

RESEARCH ARTICLE

# Legislation as a Social Process: Japanese Family Law and the Drafting of the Bill on the Hague Child Abduction Convention

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## Abstract

When Japan signed the Hague Convention on the Civil Aspects of International Child Abduction, the government enacted a new act to deal with international parental child abduction according to the Convention in the same year. The Ministries of Justice and Foreign Affairs were immediately in charge of making a draft Bill. Once the government and respective ministries had instantly set up the legal and administrative procedure for dealing with international family issue under the Convention, as some studies argue, simultaneous issues of the family in separation in Japan were underdeveloped. Employing a method of content analysis of the record of policy debates by authorities, observing both diplomatic and domestic frames referred in the debate in contrast, this paper highlights this law-making process delivered and elucidated continuous consecutive inquiries about radical questions of the current Japanese family law regarding the wellbeing of the changing families and their children in contemporary Japan.

**Keywords:** Japan; international parental child abduction; Hague Child Abduction Convention; family law; cross-border marriage

## 1. Introduction

### 1.1 Japan's accession to the Hague Child Abduction Convention

When considering contemporary family disputes regarding children, one of the most difficult and complicated issues is international parental child abduction. International parental child abduction generally happens as a result of family breakdown and concludes with the forcible removal of the child by one of his or her parents. International parental child abduction does not only happen in cross-national families; it also happens in families whose family structure is extended across national borders due to international transfer or migration. While the modern nation-state system has been strictly responsible for dealing with such civil matters through the implementation of the Civil Code (family law) and respective policies at the national level, there have allegedly been concerns about the introduction to the internationally common protocol through an international Convention in order to deal with international family disputes that transcend national borders and the interests of individual states.<sup>1</sup> From a sociological perspective, law can be identified as one of the most powerful “symbolically generalised communication media,” which mediates other social systems (e.g. politics, economics, family) through an organizational one, as well as national boundaries. The system of the law, in that sense,

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<sup>1</sup> Lowe, Everall, & Nicholls (2016); Dyer (1997).

would be applicable in the global context.<sup>2</sup> As powerful media in society, not only does the law enact as a social control, but also it would play a major role to diagnose and reconstruct the established social systems, questioning problems of each system and proposing an alternative mode of communication among them.

One of the achievements of such transnational efforts was the establishment of the Hague Convention on the Civil Aspects of International Child Abduction in 1980.<sup>3</sup> This Convention is an international treaty by the Hague Conference on Private International Law in the Netherlands that seeks to provide a united, common international protocol to deal with the immediate return of a child who is wrongly or forcibly removed from his or her habitual residence (the country in which he/she has grown up) by the parent. As of October 2019, 101 countries had contracted the Convention.<sup>4</sup>

Under such global circumstances, Japan had stayed away from accession to the Convention until recently, despite the fact that Japan was one of the drafting members of this international treaty from the beginning at the Hague Conference.<sup>5</sup> Nevertheless, as there has been an increase in the number of foreign sources blaming Japan for neglecting to deal with parental child abduction involving Japanese nationals,<sup>6</sup> as well as amplified campaigns highlighting this international children's issue by domestic media outlets,<sup>7</sup> the Japanese government eventually began to consider accession to the Convention in 2011, setting up a meeting of parliamentary senior vice-ministers from related government agencies and eventually approving ratification of the Convention on 20 May 2011. The Ministry of Foreign Affairs of Japan (MOFA) as the Central Authority of Japan<sup>8</sup> and the Ministry of Justice (MOJ) were appointed to build a legal framework to integrate this international Convention into the Japanese Civil Code.<sup>9</sup> Consequently, the present institutional structure of Japan after the conclusion of the Convention can be described

<sup>2</sup> Luhmann (1990). His social analysis is primarily limited to the state level, but his theoretical framework is applicable to analyzing contemporary global society.

<sup>3</sup> Lowe, Everall, & Nicholls, *supra* note 1; Pérez-Vera (1982); Bodenheimer (1980); Hague Conference on Private International Law (2003).

<sup>4</sup> In light of the rights of a child, there seem to be various possible definitions of what the best interests of the child are in such disputes. In the case of the Convention, it regards the wrongful or forcible removal of the child from his/her habitual residence as an offence of the best interests of the child, which is also included as an exclusive child right in the UN's Convention of the Rights of the Child established in 1989. There are still controversial arguments regarding what the best interests of the child should be in legal and political terms. For critical questions about the best interests of the child in this context, see Alston, Walsh, & UNICEF (1996) on the recognition of the best interests of the child, in reference to both universal child rights and cultural values, and Cumming, Mawdsley, & Waal (2006), on reconciling parents' rights with them, for instance.

<sup>5</sup> Dyer, *supra* note 1; Schuz (2013); Beaumont & McEleavy (1999).

<sup>6</sup> Prior to the rise of this international critique of Japan's indifference to the accession to the Convention in 2010, several scholars argued for Japan's immediate consideration of the Convention to deal with ongoing international parental child abduction by Japanese nationals (Nishitani (2006); Jones (2007)). A decade ago, domestic media outlets were already reporting cases of children being internationally abducted from Japan by their non-Japanese parents at the time, although the problem did not attract wider public attention in Japan during that period. See also US Embassy Tokyo (2010a).

<sup>7</sup> Hamano (2017).

<sup>8</sup> According to the explanatory report of the Convention (see Pérez-Vera, *supra* note 3), Act 6 of the Convention stipulates that the signatory (state) must appoint at least one Central Authority, which is the national institutional agent chiefly responsible for dealing with claims of international parental child abduction in case the application is filed by either domestic nationals/citizens or other counterparts in foreign signatories. It is also assumed to play a major role in collaboration with the respective domestic authorities in the areas of jurisdiction (e.g. family court) and administration (e.g. the police and local councils and schools), in reference to the "Guides to Good Practice" described by the Hague Conference on Private International Law, *supra* note 3. While the Central Authority of Japan is the MOFA, the Convention acknowledges that different agencies can be appointed to be the authority(ies), depending upon the signatory.

<sup>9</sup> Ministry of Foreign Affairs of Japan (2014).

in the following terms. Regarding domestic procedures and other related matters, Japan implemented the Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (*kokusaitekina ko no dasshu no minjijyō no sokumen ni kansuru jyōyaku no jisshi ni kansuru hōritsu*) (The Implementation Act). The Act was promulgated on 19 June 2013 (Act no. 48 of 2013) by the 183rd Diet and enforced on 1 April 2014, when the Convention officially came into effect after the accession in January 2014.<sup>10</sup> The Act comprises 153 articles of seven chapters that mainly focus on several matters, such as designation of the Central Authority (Article 3), assistance in the child's return to a foreign state or Japan (Articles 4 and 12–16), and assistance with visitation or contacts with children in Japan and foreign states (Articles 16–18 and 21–23), for instance.<sup>11</sup> While there were some persistent questions about its actual efficiency in combatting international parental child abduction and its provisions regarding Japanese nationals,<sup>12</sup> it was an immediate step in the integration of the law into the Civil Code after the decision to accede to the Convention. Nevertheless, what is crucial is that when there were rigorous debates over the making of a Bill on the Implementation Act, those involved could explicitly and implicitly elucidate radical questions on the present legal structure to discuss the wellbeing of the child in the changing family set-up in Japan. Considering the legislation under way, what critical inquiries toward law and family will be postulated in Japan at present?

## 1.2 Aims of the article

Once the Cabinet declared in 2011 that the Convention should be ratified, the respective ministers immediately commenced work on a draft Bill for its implementation and submission to the Diet. Their efforts led to the passing of the Bill and the enactment of the related law in April 2014. We observed the process for constructing the Bill—which included the presentation of different topics by various stakeholders—and its finalization. Following careful evaluation, review, and reform carried out according to the outcome of the involved cases, Japan's implementation of the Convention has been welcomed by the signatories.<sup>13</sup>

Besides, it was remarkable to see ongoing concerns about the welfare of the child and families being debated during the legislative process. This paper conducts a social analysis of the rhetoric employed in the debates on the issue of the wellbeing of the child under the current domestic legal structure. During the myriad negotiations, international criticism regarding the wellbeing of the child in a separated family was handled well in the early stage. Experts had to respond to both national and international public opinion and adjust it to domestic legal codes. By focusing on the records of the legislative working groups in the two ministries, this paper demonstrates how wider global and local social contexts of the contemporary Japanese family were articulated and marginalized in this process, embedding an international Convention within the modern Japanese Civil Code. Consequently, legislative debates over ratification of the Convention can be examined as a process of “social problem work,”<sup>14</sup> especially in the context of international politics and diplomacy, where officials have to develop procedures to deal with difficult civil

<sup>10</sup> See Ueki (2013) about more detailed process of the establishment of the Implementation Act.

<sup>11</sup> Kaneko et al. (2015) give detailed explanatory notes about the Implementation Act in Japan. See also Yamakawa & Matsushima (2020) about the 2020 reform of the Act.

<sup>12</sup> Costa (2010); Jones (2013).

<sup>13</sup> For instance, the 2020 “Annual Report on International Parental Child Abduction” released by the US Department of State relatively gives positive remarks about the results of the dissolving of international parental child abduction brought about between two countries, recognizing the efficacy of Japan's implementation of the Act and organizational actions taken under the Convention, despite having an awareness of the remaining pre-Convention cases. See US Department of State (2020).

<sup>14</sup> Best (2020).

matters that extend beyond national borders. In this social constructionist approach, this “social problem work” can be assumed to be an analytical ideotype, which comes in the form a sequence of the discovery of social problems and the implementation of actual public policy.<sup>15</sup> Given that the Implementation Act emerged from Japan’s accession, influenced by international (and domestic) claims of its negligence of international parental child abduction, and in recognition of how different stakeholders, professionals, and media outlets, as well as policy-makers and law-makers worked, that traces how a social process of making claims, identifying, and diagnosing, turns into a policy package such as the new Act. Importantly, the conclusion of one process often prompts another process through the evaluation of the new policy and its shortcomings.

From this perspective, the implication is that specific issues of the Japanese family must be contextualized in a transnational framework that surpasses national interests and emphasizes achievement of the “global” human rights of individuals. No matter how the Convention exclusively focused on the significance of the forcible removal of a child from their habitual residence as the principle of the best interests of the child, it gave an opportunity for the domestic legal-policy framework to ensure the wellbeing of children in different social contexts. Analyzing the minutes of two meetings, this article argues how debates leading to the Implementation Act elucidated key questions about the Japanese family law. These would help to improve subsequent investigations and debates in both academic and public circles regarding the development and aid of the wellbeing of the contemporary Japanese family.

## 2. Drafting a Bill by two ministries

### 2.1 Ministry of Justice and a subcommittee of the Legislative Council

Once the accession to the Hague Child Abduction Convention by the former Hatoyama government and its successor, the Abe government, was complete, two respective ministries—the MOJ and the MOFA—took part in drafting the Bill of the Implementation Act. In the Japanese political system, there are two ways to enact a Bill: one is introduction by members of the Diet and the other is introduction by the Cabinet. Of these two methods of enacting a Bill deliberated on by both houses of the Diet, the respective ministry is generally responsible for the duty for the sake of the Cabinet.<sup>16</sup> Along with the enactment of the Bill by the ministry itself, a subcommittee (*bukai*) of the Hague Child Abduction Implementation Act was formed to discuss issues in the MOJ’s Legislative Council (*hōsei shingikai*). The Council is a subordinate organization of the Ministry. A subcommittee under the Legislative Council can occasionally be called by the minister to investigate and discuss basic matters regarding both the Criminal and Civil Code, as stipulated by Article 60 of the Order for Organization of the MOJ (*hōmushō soshikirei dai 60jyō*).<sup>17</sup> The number of members of each subcommittee should be fewer than 20 and it should comprise scholars who specialize in the major topic of the committee. Each subcommittee is appointed to hold regular meetings for up to two years. As of November 2019, there were seven active subcommittees under the Council.

In July 2011, a new subcommittee of the proposed Hague Child Abduction Implementation Act was assembled in the MOJ’s legislative committee in response to the Japanese government’s declaration. According to the minutes from the first meeting,<sup>18</sup> they explained that the establishment of this new subcommittee was based on a decision

<sup>15</sup> *Ibid.*; Loseke (2015) for more details of its analytical method.

<sup>16</sup> Occasionally, the ministry itself seeks to implement an act and submit a Bill to the Diet, instead of a request order made by the Cabinet.

<sup>17</sup> Ministry of Justice of Japan (2019).

<sup>18</sup> Ministry of Justice of Japan (2011b).

**Table 1.** Schedule of the Hague Convention Subcommittee

Number	Date	Contents
MJ-I	13 July 2011	Introduction
		Proposal review (first round)
MJ-II	25 July 2011	Proposal review (first round)
MJ-III	9 September 2011	Proposal review (first round)
MJ-IV	22 September 2011	Mid-summary review
		Introduction to public opinion
MJ-V	17 October 2011	Proposal review (second round)
MJ-VI	28 October 2011	Hearing from guest specialists
		Proposal review (second round)
MJ-VII	11 November 2011	Proposal review (second round)
MJ-VIII	28 November 2011	Public opinions review
		Proposal review (second round)
MJ-IX	5 December 2011	Proposal review (second round)
		Final proposal review
MJ-X	19 December 2011	Proposal review (supplement)
		Final proposal review
MJ-XI	16 January 2012	Final proposal review
MJ-XII	23 January, 2012	Final proposal review

Source: Ministry of Justice of Japan (2011a).

made at the 165th meeting of the Legislative Council. The purpose was to conduct research and discuss the juridical procedure of the return of the child under the Convention. The subcommittee met 12 times between then and January 2012. The expert members of the subcommittee were composed of one chair, 16 members, and 13 other organizers. The former group was composed of legal scholars and legal practitioners specializing in international civil disputes. Some of the legal practitioners and legal scholars who attended this subcommittee were also affiliated with the advisory board of the Roundtable discussion spontaneously organized by the MOFA around the same time to discuss the role of the Central Authority of Japan under the Convention. During those meetings, not only did the subcommittee continue discussions about several issues regarding the integration of the Convention into the domestic legal structure; it also conducted a call for public opinions and engaged in exchanges with the MOFA. The latter group was mostly composed of delegates from each ministry, a few academics, and a legal practitioner who attended on behalf of the Japan Bar Association (JBA).<sup>19</sup> Table 1 is a schedule of the meetings between 2011 and 2012.

## 2.2 Ministry of Foreign Affairs and the Roundtable Conference

Along with the subcommittee of the Legislative Council by the MOJ, the MOFA, as the designated Central Authority of Japan under the Convention, organized a series of conferences

<sup>19</sup> *Ibid.*

**Table 2.** Schedule of the MOFA's Roundtable

Number	Date	Contents
MOFA-I	29 July 2011	Proposal review
MOFA-II	14 September 2011	Proposal review
MOFA-III	24 October 2011	Hearing from guest practitioners
MOFA-IV	22 November 2011	Public opinions review
MOFA-V	7 December 2011	Confirmation of the proposal for final report
Submission of final report	19 January 2012	

Source: Ministry of Foreign Affairs of Japan (2014).

known as Roundtable Conferences on the Roles and Functions of Central Authority (*Hāgujyōyaku no chūōtōkyoku no arikata ni kansuru kondankai*) in 2011.<sup>20</sup> In conjunction with another regular meeting of the subcommittee of the MOJ's Legislative Council, the MOFA called for its own advisory board by inviting specialists and practitioners of international civil affairs (e.g. international child-parent issues) to consider the best practices of the MOFA as the Central Authority in July 2011. Meetings of the board were held five times between then and December 2011, as Table 2 shows. The advisory board comprised various experts: representatives of both the MOFA and MOJ, representatives from other ministries and agencies, legal practitioners, and scholars. They also invited guest experts to discuss specific issues raised in the meetings. During these five meetings, the MOFA allowed public comments nationwide, and the results were also considered in later meetings.

Primarily, this MOFA's Roundtable aimed to identify the role of the MOFA as the Central Authority of Japan and to assess a possible accommodation of the basic principles of the Convention in the context of the Japanese institutional framework. As a result of those meetings, the revised version of the final summary of the meetings was issued on 19 January 2012 for the final introduction of the Bill of Implementation Act to the Diet.<sup>21</sup> Some members of the Roundtable concurrently held membership in the subcommittee of the MOJ's Legislative Council, for the establishment of a legal framework in light of the Convention Implementation Act. Above all, the MOFA discussed the ways in which they might integrate the Central Authority into the Japanese social context, as well as its legal endorsement within the Convention, at the meetings.

### 2.3 Common and different interests by the two ministries

Both serial meetings were spontaneously carried out during a similar period, and the content of each discussion was frequently referred to by the other counterpart. The two ministries also sent a delegate to the other's meetings to exchange ideas and express the mutual interests of the ministries through discussion. At the early stage of both meetings, there were appearances of legal scholars of comparative family law, who had experienced actual practitioners of international civil disputes, or who had advocated for institutional (legal) establishment of measures to prevent or deal with international parental child abduction involving Japanese nationals. Their roles were expected to provide information with other members who were unfamiliar with this special case of an international civil

<sup>20</sup> On account of preparatory activities for the Convention since then, the MOFA still plays a role in providing subsequent activity reports on the portal of its website; "The Hague Convention (The Convention on the Civil Aspects of International Child Abduction)" is available in both Japanese and English. See Ministry of Foreign Affairs of Japan (2017).

<sup>21</sup> Ministry of Foreign Affairs of Japan (2012).



matter. The majority of the subcommittee of the MOJ's Legislative Council was generally made up of legal scholars in Japanese Civil Codes, legal practitioners of international civil affairs (those who have already dealt with international parental child abduction). They also involved few non-regular members in international private laws on occasion, while there were likely more specialists in international law and civil affairs in the MOFA's Roundtable. Also, the Roundtable was differently characterized as a sort of special working group for that purpose. In addition to these legal specialists of regular and special members, other delegates from respective national juridical and administrative institutions (e.g. the high court; the Metropolitan Police Department; and the Ministry of Health, Labor, and Welfare (MHLW)) joined them in both meetings on occasion.

While they shared a great deal about the Bill-making process, they occasionally expressed different interests regarding this practice. In meetings of the subcommittee of the MOJ's Legislative Council, they emphasized the investigation of the relevancy of texts in a new draft Bill (the early version was constructed and submitted via MOJ policy), rigorously referencing the established legal codes embedded in the present Japanese Civil Code. Although the subcommittee considered opinions and arguments raised by non-regular legal specialists and other advocates to some extent, the dominant atmosphere of the subcommittee was to match the draft Bill with the Japanese legal context. In the first meeting with MOJ, a policy-maker from the MOJ brought a list of 38 topics with their main arguments, both of which had to be discussed through the meetings (see MJ-I in Table 1).<sup>22</sup> Listing the subjects related to the articles in the Convention, he suggested examining them according to the Civil Executing Act<sup>23</sup> and the Domestic Case Relations Procedure Act,<sup>24</sup> both of which would primarily be referred to in the new Implementation Act.

Meanwhile, the debate in the MOFA's Roundtable—particularly in the early stage—might have been relatively inclusive in order to establish an effective institutional structure of the Central Authority in Japan, indicating tolerance for a wider scope of social and organizational matters that could possibly bring about the dissolution of international parental child abduction in Japan.

The MOFA's concern about a wider social context can be represented by its attention to both the local and global: for instance, in the record of the minutes of the first Roundtable, a delegate from the MOFA remarked that topics needed to be discussed at the Roundtable Conference itself.<sup>25</sup> Reflecting the alternative interests of the MOFA, a differently nuanced list, unlike the previous one presented at the MOJ's subcommittee, was proposed. While discussing the establishment of the Central Authority, it appeared that the agendas proposed by the MOFA were connected with ways to develop accurate and safe correspondence procedures with all parties involved in both the domestic and the international frameworks. This transnational context seemed to be crucial for the MOFA in the course of the drafting of the Implementation Act. As the designated Central Authority had to assume how they demonstrated effective and practical performance in dissolving lodged cases immediately, the MOFA wanted to guarantee wider collaboration and a network

<sup>22</sup> Ministry of Justice of Japan, *supra* note 18, p. 9; Ministry of Justice of Japan (2011c).

<sup>23</sup> Regarding the first reform of the Hague Child Abduction Convention Implementation Act in 2019 (enacted in 2020), it aimed to enable a more effective and less harmful procedure for the return of the child to his/her habitual residence after the decision made under the Convention. This reform was also a result of the increasing problem of incapability of dealing with parental child abduction or transfer of child custody between spouses. See Ministry of Justice of Japan (2020) for further details about this reform.

<sup>24</sup> This Act was just amended on 25 May 2011 (but not enacted until 2012).

<sup>25</sup> Ministry of Foreign Affairs of Japan (2011a). As of February 2020, the full version of the minutes of the meeting disappeared and replaced with a summary on this webpage.

consisting of the relevant authorities in domestic society, such as legal governments, the family court, the police, and schools from the beginning of the Roundtable.<sup>26</sup>

Prior to this process of drafting the Bill with legal specialists and policy-makers at the ministry level, they attempted to draw public awareness about the Convention through an online poll about Japan's accession to the Convention. The survey was conducted between May and November in 2010.<sup>27</sup> It reflected the MOFA's concern about collecting voices from the wider public. 64 samples were collected from those involved in parental child abduction, including 18 parental abductors and 19 parents who were left behind (LBPs). The summary report cites the pros and cons of Japan's accession to the Convention, which were to be found in the research outcome. The fact that it would be too small to denote the reality of international parental child abduction in Japan would have been carefully examined when the MOFA prepared a proposal for the Roundtable the following year. As shown later, such voices about Japan's implementation of the Convention were depicted in the process of Bill-making and, more importantly, they would have affected related legal debates on the wellbeing of the child and the family in Japan, even though these extra measures (e.g. shared parenting, family violence, or subsequent aid for returned child) were understandably excluded from the final law. Beyond stakeholders' Bill-making according to the domestic legal codes, it was necessary to be an agent for introducing an effective organization, as well as legal grounds, to deal with transnational civil matters.

### 3. Decontextualizing/recontextualizing the Convention

#### 3.1 International parental child abduction as a diplomatic problem

On 7 April 2011, the shocking news was reported nationwide that a Japanese mother had been arrested for abducting her nine-year-old child from her ex-spouse, who was living in the US, when she returned to that country to renew her status as a permanent US resident.<sup>28</sup> Beyond private disputes among cross-national families, this family issue had grown into a diplomatic concern relevant to the rights of the child in several countries.<sup>29</sup> Along with an increase in international violence, international parental child abduction involving Japanese nationals was "in the air" in Japan.

While the MOJ is responsible for enforcing and controlling the legal order in domestic society, the MOFA is in charge of up-to-date international diplomatic policies for the interests of the state. The two different attitudes toward policy-making and its maintenance are represented by the different priorities in introducing the Convention to the Japanese legal structure. Initially, in both meetings, there were common arguments about the possible conflict of interests between the domestic circumstances and diplomatic concerns of the state of Japan. That is, despite the debates, both ministries, by the order of the Cabinet, opened these assemblies in the process of making a draft of the Bill for the Implementation Act, and it was found that each ministry, in some cases, expressed different interests regarding the Bill.

For example, at the first meeting of the subcommittee of the MOJ's Legislative Council,<sup>30</sup> the participants began to speak of whether the Central Authority (MOFA) would be able to ask for help from other institutions that are responsible for the protection of children in Japan.<sup>31</sup> In that initial process, a delegate from the MOFA (Issues of Child Custody Division) to the MOJ's subcommittee clearly argued that Japan's accession to the Convention was an

<sup>26</sup> *Ibid.*

<sup>27</sup> Ministry of Foreign Affairs of Japan (2011e).

<sup>28</sup> Mainichi Daily News (2011).

<sup>29</sup> Dingle (2011).

<sup>30</sup> Ministry of Justice of Japan (2011c), *supra* note 22.

<sup>31</sup> Ministry of Justice of Japan (2011a).



emergent diplomatic issue, as well as a matter of international family disputes. Referring to the handouts about the Convention and its signatories that were provided to attendees (prior to the working groups, the Convention was already translated into Japanese by the MOFA),<sup>32</sup> she insisted that Japan had to sign the Convention on account of diplomatic concerns:

On the last page, page 6, there is a list of 85 [sic]<sup>33</sup> signatories of the Convention. It can be seen that the US, Canada, most of Central and South America, and most European countries have already become signatories. As explained before, among the G8, only Japan and Russia have not signed it yet, but I hear that it (note: Russia) will do it this year. Among Asian countries, only a few countries have become signatories, such as Hong Kong, Macau, Singapore, Sri Lanka, and Thailand. However, South Korea is now in the process of agreeing to it.<sup>34</sup>

As a representative of the MOFA, which had been playing a leading role with regard to Japan's accession to the Convention, and perhaps would have suffered severe criticism for having an indifferent attitude towards international parental abduction by international agencies in the diplomatic field, the delegate exclusively identifies the case with an international diplomatic framework in her argument. Criticizing Japan as one of the few states among the G8 countries that had not joined the Hague signatories until recently, she urges other participants to engage in constructive discussions toward the conclusion of the Bill for the Implementation Act. We see how the MOFA attempted to make the participants recognize the significance of immediate implementation of the Convention in line with its diplomatic concern. Observations from several studies about policy-making in Japan indicate that foreign pressure (*gaiatsu* in Japanese) from Western societies (the US, in particular) often impacts policy-making in Japan pertaining to international relations,<sup>35</sup> and Kaji also lists official criticisms from foreign officials regarding Japan's reluctance to deal with international parental child abduction under the Convention, and international authorities and media outlets have increasingly blamed Japan for its negligence regarding such abductions involving Japanese parents.<sup>36</sup> As Japan was considering whether to approve ratification of the Convention, the US Embassy Tokyo released an issue in its bilingual web magazine regarding international parental child abduction by Japanese nationals.<sup>37</sup> Against the backdrop of such global and local circumstances, the MOFA's rhetoric to reframe international parental child abduction in that way can be understood as a reflection of *gaiatsu* in relation to international human rights diplomacy.

### **3.2 Connecting international parental child abduction with domestic family problems**

In the course of the Bill-making process, both ministries apparently drew attention to public awareness about Japan's ratification of the Convention and its implementation. They were keen on the immediate implementation of the Convention, facing increasing foreign diplomatic pressure, as well as facing criticism over the government's long-term negligence of international parental child abductions claimed by the LBP, activists, support groups, legal practitioners, and other specialists involved in the cases. They also drew

<sup>32</sup> Ministry of Foreign Affairs of Japan, *supra* note 25.

<sup>33</sup> As of October 2020, a number of signatories reached 101.

<sup>34</sup> Ministry of Justice of Japan, *supra* note 30.

<sup>35</sup> Brown (1994); Miyaoka (1998); Mulgan (1997).

<sup>36</sup> Kaji (2012).

<sup>37</sup> US Embassy of Tokyo (2007); US Embassy of Tokyo (2010b).

attention to different (or even contradictory) arguments about domestic setups from civil society, reflecting the growing diversity of family values and norms in contemporary Japan.<sup>38</sup> To gather those complicated voices, they conducted a hearing at the meetings.

First, guest speakers—experienced legal practitioners in international family disputes and advocates for victims of spousal violence and the wellbeing of the family—were invited to both meetings.<sup>39</sup> They were asked to explain why the impact of spousal violence should be considered in the decision to return a child. One speaker, a lawyer invited to the MOJ's subcommittee, said:

I've been supporting women and children escaped from domestic violence . . . . Although I'm not sure about the detail of the Hague Convention, I've heard that approximately 70% of parental abductors are mothers, and I'm greatly concerned about a large number of the victims of domestic violence are included in the numbers.<sup>40</sup>

A similar concern about the protection of the victims of domestic violence was expressed by another guest speaker in the MOFA's hearing held at the third meeting,<sup>41</sup> although invited speakers insisted on more effective and less harmful organizational and legal structures for the sake of the abducted children. They pointed out some radical issues remaining in the current domestic legal structure that would make the immediate decision of the return of the abducted child difficult under the circumstances. While the former claims concentrated on the welfare of victims of family violence, the latter attempted to submit a wider question on the relevancy of the new Implementation Act, in conjunction with the respective legal structure established in the current Civil Code. Similarly, both topics were frequently mentioned in the opinions collected from an early online survey by the MOFA describing the pros and cons of Japan's ratification to the Convention, which proliferated throughout the country through the media and public voices during that period.<sup>42</sup> Then, in addition to early small-scale online opinion polls by the MOFA,<sup>43</sup> it, furthermore, made another public comment between 30 September and 31 October 2011.<sup>44</sup> The purpose of the meeting for public comments was to consider a wider range of questions and issues that might be involved in drafting the Bill by a diverse group of people and individuals, such as legal professionals, activist groups for LBPs or women and children, or parents involved by the incident. Officials collected 168 comments from both 148 individuals and 20 organizations about five designated topics: the relevance of the MOFA as the Central Authority of Japan, return of the child, access to the child, limitations on raising an objection (to the (non)return decision), and other miscellaneous matters.<sup>45</sup>

The manner in which the meetings progressed indicates the ways in which the legislative process was, by no means, developed exclusively by the related professionals and

<sup>38</sup> Regarding ethnographic research about growing complexities and increasing questions of the hitherto family norms such as parenting and the respect of individual rights and freedom in the Japanese family and law, see Alexy (2020). She particularly argues about the ways in which Japanese family values and ideas have been explicitly and implicitly normalized through the ideal family embodied in the family law. See also Hamano (2013) about contested media representations of Japan's ratification to the Convention.

<sup>39</sup> The Ministry of Foreign Affairs of Japan (2011c) organized this hearing from guests in the third meeting (24 October 2011) and the Ministry of Justice of Japan (2011f) did it in the sixth meeting (28 October 2011).

<sup>40</sup> Ministry of Justice of Japan, *supra* note 39, p. 2.

<sup>41</sup> Ministry of Foreign Affairs of Japan, *supra* note 39.

<sup>42</sup> Ministry of Foreign Affairs of Japan, *supra* note 27; Hamano, *supra* note 7.

<sup>43</sup> Ministry of Foreign Affairs of Japan, *supra* note 39.

<sup>44</sup> Ministry of Foreign Affairs of Japan (2011d). The Ministry of Justice of Japan (2011d) also contributed key questions to this public comment based on the interim conclusion in the fourth meeting.

<sup>45</sup> Ministry of Foreign Affairs of Japan (2011f).

policy-makers. The overall process partly reflected a wider social and public awareness. Here, as David et al. argue in their analysis of the construction of the frame of recognition (or problematization) in the course of producing legislation, an investigation of the ways in which different actors in those serial meetings handled distinctive frames of reference drawn from both domestic and international public concerns about this cross-national family issue was noteworthy.<sup>46</sup>

### 3.3 Accommodating the Convention in the domestic legal structure

#### 3.3.1 Managing organizational collaborations

International parental child abduction is certainly a translational family issue that can only be prevented according to a national legal framework. Stipulating an international law can be understood as a process in which the state as a signatory applies a universal principle to the local social systems. Merle argues that contemporary issues concerning family law could have become more internationalized (beyond domestic relations).<sup>47</sup> As seen in the previous section, the recontextualization of domestic legal issues to accommodate different codes of the international Convention involves a cultural analysis of society that implements it in its own light,<sup>48</sup> because it not only compares different principles in the laws, but also re-examines the normative ideas of the family embodied in family law vis-à-vis those counterparts within the international Convention. Another rhetorical framework was observable in the process of drafting the Bill so that the principles of the Convention could be integrated into the internal legal and institutional contexts.

Along with making a “lawful” act for implementation, both ministries (the MOFA, in particular) extended a great deal of effort to establish an organizational network as a liaison with various governmental and private organizations in order to achieve an immediate return or guarantee the safe protection of abducted children from any possible risk, but their actual executive power was limited. They also relied on the jurisdiction and police authorities.<sup>49</sup> In the case of an incoming abduction, the Central Authority must inform its counterpart of the whereabouts of the child staying in its territory. To complete this initial procedure, it is crucial for the Central Authority to exercise its authority over other internal organizations, such as the police, the court, ministries, local governments, and non-governmental organizations that are in charge of the protection of the welfare and privacy of the citizens. Even so, in the Japanese context, both the MOFA and MOJ were very careful in examining how much other agencies must recognize the essence of the Convention to reach an immediate decision on the return of the abducted child collectively. They assessed whether the Central Authority (MOFA) would be able to ask for help from the police in identifying the whereabouts of a child abducted to Japan.<sup>50</sup> In the same vein, a similar question was raised about collaboration with the MHLW, which is in charge of child welfare and makes policies for the protection of the child against family violence.<sup>51</sup> Perhaps, it came from the point that there is a consensus in the protocol that the Central Authority is endorsed by the Convention to collect information on the whereabouts of the abducted child and share this information with its foreign counterparts. The Convention encourages the Central Authority to engage in a flexible and effective institutional scheme to deal with the complicated and individualized family issues across borders, but it

<sup>46</sup> David, Atun, & La Viña (2012).

<sup>47</sup> Merle (2008).

<sup>48</sup> Rosen (2008), p. 22.

<sup>49</sup> Ministry of Foreign Affairs of Japan (2011b); Ministry of Foreign Affairs of Japan, *supra* note 39.

<sup>50</sup> Art. 7 of the Convention stipulates: “Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.”

<sup>51</sup> Ministry of Foreign Affairs of Japan, *supra* note 39.

signifies the point at which the actual protocol under the Convention would be necessarily negotiated, contested, and amalgamated into a coherent organizational structure referencing different ideas of the rights of the child and the child's wellbeing according to different social contexts even in the single national framework. As Stammers introduces a social constructionist approach to the analysis of human rights, the idea of the rights of the child can vary among domestic authorities.<sup>52</sup> Additionally, there is a difference between the Japanese Law and the Convention. This may suggest that, in looking at the welfare of the child as their priority, different actors may interpret and contextualize according to their own codes and interests. Debates over the security of the abducted child recorded in the minutes of the MOFA's Roundtable certainly indicate that while the MOFA was drafting the Bill according to the principles of the Convention and assumptions regarding the rights of the child and the child's wellbeing within the family, both the MOJ and the MHLW submitted alternative interpretations of those accounts in reference to domestic legal and policy implications.

### 3.3.2 Negotiation with human rights in the Japanese legal structure

In the MOJ, the members of the subcommittee, initially and deliberately, discussed the extent to which other institutions were responsible for the welfare of the child and how they could work with the Central Authority under the Convention. At the fourth meeting, they also discussed how this topic might raise a conflict of interests in light of *habeas corpus* from several perspectives.<sup>53</sup> In Japan, a case for parental child abduction between custodial parents would be filed in light of the Act on Protection of Personal Liability (*Jinshinhogo hō*, Act no. 199 of 1948)—an act that, in reality, stipulates a wide range of forcible restrictions against the person beyond civil matters.<sup>54</sup> Besides, due to the lack of actual legal grounds to prevent or restrict wrongful or forcible removal of the child by a parent (or other elder family members) in the Civil Code, either a violation of this Act and/or the prohibition on Kidnapping of Minors in Article 224 of the Penal Code (*Miseinsha ryakushu*) would be claimed by the LBP, unlike in other parties to the Convention, such as the US.<sup>55</sup> Indeed, at this fourth meeting of the MOJ's subcommittee, there was an extended exchange between the participants regarding to what extent they would be able to anticipate a possible future law reform that would accommodate the Convention, in light of institutional sanctions against parental child abduction, after they had expressed their concerns about contradictory ideas regarding parental child abduction in the Implementation Act's Bill and the respective acts in existing Japanese law.

At the subsequent fifth meeting of the subcommittee of the MOJ's Legislative Council, they engaged in several debates over a part of the Bill's draft regarding the *Ne Exeat Order* of the abducted child to Japan<sup>56</sup> because, after the case is lodged in the Family Court of Japan, the legal restrictions on the mobility of the national (including the child) would contravene the basic human rights guaranteed by the Constitution of Japan. While it is crucial to control the mobility of the abducted child to prevent the re-abduction and disappearance of the child, it causes a delay in the immediate decision for the return of the child under the principles of the Convention. The *Ne Exeat Order* under the Implementation Act ended up being long and detailed after all, comprising Articles 122–133, with the restrictions on the departure of the child considered a sensitive topic to be discussed throughout the entirety of the meetings.

<sup>52</sup> Stammers (1995), p. 491.

<sup>53</sup> Ministry of Justice of Japan, *supra* note 44.

<sup>54</sup> See Ōhe et al. (2014) about detailed comments on the related acts and actual practice.

<sup>55</sup> See Brummel (2016) for legal sanctions against parental child abduction in the US.

<sup>56</sup> Ministry of Justice of Japan (2011e).

### 3.4 Questioning legal protection against family violence

#### 3.4.1 *The shadow of family violence*

Although it is arguable that drafting the Implementation Act introduced for the Convention by each state strictly aimed at addressing the issue of forcible or wrongful removal of a child by a parent from his/her habitual residence to a location across borders, it would have been necessary to discuss it in reference to other possible family issues that both directly and indirectly would result in an international parental child abduction. While the members of both the MOJ and the MOFA meetings acknowledged their role in helping to implement the Convention as soon as possible, they could not help but account for those family issues as to child protection. It must be noted that Japan's accession to the Convention was not only a legal or bureaucratic matter of the state regarding its diplomatic or organizational interests under foreign pressure, as well as negotiations of different interests with respective authorities, but also one that drew public attention to the issue beyond the LBPs and their organizations involved in the cases.<sup>57</sup>

In fact, the most prevalent question raised by guest practitioners, the public, and regular members was a question about the ways in which the Japanese government would protect a child and parent who had fled from family violence. According to the general understanding of the protection of victims of family violence, as the Japanese Domestic Violence Act stipulates, the victim's private information (such as residential address) should not be disclosed. While it was framed as a public concern that many Japanese (female) parental abductors would be fleeing spousal violence, many members of the public reflected upon the conventional perception of the migrant women (Japanese women) escaping spousal violence (and possible abuse of the child) by their former husbands. While the MOFA revealed that one of the major responsibilities of the Central Authority under the Convention was to provide information about the whereabouts of the abducted child (and his/her parent) to its counterparts on request, many individuals and organizations expressed anxieties about the protection of victims of family violence. For example, let us see several opinions found in the final report of the public comments like the following:

It is very dangerous for the victim who has fled from domestic violence to have her whereabouts disclosed. It is necessary to consider the method to prioritise the safety of the mother and child (opinion of an individual).<sup>58</sup>

In order to protect the victim of domestic violence and her child, I, at least, am opposed to any public organisation being subject to an obligation to report the whereabouts of the child under the act. It must also be clearly stipulated that organisations tasked with the protection of victims of domestic violence may decline to provide this information about the protected child (opinions of an individual and organisation).<sup>59</sup>

Meanwhile, there were also concerns about false allegations of domestic violence:

The Implementation Act must outline how to deal with false allegations of domestic violence by the parental abductor. According to the revised Domestic Violence Protection Act of 2004, which stipulates (active) support for the victim (by the authority), her partner (usually male) is unable to find out her whereabouts if she does not

<sup>57</sup> For example, see Hamano, *supra* note 38, on how the media framed the analysis of Japan's accession to the Convention in national news articles.

<sup>58</sup> Ministry of Foreign Affairs of Japan, *supra* note 39, p. 8.

<sup>59</sup> *Ibid.*, p. 9.

want her partner to know her address and submits a report of non-acceptance of being searched by the police. She only needs to make a claim to the police to be regarded as a victim of domestic violence. Nothing more is necessary to do so. This is one cause of an increase in false accusations (of domestic violence) in Japan. Such a situation would have a negative effect on the immediate return of the child under the Hague Convention (opinion of an individual).<sup>60</sup>

One of the most important reasons why there are many opinions about the protection of the mother and child derives from the fact that there would need to be a public concession in Japan that the protections against, and prevention of, family violence are insufficient, both legally and socially.<sup>61</sup> It comes from the fact that while social recognition of spousal violence and its (in)direct negative influence upon a child has been growing in Japanese society, the structures for prevention of, and protection against, it are still underdeveloped in Japan. As much of the relevant literature insists,<sup>62</sup> those comments reflect a suspicion about the insufficiency of statutory and institutional measures to deal with serious issues, such as family violence.

The difficult point was that the Convention is principally devoted to the immediate return of the abducted child to his/her original habitual residence, and the best interests of the child are defined in that context. In contrast to this clear definition of the best interest of the child in the Convention, it is likely to be obscure in the Japanese Civil Code (e.g. Article 766, reformed in 2012) in cases of a child from a divorced family. Although Japan ratified the UN's Convention of the Rights of the Child in 1990 (CRC) that defines the interests of the child clearly, the term itself never appeared in the Japanese legal code until 2012 when Article 766 and others were reformed. The reformed section 1 of Article 766 stipulates:

If parents divorce by agreement, the matters of who will have custody over a child, visitation and other contacts between the father or mother and the child, sharing of expenses required for custody of the child and any other necessary matters regarding custody over the child shall be determined by that agreement. In this case, the child's interests shall be considered with the highest priority.

It appeared one year after this Bill-making process. Yet, the reality is far from the achievement of the best interest of child in the divorced family. According to the 2016 national survey of divorced families with small children,<sup>63</sup> more than three-quarters of ex-spouses divorced without an agreement of child support and a visitation plan for the child. In a different context, examining the UN's CRC, Jančić remarks that all other possible considerations, such as different situations of parenthood, legal status, or risk of violence, may not be examined at the same level. She argues:

whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must also be taken into account in case of separation of the child from his or her parents.<sup>64</sup>

This perspective relatively goes along with that of the Hague Child Abduction Convention.

<sup>60</sup> *Ibid.*, p. 10.

<sup>61</sup> Nagai (2017); Kumagai & Ishii-Kuntz (2016); Chan (2004).

<sup>62</sup> Nagai, *supra* note 61; Kumagai & Ishii-Kuntz, *supra* note 61; Yamaguchi & Lindhorst (2016).

<sup>63</sup> Ministry of Health, Labor, and Welfare of Japan (2016).

<sup>64</sup> Jančić (2016), p. 9. See also Child Welfare Information Gateway (2020) in the US; Xia (2020) in China; and Ishaque & Mustafa Khan (2015) in Pakistan.



The Convention refers to the fact that a grave risk to the child (physical or mental) after return must be considered, but it does not clearly articulate ways in which the impact of spousal violence should be considered in the decision on the return of the child. Regarding one of the reasons for the non-return of the abducted child by the authority of the requested state, Article 13(1)(b) of the Convention says that the child will not be returned if “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.” While there seems to be a legal interpretation that the best interests of the child, as represented in the Convention, inclusively consider spousal violence against the child’s parent in the recognition of basic child rights, the treatment of cases involving spousal violence under the Convention has become its most sensitive and controversial issue.<sup>65</sup> It also goes without saying that this issue should be integrated into the development of domestic legal and social awareness of family violence in light of the best interests of the child.<sup>66</sup> Citing a lack of detailed references to the consideration of spousal violence (against abducted parents) in the Convention, Itō, for example, casts a question as to whether the Japanese Implementation Act should consider domestic violence against the abductor (mother) and child in its provisions,<sup>67</sup> while the Implementation Act stipulates in Article 28(2)(ii), for example, that the court shall consider circumstances such as

whether or not there is a risk that the child would be subject to physical violence or any other the words and deeds which would cause physical or psychological harm (referred to as “violence, etc.” in the following item) by the petitioner, in the State of habitual residence.

Without such consideration, the abducted child could easily be returned to the violent parent, which might present a grave risk to the child. The argument as such recognizes the significance of the Convention regarding the protection of the child from international parental violence. Meanwhile, considering the wellbeing of the child of a divorced family in a wider social context, it is worrying the extent to which the current Japanese family law and its legal structure could synthesize the welfare of the child with the Implementation Act. While the government emphasizes a relatively successful implementation and the practice of the Convention since its enactment, there is a critical view of the current Japanese legal structure for lack of more effectiveness and inclusiveness to deal with complicated family issues that would result in parental child abduction.<sup>68</sup>

#### 4. Conclusion

Japan’s accession to the Hague Child Abduction Convention and the addition of the Implementation Act to domestic family law have surely resulted in a great step towards the development of the rights of the child and the recognition of the best interests of the child in both legal and juridical contexts in Japan, as the MOFA emphasizes.<sup>69</sup> Most

<sup>65</sup> Quillen (2014); Shani (2013); Hague Conference on Private International Law (2011); Lindhorst & Edleson (2012).

<sup>66</sup> Stoever (2017); Bozin (2018).

<sup>67</sup> Itō (2017).

<sup>68</sup> Even after the enactment of the Implementation Act of the Convention in Japan, Yamaguchi & Lindhorst, *supra* note 62, raised a question about Japan’s Implementation Act with regard to the risk of possible family violence against the abducted or returned child to Japan and criticizing the Japanese Civil Code in this regard. See Kumagai & Ishii-Kuntz, *supra* note 61, about the neglect of the protection of children and the prevention of possible family violence against younger children in Japan. See also Bozin, *supra* note 65, about the protection and development of the wellbeing of the child in post-return scenarios.

<sup>69</sup> Zushi (2019).

importantly, this article has argued that, beyond diplomatic or legal debates, this ongoing incident has made Japanese society envisage unsolved but under-discussed issues regarding the legalization of the family in the modern state. There is likely an inconsistency between contemporary ideas of the wellbeing of the child in the separated family as articulated in the Convention and the present family law in Japan. As mentioned earlier, debates over the legislation of the Implementation of the Act of the Convention could contribute to articulating what is necessary to be discussed socially and improved institutionally (in both legal and organizational terms) relating to the wellbeing of the increasing number of children living in separated families (including those beyond national borders) in contemporary Japan.

Not only does internal parental child abduction between Japanese parents seldom lead to the immediate return of the child to his/her place of residence, but it is also the case with the children who have been abducted to Japan since the Implementation Act was enacted since 2014. This so-called “post-Hague” issue is signified by the fact that, among serious conflicted cases between (former) spouses, no child abducted to Japan could be returned to his/her habitual residence by Japanese court order. Accordingly, no forcible return of a child under the Implementation Act has been conducted so far,<sup>70</sup> which resulted in an Amendment of the Implementation Act enacted in April 2020.<sup>71</sup> In the Japanese socio-legal context, the forcible return of the abducted child to his/her habitual residence is still controversial in both Japanese jurisdiction and administration in light of child rights, although confiscating property or charging fines in a civil matter is acknowledged as a last resort.

Most importantly, seeing legislation as a social process, there is not a clear-cut way to prevent both internal and international parental child abduction, unlike the best interests of the child idealized in the Convention. Family issues involving a child are a consequence of the problem of diverse sociocultural factors in both the international and domestic environments, the investigation of which would lead us to examine gender, class, and even racial factors among the families ideally reconstructed across borders, as well as inquire about the normative (or ideal) family ideologies implemented by state policy. In Japan, child abduction is hardly considered a criminal offence by police or legal jurisdictions, even when the LBP lodges a case of parental abduction by his/her partner alleging these acts. For this reason, many activist groups for domestic LBPs anticipated that Japan’s accession to the Convention would lead to domestic law reform to prohibit parental child abduction, while other groups were, as was seen in the debates at both the MOJ’s and the MOFA’s meetings on the Implementation Act, opposed to it in light of the issues surrounding protection of the victims of spousal (and parental) violence. Yamaguchi and Lindhorst emphasize a feminist critique of Japan’s accession to the Convention without deeper consideration of providing further institutional support for the victims of family violence.<sup>72</sup>

Indeed, it is feasible to say that this incident regarding international parental child abduction, beyond its exclusive role of the immediate return of the abducted child, fuelled a new critical inquiry into the wellbeing of the child and the family in contemporary Japanese society.<sup>73</sup> As has been seen in the legislation process, the question of the rights of the child of a divorced family stipulated in the current Japanese family law has been reviewed and questioned more in Japanese society today as a consequence of the comparative perspective on new ideas implemented in other family laws and international conventions regarding children,<sup>74</sup> such as Japan’s ratification to the Hague Child Abduction

<sup>70</sup> Yomiuri Shinbun (2018); The Japan News (2018).

<sup>71</sup> Yamakawa and Matsushima, *supra* note 11.

<sup>72</sup> Yamaguchi & Lindhorst, *supra* note 62.

<sup>73</sup> Iizuka (2020).

<sup>74</sup> Jones (2012); Tanase (2011).

Convention.<sup>75</sup> Recently, the Committee on the Rights of the Child also released a case report of Japan from that issue<sup>76</sup> and, as several scholars have emphasized, the legal elaboration of the wellbeing of the family should be concerned within cross-national or transnational contexts on that account.<sup>77</sup> The remaining discussions involved in reconciling the Japanese context and the Convention should be dedicated to leading us to explore the reconstruction of the Japanese family in this new era, in recognition of the internal diversity within cross-border families, and with an emphasis on individual equity and rights in the intimate sphere.

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<sup>75</sup> Boykin (2012); Committee on the Rights of the Child (2019).

<sup>76</sup> Committee on the Rights of the Child, *supra* note 73.

<sup>77</sup> Barbara (2017): Lowe, *supra* note 1.

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