Diane Fienstein, Lamar Alexander, Daniel K. Inouye, Jack Reed, Carl Levin, Sheldon Whitehouse, Mary L. Landrieu, Ron Wyden, Jeff Merkley, Maria Cantwell, Roland W. Burris, Amy Klobuchar, Bill Nelson, and Patty Murray. See also Minoru Matsutani, *Senators to Obama: Press Tokyo on Parental Child Abductions*, JAPAN TIMES, Nov. 10, 2009, available at 2009 WLNR 22507435.

issue of international parental child abduction to Japan.⁶⁸ In his report he stated,

[i]f Japan truly wishes to participate in the international community, it must follow international norms and ratify this treaty. In the past, private frankness followed by public discretion had been tried to resolve this issue on a case-by-case basis, but to no avail. Recently, however, the tragedy of Japanese child abduction has been made public.⁶⁹

In addition to conflicts involving international parental child abduction, there are other issues straining the relationship between the United States and Japan which may further pressure Japan to join the Convention in order to maintain a prosperous relationship with the United States. First, in August of 2009, the Democratic Party of Japan (DPJ) replaced the Liberal Democratic Party (LDP) as Japan's dominant political party.⁷⁰ Prior to the DPJ's election victory, the LDP was the only dominant political party to govern Japan since post-World War II political independence.⁷¹ Senator Inhofe notes in his committee report that this victory has impacted every aspect of Japanese government, including its international relations.⁷² Senator Inhofe went on to report that "[e]xperienced observers . . . have remarked that this has not been a 'smooth' transition by any standard."⁷³ Other U.S. Senators are hopeful however.⁷⁴ In a letter to the President, twenty-two U.S. Senators stated, "We feel strongly that the recent election of the Democratic Party of Japan (DPJ), under the leadership of Prime Minister Hatoyama, is an unique opportunity for the United States to reinvigorate its dialogue with Japan on the issue of international parental child abduction."⁷⁵

⁶⁸ U.S.–Japan Relations, Hearing before the Subcomm. on East Asian and Pacific Affairs of the S. Foreign Relations Comm. (Apr. 15, 2010) (statement of Sen. Inhofe, Ranking Member), http://inhofe.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=51d1ea1e-6b77-4a70-9879-f93087ec4d64 [hereinafter *Inhofe Statement*]; See also *Sen. Inhofe Registers Concerns Over U.S.–Japan Relations*, U.S. FED. NEWS, Apr. 16, 2010, available at 2010 WLNR 7872161. For reactions from the press to Congressional action, see e.g. *U.S. Senator Inhofe Addresses US–Japan Child Abduction Concerns*, PR LOG, Apr. 20, 2010, <http://www.prlog.org/10637633-us-senator-inhofe-addresses-us-japan-child-abduction-concerns.html>.

⁶⁹ *Inhofe Statement*, *supra* note 68, at 7.

⁷⁰ *Id.* at 1.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 2.

⁷⁴ Letter to the President, *supra* note 67.

⁷⁵ *Id.*

In addition to the DPJ receiving heightened pressure from the U.S. and other allies regarding international parental child abduction, U.S.–Japan relations are further strained by the current conflict between the two states regarding military bases in Okinawa.⁷⁶ Throughout the past three U.S. administrations, the United States has negotiated with Japan to move the U.S. Marine’s Futenma Air Station to a new, less crowded location.⁷⁷ Today, after thirteen years of negotiation resulting in a signed agreement in 2006, the DPJ government has reported it may not honor the agreement.⁷⁸ To date, the U.S. government has not yet been given a reason for Japan’s sudden change of mind.⁷⁹ In fact, the United States is still awaiting a firm answer on whether the agreement will be honored.⁸⁰

The U.S.’s warnings and pressure, as well as the strained U.S.–Japan relations, have not gone unnoticed by the Japanese people and international community.⁸¹ The strain between the U.S. and Japan has contributed to a drop in voter support for Prime Minister Hatoyama and other DPJ members.⁸² Shortly after President Obama’s visit in November of 2009, Japan launched an office for international child abductions.⁸³ The purpose of this office is to discuss whether Japan should sign the Convention.⁸⁴ At a press conference discussing the new office, Japanese Foreign Minister Katsuya Okada said that Japan is considering requests that it join the Convention.⁸⁵ In February of 2010, Prime Minister Hatoyama said that he would sign the

⁷⁶ *Inhofe Statement*, *supra* note 68.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.*; *See also U.S. Presses Japan Over Parental Child Abduction*, REUTERS, Feb. 2, 2010, available at <http://www.reuters.com/article/idUSTRE6112BW20100202>. (discussing tension between US and Japan regarding the Convention and the Futenma conflict.)

⁸¹ *See, e.g., Ito*, *supra* note 42; Nagata, *supra* note 52; Matsutani, *supra* note 67; Masami Ito, *U.S. Pressures Japan to Resolve Child Custody*, JAPAN TIMES, Feb. 3, 2010, available at 2010 WLNR 2266016 (citing a senior U.S. diplomat who said the United States has discussed the option of demanding extradition, but is hesitating in favor of preserving U.S.–Japan relations and solving the parental abduction problems through more diplomatic means.); *Japan/United States: Parental Abduction Becomes Growing International Problem*, THAI PRESS REP., Feb. 16, 2010, available at 2010 WLNR 3181314.

⁸² REUTERS, *supra* note 80.

⁸³ *Japan Launches Office for Int’l Child Abductions*, JIJI PRESS, Dec. 1, 2009, available at 2009 WLNR 24253034.

⁸⁴ *Id.*

⁸⁵ *Id.*

Convention, but noted that the Japanese Parliament would not be able to discuss accession until 2011, at the earliest.⁸⁶

Most arrows point to yes; Japan will likely sign the Convention by 2012, and given the immense pressure from the West for Japan to join the Convention, there is little reason to speculate whether Japan's accession will be accepted by its allies, particularly the United States. However, given the conditions surrounding accession, will Japan embrace the purpose and goals of the Convention?

III

IS JAPAN READY FOR THE CONVENTION?: PREDICTIONS ABOUT INTERPRETATION AND ENFORCEMENT IMMEDIATELY FOLLOWING RATIFICATION

Japan will likely sign the Convention by 2012, and most of the Convention's member states of the West, particularly those that pressured Japan to accede, will likely accept Japan's accession. The only question left to ask is: How will things change? Can Japan continue to protect its own interests while embracing the purpose and goals of the Convention? In short, the changes from Japan's accession will likely be meaningful, but slow.

It is important that member states recognize and appreciate in the beginning that Japan is not joining the Convention because it is convinced of its inherent benefits; rather, the extreme pressure placed on Japan from 2007 to 2010, particularly in the latter part of that time period, compelled Japan to accede to the Convention where it likely would not have done so absent those circumstances. Therefore, several questions may reasonably be raised. For instance, will the Japanese judiciary change its ways? Will they avoid conducting the best interest of the child analysis and return the child to his habitual residence, trusting that the other member states are qualified to perform the task? This is a particularly difficult question to answer because the Japanese courts cannot possibly trust other member states to decide in the child's best interest as it is applied in Japan. The preference for only one custodial parent, typically the mother, is simply not the standard applied in other countries.⁸⁷ The adjustments

⁸⁶ AFP NEWS AGENCY, *supra* note 46.

⁸⁷ See Declaration, *supra* note 36 (representing the general consensus among states that children benefit most from maintaining contact with both parents and parents should not be discriminated against on the basis of sex).

for the Japanese judiciary will likely be slow, and member states should be patient during this transition.

As noted in Part I, the Convention leaves adequate room for interpretation. Particularly, the Japanese courts may interpret the grave risk exception of Article 13(b) to allow for women fleeing from domestic violence to remain in Japan with their children. This issue is particularly interesting because Japan would not be wrong in finding such an interpretation; however, scholars may see more liberal interpretations of the exceptions by the Japanese judiciary than have been previously seen in other member states. Through a more liberal interpretation of the exceptions, Japan can accede to the Convention without completely losing its ability to consider the best interest of the child. It may be interesting to analyze the first Convention cases to come out of Japan in order to determine if the courts weave the best interest of the child analysis into the cases via the Convention's exceptions.

However, it may be more likely that observers will see the Japanese parliament limit the broad discretion of the judiciary. Indeed, one scholar suggests that the strong judicial preference for maternal custody does not reflect the interests of the modern Japanese family; rather, it is the custom of the current extremely elitist and politically driven judiciary.⁸⁸ If this is true, there is reason to be hopeful that the new political party in power may be able to sway the judiciary into reassessing the best interest of the child model currently in use. In addition, the Japanese media has reported that Justice Minister Keiko Chiba has expressed interest in revising the Japanese civil law to recognize joint custody.⁸⁹ If this is a possibility, perhaps the civil law will also be amended to give the judiciary more guidance on what it should consider when determining the best interest of the child. These changes would make it far more likely that Japan would transition smoothly into its new role as a member state of the Convention.

In 2007, one law professor in Japan published an article insisting that Japan's accession to the Convention would lead to very little change.⁹⁰ He predicted that the Convention would be yet another law

⁸⁸ Jones, *supra* note 24, at 188.

⁸⁹ Masami Ito, *DPJ Rule Raises Hague Treaty-Signing Hope: 'Left-Behind Parent' Urges Japan to Side with Child-Abduction Pact*, JAPAN TIMES, Mar. 18, 2010, available at 2010 WLNR 5651570.

⁹⁰ Jones, *supra* note 24, at 266.

that the Japanese courts “reason[ed] their way around.”⁹¹ However, the professor’s analysis was conditioned on one factor: that there not be “a drastic change [in] enforcement regime.”⁹² Given the change in the political regime, which Senator Inhofe reported to the Foreign Relations Subcommittee as being drastic,⁹³ there is reason to hope that the accession may not be undermined by the customs of the judiciary that dominated in the past.

The last dominant post-accession concern and question is what to do with all of the children who were wrongfully removed prior to Japan’s accession to the Convention. Certainly, even if the Convention were to apply retroactively, these children would likely easily fall under the well-settled exception.⁹⁴ In their letter to President Obama, twenty-two U.S. Senators stated that,

the United States must also work with Japan to establish a bilateral mechanism to assist with the resolution of current cases. This is critical because the Hague Convention does not apply to abductions that occur before [the] country joins the Convention, and therefore would not be available as a tool to resolve existing cases involving Japan.⁹⁵

What would such a mechanism look like? How would it be enforced? Should a bilateral agreement focus on parental rights, children’s rights, or the elusive “best interest of the child”? If the latter, which best interest of the child test do we use: that of the United States, Japan, or a hybrid Convention on the Rights of the Child?⁹⁶

There is no doubt that some bilateral agreement should be adopted in order to resolve current outstanding parental child abduction cases. Such an agreement should be entered as soon as possible, even if Japan has not yet committed itself to the Convention. A bilateral agreement may involve an adoption of only some of the responsibilities of the Convention. It could function as a short-term

⁹¹ *Id.*

⁹² *Id.*

⁹³ Inhofe, *supra* note 68.

⁹⁴ See *Convention*, *supra* note 1, art. 12.

⁹⁵ Letter to the President, *supra* note 67.

⁹⁶ Hybrid in the sense that Japan’s interpretation of the Declaration of the Rights of the Child is clearly different from that of the Convention’s member states, this is inferred from Japan’s purported compliance with the Declaration despite not offering joint or partial custody and having a post-divorce maternal custody preference.

test-run for Japan prior to accession to the Convention.⁹⁷ Many of the responsibilities under the Convention may not be appropriate given that the removal was wrongful, the left-behind parent had no remedy, and the child has since become well-settled in Japan.⁹⁸ Given these circumstances, a unique reunification program with visitation and bilateral government involvement may be best. Ultimately, these are options that need careful exploration and consideration, but options for a bilateral agreement should be explored and are in the best interest of all parties involved.

CONCLUSION

Given the strong pressure on Japan to join the Convention, it is highly likely that Japan will accede by 2012. However, it is imperative that the current member states of the Convention, particularly the United States and other member states that have pressured Japan to join, understand Japan's concerns and work closely and openly with Japan as Japanese judges and lawmakers adjust domestic laws and practices to conform to the Convention. It is also important that the United States works closely with Japan to enter a mutually satisfactory bilateral agreement to reunite left-behind parents and abducted children in a way that serves the interests of all parties involved to the greatest extent possible and in a manner in conformity with the Declaration of the Rights of the Child. The future looks very bright for parents facing this very difficult problem. However, the decision for Japan is a political one, and for that reason, conformity may not come naturally or easily for the state. In short, member states should expect and prepare for the changes from Japan's accession to be meaningful, but slow.

⁹⁷ *But see* Ericka A. Schnitzer-Reese, Note, *International Child Abductions to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. J. INT'L HUM. RTS. 7, 24 (2004).

⁹⁸ *See Convention, supra* note 1, art. 12.