

10-1-2008

When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense

Julia Alanen

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. Miami Inter-Am. L. Rev. 49 (2008)

Available at: <http://repository.law.miami.edu/umialr/vol40/iss1/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense

Julia Alanen*

I. INTRODUCTION	50
II. THE SCOPE AND GRAVITY OF PARENTAL KIDNAPPING ..	55
A. <i>Parental Kidnapping Statistics</i>	55
B. <i>Potential Effects of Parental Kidnapping on Children</i>	57
C. <i>Civil, Criminal and Diplomatic Remedies</i>	59
D. <i>International Family Mediation</i>	61
III. DOMESTIC VIOLENCE AND GENDER	64
A. <i>Gender-based Violence</i>	64
B. <i>Agency and Empowerment</i>	65
C. <i>Gender Stereotyping and Discrimination in Parenting</i>	69
IV. CONFLATING PARENTAL KIDNAPPING WITH A DOMESTIC VIOLENCE REMEDY	72
A. <i>The Domestic Violence Defense</i>	73

* Julia Alanen represented victims of domestic violence in family court and immigration proceedings as a staff attorney with the Legal Aid Foundation of Los Angeles (LAFLA) for a number of years before relocating to the Washington D.C. area to serve as Director of the International Division, and as Policy Counsel, at The National Center for Missing and Exploited Children (NCMEC). Alanen has lectured on private international law and child advocacy in numerous venues including the Judge Advocate General's Legal Center and School, Dallas Crimes Against Children Conference, FBI Academy, U.S. Foreign Service Institute, American Bar Association Continuing Legal Education events, the Puerto Rican Federal Affairs Commission, Federación de Abogados Interamericanos, and at judicial colleges in the U.S. and abroad. She taught at California's mandatory Domestic Violence Counselor Trainings, and lectured on domestic violence laws and resources to California law enforcement agents, Department of Public Social Services, various non-governmental organizations, and at the California State University at Long Beach. She has testified as an expert for courts and U.S. and foreign legislative committees. Alanen holds a Bachelor of Arts degree in Political Science, International Relations, from the University of California at San Diego, a Masters degree in international affairs from American University's School of International Service, a Juris Doctor degree from the University of San Diego School of Law, and a Legum Magistra (LL.M.) degree in International Legal Studies with a dual specialization in International Human Rights and Gender and the Law from the Washington College of Law in D.C. In this article, Alanen draws in part upon her own experience working directly with families, system actors and victims of parental kidnapping and domestic violence.

<i>B. Parental Kidnapping as a Form of Domestic Violence and Child Abuse</i>	74
<i>C. Casting the Roles of "Victim" and "Offender"</i>	76
V. BALANCING CONFLICTING HUMAN RIGHTS	79
<i>A. The Rights of the Child</i>	79
<i>B. Domestic Violence Victims' Rights</i>	81
<i>C. Left-Behind Parents' Rights</i>	83
VI. MEDIATING INTERNATIONAL PARENTAL KIDNAPPING DISPUTES INVOLVING DOMESTIC VIOLENCE	
ALLEGATIONS	84
<i>A. Domestic Violence Prompted Mediation Bans</i>	86
<i>B. Factors Unique to the International Context</i>	90
<i>C. Cultural Considerations</i>	97
<i>D. Best Practices</i>	100
VII. CONCLUSION	107

I. INTRODUCTION

Each year, hundreds of thousands of parents kidnap their own children, some of them to international destinations. Parental kidnapping¹ can prove detrimental, dangerous and even fatal

1. Nomenclature carries powerful implications. Word choice can significantly impact the framing of a debate, reveal an author's bias, and shape how a reader processes information. For these reasons I will clarify in advance what I mean by certain key terms, and my intent behind choosing that particular terminology. The terms "international parental abduction" and "international parental kidnapping" are often used interchangeably although, typically, the term *abduction* appears in civil instruments and the term *kidnapping* in criminal statutes. Both terms describe circumstances where one parent or guardian *removes* a child from the child's country of habitual residence to some other country, or *retains* the child outside his or her country of habitual residence, in violation of a custody decree, stipulated agreement or law. Statutes define precisely what constitutes an abduction or kidnapping in a particular jurisdiction. But, in essence, one parent or guardian has interfered with the lawful exercise of the other parent or guardian's parenting rights. I have chosen to use the term "parental kidnapping" to underscore the gravity of the act and its potential criminality. Likewise, I will utilize the term domestic violence "victim" rather than the term "survivor" to underscore the gravity and criminality of domestic violence. Using the word "victim" to capture all persons who *allege* domestic violence runs the risk of misleading the reader to believe that domestic violence allegations are never fabricated or exaggerated, and that violence is never mutual or retaliatory. However, in crafting mediation procedures that will protect and empower *actual* victims without knowing with certainty which persons are actual victims and which are not, it is responsible to err on the side of over-inclusiveness without taking a position on either party's veracity or culpability. For this reason, I will refer to all persons who *allege* domestic violence as "victims." For the sake of brevity, I will at times use the terms "kidnapper/victim" or "victim/kidnapper" to denote a kidnapping parent who alleges domestic violence against the other parent. The missing child and the child's left-behind parent may *also* be victims – of parental kidnapping (I explore

to the child victim, and devastating to the left-behind parent.² When confronted with parental kidnapping allegations, many taking parents raise domestic violence as an affirmative defense.

Parents are increasingly using mediation to resolve international parental kidnapping disputes. Mediating disputes involving domestic violence allegations has proven exceptionally challenging and highly controversial in the domestic context. The power and control dynamics characteristic of domestic violence can compromise the mediation process, endanger victims, or yield a coerced outcome.³ Some system actors promote a mediation ban on all cases involving domestic violence allegations.⁴ Considerations surrounding domestic violence allegations in the international context can differ profoundly from those present in a domestic dispute. States⁵ incompatible social and cultural norms, irreconcilable family laws, or lack of effective domestic violence, child protection and parental kidnapping institutions can endanger the parties and adversely impact the mediation process and the outcome. System actors⁶ are clamoring for guidance with respect to a critical question: *Should international parental kidnapping disputes be mediated when one parent raises domestic violence allegations against the other parent?*

this matter in some detail in the section entitled *Conflating Parental Kidnapping with a Domestic Violence Remedy*, *infra* pp. 72-79.).

2. The term "left-behind parent" (or "searching parent") refers to the parent who is unlawfully denied rights of child custody or visitation by the other parent. The term "taking parent" ("kidnapping parent" or "parental kidnapper") refers to the parent who unlawfully interferes with the other parent's rights of child custody or visitation.

3. Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 245-48 (2002). For research and reports on mediating in the domestic violence context, visit the Stop Violence Against Women website, available at http://stopvaw.org/Research_and_Reports_on_Mediation.html (last visited Oct. 5, 2008).

4. For a complete list of U.S. states' mediation standards in cases involving domestic violence, see AMERICAN BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT* (2008), http://www.abanet.org/domviol/docs/Mediation_1_2008.pdf.

5. Interchangeable use of the terms "state" and "country" can be somewhat confusing to readers who are nationals of federal systems. However, "state," "state party," "contracting state," and "sovereign state" are the terms typically used in international instruments; therefore, I will favor the term "state" over the term "country."

6. I use the term *system actors* here to capture the full array of authorities and professionals that can be involved at different stages of the investigation or resolution of an international parental kidnapping dispute involving domestic violence allegations, for example: attorneys, mediators, judges, social workers, domestic violence counselors, diplomats, law enforcement agents, Interpol, states' Central Authorities, The Hague Permanent Bureau, etc.

Every compelling reason *not* to mediate cases involving domestic violence in the domestic context is amplified in the international context - so, too, are the rationales for promoting elective mediation. When the destination state involved in a dispute lacks legal or diplomatic parental kidnapping remedies, is non-compliant with international treaty obligations, or lacks effective domestic violence and child protection institutions, mediation may prove the *only* available mechanism to ensure an abducted child's safety and well-being, secure the child's return to a state that *has* effective protections, or facilitate appropriate access to both parents. Mediation can compensate for ineffectual remedies by affording system actors and parents an opportunity to build protective terms into a stipulated agreement and craft a safe, appropriate co-parenting regime. Mediation may provide a domestic violence victim charged with international parental kidnapping an alternative to facing criminal prosecution, extradition and incarceration.⁷ The option to mediate a mutually agreeable solution could prevent a desperate, disenfranchised parent from taking unilateral actions that place the child, the parent and others at risk of grave harm.

Parental kidnapping cases involving domestic violence allegations can be rife with moral ambiguity. Starkly conflicting rights - those of an abducted child, a left-behind parent, and a domestic violence victim - are implicated. In the author's professional experience, left-behind parents and fathers' rights advocates assert that some system actors, confronted with parental kidnapping allegations and counter-allegations of domestic violence, informally adjudicate the dispute.⁸ Siding with the domestic violence victim, authorities refuse to enforce valid custody orders, fail to execute criminal warrants, and deny parents the option to mediate.⁹ Domestic violence victims and their advocates, on the other

7. In some cases, prosecutors will drop criminal charges once the child is returned to the custodial parent or the parents have stipulated to a valid, enforceable parenting agreement.

8. For more on gender bias against fathers and non-custodial parents see Stewart Rein's testimony on behalf of Families Need Fathers Ltd. United Kingdom, Children's Rights Council, New York, and Children & Human Rights Council Europe for the New York Senate Standing Committee on Children and Families (1995), available at http://www.childrensjustice.org/impact_sp.htm.

9. The well-known *Sylvester* case is often cited to as an example of maternal preference. See *Sylvester v. Austria*, 37 Eur. Ct. H.R. 17 (2003). *Sylvester* is the only Hague Abduction case to come before the European Court of Human Rights (ECHR) to date. An American petitioner (left-behind father) triumphed in court against an abducting Austrian mother. The Austrian Hague Judge ordered the mother to return the parties' daughter to the United States where the father resided. But Austrian authorities simply refused to enforce the Austrian court order against the mother.

hand, argue that system actors and institutions sometimes neglect the safety of victims or children in the course of vindicating an alleged batterer's parental rights.¹⁰

Both parental kidnapping *and* domestic violence allegations must be thoroughly and formally investigated, adjudicated and addressed through the implementation and enforcement of effective, directed remedies and resources. Appropriate action must be taken in both the criminal and civil contexts to protect, counsel and empower victims and to deter, punish and rehabilitate offenders. Treating parental kidnapping as a domestic violence remedy, instead of treating domestic violence as a rebuttable affirmative defense to parental kidnapping, does injustice to left-behind parents, deprives children of their right to access both parents, and undermines the rule of law.

Addressing domestic violence allegations indirectly by promoting capricious, discriminatory or excessively protectionist international parental kidnapping laws and practices, detracts from the need to implement and reform inadequate domestic violence institutions. Domestic violence-based and parental kidnapping-based mediation bans have a gender discriminatory impact because more women than men report experiencing domestic violence¹¹ and the majority of international parental kidnappers are mothers.¹² Two analyses, conducted in 2006 and 2007, of the

The father took his case before the ECHR, and again he emerged victorious. The ECHR ordered Austria to enforce its own Hague return order forthwith. Again Austria refused to execute its own judgment, and more than a decade later, the girl remains in Austria with her mother.

10. See Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004); see also Merle H. Weiner, *Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275 (2002); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000); SUDHA SHETTY & JEFFREY L. EDLESON, ADULT DOMESTIC VIOLENCE IN CASES OF INTERNATIONAL PARENTAL CHILD ABDUCTION, 11 VIOLENCE AGAINST WOMEN 115 (2005), <http://vaw.sagepub.com/cgi/reprint/11/1/> (subscription required).

11. There is considerable debate over figures concerning how many men and women actually suffer domestic violence because of the relative lack of domestic violence resources for men and the difficulty of assessing the relative likelihood that male and female victims will report their abuse.

12. One report estimates that "seventy percent of Hague Convention applications involve children removed, or retained by their *primary* carers, usually their mothers, but without the permission of, and in breach of the legal rights of, the other parent." REUNITE INT'L CHILD ABDUCTION CTR., *MEDIATION IN INTERNATIONAL PARENTAL CHILD ABDUCTION: THE REUNITE MEDIATION PILOT SCHEME 4* (2006), <http://www.reunite.org/edit/files/Mediation%20Report.pdf> [hereinafter REUNITE report]. Two analyses, conducted one year apart (in 2006 and 2007) at the direction of this author (then

National Center for Missing & Exploited Children's international family abduction database revealed that approximately sixty-five percent to seventy percent of international family abductors were *female*, and usually mothers. Parental kidnapping-based mediation bans disparately impact men by excluding them from exercising their parenting rights and responsibilities. Denying any parent the *choice* of whether or not to mediate violates international human rights laws, norms and principles guaranteeing all persons dignity,¹³ non-discrimination,¹⁴ gender equity,¹⁵ equality in the family,¹⁶ shared parenting rights and responsibilities,¹⁷ equal access to justice,¹⁸ equality before the law¹⁹ and self-determination.²⁰

Global domestic violence and parental kidnapping advocacy efforts have a very long way to go. In the meantime, when a victim-parent elects to mediate, well-trained mediators and attorneys can employ a wide array of mediation techniques,

employed by NCMEC), of the National Center for Missing & Exploited Children's *international* family abduction database revealed that approximately 65-70% of *international* family abductors were *female* (usually mothers). At the 2006 Hague Special Commission Meeting on the 1980 Hague Convention on International Parental Abduction, The Hague Permanent Bureau and Professor Nigel Lowe of Cardiff University in Wales introduced the results of a 2003 joint survey that concluded that seventy-nine percent of all Hague respondents (taking parents) were mothers (down from eighty-six percent in 1999).

13. Convention on the Elimination of All Forms of Discrimination against Women, pmbl., G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (Dec. 1979) (entered into force Sept. 3, 1981) [hereinafter CEAFDW]; International Covenant on Civil and Political Rights, pmbl., G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, pmbl., G.A. Res. 2200, U.N. GAOR, 21st Sess., UN Doc. A/6316 (Dec. 1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Universal Declaration of Human Rights, pmbl. and art. 1, G.A. Res. 217A, U.N. GAOR, 3d Sess., UN Doc. A/810 (Dec. 1948) [hereinafter UDHR].

14. ICCPR, *supra* note 13, at art. 2(1); ICESCR, *supra* note 13 at art. 2; UDHR, *supra* note 13, at pmbl., art. 2.

15. CEAFDW, *supra* note 13, at pmbl., arts. 2-4; ICCPR, *supra* note 13, at pmbl., art. 2(1); ICESCR, *supra* note 13, at art. 3; UDHR, *supra* note 13, at pmbl., art. 2.

16. Comm. on the Elimination of Discrimination Against Women, General Recommendation 21 (13th Sess.) Equality in Marriage and Family Relations, art. 16, U.N. GAOR, 49th Sess., Supp. No. 38, U.N. Doc. A/49/38 (1994) [hereinafter GR 21]; CEAFDW, *supra* note 13, at pmbl., arts. 16(d), 16(f).

17. GR 21, *supra* note 16, at arts. 16(d), 16(f); CEAFDW, *supra* note 13, at pmbl., arts. 16(d), 16(f).

18. ICCPR, *supra* note 13, at art. 14.

19. GR 21, *supra* note 16, at art. 15(1); ICCPR, *supra* note 13, at arts. 14, 26; UDHR, *supra* note 13, at art. 7.

20. ICCPR, *supra* note 13, at art. 1(3); ICESCR, *supra* note 13 at art. 1; U.N. Charter art. 1(2).

procedures, terms, conditions, and resources to protect all parties involved and reduce the likelihood of coercion. The emerging trend in established international parental kidnapping mediation schemes is to honor the right of every parent to choose whether or not to mediate a dispute involving his or her own child, even in cases involving domestic violence allegations.²¹ Properly conducted, elective mediation holds promising potential as a mechanism to protect and empower victims of domestic violence *and* victims of parental kidnapping.

II. THE SCOPE AND GRAVITY OF PARENTAL KIDNAPPING

Sometimes, when relationships between co-parents sour, one partner unilaterally relocates the child(ren). When that parent is a dual citizen, a migrant, or lacks lawful immigrant status, the relocation may traverse national borders. A parent who removes his or her child from the state where that child was habitually residing (or retains the child abroad) in violation of a custody decree, stipulated agreement or law, may have committed parental kidnapping.

A. *Parental Kidnapping Statistics*

There are no available statistics that accurately capture the number of international parental kidnappings that take place each year. The Hague Permanent Bureau in The Netherlands maintains case statistics on disputes brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.²² However, the Permanent Bureau's statistics rely upon self-reporting by the Central Authorities of states party,²³ many of which are poorly resourced. Disputes involving circumstances that fail to meet the elements of the treaty and disputes involving at least one *non*-state party are not reflected in the statistics.²⁴ A national study funded by the Justice Department esti-

21. See *infra* section on "domestic violence-prompted mediation bans" pp. 86-90.

22. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 (entered into force Dec. 1, 1980), T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention]. Hague case statistics may be viewed at <http://www.hcch.net>. The 1980 Hague Convention is the sole international civil treaty directly addressing the issue of international parental child abduction.

23. "States party" refers to countries that have formally ratified or acceded to the Hague Convention.

24. For information on the Permanent Bureau's international child abduction statistics database, INCASTAT, visit <http://www.hcch.net>. To view statistics, visit http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=24.

mated that in the United States approximately 203,900 children were abducted by a family member in one year.²⁵ Many are bound for international destinations. In 2007, NCMEC maintained an average of more than 1,800 active international parental kidnapping cases – more than half of them involving Latin America – and dozens of international technical assistance cases.²⁶ Most states do not maintain international parental kidnapping statistics.

After working on parental kidnapping cases (first as a litigator, and later as the Director of NCMEC's International Division), training a wide array of system actors in the U.S. and abroad, and participating in international conferences and bilateral meetings, the author estimates that parental kidnapping may be grossly underreported for various reasons. Many left-behind parents are unaware that legal remedies exist to combat parental kidnapping. Undocumented parents may fear that reporting the abduction to authorities will result in their swift deportation and permanent separation from the missing child or other dependents. Many system actors are unfamiliar with applicable civil, criminal and international laws or are inadequately trained to investigate and enforce.²⁷ Authorities sometimes fail to respond appropriately to

For information on the Permanent Bureau's efforts to improve and harmonize statistical data in the future by introducing a new electronic case management system known as "iChild," see Permanent Bureau, Hague Conference on Private International Law, *Report on the iChild Pilot and the Development of the International Child Abduction Statistical Database, INCASTAT, for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980*, Preliminary Doc. no. 9 (Oct. 2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd09e2006.pdf. For information on the Permanent Bureau's case data collection efforts, see Hague Conference on Private International Law, Preliminary Doc. no. 10 (Jul. 2002), available at http://hcch.e-vision.nl/upload/abd2002_pd10e.pdf.

25. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN, NATIONAL ESTIMATES OF MISSING CHILDREN: AN OVERVIEW 2 (2002), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/196465.pdf>. Studies funded and published by the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP).

26. Interview with Susan Rohol, Gen. Counsel, NCMEC (Oct. 21, 2008). This 2007 statistic includes all international family abduction cases, including cases where a biological parent, a legal guardian, or close family member abducted a child across a foreign border. NCMEC counts all international family abduction cases by child.

27. Despite the large number of international parental kidnapping crimes committed annually, U.S. federal prosecutors rarely prosecute parental kidnapping cases. Interview with Augustus "Mick" Fennerty, Supervising Special Agent, Fed. Bureau of Investigation (Dec. 2006). The U.S. Justice Department's Office of International Affairs (OIA) tracks active International Parental Kidnapping Crime Act cases (those statistics are not published).

parental kidnapping reports because they are unaware of its deleterious effects upon children.

B. Potential Effects of Parental Kidnapping on Children

Parental kidnapping can prove detrimental, dangerous and even fatal to the child victim. Many kidnapping parents convince their children that the left-behind parent is deceased, dangerous or uninterested in pursuing a parent-child relationship.²⁸ Prolonged separation causes a break in the bond between the child and the left-behind parent. In particularly high-conflict parental kidnapping disputes (e.g., those involving domestic violence), or during prolonged separations, children may become alienated or estranged from left-behind parents. According to the reunite International Child Abduction Centre,²⁹ “[i]nternational parental child abduction. . . frequently causes acute emotional distress to both parents involved and, most importantly, to the abducted children.”³⁰ Parent-child relationships are compromised or destroyed, children are uprooted and destabilized, and families are exposed to grave danger or even filicide.³¹

28. Interview with Liss Hart-Haviv, Executive Director, Take Root (Oct. 7, 2008). Hart-Haviv refers to this phenomenon as “The Three D’s: Dead, Dangerous and Disinterested.” Former victims of parental abduction make up the membership of Take Root, a Kalama, WA based non-profit dedicated to helping victims recover and educating parents and professionals about the potentially severe and lasting detrimental effects of family abduction. Hart-Haviv is a survivor of parental child abduction; visit <http://takeroot.org> for more information.

29. The reunite International Child Abduction Centre deliberately uses a lower-case “r” in the word *reunite* in its formal title. Reunite International Child Abduction Centre, <http://www.reunite.org/aboutus.asp> (last visited Dec. 30, 2008).

30. REUNITE report, *supra* note 12, at 4.

31. See Kenneth A. Hanfland, Robert D. Keppel & Joseph G. Weis, *Case Management for Missing Children Homicide Investigation*, Attorney General of Washington & U.S. Dept. of Justice Office of Juvenile Justice and Delinquency Prevention (May 1997), at 16; see also *A Family Resource Guide on International Parental Kidnapping*, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention (Jan. 2007); *Family Abduction: Prevention & Response*, a joint publication by The National Center for Missing and Exploited Children, the Office of Juvenile Justice and Delinquency Prevention, and the American Bar Association (Mar. 2002), available at <http://missingkids.com>.

According to one estimate, between ten percent and forty percent of parentally kidnapped children became severely emotionally disturbed as a direct result. See Geraldine Van Buren, *The Best Interests of the Child*, The British Institute of Human Rights (1993) at 20; see also SEDLAK ET AL., *supra* note 25. A subsequent study of nearly 400 parents involved in parental kidnapping disputes concluded that seven percent of the children suffered sexual abuse, twenty-three percent suffered physical abuse, and five percent suffered both physical and sexual abuse. See GEOFFREY L.

Adults who were parentally kidnapped as children find support from fellow survivors who comprise the membership of Take Root, a non-profit organization dedicated to helping victims recover and to educating parents and professionals about the potentially severe and lasting detrimental effects of family abduction. Jen, a Take Root member, was abducted as a child by her mother. Excerpts follow from the experience that she shared with Take Root:

We spent two years [on the run] to avoid being found. I changed schools three times, and each new place we went to I lost . . . more of the life I had prior to these events . . . I had only one pair of pants, one pair of shoes, one pair of socks, two shirts, and one sweater. We had gone from living in a million dollar home . . . to living in our car at times, and scraping by with little means . . . I remember sitting in a classroom one day, looking out the window, and glancing back at the door, hoping that someone would find me and take me back to my father. I used to think that if I could just make it through one more day in the life I was in, that they would find me the next . . . I had no friends. I was scared . . . that if I did befriend people . . . my mother would be arrested, and that then I'd lose her too . . . I could no longer even remember what my father looked like . . . I was hating my mother, and how I wanted to be with my father. [After] I was finally sent back . . . I lied about everything to everyone. I never wanted any of my friends to know what had happened. I didn't understand the dynamics of our situation very well . . . I feel a well of emotion when I think about how hard it must have been on my father to wonder if he'd ever see me again . . . The years have presented many obstacles with regard to all of the feelings that I have for so long [suppressed] . . . I have never spoken to [my mother] about what it has done to me . . . I was an angry person for a very long time . . . my past is filled with hurt, and shame . . . I continue to try to learn

GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES (The Free Press 1993); see also Gadi Dechter, Tyeesha Dixon & Julie Scharper, *Howard Mother, 3 Children Fatally Shot: Father, Believed to Be Killer, Also Found Dead in Park*, BALT. SUN, Nov. 24, 2007, at 1 (on Thanksgiving Day, David Peter Brockdorff of Frederick, Maryland shot and killed his three children and his estranged ex-wife before shooting himself to death); Daniel de Vise & Elissa Silverman, *3 Children Found Slain in Baltimore Hotel Room*, WASH. POST, Mar. 31, 2008, at B1; Dana DiFilippo, *Expert Details What Leads Parents to Kill their Own Children*, PHIL. DAILY NEWS, Apr. 16, 2007, at 1; Katherine Shaver & Amy Argetsinger, *Police: Father Staged Carjacking, Killed Son*, WASH. POST, Sept. 10, 1999 at A1.

the truths of my past, and have been building relationships back up for years. Clearly, there will probably always be pain.³²

International parental kidnapping presents compounding factors that can intensify the child's suffering and magnify the risk of harm – linguistic, social and cultural barriers, incompatible education systems, religious restrictions, travel and immigration restrictions, inadequate child protection and domestic violence regimes, disparate gender norms, discrimination and human rights violations are a few examples.

C. Civil, Criminal and Diplomatic Remedies

Numerous civil, criminal and diplomatic remedies exist to combat and prevent international parental kidnapping. One international civil treaty directly addresses parental kidnapping: the 1980 Hague Convention on the Civil Aspects of International Child Abduction.³³ Some states recognize parental kidnapping as a *crime* and will extradite a parent to face criminal charges in the child's state of habitual residence.³⁴ Formal diplomatic negotia-

32. Jen's complete narratives, and those of other Take Root members, are available at <http://www.takeroot.org/sanctuary.php>.

33. Hague Convention, *supra* note 22.

34. For example, the U.S. federal government and every U.S. state have criminalized interference with custody, and many U.S. states have criminalized interference with visitation (access). For a list of U.S. state custodial interference statutes, visit <http://www.missingkids.com>. A federal statute, Unlawful Flight to Avoid Prosecution (UFAP), 18 U.S.C. § 1073 (1996), allows federal law enforcement authorities to pursue parents who move children across state or federal borders in violation of a state warrant for criminal custodial (or visitation) interference. UFAP is part of the Fugitive Felon Act; the Parental Kidnapping Prevention Act (PKPA) clarified that the Fugitive Felon Act applies to interstate *and* international abduction cases. The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204 (2003), criminalizes inter-country parental kidnapping and *attempted* inter-country parental kidnapping. Numerous factors govern whether international criminal extradition is an option in any particular parental kidnapping case. The foreign country must have an extradition treaty in effect with the requesting country with respect to the crime charged.

There are two general treaty types: *list treaties* and *dual criminality treaties*. All modern treaties are dual criminality treaties, but some list treaties remain in effect (one treaty dates back to the Ottoman Empire in the 1800's). In a list treaty, only specifically enumerated crimes constitute extraditable offenses. In a dual criminality treaty, any crime punishable by twelve months plus one day (or longer) imprisonment in *both* states constitutes an extraditable offense. Most extradition treaties provide that the agreement will apply to offenses committed before *and* after it entered into force, provided that, at the time of making the extradition request, the offense was recognized as an offense under both states' laws. Extradition information obtained from True Rowan, Senior Litigator, U.S. Dep't of Justice, Office of Int'l Affairs (OIA). OIA maintains current information regarding all extradition treaties in effect

tions and bilateral memoranda of understanding between states have sometimes secured a child's return or facilitated parent-child access.³⁵ Family law attorneys are now increasingly reporting success at domesticating and enforcing foreign child custody decrees.³⁶

However, less than half of the world's sovereign states have ratified the sole international civil treaty on point.³⁷ Many states still do not consider parental kidnapping a crime and very few states are willing to extradite their own nationals on parental kidnapping charges.³⁸ Where the states involved lack legal or diplomatic remedies, or are non-compliant with international treaty obligations, mediation may prove the *only* available alternative. Family mediation has been grossly underutilized in this context.³⁹

between the U.S. and foreign states that recognize parental kidnapping as an extraditable offense (this data is not published).

35. The international community's recognition of the importance of *visitation* (access) rights is evidenced by the existence of a number of bilateral memoranda of understanding to address parental kidnapping. These memoranda generally operate between one Hague signatory country and one non-Hague country. According to Kathleen Bresnahan, the U.S. has entered into parental kidnapping memoranda of understanding with Egypt, Jordan, Lebanon, and Saudi Arabia. Interview with Kathleen Bresnahan, former Country Officer, U.S. Central Authority, State Department's Abduction Unit in the Office of Children's Issues (Apr. 29, 2007). For example, according to Jessica Sarra, Belgium has entered into such a memorandum of understanding with Morocco; each year Belgium loads its left-behind parents onto a plane and shuttles them to Morocco for visitation with their children. The memoranda typically do not facilitate a child's *return*, and have achieved only limited success with respect to promoting *access*. Interview with Jessica Sarra, Dir. of Operations, Int'l Ctr. for Missing & Exploited Children (ICMEC) (Apr. 27, 2007).

36. This practice is fairly common in incoming cases to the United States, facilitated by the Uniform Child Custody Jurisdiction and Enforcement Act of 1997 [hereinafter UCCJEA]. It is less common in outgoing cases to non-Hague states. However, New Jersey-based attorney Patricia Apy reported that she has successfully registered and enforced U.S. child custody orders in Middle East region states. Telephone Interview with Patricia Apy, Partner, Paras, Apy & Reis, in Red Bank, N.J. (Dec. 2006).

37. The Department of State maintains a list of states bound to the United States under the Hague Convention that is available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html. A complete list of contracting states to the Hague Convention also exists at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24.

38. The U.S. Department of Justice's Office of International Affairs (OIA) processes international extradition requests involving the United States and maintains a comprehensive list of extradition treaties, terms and conditions in effect between the U.S. and other states (this data is not published).

39. Mediation is a form of alternative dispute resolution (ADR) that is frequently employed in child custody disputes to assist parents to open or improve dialogue, and reach a mutually acceptable parenting agreement. Mediation can initiate, in a safe environment, a process of cooperative parenting between two adults who will be forced to co-parent for many years to come. Mediation provides parents an alternative

D. *International Family Mediation*

Elective family mediation is increasingly employed to resolve international parental kidnapping disputes. The 1980 Hague Convention on the Civil Aspects of International Child Abduction urges states party to cooperate and to employ a comprehensive range of remedies and resources to resolve international parental kidnapping disputes expeditiously:

Contracting States shall take *all appropriate measures* to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the *most expeditious* procedures available.⁴⁰

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the *voluntary return* of the child.⁴¹

Central Authorities shall co-operate with each other and *promote co-operation* amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures *a)* to discover the whereabouts of a child who has been wrongfully removed or retained; *b)* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; *c)* to secure the voluntary return of the child or to bring about an amicable resolution of the issues; *d)* to exchange, where desirable, information

to the stress, expense, delays and uncertainty of litigation, and empowers them to craft solutions that meet their child's needs and their own. Typically, the mediator plays a neutral role. Many family courts impose a mandatory mediation requirement on all parties before the court will hear a custody dispute – only if the parties reach an impasse, or one party refuses to attend mediation, will the court proceed (the obstructive party who refused to attempt mediation may not be well-received by the judge). The terms discussed in the course of mediation become binding only if and when both parties execute a written stipulated agreement. Ideally, each party retains an attorney to carefully review and explain the implications of all terms and conditions prior to the parties signing. When parents bring to light concerns about abuse or neglect, well-trained mediators and attorney advisors involved in the mediation process can introduce terms, conditions, and resources to protect and empower victims and children. For more on domestic violence mediation safeguards, see *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, winning essay in the law student category, 2001, James Boskey ADR Writing Competition, sponsored by the American Bar Association Dispute Resolution Section and the Association for Conflict Resolution, available at <http://www.mediate.com/articles/rimelspach.cfm> (last visited Oct. 26, 2008).

40. Hague Convention, *supra* note 22, at art. 2.

41. *Id.* at art. 10.

relating to the social background of the child; *e*) to provide information of a general character as to the law of their State in connection with the application of the Convention; *f*) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access; *g*) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; *h*) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; [and] *i*) . . . to eliminate any obstacles to [the treaty's] application.⁴²

Elective mediation is one appropriate mechanism to promote cooperation, voluntary return and an amicable (or at least mutually acceptable) resolution. Despite treaty language explicitly mandating expeditious adjudication, Hague litigation can drag on for months or even years, whereas mediation typically concludes expeditiously, in a matter of days or weeks.⁴³

In spite of these obvious advantages, relatively few states have formally engaged mediation to resolve international parental kidnapping disputes. Approximately eight years ago, the United Kingdom designated a non-governmental organization, the reunite International Child Abduction Centre, to mediate international parental kidnapping (IPK) disputes involving the United Kingdom.⁴⁴ The reunite mediation scheme has partnered with various states party to the 1980 Hague Convention in pilot international parental kidnapping mediation schemes, and also partners with states not party to the treaty, including Pakistan, Dubai and Egypt. The director of reunite, Denise Carter, recently traveled to Egypt to train mediators at a Cairo-based non-governmental organization in anticipation of a U.K.-Egypt pilot international parental kidnapping mediation scheme.⁴⁵ The federally-funded

42. *Id.* at art. 7.

43. *Id.* at art. 11.

44. According to Denise Carter, William Duncan, Deputy Secretary General of The Hague Conference on Private International Law, served on reunite's mediation steering group, guiding the organization's development. The mediation program is privately funded. Telephone Interview with Denise Carter, Dir., reunite (April 7, 2008).

45. Carter reports that U.K.-Egypt bi-national mediations will be conducted in the co-mediation model, using one mediator from each state. Carter noted that Egypt's Shari'a Law may preclude negotiating a child's return, but mediation may allow

German Association of Family Mediation (Bundes-Arbeitsgemeinschaft für Familien-Mediation, or BAFM) mediates international parental kidnapping cases involving Germany. According to Sarah Vigers, former Legal Officer of The Hague Permanent Bureau, system actors in Argentina, France and the International Social Services (ISS) also report formally engaging mediation to resolve international parental kidnapping disputes.⁴⁶ Ignacio Goicoechea confirms that a few Latin American states (Argentina, Brazil, Ecuador, Paraguay and Peru) report that they are already mediating international parental kidnapping cases on an ad hoc basis.⁴⁷

In 2005, the United States' designated Central Authority on Hague international parental abduction disputes agreed to engage in a bi-national pilot mediation scheme with Germany's well-established mediation program, BAFM.⁴⁸ However, the United States has neither implemented nor funded a formal international parental kidnapping mediation program to date. A Virginia-based non-profit organization, the National Center for Missing and Exploited Children (NCMEC), offers parents involved in international parental kidnapping disputes the option to mediate, and attempts to secure volunteer mediators and attorneys for indigent parents. In an effort to prepare U.S. mediators and explore best practices, NCMEC and the University of Miami School of Law co-hosted the first U.S. international parental kidnapping mediation

parents to negotiate access. Telephone Interview with Denise Carter, Dir., reunite (April 7, 2008).

46. Sarah Vigers, *Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980*, Hague Conference on Private International Law, International Child Abduction, Prel. Doc. No. 5 (Oct. 2006), App. 1, at 1-5, available at http://www.hcch.net/upload/wop/abd_pd05e2006.pdf. For more information on cross-border family mediation, see Sarah Vigers, *Feasibility Study on Cross-border Mediation in Family Matters – Responses to the Questionnaire*, Hague Conference on Private International Law, General Affairs and Policy, Prel. Doc. No. 10 (March 2008), available at http://www.era.int/web/en/resources/5_2341_5038_file_en.7155.pdf. Neither report addresses domestic violence other than a brief recommendation that mediators be trained on domestic violence.

47. E-mail from Ignacio Goicoechea, Liaison Legal Officer for Latin America at The Hague Conference on Private International Law, to the author (Aug. 14, 2008) (on file with author). Goicoechea cites in his e-mail to unpublished comments that he received from Latin American and Caribbean states' Hague Central Authorities in response to an inquiry into whether the Authorities are using mediation, or are interested in using mediation, to resolve international parental kidnapping disputes.

48. Vigers, *supra* note 46, at App. 1, at 5. The U.S. State Department is the officially-designated U.S. Central Authority under the 1980 Hague Convention on the Civil Aspects of International Child Abduction; the German Ministry of Justice is Germany's Central Authority under that treaty.

conference in February 2008.⁴⁹

As family mediation is increasingly used to resolve international parental kidnapping disputes, system actors are asking a critical question: Should international parental kidnapping disputes be mediated when one parent raises domestic violence allegations against the other parent?

III. DOMESTIC VIOLENCE AND GENDER

Domestic violence is a complex and culturally nuanced phenomenon. It can include physical, sexual, psychological, emotional or even financial abuse. It can occur in public or in private life. Domestic violence cuts across gender, race, ethnicity, age and socio-economic lines. The victim can be male, female, transsexual, or transgender. A batterer can be the victim's same-sex or opposite-sex partner, or the victim's child, parent or other family member. Domestic violence can occur within the context of marriage, cohabitation, dating or in a non-intimate, co-parenting relationship. Domestic violence allegations may be legitimate, mutual, retaliatory, or contrived.⁵⁰

A. *Gender-based Violence*

Much of the literature and advocacy surrounding domestic violence focuses on gender-based violence against women and girls because of the unique vulnerabilities occasioned by females' marginalized status. Various instruments serve as evidence that

49. Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, University of Miami School of Law, February 22-24, 2008, http://www.law.miami.edu/cle/cle_01_01.php?op=1.

50. The United States Justice Department, Office on Violence Against Women, About Domestic Violence, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Nov. 8, 2008). See generally THE SURVIVOR'S HANDBOOK, WOMEN'S AID FEDERATION OF ENGLAND (2005), <http://www.womensaid.org.uk/domestic-violence-survivors-handbook.asp?section=0001000100080001&itemTitle=The+Survivor%27s+Handbook> (last visited Nov. 8, 2008). In the limited context of this paper, I will focus primarily upon violence between opposite-sex co-parents of a minor child. With respect to *mutual*, *retaliatory*, or *contrived* allegations of abuse, I staffed court-based domestic violence clinics for a number of years. A number of the domestic violence cases I litigated or observed in court involved mutual allegations of violence. In some cases, judges issued mutual restraining orders. On rare occasions, I encountered litigants who admitted, during the clinic's intake process, to inventing or exaggerating a particular incident of domestic violence in hopes of gaining some legal advantage over the alleged abuser (e.g., getting the person legally excluded from a shared rental unit, retaliating for infidelity by getting the person arrested, gaining an advantage in child custody proceedings, etc.). However, most domestic violence allegations are bona fide.

the international community has acknowledged violence against women as a global epidemic and a distinctly grave human rights violation. The United Nations (UN) General Assembly, in its preamble to the 1993 Declaration on the Elimination of Violence Against Women, affirmed that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms" ⁵¹ The United Nations General Assembly expressed concern about "the long-standing failure to protect and promote those rights and freedoms in the case of violence against women." ⁵² And, the 1995 Beijing Declaration and Platform for Action, formulated at the Fourth World Congress on Women, noted that "violence against women is an obstacle to the achievement of the objectives of equality, development and peace." ⁵³

B. Agency and Empowerment

Protectionist inclinations, such as domestic violence-prompted mediation bans, are certainly comprehensible. According to Judith Gardam, women are often powerless to draw attention to their own plight or to posit, promote and implement solutions:

Nowhere are women full participants in society. Women are disadvantaged in access to education and health care. They are considerably less mobile because of their traditional role caring for others. . . . Their work remains grossly unpaid, unrecognized and undervalued . . . [W]omen's political opportunities are severely limited. They are generally denied access to power structures and participation in decision-making at all levels. . . . ⁵⁴

Numerous states' legal systems severely marginalize women and children. Divorce, or *female-initiated* divorce, is prohibited. Women's and children's travel and movement are restricted or linked to the permission of male guardians. Women and children are treated as chattel of male partners or other male family members. Maternal custody of children of a certain age-range is pre-

51. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 preamble 85th. plen. mtg. (Dec. 20, 1993).

52. *Id.*

53. Fourth World Congress on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 112, A/CONF. 177/20 (Oct. 17, 1995).

54. Judith Gardam, *Women and Armed Conflict: The Response of Humanitarian Law*, in LISTENING TO THE SILENCES: WOMEN AND WAR 109 (H. Durham & Tracey Gurd eds., 2005).

cluded. Women are denied property rights and prohibited from working, and are therefore unable to independently support themselves and their dependents.

In many states, a female victim of domestic violence is thrice-marginalized. First, because she lacks status in her home state (having little or no access to property, education, the legal system, etc.); second, because her culture relegates matters of domestic violence to the private sphere, offering her no protection or redress; and third, because even sympathetic system actors may perceive and treat her as simple, uneducated, defenseless, or incapable of identifying and pursuing her own best interests or her child's. Even in developed countries, and in spite of the women's rights movement, many women still lack voice.⁵⁵ The question confronting advocates is whether to protect these silenced women by precluding mediation or to help them find their voices through carefully-structured elective mediation?

The inclination to protect such a woman and her children from a coerced parenting agreement can be powerful and well-intentioned. Family mediation has the potential to situate a battered woman so that she feels pressured to sign a parenting accord that she does not genuinely support, one that is not in her best interest or the child's, or to empower her and secure critical rights and protections for the victim and her children that might otherwise be unrealizable. Summarily depriving a domestic violence victim of the right to choose elective mediation, even for her own protection, disempowers her and strips her of agency. Envision, for example, the following international parental kidnapping scenario:

Jennifer, born and raised in the United States, meets and marries her Iranian-born husband, Ali, in Los Angeles, where he works as a physician. The happy couple buys a beautiful home in Encino, and a child is born of the marriage, a daughter, Anahita (Ana, for short). Over the years, the marriage breaks down, and Ali becomes increasingly

55. This is particularly true of migrant women. The Virginia-based Tahirih Justice Center points out that "immigrant [women] victims suffer more severe abuse, more often, and that abuse rates in marriages between U.S. citizens and foreign women are approximately three times higher than in the general U.S. population." Tahirih Justice Center, Frequently Asked Questions (IMBRA) at 2, [http://www.tahirih.org/legal/docs/Top10IMBRAFAQs\(Final\).pdf](http://www.tahirih.org/legal/docs/Top10IMBRAFAQs(Final).pdf) (last visited Jan. 2, 2009); see also Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, LEGAL MOMENTUM, Apr. 24, 2006, at 5, available at <http://www.legalmomentum.org/site/DocServer/wwwbatteredimmsanduscspouses.pdf?docID=635>.

verbally and physically abusive toward Jennifer. She eventually reports the abuse to police, who arrest her husband and charge him with battery. Ali, a highly respected member of the community, is released on his own recognizance pending trial. Furious with his wife, and fearing conviction and incarceration, Ali kidnaps their now-teenaged daughter, Ana, and hops the next flight to his native Iran. He informs Jennifer that she will never see Ana again as long as she lives, and adds that he is arranging Ana's marriage to a much older man, a close friend of his family in Iran. Jennifer explores her legal options and learns that Iran has not signed the Hague treaty and does not extradite parental kidnappers to face criminal charges in the United States. The U.S. State Department is unable to negotiate Ana's return through diplomatic channels. Eventually, Ali indicates that he might be willing to mediate a solution. Jennifer suspects that he only intends to use the mediation as a forum to threaten and manipulate her but, knowing that this represents her only possible link to Ana, she wants to proceed with mediation.

A domestic-violence-based mediation ban could deny this mother the only opportunity that she has to secure her daughter's return, facilitate some degree of access, or learn news of her child's health, welfare and whereabouts. Under these circumstances, even properly conducted elective mediation may end in an impasse. Or, mediation could prove to be successful. Prohibiting elective mediation could mean that this child will never see or hear from her mother again. "The focus of the international women's rights movement," Ratna Kapur observes, "has been on violence against women and their victimization."⁵⁶ By approaching women's rights from a victimization framework, we may be stripping women of what agency they *do* possess.⁵⁷

It is important that mediators and other system actors be acutely aware of their own cultural and gender biases. Where one of the states involved lacks domestic violence or child-abuse protections or relegates such concerns to the private sphere, or where the alleged domestic violence victim has only a minimal level of formal education, it can be particularly tempting for system actors to perceive her as "infantile, civilizationally backward, and inca-

56. Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENV. U. L. REV. 855, 866 (2001) [hereinafter Kapur, *Post-Colonial Economies*].

57. See Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NWSA J. 64, 81 (2005).

pable of self-representation or autonomy.”⁵⁸ Ratna Kapur observed that “[t]he construction of women exclusively through a lens of violence has triggered a spate of domestic and international reforms . . . which are used to justify state restrictions on women’s rights — for the protection of women.”⁵⁹ It is easy to overlook or underestimate the strength, tenacity and resilience that empowers a domestic violence victim to break free of the cycle of violence, leave the batterer, tackle single-parenthood (often without financial means or support), and unilaterally relocate, with the children, abroad. Kapur points out that “[w]omen are migrating. . . in search of increased autonomy and economic independence. Yet the current discourse represents women. . . as fleeing from intolerable conditions, a representation that denies the subject any agency or ability to make affirmative choices.”⁶⁰ Even the most marginalized women are not necessarily devoid of agency.

Agency and empowerment are direct corollaries of *autonomy* and *choice*. International human rights laws, norms and principles entitle *all* persons to dignity,⁶¹ non-discrimination,⁶² gender equity,⁶³ equality in the family,⁶⁴ shared parenting rights and responsibilities,⁶⁵ equal access to justice,⁶⁶ equality before the law⁶⁷ and self-determination.⁶⁸ These rights implicate the autonomy to choose whether or not to mediate a dispute involving one’s own child, and to choose what terms and conditions the parent will stipulate to during mediation. According to reunite Director

58. Kapur, *Post-Colonial Economies*, *supra* note 56, at 867. Kapur later alludes to Kathleen Barry and her ilk’s “strategy for saving those incapable of self-determination.” *Id.* at 868.

59. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International / Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002).

60. Kapur, *Post-Colonial Economies*, *supra* note 56, at 881.

61. CEAFDW, *supra* note 13, at pmbl.; ICCPR, *supra* note 13, at pmbl.; ICESCR, *supra* note 13, at pmbl.; UDHR, *supra* note 13, at pmbl., art. 1.

62. ICCPR, *supra* note 13, at art. 2, para. 1; ICESCR, *supra* note 13, at art. 2; UDHR, *supra* note 13, at pmbl., art. 2.

63. CEAFDW, *supra* note 13, at pmbl., arts. 2-4; ICCPR, *supra* note 13, at pmbl., art. 2(1); ICESCR, *supra* note 13, at art. 3; UDHR, *supra* note 13, at pmbl., art. 2.

64. GR 21, *supra* note 16, at art. 16; CEAFDW, *supra* note 13, at pmbl., arts. 16(d), 16(f).

65. GR 21, *supra* note 16, at arts. 16(d), 16(f); CEAFDW, *supra* note 13, at pmbl., arts. 16(d), 16(f).

66. ICCPR, *supra* note 13, at art. 14.

67. GR 21, *supra* note 16, at art. 15(1); ICCPR, *supra* note 13, at arts. 14, 26; UDHR, *supra* note 13, at art. 7.

68. ICCPR, *supra* note 13, at art. 1(3); ICESCR, *supra* note 13, at art. 1; U.N. Charter art. 1(2).

Denise Carter, mediation can be an empowering experience for victims of domestic violence: "by the time they leave mediation they are much stronger characters."⁶⁹

C. Gender Stereotyping and Discrimination in Parenting

"Without equity in the family there will not be equity in society."⁷⁰

Gendered expectations about mothers' and fathers' roles in childrearing can lead to discriminatory, protectionist laws and practices that further entrench harmful gender norms.⁷¹ "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."⁷² Institutions that exclude or excuse fathers' participation in parenting in the name of protecting mothers can actually contribute to women's marginalization.⁷³

69. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008).

70. Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 56 (Rebecca J. Cook ed., 1994). Coomaraswamy is a U.N. Special Rapporteur on women's issues.

71. For an exploration of gender issues surrounding the 1980 Hague Convention, consult Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221 (2000), at 233-35. Silberman points out that the drafters of the 1980 Hague Convention succumbed to stereotyping and "gender politics."

72. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

73. For example, the gendered characterization of parenting leads to male hegemonic practices that marginalize women and prevent them from competing in the formal workplace and, in some states, from working at all. Inability to independently support themselves and their children makes it difficult or impossible for many women to exit the cycle of domestic violence. "Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. [S]tereotypes . . . fostered employers' stereotypical views about women's [sic] commitment to work and their value as employees." *Id.* at 736. The *Hibbs* decision references the word "stereotype" approximately twenty times, underscoring the Court's keen awareness of the negative impacts of gender stereotyping. Wendy Weiser, of the National Organization for Women (NOW), commented that the *Hibbs* decision shows an improved "understanding of stereotypes, how they operate and how they limit women" by the Supreme Court. Jillian Jonas, *High Court Bars Gender Bias in Family Leaves*, WOMEN'S ENEWS, June 16, 2003, available at www.womensenews.org. NOW filed an amicus brief in support of the plaintiff. In total, thirty-one women's and civil rights organizations signed an amicus brief in support of plaintiff Hibbs submitted by the National Women's Law Center. Real or constructed, gender stereotypes and ideology have a powerful impact on women and men. Gender stereotyping fosters caregiver discrimination that, in turn, limits workers' ability to get hired and promoted, or to obtain choice assignments and coveted opportunities in the formal workplace.

In 1973, U.S. Supreme Court Justice Brennan observed that protectionist laws and practices have historically disadvantaged women: "Romantic paternalism . . . [puts] women, not on a pedestal, but in a cage."⁷⁴ Protectionist mediation bans, whether triggered by domestic violence or by parental kidnapping, perpetuate inequality in the family by simultaneously disempowering mothers and excluding fathers from exercising their parenting rights and responsibilities.

The U.S. Supreme Court in *Nevada Department of Human Resources v. Hibbs* acknowledged the interconnectivity of men's and women's rights:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes [create] a self-fulfilling cycle of discrimination that [forces] women to continue to assume the role of primary family caregiver. . . .⁷⁵

The comparatively limited participation of men in parenting, even in developed countries,⁷⁶ continues to present a universal obstacle to women's equality in both the public and the private spheres:

In all parts of the world, women are facing threats to their lives, health and well-being as a result of being overburdened with work and of their lack of power and influence. . . . Achieving change requires policy and programme actions that will . . . alleviate their extreme responsibilities with regard to [private sphere] work. . . . Greater investments should be made to . . . lessen the daily burden of domestic responsibilities, the greatest share of which falls on women.⁷⁷

Private- and public- sphere rights are inextricably linked;

74. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see also NANCY LEVIT & ROBERT R. VERCHICK, *FEMINIST LEGAL THEORY, A PRIMER* 20 (Richard Delgado & Jean Stefanie eds., New York University Press 2006).

75. *Hibbs*, 538 U.S. at 732. The *Hibbs* decision references the word "stereotype" approximately nineteen times, underscoring the Court's keen awareness of the negative impacts of gender stereotyping.

76. For example, according to the most recent U.S. national census, 10.4 million of the 12.9 million primary caregivers (single parents living with their children) in the U.S. are *females*. Out of an estimated 5.8 million "stay-at-home" parents, 5.6 million are *mothers* and only 143,000 are fathers. U.S. CENSUS BUREAU, 2005 U.S. CENSUS, available at <http://www.census.gov>.

77. Programme of Action of the UN International Conference on Population and Development: ch. IV, Gender Equality, Equity and Empowerment of Women (1994), at 4.1, 4.11, available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> [hereinafter Programme].

Radhika Coomaraswamy observed that "conquering one empowers you to conquer the other."⁷⁸

The international community has embraced gender-equality in the family context. Innumerable international human rights instruments emphatically emphasize states' obligations to promote shared parenting, challenge gender stereotyping and deconstruct the gendered characterization of reproductive work. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets forth in its preamble that:

The role of women in procreation should not be a basis for discrimination . . . the upbringing of children requires a sharing of responsibility between men and women and society as a whole. . . . [A] change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.⁷⁹

According to the Committee on the Elimination of Discrimination Against Women, the gendered division of labor foists a double burden upon working women that can adversely impact their health and well-being, and that of their children:

The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. . . . [These factors] impact on women's lives and also affect their physical and mental health, as well as that of their children.⁸⁰

The principle of equal division of parenting responsibilities between men and women is not novel. Fourteen years ago, Chapter IV (on Gender Equality, Equity and Empowerment of Women) of the Programme of Action of the UN International Conference on Population and Development set forth the standard that: "[t]he full participation and partnership of both women and men is required in productive and reproductive life, including shared responsibilities for the care and nurturing of children and mainte-

78. Cecelia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257 (Rebecca J. Cook ed., University of Pennsylvania Press 1994).

79. CEAFDW, *supra* note 13, at pmb1. The United States has declined to ratify CEAFDW, yet expounds the values that it embodies abroad and justifies certain foreign policy maneuvers on their basis.

80. GR 21, *supra* note 16.

nance of the household.”⁸¹ The same principles apply to unmarried and single co-parents. CEDAW Recommendation 21 on Equality in Marriage and Family Relations states that unmarried parents “should share equal rights and responsibilities . . . for the care and raising of dependent children and family members.”⁸² The Beijing Declaration and Platform for Action at the Fourth World Congress on Women called upon all states to: “encourage men to share equally in child care and household work and to provide their share of financial support for their families, even if they do not live with them.”⁸³ By excluding or excusing men from equal participation in parenting and maintenance, we unwittingly “recreate the illegitimate power structures [that we are] trying to identify and undermine.”⁸⁴

Nancy Levit advocates that, to bring men into the private sphere, feminists must examine men’s experience with gender and the effects that gender stereotypes have on men.⁸⁵ “Laws and legal theory need to remove barriers for men and encourage possibilities.”⁸⁶ Men, women and children stand to gain tremendous benefits from the promotion of shared parenting and men’s equal integration into the private sphere. Gretchen Soderlund posits that “feminists should be working toward creating conditions where all women and men can envision and ultimately participate in their own liberation.”⁸⁷

IV. CONFLATING PARENTAL KIDNAPPING WITH A DOMESTIC VIOLENCE REMEDY

When confronted with parental kidnapping allegations, many parental kidnappers raise domestic violence as an affirmative defense. Some system actors treat parental kidnapping as a domestic violence *remedy*, instead of treating domestic violence allegations as a *rebuttable affirmative defense* to parental kidnapp-

81. Programme, *supra* note 77, at 4.1.

82. GR 21, *supra* note 16, at art. 16(18).

83. Fourth World Congress on Women, Sept. 4-15, 1995, *supra* note 53, at ¶107(c).

84. Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (quoting Joseph Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1753 (1989)).

85. See generally Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996). Feminists have, at times, ignored men’s gender issues. According to Levit, some feminists fear that if scarce resources are squandered on men, critical women’s issues will go unredressed.

86. NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* 12 (Niko Pfund ed., New York University Press 1998).

87. Soderlund, *supra* note 57, at 83.

ping. Extralegal or improper application of the domestic violence defense undermines the rule of law and summarily deprives parents and children of the right to have a court of competent jurisdiction address *both* the domestic violence *and* the parental kidnapping.

A. *The Domestic Violence Defense*

Domestic violence may be raised as a rebuttable defense to criminal custodial interference charges in the majority of U.S. states. For example, the International Parental Kidnapping Crime Act (IPKCA) offers an affirmative defense to parental kidnapping for defendants "fleeing an incidence or pattern of domestic violence."⁸⁸ And, article 13(b) of the Hague treaty creates a grave risk (e.g., domestic violence) defense to the child's return.⁸⁹ The respondent may rebut the grave risk defense with evidence that the child's state of habitual residence has adequate remedies and resources to protect the child.⁹⁰

Many left-behind fathers complain that, the moment a kidnapping mother brings domestic violence allegations, the left-behind father's rights and remedies seem to abruptly dissolve as system actors become complacent or even facilitate the kidnapper. When the kidnapping parent is a mother alleging domestic violence, some law enforcement officers "adjudicate" the domestic violence defense on-the-scene, instead of leaving fact-finding to the courts. Hague judges frequently misapply Article 13(b) by treating domestic violence allegations as an automatic bar to the child's return, without properly considering the applicant (left-behind) parent's rebuttal evidence of the foreign state's ability to protect the child.⁹¹ Despite the fact that slightly more than half of

88. 18 U.S.C. § 1204(c)(2) (2003).

89. See International Child Abduction Convention Between the United States of America and Other Governments art. 13(b), *opened for signature* Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89 (*entered into force* Dec. 1, 1983) [hereinafter Hague Treaty].

90. Domestic violence advocates and Hague judges routinely misunderstand the purely *jurisdictional* function of the Hague Convention, which restores the child to his or her state of habitual residence but not necessarily to the left-behind parent. In many cases, the taking-parent accompanies the child back to his or her state of habitual residence and retains physical custody of the child until the appropriate family court issues a judgment. The taking parent may submit a move-away request to the court in the child's habitual residence, as he or she *should* have done *before* abducting the child. See *id.* at arts. 12-20.

91. For example, in one unpublished San Diego Hague case, the respondent/mother asserted an Article 13b defense, stating that the U.S. had granted her and her child domestic violence-based asylum. The U.S. Hague judge failed to evaluate

parental abductors are *female*,⁹² many authorities are more likely to aggressively pursue *male* taking-parents, and remain exceedingly reluctant to press criminal charges or even to enforce civil orders against mothers. When a father reports his child's parental kidnapping, some system actors respond only reluctantly, if at all. When a father kidnaps his child, that act is consistently perceived as perhaps the cruelest imaginable form of abuse against both the child and the left-behind mother.⁹³ When a mother kidnaps her child, her behavior is often characterized as an act of love.

B. Parental Kidnapping as a Form of Domestic Violence and Child Abuse

Merritt McKeon characterized parental kidnapping as "one of the worst forms of child abuse."⁹⁴ But children are not the only victims of parental abduction. Experienced Hague litigator Stephen Cullen avers that mediating international parental kidnapping cases involving a domestic violence defense is complicated by the fact that "part of the violence is the abduction."⁹⁵ Parental kidnapping is a veritable form of domestic violence and child abuse, regardless of the perpetrator's gender. Maureen Dabbagh describes the emotional impact that international parental kidnapping has on left-behind parents:

whether the *child* was in any imminent harm. U.S. domestic violence-based immigration remedies permit the victim/applicant to list her children as beneficiaries on her petition, without offering any evidence that the children themselves suffered harm. The San Diego judge also failed to consider rebuttal evidence of the availability of domestic violence resources in the child's state of habitual residence. The judge denied the child's return despite the fact that all of the Hague elements were met. [Identifying details omitted in order to protect the family's privacy.]

92. See REUNITE report, *supra* note 12.

93. In this author's experience, parental kidnapping often triggers U.S. judges to issue restraining orders for the child and left-behind mother, order professionally-monitored visitation for the abductor/father, entertain presumptions of parental unfitness on the abductor/father's part, and may even qualify an undocumented left-behind mother and her child for immigration relief under the Violence Against Women Act (VAWA).

94. Merritt L. McKeon, *International Parental Kidnapping: A New Law, A New Solution*, 30 FAM. L.Q. 235, 244 (1996) (quoting H.R. REP. NO. 103-390, at 2 (1993), reprinted in 1993 U.S.C.C.A.N. 2419, 2420). For more on parental kidnapping as child abuse see Dorothy Huntington, *Parental Kidnapping: A New Form of Child Abuse* (1982), http://207.58.181.246/pdf_files/library/Huntington_1982.pdf (arguing that child stealing is tantamount to child abuse).

95. Telephone Interview with Stephen Cullen, Principal, Miles & Stockbridge P.C. (Oct. 1, 2008). Cullen has litigated more than 200 Hague abduction cases, many of them pro bono, as an honored member of the International Child Abduction Attorney Network (ICAAAN).

Searching parents are . . . overcome by grief, guilt, confusion, frustration and panic Some start out strong, then slowly become exasperated by the system, failures and disappointments. Still others are so distraught that they are unable to hold down jobs, have successful relationships, or even begin to coordinate recovery efforts. Unlike losing a child to death, abduction usually has no resolution for the searching parent until the child is either recovered or grown. Many searching parents put their lives on hold, becoming so absorbed in the recovery process that little else matters.⁹⁶

Some parents kidnap to exact revenge against a former partner. "Searching parents worry and wonder, constantly tormented It is a revenge far sweeter and longer lived than a beating or even a murder, for it never ends."⁹⁷ Whatever the abductor's impetus, the impact of parental kidnapping on the left-behind parent and the child victim can be equally severe and enduring.

Two parental kidnapping studies offer some insight into *why* parents abduct their own children.⁹⁸ When asked (post-recovery) to speculate as to why their children were abducted, seventy-seven percent of the left-behind parents polled in one study answered that the taking parent's motivation was to hurt the left-behind parent; twenty-three percent cited the taking parent's anger over their breakup; sixteen percent believed that the taking parent desired to be with the child; thirteen percent blamed pressure from others; thirteen percent attributed the abduction to the taking parent's dissatisfaction with the visitation regime; and nine percent deemed the left-behind parent's new marriage or relationship to be a force driving the taking parent.⁹⁹ Fifteen percent of the left-behind parents reported that their children exper-

96. MAUREEN DABBAGH, *THE RECOVERY OF INTERNATIONALLY ABDUCTED CHILDREN* 14 (1997). Dabbagh's own daughter was parentally abducted (by the child's father) to the Middle East in 1992 at age two.

97. Anna I. Sapone, Note, *Children as Pawns in Their Parents' Fight For Control: The Failure of the United States to Protect Against International Child Abduction*, 21 WOMEN'S RTS. L. REP. 129, 130 n.7 (2000) (quoting SALLY ABRAHMS, *CHILDREN IN THE CROSSFIRE: THE TRAGEDY OF PARENTAL KIDNAPPING* 126 (1983)).

98. See GEOFFREY L. GREIF & REBECCA L. HEGAR, *WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES* (1992) [hereinafter GREIF & HEGAR, *WHEN PARENTS KIDNAP*]; Geoffrey L. Greif & Rebecca L. Hegar, *Parents Who Abduct: A Qualitative Study With Implications For Practice*, 43 FAM. REL. 283 (July 1994), [hereinafter Greif & Hegar, *Parents Who Abduct*], available at http://uwf.edu/pcl/research/edf6481/week02/files/Parents_who_abduct.pdf.

99. See Greif & Hegar, *Parents Who Abduct*, *supra* note 98, at 284 (discussing results of Greif & Hegar's earlier study). Subjects were permitted to cite multiple causes.

experienced violence or force in the course of the abduction and one third alleged that the taking parent subjected the child to physical or sexual abuse.¹⁰⁰ A subsequent study polled taking parents after their children were recovered: Twelve of seventeen taking parents said that they abducted after experiencing unsatisfactory contact with the court system and professionals. Of those twelve, six claimed that their children were being abused, neglected or subjected to an unhealthy home environment by the other parent; five blamed unfair custody terms; and two admitted that anger towards the other parent was a factor.¹⁰¹ Parental kidnapping is rarely an act of love.

Parental kidnapping, like other forms of abuse, can engender an acute imbalance in bargaining power. The simple fact that one parent has physical possession of the child can yield a coerced mediation outcome, particularly in disputes involving states that lack parental kidnapping remedies and states not compliant with treaty obligations. A devoted left-behind parent may feel compelled to agree to repugnant terms and conditions if he or she believes it is the only hope to access or protect his or her child. The power imbalance between the parents is exacerbated in cases where the batterer is also the kidnapper and the left-behind parent is twice victimized and doubly disadvantaged. At least one mediation code, the Model Standards of Practice for Family and Divorce Mediation, acknowledges the gravity of parental kidnapping by requiring that the mediator consider suspending or terminating mediation "when a participant has [abducted] or is threatening to abduct a child."¹⁰²

C. *Casting the Roles of "Victim" and "Offender"*

Ideology and nomenclature surrounding domestic violence and parental kidnapping evolve as system actors become increasingly well-versed in the phenomena. For example, many contemporary advocates promote use of the term "survivor" in lieu of the

100. See GREIF & HEGAR, WHEN PARENTS KIDNAP, *supra* note 98, at 34.

101. See Greif & Hegar, *Parents Who Abduct*, *supra* note 98, at 286. Subjects were permitted to cite multiple motives.

102. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard XI(A)(2) (1994), available at <http://www.acrnet.org/about/initiatives/QualityAssurance/standards-conduct.htm#family>. These Standards were a joint initiative of the American Arbitration Association, the American Bar Association (Section of Dispute Resolution), and the Society of Professionals in Dispute Resolution.

term “victim.”¹⁰³ Both terms have powerful contextual implications. For example, a domestic violence advocate might prefer to use the term “victim” when pressuring legislators to pass a bill, but prefer the term “survivor” when addressing a victim directly. In criminal court, the prosecutor might elect to use the term “victim” to inspire empathy or outrage from a judge or jury. In an international parental abduction case in civil court, counsel for the respondent (taking parent) who alleges domestic violence might prefer to characterize that client as a “victim” to distract the court from the client’s own malfeasance, to justify the abduction, or to prioritize the abductor’s rights over the left-behind parent’s rights or the child’s rights. A parent who experiences domestic violence, or a child who experiences parental kidnapping, may be simultaneously characterized as a victim *and* a survivor.¹⁰⁴ And, a domestic violence victim who kidnaps his or her child, or a left-behind parent who battered his or her partner, may be simultaneously a victim *and* an offender. System actors confronted with the domestic violence defense often overlook the possibility that there could be *two* victim-offenders involved in a parental kidnapping dispute.

For many moviegoers, the phrase *international parental kidnapping* conjures a particularly poignant example depicted in the film, “Not Without My Daughter,” starring Sally Field as a battered American mother who narrowly escapes Iran and her abusive Persian husband with their young daughter in tow.¹⁰⁵ Moviegoers actually *witness* this mother’s battery and subjugation, so we require no neutral fact-finder to assess the veracity or severity of her domestic violence allegations. The story ends with mother and daughter’s emotional arrival on U.S. soil. The film glorifies an extremely dangerous self-help remedy without examining

103. Victim and survivor are not simply *before* and *after* terms used to describe battered persons. There is a considerable body of scholarship behind the distinction.

104. Note the self-descriptive use of the term “survivor” in the testimonials of adults who were parentally kidnapped as children, at <http://takeroot.org/missing.php> (follow hyperlinks to any of the names listed).

105. NOT WITHOUT MY DAUGHTER (Pathé Entertainment 1991). The film is based upon a non-fiction book. See BETTY MAHMOODY & WILLIAM HOFFER, NOT WITHOUT MY DAUGHTER (St. Martin’s Press 1987). Mahmoody shares, from her perspective, the story of her international custody battle for her daughter. The story has become controversial – critics claim that Mahmoody’s book and the film grossly misrepresent Iran and Iranians. Iranian-born Finnish director, Alexis Kouros, made a documentary film in response titled WITHOUT MY DAUGHTER (Finland, 2002). From any perspective, the Mahmoody family’s experience highlights the critical need to develop safe, lawful alternatives to self-help remedies in states not party to, or not compliant with, the 1980 Hague Convention.

the possible legal or other ramifications of the victim-kidnapper's actions.¹⁰⁶ There is no follow-up on the lasting effects of the abduction or parental separation on the little girl, no mention of the left-behind father's agony over losing his only child. The storyteller relies upon the audience's gender bias, cultural bias, and legitimate outrage at domestic violence to dispel concerns about any crimes, rights violations, or harms perpetrated by the domestic violence victim/kidnapper.

Casting the role of *victim* in an international parental kidnapping dispute involving domestic violence counter-allegations is a complex exercise that has serious ramifications. The domestic violence victim (or alleged victim) may be the child's mother, father, sibling, or even the child itself.¹⁰⁷ The alleged batterer may be the taking parent, the left-behind parent or *both* parents.¹⁰⁸ Gender stereotyping domestic violence detracts from mitigating circumstances involving mutual violence between partners or against the child. A genuine commitment to eradicating domestic violence requires that male victims of domestic violence be entitled to the same rights, remedies, and resources to which female victims are entitled. In the international parental kidnapping context, male victims of domestic violence infrequently report domestic violence or self-identify themselves as victims. Rarely, if ever, do men assert an affirmative domestic violence defense to international parental kidnapping. Rarely, if ever, are men denied the option to

106. In my experience, self-help remedies have the potential to endanger the child and others, and motivate the family court to subsequently deny the left-behind parent custody. Many taking parents are unaware that a lawful act in one jurisdiction could constitute a criminal offense in another; that criminal penalties could be severe; that numerous countries will extradite their own nationals to face criminal charges abroad; or even that their own country is party to international treaties on parental abduction. In 2006, for example, one desperate U.S. left-behind mother hired some men to snatch back her child from the child's abductor/father in Egypt. In the process of executing the plot, the men poisoned the father and were ultimately apprehended. The mother now has custody of her child, but she is the subject of an extradition request from Egypt to the United States; among the charges is *attempted murder*.

107. For the United States Department of Justice Office on Violence Against Women's definition of domestic violence, see <http://www.ovw.usdoj.gov/domviolence.htm>; see also WOMEN'S AID FEDERATION OF ENGLAND, THE SURVIVOR'S HANDBOOK 5-7 (rev. 2007), available at http://www.womensaid.org.uk/core/core_picker/download.asp?id=1346.

108. In my experience, courts sometimes find that the domestic violence was mutual or in self-defense. In some cases, a court will issue mutual restraining orders against the parties. Some jurisdictions situate law enforcement authorities to identify which party was the primary aggressor following a finding of mutual aggression. See, e.g., CAL. PENAL CODE § 836(c)(3) (2008). Some domestic violence advocates posit that domestic violence is *never* mutual, that there is always a batterer and a victim.

mediate on the basis of domestic violence victim status. Casting a battered woman as the sole or principle victim in an international parental kidnapping dispute is a tactic used with considerable success by parental kidnappers and their advocates to distract system actors from addressing the child's rights and victimization, and the rights and victimization of the left-behind parent.

Mediators and other system actors who work parental kidnapping cases involving domestic violence allegations must resist the temptation to treat parental kidnapping as a domestic violence remedy instead of treating domestic violence as a rebuttable affirmative defense to parental kidnapping. Both parental kidnapping allegations and domestic violence allegations should be thoroughly and formally investigated and adjudicated. Appropriate criminal and civil actions should be taken to protect and counsel victims and deter, punish, and rehabilitate offenders. Domestic violence and parental kidnapping must be addressed through the implementation and enforcement of effective, directed remedies and resources. Gender-discriminatory parental kidnapping laws and practices detract from the critical need to implement or reform inadequate domestic violence institutions. When mediators and other system actors focus exclusively or primarily on the parental kidnapper's domestic violence counter-allegations, they neglect or even violate the rights of others victimized in the course of a parental kidnapping. Addressing domestic violence or child abuse indirectly, through discriminatory parental kidnapping laws or practices, does injustice to three victims (the victim of parental kidnapping, the domestic violence victim, and the left-behind parent), and undermines the rule of law.

V. BALANCING CONFLICTING HUMAN RIGHTS

Every parental kidnapping case involves at least one child and at least two parents (or legal guardians). Each individual possesses certain rights and, in these highly contentious cases, those rights frequently come into stark conflict. It is important that system actors identify, understand, and address each party's respective rights.

A. *The Rights of the Child*

The international Convention on the Rights of the Child (hereinafter CRC) recognizes that "the child, by reason of his physical and mental immaturity, needs special safeguards and

care, including appropriate legal protection"¹⁰⁹ "In all actions concerning children . . . the best interests of the child shall be a primary consideration."¹¹⁰ Parental kidnapping remedies, including mediation, are not always child-focused. When parents or legal guardians do battle over their parental rights or negotiate parenting agreements, the child's perspective, needs, and rights can go unheard and unrequited. Very few children are assigned minor's counsel or guardians ad litem in the course of international parental kidnapping mediation or litigation. Counsel for the mother or the father has a duty to zealously advocate for the adult client and advance only that adult's perceptions about what is best for the child.

The CRC sets forth guiding principles for children's human rights. It provides that "[s]tates . . . shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."¹¹¹ Children may have a right to conclusively prove legal paternity (a biological father-child relationship, usually established through the parents' mutual stipulation or DNA testing): "States [shall] undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations . . . without unlawful interference Where a child is illegally deprived of . . . his or her identity, States . . . shall provide appropriate assistance and protection."¹¹²

Every child is entitled to the right to have a competent court of law determine the nature and extent of the parent-child relationship in the event that the parents are unable to reach a mutually acceptable parenting agreement. In cases where no legal or diplomatic remedy exists to facilitate the rule of law, and mediation is the sole available means by which to procure the parties' presence and participation, we violate the child's rights if we summarily sever the parent-child relationship by banning elective

109. Convention on the Rights of the Child pmbl., Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter Convention on the Rights of the Child] (quoting Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), ¶ 3, U.N. Doc. A/4059 (Nov. 20, 1959)).

110. *Id.* at art. 3(1).

111. *Id.* at art. 9(1). All U.N. member nations except Somalia and the United States have ratified the CRC. Article 9 cites abuse or neglect as examples. Article 9(3) requires that states ensure that a child who is separated from a parent is able to maintain personal relations and direct contact with both parents on a continuous basis, except where contrary to the child's best interests. *Id.*

112. *Id.* at art. 8(1)-(2).

mediation on account of domestic violence allegations. If mediation is the only available alternative then, to vindicate the child's rights, mediation must be presented to both parents as an available option. An effective international parental-kidnapping mediation protocol should emphasize the child's rights to safety, stability, well-being, and access to both parents.

An oft-articulated principle in the international human rights context is "[i]n all cases the interests of the child shall be paramount."¹¹³ The concept that a child's rights may supersede its parents' rights raises important questions in parental kidnapping disputes involving domestic violence.¹¹⁴

B. Domestic Violence Victims' Rights

Numerous treaties establish states' obligations to protect women from domestic violence. The Inter-American Court of Human Rights (IACHR) has clarified the scope of positive liberties and corresponding affirmative duties of states. The IACHR in *Velasquez-Rodriguez* held that the state is obligated to "conduct itself so as to effectively ensure the free and full exercise of human rights."¹¹⁵ The state "has a legal duty to take reasonable steps to prevent human rights violations" by means "legal, political, administrative and cultural" and to investigate thoroughly and ensure that violations are punished and victims compensated.¹¹⁶ The IACHR found human rights to be inherent attributes of human dignity superior to state sovereignty.¹¹⁷ In *Maria da Penha Fernandes v. Brazil*, the Inter-American Commission on Human Rights concluded that states have an affirmative due diligence obligation to conduct a "serious, impartial and exhaustive investigation"; identify events and state action that prevented rapid and effective prosecution; adopt corrective measures; and afford the domestic violence victim a fair trial, judicial protection,

113. Convention on the Elimination of All Forms of Discrimination Against Women, Art. 16(d), 16(f) (*entered into force* Sept. 3, 1981). For historical background and international sources of children's rights, see generally the Geneva Declaration of the Rights of the Child, 1923-1924 O.J. Spec. Ed. (21) 43 (League of Nations), available at <http://www.un-documents.net/gdrc1924.htm>; Convention on the Rights of the Child, *supra* note 109; UDHR, *supra* note 13; ICCPR, *supra* note 13; ICESCR, *supra* note 13.

114. For example, when the victim-parent's rights conflict with the child's rights, should the child's rights trump?

115. *Velasquez-Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, at 91, 152 (July 29, 1988), reprinted in 28 I.L.M. 291 (1989).

116. *Id.* at 155.

117. *See id.* at 139.

and just compensation.¹¹⁸ A state's failure to comply with the due diligence standard would constitute a pattern of discrimination condoning domestic violence against women.¹¹⁹

International human rights advocates and instruments increasingly emphasize the indivisibility of certain human rights.¹²⁰ The right of every domestic violence victim parent to choose independently whether or not to mediate implicates an array of human rights: dignity,¹²¹ non-discrimination,¹²² gender equity,¹²³ equality in the family,¹²⁴ shared parenting rights and responsibilities,¹²⁵ equal access to justice,¹²⁶ equality before the law,¹²⁷ and self-determination.¹²⁸

Elective mediation can be characterized as an *empowerment right*, "an indispensable means of realizing other human rights."¹²⁹ For example, most international human rights instruments guarantee women protection from gender-based discrimination. According to Cecilia Medina, "[t]he general principle of non-discrimination and the specific provisions concerning sexual discrimination are enough to challenge any domestic legal provision that discriminates against women, such as legal incapacity . . . [or]

118. *Da Penha v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 ¶ 61 (2000), available at <http://www1.umn.edu/humanrts/cases/54-01.html>.

119. See *id.* at ¶¶ 55-58.

120. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002) (recognizing right to water as indispensable to human dignity); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, ¶ 1, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (recognizing right to adequate food as important to enjoyment of all rights).

121. CEAFDW, *supra* note 13, at pmb1; ICCPR, *supra* note 13, at pmb1; ICESCR, *supra* note 13, at pmb1; UDHR, *supra* note 13, at pmb1., art. 1.

122. ICCPR, *supra* note 13, at art. 2(1); ICESCR, *supra* note 13, at art. 2; UDHR, *supra* note 13, at pmb1., art. 2.

123. CEAFDW, *supra* note 13, at pmb1., arts. 2-4; ICCPR, *supra* note 13, at pmb1., art. 2(1); ICESCR, *supra* note 13, at art. 3; UDHR, *supra* note 13, at pmb1., art. 2.

124. GR 21, *supra* note 16, at art. 16; CEAFDW, *supra* note 13, at pmb1., arts. 16(d), 16(f).

125. GR 21, *supra* note 16, at arts. 16(d), 16(f); CEAFDW, *supra* note 13, at pmb1., arts. 16(d), 16(f).

126. ICCPR, *supra* note 13, at art. 14.

127. GR 21, *supra* note 16, at art. 15(1); ICCPR, *supra* note 13, at arts. 14, 26; UDHR, *supra* note 13, at art. 7.

128. ICCPR, *supra* note 13, at art. 1(3); ICESCR, *supra* note 13, at art. 1; U.N. Charter art. 1(2).

129. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment: The Right to Education*, ¶ 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

exclusion from representing their children.”¹³⁰ Whether a mother is the left-behind parent or the taking parent, precluding her from representing her children by exercising her right to choose whether or not to mediate violates the principle of non-discrimination. Domestic violence-based mediation bans have a *de facto* disparate discriminatory impact on women – more women than men report experiencing domestic violence and the majority of international parental kidnappers are mothers.¹³¹

A negative consequence of viewing domestic violence and parental kidnapping through a gendered lens is that many remedies and resources are applicable exclusively to female victims or are less accessible to men. Conscientious attention to the disparate impact that domestic violence can have upon women need not diminish the gravity of violence against men.¹³² According to the United Nations General Assembly, all men and women are entitled to enjoy certain fundamental human rights including, *inter alia*, rights to life, equality, and security.¹³³ These fundamental rights are violated when a man or a woman is subjected to domestic violence. Characterizing domestic violence as something that impacts only women, or parental kidnapping as a crime committed only by men, minimizes the harm suffered by male victims, deters men and boys from reporting their offenders, and deprives male victims of their rights. The autonomy of every parent to choose whether or not to mediate may prove indivisible from and indispensable to a bundle of civil, political, social, economic and cultural rights.

C. Left-Behind Parents' Rights

Increasingly, international rights instruments emphasize the importance of equal participation in parenting. The Committee on the Elimination of Discrimination Against Women has embraced gender-equality in the parenting context. The Committee requires that “[s]tates . . . should ensure that by their laws both parents,

130. Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in HUMAN RIGHTS OF WOMEN 257, 271 (Rebecca J. Cook ed., 1994). To illustrate my point, I have inserted [men] where the author said “women.”

131. See REUNITE Report, *supra* note 12.

132. For a thorough account of studies documenting women’s aggression toward their partners, see Martin S. Fiebert, Professor, Cal. State Univ, Long Beach, References Examining Assaults By Women On Their Spouses Or Male Partners: An Annotated Bibliography (Sept. 2008), <http://www.csulb.edu/~mfiebert/assault.htm>.

133. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 3, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children."¹³⁴ The Convention on the Rights of the Child requires that states ensure that children have access to both parents, without discriminating on the basis of the parent's gender. It stipulates that "states . . . shall respect and ensure the rights . . . [of] each child . . . without discrimination of any kind, irrespective of the child's or his or her parent's . . . sex,"¹³⁵ and that "the child . . . shall have the right to know and be cared for by his or her parents."¹³⁶ In essence, this principle is tantamount to a presumption in favor of joint-parenting.¹³⁷

Practitioners and scholars who subscribe to the theory that a spouse or partner who has abused his or her co-parent cannot be a fit parent may find it less difficult to separate the child's interests from the victim-parent's. Nonetheless, even a convicted batterer is entitled to have a competent court determine the nature and extent of the parent-child relationship that best serves the child's safety and wellbeing (e.g., unsupervised visitation following parenting or anger management classes; supervised or professionally-monitored visitation; or permanent termination of parental rights) and to legally establish paternity.

VI. MEDIATING INTERNATIONAL PARENTAL KIDNAPPING DISPUTES INVOLVING DOMESTIC VIOLENCE ALLEGATIONS

Mediating an international parental kidnapping dispute involving domestic violence allegations can prove a precarious, challenging and highly controversial exercise. Batterers *and* kidnappers sometimes attempt to use family mediation as an opportunity to threaten, harass, intimidate, manipulate, control, stalk or otherwise harm the other parent.¹³⁸ Absent careful domestic violence screening, appropriate safeguards and rigorously trained mediators and attorneys, the batterer or the kidnapper may even succeed in coercing the other parent into signing a parenting accord that he or she does not truly support, and which does not

134. GR 21, *supra* note 16, at ¶ 20. It is interesting to note that the U.S. has *not* ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEAFDW).

135. Convention on the Rights of the Child, *supra* note 109.

136. *Id.* at art. 7.

137. Like most legal presumptions, it should be rebuttable.

138. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

serve his or her interests, or those of the child.¹³⁹

Nonetheless, where the states involved lack legal or diplomatic parental kidnapping remedies, mediation may prove to be the *only* available mechanism to ensure an abducted child's safety and well-being, secure the child's return or facilitate appropriate access to both parents. In disputes involving states that are non-compliant with international treaty obligations or lack effective domestic violence and child protection institutions,¹⁴⁰ mediation can potentially compensate for ineffectual remedies by affording system actors and parents an opportunity to build in protective terms and craft a safe, appropriate, cooperative co-parenting regime. Mediation may provide a domestic violence victim charged with international parental kidnapping an alternative to facing criminal prosecution, extradition and incarceration. The option to mediate a mutually agreeable solution could prevent a desperate, disenfranchised parent from taking unilateral actions that place the child, the parent and others at risk of grave harm. Elective mediation can help parents avoid the cost, stress, delay and uncertainty of litigation and maintain greater control over the outcome of the dispute.¹⁴¹ In some cases, mediation can even improve communication, facilitate collaborative parenting, and diffuse underlying conflicts that motivated or exacerbated abuse.¹⁴² While there is never a valid excuse for domestic violence or abuse, it is always

139. In my experience, many immigrant parents (particularly those who are undocumented) face gut-wrenching choices about whether to abduct or abandon their foreign-born children to the sole care of a batterer-parent. Domestic immigration law reform could help to reduce the potential for coercion.

140. Currently, no state has perfected its systemic response to domestic violence, child abuse or parental kidnapping. Some advocates criticize the 1980 Hague Convention's ability to address domestic violence, particularly in light of the summary nature and jurisdictional function of Hague proceedings, and call for reforms to make the treaty more effective and responsive to victims and their children. See, e.g., Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW 391, 423 (2000).

141. For more on the potential benefits of family mediation, see Nancy Ver Steegh, *Yes, No, Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. OF WOMEN & L. 145 (2003); see also Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291 (2003); UNIF. MEDIATION ACT, Prefatory note (amended 2003).

142. See generally Luisa Bigornia, *Domestic Violence: Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57 (2000); Katherine Kitzmann & Robert Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCHOL. 150 (1994); Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. DISP. RESOL. 95 (2001).

advantageous to explore ways to facilitate safe, non-violent co-parenting where both parents retain legal rights of custody or access.

Global domestic violence and parental kidnapping advocacy have a very long way to go. The international community continues to encourage all states to adopt, reform, implement and enforce laws and practices that protect and empower victims of domestic violence and victims of parental kidnapping. Meanwhile, numerous mechanisms can be employed to mediate international parental kidnapping disputes involving allegations of domestic violence as safely, ethically and effectively as possible. Properly conducted, elective mediation holds promising potential as a mechanism to protect and empower victims of domestic violence and victims of parental kidnapping.

A. *Domestic Violence Prompted Mediation Bans*

Tremendous discord persists over whether to mediate parental kidnapping disputes involving domestic violence allegations.¹⁴³ Some jurisdictions' family courts refer disputes involving domestic violence allegations for routine mediation, as they would any ordinary case.¹⁴⁴ Other jurisdictions refer the parties to a diversion program when domestic violence allegations arise.¹⁴⁵ In some jurisdictions the alleged victim is permitted to opt out of mediation (if the victim opts to mediate, safety mechanisms are built into the mediation process¹⁴⁶ to balance negotiating power, and protect and empower victims).¹⁴⁷ And, in some jurisdictions,

143. See Krieger, *supra* note 3, at 245-48; see also Douglas B. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255, 267 (1994); Veronica Torrez, Cheryl Coleman and Tina Burleson, *The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction*, 5 WHITTIER J. CHILD & FAM. ADVOC. 7, 8 (2005); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L., 749, 782-797 (2003).

144. See, e.g., Hyeon-Ju Rho, *Initiative Supports Push for Gender Justice in China*, AMERICAN BAR ASS'N RULE OF LAW INITIATIVE, Aug. 20, 2007, http://www.abanet.org/rol/news/news_china_gender_justice.shtml.

145. See, e.g., NEB. REV. STAT. § 43-2939 (2007).

146. See, e.g., ALA. CODE § 6-6-20 (1975); see also NEB. REV. STAT. § 43-29939 (2007).

147. See, e.g., ALA. CODE § 6-6-20; see also Del. Code Ann. tit. 13, § 711A (2007). For a chart detailing the domestic violence mediation rules of the fifty U.S. states, see AMERICAN BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *MEDIATION IN FAMILY LAW*

domestic violence allegations (or parental kidnapping) may trigger an automatic bar to mediation.¹⁴⁸

Domestic violence advocates' attitudes toward mediating in a domestic violence context are by no means uniform, and some experts have adjusted their positions over time. Leigh Goodmark, Director of the Family Law Clinic at the University of Baltimore School of Law, remarked that:

Some of us who strongly identify as advocates for battered women are reconsidering our strong opposition to mediation . . . an old article of mine [stated] that mediation was *never* appropriate in a case involving domestic violence and discussed how such positions are at odds with the idea of autonomy and empowerment for individual women who might want to engage in mediation. I'm working on a piece now that discusses why mandatory policies like blanket bans on mediation are inconsistent with some of the original goals of the battered women's movement.¹⁴⁹

Where pre-screening reveals domestic violence allegations, Alison Gerencser asserts that the parties should be permitted to opt out of otherwise mandatory mediation.¹⁵⁰ Gerencser posits that:

Domestic violence or abuse itself can never be mediated. Abusers must know that domestic abuse is criminal, with no potential for conciliatory process. Once abuse is

MATTERS WHERE DV IS PRESENT (2008), http://www.abanet.org/domviol/docs/Mediation_1_2008.pdf.

148. See, e.g., FLA. STAT. § 44.102(2)(c) (2008), which states that "[u]pon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process." Some examples, not from any particular jurisdiction, of underlying bases or circumstances that may trigger mediation bans include: one party raises domestic violence allegations against the other party; a domestic violence protective order has been issued protecting one party (and/or the child) from the other party; one party raises child abuse or neglect allegations against the other party; one parent has kidnapped or threatened to kidnap the parties' child(ren); the screener believes that mediation will fail to serve the child's interests; or, the screener believes that there is no reasonable possibility that mediation will promote the development of an effective parenting plan.

149. E-mail from Leigh Goodmark, Director, Family Law Clinic, University of Baltimore School of Law, to the author (Aug. 11, 2008) (on file with author). For Goodmark's prior position on domestic violence-related mediation bans, see Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, 39 JUDGES' J. 21, 24 (2000); see also Leigh Goodmark, *Second Wave Policies in a Third Wave World: Dominance v. Anti-Essentialist Feminism, Autonomy, and Mandatory Policies in Domestic Violence Cases* (Aug. 13, 2008) (unpublished manuscript, on file with the author).

150. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 55 (1995).

detected, participants must have a method for exempting a case from the mediation process. However, if the parties can reach agreement on equal terms and neither party controls the other, family mediation, including matters such as child custody, visitation and support, may be appropriate even though some abuse has occurred in a relationship.¹⁵¹

When it comes to deciding whether or not to mediate in the domestic violence context, Margaret Drew asserts that, "the decision must be the client's in all circumstances."¹⁵² However, Drew encourages attorney advocates to thoroughly explore with victim clients the potential consequences of engaging in family mediation with the batterer:

I never say that any process is absolutely prohibited in domestic violence cases. We must, however, be clear that there can be huge risks in engaging in mediation It does not mean that we never use mediation, but it does require some sophisticated discussions with the client to determine her goals of mediation and to make a realistic assessment of the process The client empowerment model does not relieve us of our obligation to give appropriate guidance to a client who may have unrealistic expectations of the alternative [dispute] resolution process."¹⁵³

Peter Salem and Billie Lee Dunford-Jackson summarized their beliefs about mediating in a domestic violence context as follows:

Mediation *does not* work in all situations and certainly not in all cases involving domestic violence;
All domestic violence *is not* the same;
Shared parenting *is not always* the best solution;
Some female victims of domestic violence *want* their children to have a relationship with their fathers, *even if he has been violent*;
Some cases *are better off going to court*; and
Women *are sometimes* the perpetrators of domestic violence.¹⁵⁴

Salem and Dunford-Jackson observe that:

151. *Id.* at 47.

152. Interview with Margaret Drew, Associate Professor of Law, University of Cincinnati College of Law, Ohio (Aug. 11, 2008). Drew is the director of her university's Domestic Violence and CPO Clinic.

153. *Id.*

154. Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008) (emphasis added).

Some insist that mediation and shared parenting are cure-alls for almost any parental conflict, including those involving domestic violence; others maintain that in such matters an adversarial process and restricted parental access to children are the only answer In this line of work, there are simply no absolutes . . . in the end, the presentation and defense of absolute and unassailable “truths” may be inconsistent with people’s realities.¹⁵⁵

System actors may even have an ethical obligation *not* to ban mediation in cases involving domestic violence allegations. Alison Gerencser observed that “[s]ome experienced family lawyers and mediators conclude that a lawyer has an ethical duty to inform a domestic relations client about the option of mediation, and that failing to do so could result in findings of malpractice.”¹⁵⁶ Whether a domestic violence victim is a parental kidnapper or a left-behind parent, he or she has the right to be presented with all available remedies, including the option to mediate.

Two of the most established international parental kidnapping mediation programs, located in the United Kingdom and Germany, report that they are already successfully mediating disputes involving domestic violence allegations. The United Kingdom’s mediation scheme, the reunite International Child Abduction Centre (reunite), is firmly committed to the principle of autonomy: “Whilst it would be true to say that mediation would not be appropriate, or suitable, in every case, and that mediation cannot resolve all cases where it is attempted, it is a facility that should be offered in *all* cases of international parental child abduction.”¹⁵⁷

The reunite mediation scheme rigorously pre-screens each international parental kidnapping case by interviewing both parents prior to proceeding with mediation, even in cases where both parents have agreed to mediate.¹⁵⁸ Director Denise Carter clarifies, “[t]here’s a place for mediation in *some* cases,” but reunite will decline to mediate a dispute where it determines that the abducting-parent has kidnapped the child as a ruse to migrate to

155. *Id.*

156. Gerencser, *supra* note 150, at 53 (citing ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 452-53 (2d ed. 1991)); see also Alison Gerencser & Megan Kelly, *Family Mediation: An Alternative to Litigation*, 68 FLA. BAR J. 49, 51 (1994) (stating that some jurisdictions, but not Florida, require attorneys to advise their clients concerning mediation).

157. REUNITE report, *supra* note 12, at 54 (2006) (emphasis added).

158. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008).

the United Kingdom; where one or both parents express unwillingness to come to mediation with an open mind; or where child abuse allegations have been raised.¹⁵⁹ According to Carter, reunite does, however, mediate cases involving domestic violence: “[i]t has got to be the parents’ choice. We will look at safety elements [but] it is up to them to make a decision about whether to mediate or not.”¹⁶⁰

When screening reveals domestic violence allegations, reunite employs safeguards during mediation to protect the parties and reduce the risk of coercion. Significantly, the results of a reunite post-mediation study indicate that the participants felt safe throughout the course of the mediation and believed that the outcome was uncompromised.¹⁶¹ Germany’s international parental kidnapping mediation program (BAFM) is also committed to offering mediation in cases involving domestic violence allegations.¹⁶²

B. Factors Unique to the International Context

Considerations surrounding domestic violence allegations in the *international* parental kidnapping context can differ profoundly from those present in a domestic dispute. Every compelling reason not to mediate parental kidnapping cases involving domestic violence allegations in the domestic context is amplified in the international context – so too are the rationales for promoting elective mediation. William Duncan, Deputy Secretary Gen-

159. *Id.*

160. *Id.* Interestingly, Carter acknowledged that in *domestic* disputes involving domestic violence, the United Kingdom does deny victim parents the option to elect to mediate. *Id.*

161. See REUNITE report, *supra* note 12. This report states that “allegations of domestic violence [did] not preclude entering the mediation process and [did] not affect the [parties’] ability to reach a [stipulated agreement].” *Id.* at 53. Seventy-five percent of the participants responded that domestic violence did not hinder the mediation process, and, in the minority of cases where participants indicated that domestic violence *did* impact the parties’ participation, the participants reported that reunite’s safeguards made them feel safe, and the mediation was ultimately not compromised. *Id.* at 48. Ninety-two percent of participants felt “safe on arrival” and “in the waiting area” and when “leaving the premises.” *Id.* at 17. “Some were hindered in the first hour but in all cases this was resolved.” *Id.* at 17. “In a small number of cases one parent was nervous about meeting the other parent (due to domestic violence) but once mediation commenced the parent felt safe and therefore was able to speak freely and unhindered regarding the best interests of the child.” *Id.* at 48.

162. BAFM’s viewpoint on mediating disputes involving domestic violence allegations was expressed during a U.S.-German mediation training in held in Berlin in 2006 – I was in attendance. See BAFM’s website for more info: <http://www.bafm-mediation.de/international/english/mediation-in-international-conflicts-involving-parents-and-children-project-description/>.

eral at the Hague Conference on Private International Law, stated that: "[i]nternational parental child abduction is not at first glance an obvious subject for mediation The level of conflict is high, cultural differences can fuel misunderstanding, and the involvement of two legal systems, and possibly two different languages, are complicating factors."¹⁶³ Despite these concerns, Duncan writes that:

[I]n the now typical abduction case (*i.e.* abduction by the child's primary carer) there are strong incentives for the parents to find an agreed outcome. For a left behind parent who does not want primary care of the child, there is the prospect of a secure agreed visitation regime. For the taking parent there is the possibility that what originally was a unilateral and unwise act may be re-characterised as an agreed relocation. Most importantly, there is the prospect of limiting damage to the child by avoiding continuing conflict and a situation in which the child may become a shuttlecock between the two countries concerned.¹⁶⁴

International parental kidnapping disputes involving domestic violence allegations might, at first glance, seem an even less likely candidate for family mediation. For example, mediating in lieu of litigating a Hague-eligible international parental kidnapping case could conceivably deprive domestic violence victims and their children of the treaty's built-in safeguards. The framers of the 1980 Hague Convention on the Civil Aspects of International Child Abduction shared a concern for its potential impact on victims of domestic violence. Article 13 of the Hague Treaty broadly addresses domestic violence:

[T]he 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 situation¹⁶⁵

The *grave risk* defense set forth in Article 13 is typically invoked on behalf of battered mothers who abduct their children.¹⁶⁶ This consideration is particularly salient where the terms

163. REUNITE report, *supra* note 12, at 3.

164. *Id.*

165. Hague Convention, *supra* note 22, at art. 13.

166. See generally SHETTY & EDLESON, *supra* note 10, at 123.

of a mediated agreement could expose the child to a state that lacks an effective child-protection regime, but the likely Hague decision based on the *grave risk* defense would not.¹⁶⁷ On the other hand, the Hague treaty is not always available or effective in every dispute. As of January 2009, only 80 of the approximately 193 generally-recognized sovereign states in the world had ratified the treaty, and the treaty is not automatically binding as between states party.¹⁶⁸ Even as between two states party, a significant number of elements must be met in order for the treaty to be invoked.¹⁶⁹ Procedural disparities between states' legal systems

167. See Hague Convention, *supra* note 22. Under Article 13 of the Convention, a return order under the Hague abduction treaty directs that the child be restored to his or her country of habitual residence, but does *not* require the abducting parent to return.

168. According to the U.S. Central Authority (the U.S. State Department, Office of Children's Issues, Abduction Unit), as of January 9, 2008, the U.S. was only bound to approximately sixty-eight of the eighty other contracting states (the treaty may have entered into force, or ceased to be binding [denunciation], as between the USA and the foreign country involved in a dispute, *after* the date this data was compiled). Of those sixty-eight states, the U.S. Central Authority rates many as non-compliant with treaty obligations. For annual Hague Convention Compliance Reports see U.S. Department of State, International Child Abduction, http://travel.state.gov/family/abduction/resources/resources_4308.html. System actors can verify current treaty status as between any two states by contacting the Hague Conference on Private International Law (HCCH) or visiting HCCH, http://www.hcch.net/upload/abductoverview_e.pdf.

169. In order to be eligible under the Hague Convention, the applicant (left-behind) parent must possess rights of custody under the laws of the child's country of habitual residence. The petitioner must also have been *exercising* those custody rights (or would have exercised them *but for* respondent's actions). Custody rights are differentiated from access rights. Article 5 of the Hague Convention states that "[r]ights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Hague 'access' proceedings must be litigated in state family courts. 42 U.S.C. § 11603(a) (1988). State family court judges frequently have difficulty refraining from improperly applying the best interests of the child custodial standard to Hague return proceedings.

Hague return proceedings are strictly jurisdictional, not custodial, in nature. 42 U.S.C. § 11601(b)(4) (1988). The Hague Convention is not designed to settle international custody disputes, but rather to discourage international forum-shopping. According to Article 19, a Hague return case is intended to determine the child's country of habitual residence and ensure that the custody case is heard in the family court with proper jurisdiction over the child. A Hague return order does not necessarily restore the child to the left-behind parent. Rather, a return order restores the child to his or her country of habitual residence (the status quo prior to the abduction) where the local family court addresses custody and entertains any move-away requests from the taking parent. In practice, *de facto* discrimination sometimes prevents enforcement of valid Hague return orders in favor of left-behind fathers. The *Sylvester* case is a well-known example of such discriminatory conduct. *Sylvester v. Austria*, 37 Eur. Ct. H.R. 17 (2003).

account for additional frustrations and misunderstandings.¹⁷⁰ Differences between states' domestic family law systems result in inconsistencies in the treaty's application or obstacles to compliance.¹⁷¹

In some cases, by the time they rule on a grave risk defense, Hague judges are well-informed about the legal protections available to women and children in the state of habitual residence. However, many judges mistakenly *assume* that the foreign state involved lacks domestic violence or child-protection remedies and resources. Experienced Hague litigator Stephen Cullen observed that many U.S. Hague judges think that "[o]nly America can deal with domestic violence. No other country is equipped. And that's flawed."¹⁷² Misconceptions about states' abilities to respond effectively to domestic violence lead to improper Hague return denials

170. For example, whereas a U.S. appeals court may only consider issues of *law* when considering a respondent's appeal from a trial court's Hague return order, the Mexican appellate courts have the ability to reconsider *factual* determinations made by the lower court. The U.S. reported of Mexico: "we continue to see [Hague] Convention cases mishandled as custody cases and not strictly as Convention (i.e. habitual residence) determinations." U.S. Department of State, *2006 Report on Compliance with the Hague Abduction Convention*, http://travel.state.gov/family/abduction/hague_issues/hague_issues_2952.html (last visited Nov. 4, 2008).

171. For example, civil law and common law states implement the treaty differently, as do federal and non-federal states' courts. Also, in contested child-custody cases, some states' family court judges almost invariably award physical custody to the child's mother, whereas other states' family codes tend toward a rebuttable presumption that joint custody serves the child's best interest (absent evidence to the contrary) or, in the alternative, preserve the status quo. Differences in the participation of children in Hague proceedings can prove critical because child testimony may be dispositive in a Hague case. Article 13(b) provides: "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Hague Convention, *supra* note 22. For example, Fernando Muñoz, (a crimes-against-children expert at the U.S. State Department's Embassy in México City) stated that Mexican family courts place relatively heavy emphasis on young children's testimony (child testimony is formally accepted from age seven, but in practice much younger children testify). Muñoz cites Article 283 of México's federal civil code, which instructs judges to consider the child's testimony in child-custody determinations. Telephone Interview with Fernando Muñoz, Special Consular Services Assistant, U.S. Embassy in Mexico City, Mexico (Dec. 2, 2008). German family courts take child testimony at an even more tender age, and assign it substantial weight. U.S. courts tend to exclude child testimony altogether or filter the child's testimony through a court-appointed expert, and assign young children's testimony very minimal weight (however, the courts tend to accept testimony from children older than age ten or eleven). Thus, the affirmative defense could turn upon a given court's assessment of the child witness' "degree of maturity."

172. Telephone Interview with Stephen Cullen, Principal, Miles & Stockbridge P.C., & Jennifer Zawid, Assistant Professor of Law, Univ. of Miami Sch. of Law (Oct. 1, 2008).

based upon misapplication of Article 13(b). Gender-bias is manifest in all states party, although it is more prevalent in some states than in others.¹⁷³ Most states' Hague judges and litigators are trained in an ad hoc fashion, if at all, through sporadic binational conferences, judicial college lectures or bar association legal education events. Hague training is not mandatory in most states party to the Hague Convention.¹⁷⁴ Given these inconsistencies in treaty interpretation and judicial training, mediating a Hague-eligible case will not necessarily yield a less favorable outcome for the domestic violence victim respondent or the child.

Domestic characteristics of the two states involved in a particular international parental kidnapping dispute may present unique concerns not typically present in domestic cases. For example, the states may be characterized by incongruent legal and diplomatic remedies to redress international parental kidnapping; incompatible domestic family laws; irreconcilable cultural and gender norms; or disparate domestic-violence and child-protection remedies and resources.

In states that have not adequately addressed domestic violence, child abuse, or neglect as bona fide concerns warranting state intervention, mediation could offer some victim-parents the opportunity to negotiate better protection than they could obtain by litigating.¹⁷⁵ Mediators must never assume that both states involved in a dispute will respond similarly to domestic violence,

173. For example, in 2006, Mexico ordered its first Hague-return to a left-behind U.S. father. Like in Mexico, the U.S. family law system usually awards child-custody to mothers. Every U.S. state has criminalized interference with custody, whereas less than half of the states have criminalized interference with visitation rights. Consequently, many U.S. left-behind fathers are effectively denied legal redress to parental abduction. *See generally* Silberman, *supra* note 71.

174. A few states party to the Hague Convention have designated a finite group of judges and litigators to adjudicate all incoming Hague cases, and require that those judges and attorneys complete extensive, specialized Hague training (Germany is an example of this model). This practice would prove considerably more difficult to implement in geographically vast states (like the U.S.), or in states party with federalism systems.

175. Some states offer a wide array of domestic violence remedies and resources for both victim-parents and their children. Such resources might include criminal or civil liability, criminal protective orders, domestic restraining orders, a family law presumption that favors the victim-parent in child custody proceedings, provisions requiring that a batterer's visitation be conducted by a professional visitation monitor, confidential address programs, safety plans, batterer treatment, domestic violence shelters with free victim counseling and legal services, and domestic-violence-based immigration remedies and public benefits. American Bar Association's Commission on Domestic Violence, <http://www.abanet.org/domviol/>. Where the abuse or neglect is severe, occurs in the child's presence, or is directed at the child, the courts in some states may even lawfully terminate the batterer's parental rights.

child abuse, or neglect. Many states still lack criminal and civil domestic violence and child protection laws, battered women's shelters, public benefits, counseling, and other domestic violence remedies and resources. Domestic violence can be exceedingly difficult to detect or to prove in states that do not have well-developed domestic violence and child protection regimes.¹⁷⁶ It is critical that system actors involved in international parental kidnapping disputes, particularly cases involving domestic violence or child abuse allegations, involve experts whenever appropriate and familiarize themselves with the laws, resources and cultural norms of both states.

The Hague Council on General Affairs and Policy has acknowledged the need to develop a central repository of foreign laws to aid judges and other system actors involved in resolving international parental kidnapping disputes:

The Council invited the Permanent Bureau to continue to explore mechanisms to improve global access to information on the content of foreign law, including at the litigation stage. The Permanent Bureau is invited to report and, if possible, to make a recommendation as to future action to the Council in 2009.¹⁷⁷

Denise Carter states that reunite has already collected applicable laws for forty states and will soon post that data on its web site for use by practitioners.¹⁷⁸ And, Emory Law School, funded by a grant from the Ford Foundation, conducted and published a broad study

176. In my professional experience serving as a domestic violence Staff Attorney with Legal Aid, abuse often occurs in the privacy of a home without independent witnesses present, rendering it difficult to procure corroborating evidence or testimony. Fear or socio-cultural norms deter the victim from reporting or seeking medical attention and counseling. Undocumented immigrant victims may fear that reporting will result in deportation, permanently separating the victim from his or her children and relegating the children to the care of the batterer. Linguistic barriers prevent some migrant victims from communicating with authorities. Financial dependency limits some victims' ability to support themselves and their children independent of the batterer. Some states' authorities are not trained to respond to domestic violence, or are reluctant to intervene into what they deem to be private, domestic matters. And batterers can learn to harm victims without leaving visible evidence. With the guidance of an attorney advisor, parents could negotiate terms, conditions, and resources to protect and empower themselves and their children.

177. Council on General Affairs and Policy of the Hague Conference on Private International Law, April 1-3, 2008, *Conclusions and Recommendations Adopted by the Council*, available at http://www.hcch.net/upload/wop/genaff_concl08e.pdf [hereinafter *Conclusions and Recommendations*].

178. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008).

on Islamic Family Law.¹⁷⁹ Foreign embassies and Central Authorities can be useful information sources. The U.S. Department of State and numerous non-governmental organizations publish country condition reports.¹⁸⁰ The United Nations (UN) Special Rapporteur on violence against women also produces useful country-specific reports on the rights and status of women and girls, and state actions to protect and empower victims.¹⁸¹

Where the kidnapper's destination state offers no legal or diplomatic remedies to resolve international parental kidnapping disputes, mediation could prove the *only* viable mechanism to recover the child or facilitate parent-child access. Most states do not recognize parental kidnapping as a bona fide problem; they have not criminalized parental kidnapping and will not extradite their own nationals to face parental kidnapping charges abroad.¹⁸² Many states are unwilling or unable to negotiate a child's return through diplomatic channels. Memoranda of understanding that facilitate access are scarce and have had somewhat limited effect. For left-behind parents who feel powerless, desperate or disenfranchised from the legal system, the temptation to orchestrate a snatch-back can be overpowering.¹⁸³ Snatch-back scenarios have the potential to endanger the child. Mediation may prevent a desperate, disenfranchised parent from taking unilateral action that places the child and others at risk of grave harm.¹⁸⁴

179. Islamic Family Law: Possibilities of Reform Through Internal Initiatives, <http://www.law.emory.edu/ifl/index2.html> (last visited Oct. 27, 2008).

180. U.S. Department of State, http://www.travel.state.gov/travel/cis_pa_tw_cis/cis_1765.html (last visited Oct. 27, 2008).

181. United Nations Inter-Agency Network on Women and Gender Equality, <http://www.un.org/womenwatch/ianwge> (last visited Oct. 27, 2008).

182. Telephone Interview with True Rowan, Senior Trial Attorney, U.S. Dep't of Justice, Office of Int'l Affairs (date unavailable). Some states' constitutions explicitly prohibit extradition of nationals.

183. "Snatch-back" is a term that refers to a self-help remedy - the left-behind parent travels abroad to surreptitiously or forcibly re-abduct the child, or hires others to do so. Many kidnapping- parents are unaware that a lawful act in one jurisdiction could constitute a criminal offense in another; that criminal penalties could be severe; that numerous states will extradite their own nationals to face criminal charges abroad; or even that their own state is party to international treaties on parental abduction. In 2006, for example, one desperate U.S. left-behind mother hired Russian men to snatch back her child from the child's abductor/father in Egypt. In the process of executing the plot, the men poisoned the father and were ultimately apprehended. The mother now has custody of her child, but she is the subject of an extradition request from Egypt to the United States, among the charges *attempted murder* (Identifying case details and source omitted to protect the victims and honor the involved agencies' privacy policies.)

184. See Sue T. Bench, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 390 n.161 (1986).

When a state elects to prosecute a parent for criminal custodial interference or parental kidnapping, mediation could present a defendant/domestic-violence victim an alternative to facing arrest, conviction and incarceration. An incarcerated parental-kidnapper may be the child's primary caretaker and, in long-term abductions, the only parent that the child knows. He or she may be the child's sole or primary income source. Incarceration could cause a significant disruption in the child's relationship with one parent or impact the child's financial security at a time when the child is already in crisis. Resolving an international parental kidnapping case involving domestic violence allegations through mediation could potentially prevent the child *and* a domestic violence victim/parental kidnapper from being re-victimized by avoiding the need to resort to criminal prosecution.

U.S. prosecutors rarely bring parental kidnapping charges, and judges and juries tend to be very reluctant to send a parent to jail, particularly a battered mother. Nonetheless, once criminal law mechanisms are set in motion, prosecutors are often unwilling to drop the charges, even after the child is recovered. Promoting and expanding the array of *civil* international parental kidnapping mechanisms available to left-behind parents could reduce the incidence of domestic violence victims agreeing to mediate simply because they fear imprisonment more than they fear mediating with a batterer.¹⁸⁵

C. Cultural Considerations

Socio-cultural norms concerning domestic violence, child custody, gender, and each party's status and role in the societies involved in the dispute can profoundly influence the outcome of mediation. For example, in the United States, family mediation tends to exclude participation by the parents' extended family and community. Some cultures emphasize individualism and a small, nuclear definition of family and biological parents' rights, whereas other cultures take a far broader view of kinship, conceiving of the individual only in the context of his or her membership or role in

185. By ratifying the 1980 Hague Convention on the Civil Aspects of International Child Abduction, states party commit to the principle that criminal remedies should be explored only after available civil and diplomatic remedies have been carefully considered, exhausted or where none are available. Some states party incorporate this principle into domestic laws. For example, U.S. federal law states that criminal remedies should "not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction." International Parental Kidnapping Crime Act, 18 U.S.C. § 1204(d) (2003).

an extended family or community. One South African woman, Nomagugu Ngobese, aptly articulates the tension between rights and culture: "Human rights are individual rights, which is not the way for us. We live communally."¹⁸⁶ Children in a communal culture are likely to reside with and be raised by many individuals, not exclusively by their biological parents or legal guardians. In a communal culture, an individual may be unaccustomed to making independent decisions based upon her needs or those of her child. Important decision-making can be highly structured or designated to elders, religious leaders or male heads of family. A woman from an intensely patriarchal culture may not be accustomed to or comfortable with making childrearing decisions in contravention of the child's father (or other male relatives), particularly in his presence during mediation. Mediators need to be sensitive to subtle cultural dynamics that could place a domestic violence victim in a position that forces her to choose between a culturally inappropriate confrontation and a coerced parenting agreement.¹⁸⁷

What is in a child's best interests may be culturally defined. Even among Western states, the definition of the so-called *best interests of the child* standard is hotly debated. Maureen Dabbagh, whose own daughter was parentally abducted by the child's father to the Middle East at age two, points out:

Foreign law can provide surprising advantages to the searching parent. Facts that seem unimportant in the United States may be extremely important in another country. For example, while a child's age or sex may not be significant in a United States court, it can very well mean automatic custody in to one parent or the other in another country Of concern, too, may be a woman's marital status. A woman who remarries may forfeit the right to custody.¹⁸⁸

Some states' laws establish a fixed age at which a child shall be in the father's or the mother's exclusive care. According to Dabbagh, "[m]any Muslim countries hold the religious training of a child to be the father's responsibility. [Therefore], a child who has

186. Karin Brulliard, *Zulus Eagerly Defy Ban on Virginity Test*, WASHINGTON POST, Sept. 26, 2008, at A1.

187. This point underscores the importance of assigning an experienced domestic violence advocate as attorney-advisor to review any proposed stipulated agreement prior to the parties signing and, particularly, to advise the domestic violence victim-parent.

188. DABBAGH, *supra* note 96, at 52.

reached a certain age goes to the father.”¹⁸⁹ The child’s gender may also be determinative of the parents’ custodial rights. “In Saudi Arabia, a female [child] goes to the father at age seven; in Syria . . . a female [child] goes to the father at age twelve. Recognition of this particular law has thus afforded American mothers the right to custody of young daughters abroad.”¹⁹⁰

Other states consistently award sole custody to one parent and simultaneously terminate the other parent’s rights and obligations.¹⁹¹ Cultural norms can also influence the parties’ understanding about children’s rights and legal status (e.g., the child’s interests are paramount versus the child as a property interest of the father).¹⁹² All states may be equally committed to the belief that their domestic family laws and practices represent the child’s best interests. Assuming that a Western *best interests of the child* standard is the starting point for every international family mediation is an ethnocentric approach likely to alienate at least one parent, his or her counsel, foreign authorities and, in a co-mediation model, the foreign co-mediator.

An international parental kidnapping mediation regime that fails to address cultural relativity is likely to quickly inspire contempt and distrust from those states where mediation could prove most critical – states altogether lacking legal or diplomatic parental kidnapping remedies. System actors should avoid essentializing members of a given culture, and pursue a more nuanced understanding of the complex implications of individuals’ cultural identities.¹⁹³ Mediators may need to suspend judgment, acknowledge and table personal biases, resist the urge to dictate values in the course of mediation, and adjust their mediation strategies to account for rich cultural context.

189. *Id.*

190. *Id.*

191. For example, Japanese family courts typically award sole custody to the mother with no visitation rights (or support obligations) for the father. Information about Japanese family law derived from the web site of the International Family Law Office of Jeremy D. Morely. Morely is an international parental abduction expert and a member of NCMEC’s International Child Abduction Attorney Network (ICAAN). Jeremy C. Morely, *Japanese Family Law – or The Lack Thereof!*, <http://www.international-divorce.com/d-japan.htm> (last visited Jan. 8, 2009).

192. For more information on Shari’a Law and non-Hague Convention states see Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT’L L. REV. 277 (2007); see also Deborah M. Zawadzki, *The Role of the Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT’L & COMP. L. 353 (2005).

193. Sujata Warrier, “*It’s In Their Culture*”: *Fairness and Cultural Considerations in Domestic Violence*, 46 FAM. CT. REV. 537, 537 (2008).

D. Best Practices

Mediating international parental kidnapping disputes involving domestic violence allegations is a dauntingly complex, multi-disciplinary undertaking. Sovereign states and the international community are just beginning to tackle the task of developing best practices for mediating these disputes.¹⁹⁴ On April 3, 2008 the Council on General Affairs and Policy at The Hague Conference on Private International Law adopted Conclusions and Recommendations regarding “cross-border mediation in family matters”:

The Council invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters. The Permanent Bureau is asked to begin work on a Guide to Good Practice on the subject. As a first step, a Guide to Good Practice on the use of mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* should be prepared, to be submitted for consideration at the next meeting of the Special Commission to review the practical operation of that Convention, which is likely to be held in 2011.¹⁹⁵

According to Uniform Law Commission (ULC) Legislative Counsel, Eric Fish, in response to the April Hague Special Commission Report, the Washington, D.C.-based ULC is now looking into U.S. mediation practices.¹⁹⁶ A committee of experts convened in Wash-

194. There is exciting international development activity underway to promote awareness and best practices in cases involving domestic violence. For example, in July 2007, Robin Runge of the American Bar Association's (ABA) Commission on Domestic Violence visited The People's Republic of China (PRC) to discuss the role of gender in the law, develop a coordinated response and explore best practices for cases involving domestic violence. Among the themes addressed during the ABA delegation's visit to the Supreme People's Court (SPC) was the use of mediation in the domestic violence context: “On July 24, Ms. Runge exchanged views with SPC Vice President Wan Xianguang on the role of the bar in working with judges and courts to promote reform, to address gender bias in the courts, and to arrange court proceedings so that victims are kept safe from their batterers and can exercise their legal rights. The July 29–30 Symposium on Gender Perspectives on Marriage and Family Cases shared best practices and explored the rationales for rules governing the use of mediation . . . in cases involving domestic violence. The SPC's expected guidance . . . is aimed at addressing abuses of power or other inappropriate pressure applied by lower courts in the widespread promotion of mediation without protections for domestic violence survivors . . .” American Bar Association Rule of Law Initiative, Initiative Supports Push for Gender Justice in China, Aug. 20, 2007, http://www.abanet.org/rol/news/news_china_gender_justice.shtml.

195. See *Conclusions and Recommendations*, *supra* note 177.

196. Telephone Interview with Eric Fish, Legislative Counsel, Unif. Law Comm'n. (May 13, 2008).

ington, D.C., in January 2009 to formulate best practices for mediating international parental kidnapping disputes.¹⁹⁷ Notwithstanding certain similarities among mediation schemes in states already engaged in mediating international parental kidnapping disputes,¹⁹⁸ considerable discord persists over which mediation model is most effective. A global, one-size-fits-all mediation model is unlikely to suit every state's resources and realities. The decision about which mediation model to employ may turn upon how the two states involved in a particular dispute are globally situated. "No one mediation model is the *right* way," posits reunite Director Denise Carter.¹⁹⁹

Established mediation programs report considerable success using a co-mediation model to resolve international parental kidnapping disputes.²⁰⁰ Even experienced mediators who initially balk at the concept of co-mediation may prefer to co-mediate in light of the complexity and nuance of international parental kidnapping cases involving domestic violence allegations. However, mediators do not always agree about how co-mediation should be structured.²⁰¹ For example, the German co-mediation model (BAFM) incorporates cultural and gender considerations into the mediation strategy by choosing mediators with cultural and linguistic competency whenever possible. According to BAFM mediator and instructor Christoph C. Paul:

197. The Best Practices Committee reports to the Steering Group of the International Child Custody Mediation Initiative that formed in early 2008 to launch a national international parental kidnapping mediation initiative as the result of a national mediation conference titled Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, held at the University of Miami School of Law from February 22-24, 2008. See Univ. of Miami 2008 Events, http://www.law.miami.edu/cle/cle_01_01.php?op=1 (last visited Aug. 26, 2008). All participants are volunteers.

198. Typically, both parents are informed that mediation is strictly voluntary and that unwillingness to mediate will in no way affect subsequent litigation; that by attempting mediation, they do not forgo their right to litigate; that in the event mediation fails, the judge will not deem that, by mediating, the left-behind parent acquiesced to the kidnapping; that the judge will not take into account the fact that mediation was unsuccessfully attempted; that mediation is strictly confidential; and that nothing said during mediation will be subsequently admissible in court. Conscientiously timing the mediation process is critical in Hague cases so as to avoid conflict with the treaty's prompt adjudication requirements, and to ensure that no party abuses mediation as a means to harass, delay, intimidate or coerce the opposing party.

199. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008).

200. See *supra* note 46.

201. I witnessed this firsthand as the previous coordinator of NCMEC's pro bono international parental kidnapping mediation program from 2005 through 2007.

Two mediators of different sexes are required in order to take full advantage of co-mediation and to give both parents the opportunity to feel properly understood during the mediation. A further prerequisite for the composition of the mediation team is differing professions. Owing to the high level of conflict potential in such proceedings, one mediator should have a psycho-social or educational background, including a high degree of relevant experience. At the same time, such proceedings are closely embedded in the legal framework so that a substantial knowledge of the law is indispensable . . . Last but not least, the pair of mediators should reflect both parents' cultural background. If, for instance, an American man takes part in a mediation proceedings in Germany (the child's state of residence), he must be sure that his national and cultural individuality is understood and appreciated – a condition which applies to the German woman as well. This means that both mediators not only have to be bilingual, but must also have insight into the other culture.²⁰²

Carter points out that, in certain circumstances, utilizing same-nationality mediators can undermine the mediation, and intimidate or endanger the domestic violence victim-parent, on account of cultural or interpersonal conflicts arising out of the mediator's close ties to the victim-parent's community or family.²⁰³ In other circumstances, Carter observed positive results due to the participation of a same-nationality interpreter who was familiar with applicable cultural norms and customs.²⁰⁴

Discord persists over whether to strictly enforce the general preference for face-to-face, joint-session mediation in international parental kidnapping disputes, particularly in cases involving domestic violence allegations. Face-to-face mediation can be frightening and intimidating to a victim-parent, and the batterer-parent's presence could lead to an imbalance in negotiating power or a coerced agreement. To ensure the victim's safety and reduce the likelihood of coercion, some mediators elect to depart from the general preference for joint-session mediation, and opt instead for

202. Christoph C. Paul & Jamie Walker, *Family Mediation in International Child Custody Conflicts: The Role of the Consulting Attorneys*, 22 AM. J. FAM. L. 42, 43 (2008).

203. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008). Also, in contrast to BAFM, reunite reports that follow-up interviews with parents who had mediated their international parental kidnapping disputes revealed that the mediators' gender, profession and nationality were less important to the parents than the mediators' levels of skill and professionalism.

204. *Id.*

individual sessions or caucus meetings with the parties.²⁰⁵

The mediator's role is a controversial issue in international family mediations involving domestic violence allegations. A family mediator might approach mediation as a neutral, or from a victim-centric or child-centric position. In a victim-centric or child-centric model, the mediator takes affirmative steps to ensure that, in forgoing legal remedies in favor of a stipulated agreement, the parties do not place the child or domestic violence victim at risk by eliminating domestic violence and child abuse safeguards (such as those provided for by the Hague Convention). Safeguards are built into the mediation process, even to the extent that mediators may terminate mediation against the parents' wishes or refuse to include terms that are mutually acceptable to both parents.

In international parental kidnapping disputes involving domestic violence allegations, the common practice of using a neutral mediator heightens the importance of assigning the parties independent attorney advisors. The attorney advisor for each party reviews any resulting stipulated agreement before the parties sign; explains the terms of the contract and their implications; ascertains that participation was voluntary and any consensus was un-coerced; and ensures that the agreement meets the legal requirements of each jurisdiction involved so that it may be registered and enforced in both states. Given these considerations, a domestic violence victim-parent *must* have an attorney-advisor with ample domestic violence advocacy experience.²⁰⁶ The attorney for the victim-parent should carefully investigate the domestic-violence and child-protection regimes in any state where the child will reside or visit pursuant to the Agreement. The attorneys typically serve only in an advisory capacity; they are not permitted to participate in mediation sessions. However, some mediation programs permit a trained support person to silently accompany the victim-parent into the mediation and to assist the victim to suspend or terminate the mediation under certain circumstances.²⁰⁷

Confidentiality is a particularly poignant issue in cases involving domestic violence or child abuse allegations. Some jurisdictions mandate that mediators and other designated profession-

205. Where concerns over physical safety or coercion are present, or where financial limitations dictate, international family mediation can sometimes be conducted by teleconference, video-conference or online dispute resolution (ODR).

206. See Silberman, *supra* note 71.

207. See AMERICAN BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT (2008), http://www.abanet.org/domviol/docs/Mediation_1_2008.pdf.

als report any allegations or indicators of family violence, abuse or neglect to appropriate authorities, whereas other jurisdictions leave reporting to the mediators' discretion. Some jurisdictions maintain strictly confidential any communications addressed in-session, whereas other jurisdictions allow the mediator to take the stand and make recommendations to the court based upon the mediation. Reporting domestic violence to authorities in a state that lacks domestic violence remedies and resources or relegates domestic violence to the private sphere could place a victim in grave danger. It is critical that mediators explore and disclose to the parties and their attorney advocates, *prior* to commencing mediation, the applicable reporting requirements and any discrepancies between the states' rules binding each mediator.

System actors and mediators must rigorously pre-screen all mediation cases for domestic violence, and develop effective tools for detecting domestic violence and child abuse indicators (some victims are too afraid or embarrassed to directly communicate allegations). Many contemporary mediation programs require that both parties complete detailed confidential questionnaires prior to mediation to screen for domestic violence and other issues that, if undetected, could potentially endanger the parties or compromise the mediation process and the outcome.²⁰⁸ In her piece on family mediation, Gerencser recommends that mediation programs conduct an interview in addition to using the questionnaire, because many parties have minimal or no formal education and may be illiterate.²⁰⁹ She advocates for state legislative reform to *mandate* vigorous domestic violence screening and mediator training:

Legislatures must require screening by participants at every level, and an exemption from mediation when participants find domestic abuse. Legislatures must also require that all participants, especially family mediators, be trained to recognize signs of domestic violence and abuse. Participants must know about domestic abuse, screen each case to identify abuse, and assume that any alleged abuse did actually occur. If mediation is inappropriate, they should offer alternatives to mediation.²¹⁰

208. For an exploration of domestic violence screening, see Loretta Frederick, "Questions About Family Court Domestic Violence Screening and Assessment," 46 FAM. CT. REV. 523 (2008).

209. Gerencser, *supra* note 150, at 44.

210. *Id.*

Domestic violence screening must begin prior to mediation and continue throughout the process and to its conclusion. A variety of system actors share responsibility for identifying the potential presence of domestic violence or child abuse in an international parental kidnapping case – Hague central authorities, diplomatic officials involved in resolving the dispute, investigating law enforcement officers, social workers, faith-based and community-based organizations that interact with the family, medical services providers, judges, victim-witness advocates, counselors, prosecutors bringing criminal charges against either the batterer or the kidnapper, victims' attorneys, and mediators. All of these system actors and, in particular, family mediators should be rigorously cross-trained to recognize and respond effectively to domestic violence and child abuse. Both BAFM (in Germany) and reunite (in the United Kingdom) emphasize the importance of maintaining a very small cadre of highly-trained, experienced international parental kidnapping mediation specialists.²¹¹ This structure facilitates close monitoring, consistent results, and enables the finite group of designated mediators to achieve substantial subject matter expertise, including rigorous training to identify and address domestic violence and child abuse.²¹²

In most circumstances, at the time the parties enter mediation, the domestic violence allegations have not yet been adjudicated in either civil or criminal court, so there is no formal finding of domestic violence. If and when domestic violence allegations are brought before a court, the judge may determine that there is insufficient evidence or that the violence was mutual. A court's finding of mutual aggression or insufficient evidence does not necessarily reflect an absence of domestic violence or dispel the need for system actors to take precautions. Mediators and attorney

211. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008); *see also* Paul & Walker, *supra* note 202.

212. Certain challenges to this structure are inherent in the U.S. legal system and governance structure. The U.S. federalist system relegates family law and family mediation to the individual states. Mediator standards vary dramatically from state to state. Some U.S. states permit only attorneys to mediate family court settlements while others allow non-lawyers to mediate; some states have a sophisticated mediator licensing scheme while, in other states, almost anybody may hang a shingle and mediate. Some U.S. states mandate minimum continuing education for mediators, while other states have no such requirement. To ensure that mediators possess the appropriate qualifications and expertise, the U.S. would have to train more than fifty mediators, or train mediators extensively in multiple states' mediation regulations and procedures, or train more than fifty attorneys to review stipulated agreements for conformity with state laws and procedures.

advisors can take domestic violence allegations seriously, address safety concerns and take steps to prevent coercion, without presuming the guilt or innocence of the parties.

Mediators of international parental kidnapping disputes involving domestic violence or child abuse allegations may find themselves subject to multiple mediation standards, codes of professional conduct, rules of professional responsibility, and licensing and mandatory reporting requirements.²¹³ The applicable standards may prove fundamentally incompatible, making it difficult to determine which standard to apply in any given case.²¹⁴ Perhaps the most universally effective solution would be to develop an Optional Protocol (to the Hague Convention) that commits to the use of elective mediation to resolve international parental kidnapping disputes, sets forth applicable standards for mediator qualifications and conduct, and details practices for mediating cases involving domestic violence or child abuse allegations.²¹⁵ Any sovereign state in the world, regardless of whether or

213. For example, the mediator (or co-mediators) may be subject to two competing national mediation standards corresponding to the two countries involved in the international parental kidnapping dispute. In some cases, regional mediation standards, such as the European Code of Conduct for Mediators, may be implicated. Where a state with a federal system of government is involved in the dispute, the mediator(s) may be subject to multiple domestic mediator standards, as well. For example, a California mediator might co-mediate a case involving a child located in Hawaii and a left-behind parent in the child's alleged country of habitual residence, the state of Michoacan, Mexico, with a co-mediator located in Mexico's Federal District. In this hypothetical example, at least four mediation standards could be implicated: California's, Hawaii's, Michoacan's, and Mexico City's. And, where a mediator holds a professional license (e.g., lawyers, teachers or healthcare providers), he or she may also be subject to state or federal professional licensing requirements, mandatory reporting requirements, codes of conduct, or rules of professional responsibility. In such circumstances, one standard might mandate absolute confidentiality while the other standard mandates that the mediator report any suspicions of domestic violence to law enforcement authorities. Substantive area-specific (e.g., family law or domestic violence) mediation standards and special Online Dispute Resolution standards could further complicate matters. For an in-depth exploration of international parental kidnapping mediation standards, see Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1, 9-29 (2008).

214. A potential danger of allowing the parties to stipulate which mediation standard will apply is that the family courts of one or both countries may decline to recognize or enforce the resulting stipulated agreement because the mediation process or contract fail to comply with local, state, federal or regional mediation rules.

215. Only an international parental kidnapping (IPK) mediation standard can achieve a high degree of uniformity, consistency and predictability. Hague states party to the Hague Convention that have Hague implementing legislation could amend that legislation to promote elective mediation and to incorporate national or international mediation best-practices standards. See International Child Abduction

not it is party to the Hague Convention, would be able to adopt the Optional Protocol.²¹⁶

The innovative, exploratory nature of states' initial forays into mediating international parental kidnapping disputes, particularly cases involving domestic violence or child abuse allegations, necessitates careful tracking and monitoring, and a high degree of adaptability.²¹⁷ An effective mediation regime *must* address the program's capacity to detect domestic violence and child abuse, ensure the safety of all participants, and prevent coerced agreements.

VII. CONCLUSION

Mediating an international parental kidnapping dispute involving domestic violence allegations is certain to prove precarious, challenging, and controversial. Nonetheless, where the destination state involved in a dispute lacks legal or diplomatic parental kidnapping remedies, is non-compliant with international treaty obligations, or lacks effective domestic violence and child protection institutions, mediation may prove the *only* available mechanism to ensure an abducted child's safety and well-being, secure the child's return to a state that *has* effective protections, or facilitate appropriate access to both parents. Elective mediation can compensate for ineffectual remedies by affording system actors and parents an opportunity to build protective terms into a stipulated agreement and craft a safe, appropriate, cooperative co-parenting regime. Mediation may provide a domestic violence victim charged with international parental kidnap-

Remedies Act, 42 U.S.C. § 11603(2)(A) (1988). However, Hague implementing legislation on point will not solve the problem of incompatible national standards, and it will not necessarily apply in non-Hague cases. In countries with federal systems, model IPK mediation rules could be promulgated (for example, by the U.S. Uniform Law Commission) for state adoption, but this approach fails to address incompatibilities between the involved states' or countries' standards.

216. A state that elects not to adopt the Optional Mediation Protocol could still model aspects of its national IPK mediation standard after the Optional Protocol, treating the Protocol as model legislation.

217. Director Denise Carter of reunite stresses the importance of tracking families following mediation to assess the mediation's efficacy. Interviewers at reunite inquire into the parties' experiences during the mediation procedure; whether they subsequently honored the terms of the mediated Agreement; how long the Agreement functioned before requiring modification; and whether the Agreement proved enforceable in the event of a party's non-compliance with its terms. Both parents and children are interviewed. The reunite mediation model is constantly adjusted according to the results of these surveys. Telephone Interview with Denise Carter, Dir., reunite (Apr. 7, 2008).

ping an alternative to facing criminal prosecution, extradition and incarceration. The option to mediate a mutually agreeable solution could prevent a desperate, disenfranchised parent from taking unilateral actions that place the child, the parent and others at risk of grave harm.

Protectionist mediation bans, whether triggered by domestic violence or parental kidnapping, disempower parents, divest them of agency, and perpetuate harmful gender stereotyping. Domestic violence-based bans have a disparate discriminatory impact on women, and parental kidnapping-based bans disparately impact men, because more women than men report experiencing domestic violence and the majority of international parental kidnappers are mothers. Denying any parent the choice of whether or not to mediate violates international laws and principles that guarantee all persons dignity, non-discrimination, gender equity, equality in the family, shared parenting rights and responsibilities, access to justice and equality before the law. Treating parental kidnapping as a domestic violence remedy, instead of treating domestic violence as a rebuttable affirmative defense to parental kidnapping, does injustice to left-behind parents, summarily deprives children of their right to access both parents, and undermines the rule of law. Addressing domestic violence allegations indirectly, by promoting capricious, discriminatory or excessively protectionist international parental kidnapping laws and practices, detracts from the critical need to implement and reform inadequate domestic violence institutions.

Global domestic violence *and* parental kidnapping advocacy have a very long way to go. The international community continues to spur all states to adopt, reform, implement and enforce laws and practices that protect and empower victims. In the meantime, numerous mechanisms can be employed to mediate international parental kidnapping disputes involving allegations of domestic violence as safely, ethically and effectively as possible. Properly conducted, elective mediation holds promising potential as a mechanism to protect and empower victims of domestic violence *and* victims of parental kidnapping.²¹⁸

218. To join the International Child Abduction Attorney Network (ICAAN), volunteer mediators or attorneys may contact The National Center for Missing and Exploited Children (NCMEC) at (703) 837-6391.