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

Julia Alanen*

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I. INTRODUCTION

Each year, hundreds of thousands of parents kidnap their own children, some of them to international destinations. Parental kidnapping\(^1\) can prove detrimental, dangerous and even fatal

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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.\textsuperscript{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.\textsuperscript{3} Some system actors promote a mediation ban on all cases involving domestic violence allegations.\textsuperscript{4} Considerations surrounding domestic violence allegations in the international context can differ profoundly from those present in a domestic dispute. States\textsuperscript{5} 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 actors\textsuperscript{6} are clamoring for guidance with respect to a critical question: \textit{Should international parental kidnapping disputes be mediated when one parent raises domestic violence allegations against the other parent?}

\begin{justify}
\small
\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{6} I use the term \textit{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.
\end{justify}
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 coparenting 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.

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.  

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.  

Domestic violence victims and their advocates, on the other

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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.


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.\textsuperscript{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 violence\textsuperscript{11} and the majority of international parental kidnappers are mothers.\textsuperscript{12} Two analyses, conducted in 2006 and 2007, of the


\textsuperscript{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.

\textsuperscript{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." \textsc{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, non-discrimination, gender equity, equality in the family, shared parenting rights and responsibilities, equal access to justice, equality before the law and self-determination.

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).


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.


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-

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\(^{21}\) See infra section on "domestic violence-prompted mediation bans" pp. 86-90.


\(^{23}\) "States party" refers to countries that have formally ratified or acceded to the Hague Convention.

mated that in the United States approximately 203,900 children were abducted by a family member in one year. 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. 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. Authorities sometimes fail to respond appropriately to


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.

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.


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


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.  

*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. 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. Formal diplomatic negotia-
tions and bilateral memoranda of understanding between states have sometimes secured a child's return or facilitated parent-child access. They serve to domesticate and enforce foreign child custody decrees.

However, less than half of the world's sovereign states have ratified the sole international civil treaty on point. 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. 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.

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).


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.\footnote{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.\footnote{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).

\footnote{40} Hague Convention, supra note 22, at art. 2.
\footnote{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.  

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.  

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. 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.  

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. 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.

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. 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).


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

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-

52. Id.
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.\(^5\) 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

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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.” By approaching women’s rights from a victimization framework, we may be stripping women of what agency they do possess.

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-

pable of self-representation or autonomy.""\textsuperscript{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."\textsuperscript{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."\textsuperscript{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,\textsuperscript{61} non-discrimination,\textsuperscript{62} gender equity,\textsuperscript{63} equality in the family,\textsuperscript{64} shared parenting rights and responsibilities,\textsuperscript{65} equal access to justice,\textsuperscript{66} equality before the law\textsuperscript{67} and self-determination.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{58} Kapur, \textit{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." \textit{Id.} at 868.
\item \textsuperscript{59} Ratna Kapur, \textit{The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International / Post-Colonial Feminist Legal Politics}, 15 HARv. HUM. RTS. J. 1, 6 (2002).
\item \textsuperscript{60} Kapur, \textit{Post-Colonial Economies, supra} note 56, at 881.
\item \textsuperscript{61} CEAFDW, \textit{supra} note 13, at pmbl.; ICCPR, \textit{supra} note 13, at pmbl.; ICESCR, \textit{supra} note 13, at pmbl.; UDHR, \textit{supra} note 13, at pmbl., art. 1.
\item \textsuperscript{62} ICCPR, \textit{supra} note 13, at art. 2, para. 1; ICESCR, \textit{supra} note 13, at art. 2; UDHR, \textit{supra} note 13, at pmbl., art. 2.
\item \textsuperscript{63} CEAFDW, \textit{supra} note 13, at pmbl., arts. 2-4; ICCPR, \textit{supra} note 13, at pmbl., art. 2(1); ICESCR, \textit{supra} note 13, at art. 3; UDHR, \textit{supra} note 13, at pmbl., art. 2.
\item \textsuperscript{64} GR 21, \textit{supra} note 16, at art. 16; CEAFDW, \textit{supra} note 13, at pmbl., arts. 16(d), 16(f).
\item \textsuperscript{65} GR 21, \textit{supra} note 16, at arts. 16(d), 16(f); CEAFDW, \textit{supra} note 13, at pmbl., arts. 16(d), 16(f).
\item \textsuperscript{66} ICCPR, \textit{supra} note 13, at art. 14.
\item \textsuperscript{67} GR 21, \textit{supra} note 16, at art. 15(1); ICCPR, \textit{supra} note 13, at arts. 14, 26; UDHR, \textit{supra} note 13, at art. 7.
\item \textsuperscript{68} ICCPR, \textit{supra} note 13, at art. 1(3); ICESCR, \textit{supra} note 13, at art. 1; U.N. Charter art. 1(2).
\end{itemize}
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

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.” 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....

The comparatively limited participation of men in parenting, even in developed countries, 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.

Private- and public- sphere rights are inextricably linked;


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.

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

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.

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-

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79. CEAFDW, *supra* note 13, at pmbl. 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." 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." 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." 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."

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. "Laws and legal theory need to remove barriers for men and encourage possibilities." 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."

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 kidnap-
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." And, article 13(b) of the Hague treaty creates a grave risk (e.g., domestic violence) defense to the child's return. 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.

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. Despite the fact that slightly more than half of

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, 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. 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." 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." 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).
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 (ICAAN).
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.


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.
enced 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. 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. 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.”

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.
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. 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. 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).
the possible legal or other ramifications of the victim-kidnapper's actions. 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. The alleged batterer may be the taking parent, the left-behind parent or both parents. 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

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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.


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

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." The concept that a child's rights may supersede its parents' rights raises important questions in parental kidnapping disputes involving domestic violence.

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." 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. The IACHR found human rights to be inherent attributes of human dignity superior to state sovereignty. 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,


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


116. Id. at 155.

117. See id. at 139.
and just compensation.\textsuperscript{118} A state's failure to comply with the due diligence standard would constitute a pattern of discrimination condoning domestic violence against women.\textsuperscript{119}

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

Elective mediation can be characterized as an\textit{empowerment right}, "an indispensable means of realizing other human rights."\textsuperscript{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]"

\begin{thebibliography}{9}
\bibitem{119} See id. at \textsect sect 55-58.
\bibitem{121} CEAFDW, \textit{supra} note 13, at pmbl; ICCPR, \textit{supra} note 13, at pmbl; ICESCR, \textit{supra} note 13, at pmbl; UDHR, \textit{supra} note 13, at pmbl., art. 1.
\bibitem{122} ICCPR, \textit{supra} note 13, at art. 2(1); ICESCR, \textit{supra} note 13, at art. 2; UDHR, \textit{supra} note 13, at pmbl., art. 2.
\bibitem{123} CEAFDW, \textit{supra} note 13, at pmbl., arts. 2-4; ICCPR, \textit{supra} note 13, at pmbl., art. 2(1); ICESCR, \textit{supra} note 13, at art. 3; UDHR, \textit{supra} note 13, at pmbl., art. 2.
\bibitem{124} GR 21, \textit{supra} note 16, at art. 16; CEAFDW, \textit{supra} note 13, at pmbl., arts. 16(d), 16(f).
\bibitem{125} GR 21, \textit{supra} note 16, at arts. 16(d), 16(f); CEAFDW, \textit{supra} note 13, at pmbl., arts. 16(d), 16(f).
\bibitem{126} ICCPR, \textit{supra} note 13, at art. 14.
\bibitem{127} GR 21, \textit{supra} note 16, at art. 15(1); ICCPR, \textit{supra} note 13, at arts. 14, 26; UDHR, \textit{supra} note 13, at art. 7.
\bibitem{128} ICCPR, \textit{supra} note 13, at art. 1(3); ICESCR, \textit{supra} note 13, at art. 1; U.N. Charter art. 1(2).
\end{thebibliography}
exclusion from representing their children.\textsuperscript{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 \textit{de facto} disparate discriminatory impact on women – more women than men report experiencing domestic violence and the majority of international parental kidnappers are mothers.\textsuperscript{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.\textsuperscript{132} According to the United Nations General Assembly, all men and women are entitled to enjoy certain fundamental human rights including, \textit{inter alia}, rights to life, equality, and security.\textsuperscript{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.

\textbf{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,


\textsuperscript{131} See \textit{reunite} Report, supra note 12.

\textsuperscript{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.

regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children."\textsuperscript{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,"\textsuperscript{135} and that "the child . . . shall have the right to know and be cared for by his or her parents."\textsuperscript{136} In essence, this principle is tantamount to a presumption in favor of joint-parenting.\textsuperscript{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.\textsuperscript{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

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\item\textsuperscript{134} GR 21, \textit{supra} note 16, at \S\ 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).
\item\textsuperscript{135} Convention on the Rights of the Child, \textit{supra} note 109.
\item\textsuperscript{136} \textit{Id.} at art. 7.
\item\textsuperscript{137} Like most legal presumptions, it should be rebuttable.
\item\textsuperscript{138} Lisa G. Lerman, \textit{Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women}, 7 \textsc{Harv. Women's L.J.} 57 (1984).
\end{itemize}
\end{footnotesize}
serve his or her interests, or those of the child.\textsuperscript{139}

 Nonetheless, where the states involved lack legal or diplo-
matic 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,\textsuperscript{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 uncer-
tainty of litigation and maintain greater control over the outcome
of the dispute.\textsuperscript{141} In some cases, mediation can even improve com-
unication, facilitate collaborative parenting, and diffuse under-
lying conflicts that motivated or exacerbated abuse.\textsuperscript{142} While there
is never a valid excuse for domestic violence or abuse, it is always

\textsuperscript{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.

\textsuperscript{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. \textit{See, e.g.}, Jeanine Lewis, \textit{The Hague Convention on the Civil Aspects of
International Child Abduction: When Domestic Violence and Child Abuse Impact the

\textsuperscript{141} For more on the potential benefits of family mediation, see Nancy Ver Steegh,
\textit{Yes, No, Maybe: Informed Decision Making About Divorce Mediation in the Presence
of Domestic Violence}, 9 WM. & MARY J. OF WOMEN & L. 145 (2003); \textit{see also}

\textsuperscript{142} \textit{See generally} Luisa Bigornia, \textit{Domestic Violence: Alternatives to Traditional
Criminal Prosecution of Spousal Abuse}, 11 J. CONTEMP. LEGAL ISSUES 57 (2000); Katherine Kitzmann & Robert Emery,
\textit{Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes}, 8 J. FAM. PSYCHOL. 150 (1994); Rene
L. Rimelspach, \textit{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 process\(^{146}\) to balance negotiating power, and protect and empower victims).\(^{147}\) And, in some jurisdictions,

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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.\(^\text{148}\)

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.\(^\text{149}\)

Where pre-screening reveals domestic violence allegations, Alison Gerencser asserts that the parties should be permitted to opt out of otherwise mandatory mediation.\(^\text{150}\) 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

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

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

\[^{150}\text{Alison E. Gerencser, Family Mediation: Screening for Domestic Abuse, 23 Fla. St. U. L. Rev. 43, 55 (1995).}\]
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.\textsuperscript{161}

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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{154}

Salem and Dunford-Jackson observe that:

\textsuperscript{151} Id. at 47.
\textsuperscript{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.
\textsuperscript{153} Id.
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. 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." 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."

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. 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.
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{161} Germany's international parental kidnapping mediation program (BAFM) is also committed to offering mediation in cases involving domestic violence allegations.\textsuperscript{162}

\textbf{B. Factors Unique to the International Context}

Considerations surrounding domestic violence allegations in the \textit{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-

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\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. Interestingly, Carter acknowledged that in \textit{domestic} disputes involving domestic violence, the United Kingdom does deny victim parents the option to elect to mediate. \textit{Id.}
\item \textsuperscript{161} See reunite report, \textit{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]." \textit{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 \textit{did} impact the parties' participation, the participants reported that reunite's safeguards made them feel safe, and the mediation was ultimately not compromised. \textit{Id.} at 48. Ninety-two percent of participants felt "safe on arrival" and "in the waiting area" and when "leaving the premises." \textit{Id.} at 17. "Some were hindered in the first hour but in all cases this was resolved." \textit{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." \textit{Id.} at 48.
\item \textsuperscript{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-meditation.de/international/english/mediation-in-international-conflicts-involving-parents-and-children-project-description/.
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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." Despite these concerns, Duncan writes that:

"In 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."

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:

"The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . . ."

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

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164. *Id.*
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.\textsuperscript{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 rati-
fied the treaty, and the treaty is not automatically binding as between states party.\textsuperscript{163} Even as between two states party, a sig-
nificant number of elements must be met in order for the treaty to be invoked.\textsuperscript{169} Procedural disparities between states’ legal systems

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\item \textsuperscript{167} See Hague Convention, \textit{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 \textit{not} require the abducting parent to return.
\item \textsuperscript{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, \textit{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.
\item \textsuperscript{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 \textit{exercising} those custody rights (or would have exercised them \textit{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.
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account for additional frustrations and misunderstandings.\textsuperscript{170} Differences between states’ domestic family law systems result in inconsistencies in the treaty’s application or obstacles to compliance.\textsuperscript{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.”\textsuperscript{172} Misconceptions about states’ abilities to respond effectively to domestic violence lead to improper Hague return denials.

\textsuperscript{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 \textit{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, \textit{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).

\textsuperscript{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, \textit{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.”

\textsuperscript{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 bi-national 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. 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.

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. 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.


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

Where the kidnapper's destination state offers no legal or dip-
lospheric remedies to resolve international parental kidnapping dis-
putes, mediation could prove the only viable mechanism to recover
the child or facilitate parent-child access. Most states do not recog-
nize 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. 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 disen-
franchised from the legal system, the temptation to orchestrate a
snatch-back can be overpowering. Snatch-back scenarios have
the potential to endanger the child. Mediation may prevent a des-
perate, disenfranchised parent from taking unilateral action that
places the child and others at risk of grave harm.

cis_1765.html (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
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.

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." 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.

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.

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

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.
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. 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.

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. 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 Exiang 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).

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.

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

See supra note 46.

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


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-

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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.

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. 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. 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.

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.  

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.

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. The applicable standards may prove fundamentally incompatible, making it difficult to determine which standard to apply in any given case. 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.

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.\footnote{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.\footnote{217} An effective mediation regime \textit{must} address the program's capacity to detect domestic violence and child abuse, ensure the safety of all participants, and prevent coerced agreements.

\section*{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 \textit{only} available mechanism to ensure an abducted child's safety and wellbeing, secure the child's return to a state that \textit{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-

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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.

\footnote{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.

\footnote{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).
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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

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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.