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The place of domestic violence in the Hague Convention of 1980. Is domestic violence consistent with the principle of prompt return and the use of international family mediation?

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**UNIVERSITÉ
DE GENÈVE**

**The place of domestic violence in the Hague
Convention of 1980**

*Is domestic violence consistent with the principle of prompt return
and the use of international family mediation?*

University of Geneva

Faculty of Social Sciences

Master's degree in Political Science with an orientation in Comparative Politics
and International Relations track

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1. Introduction

1.1. The international Social Service

The present paper aims to complete an internship I did in the International Social Service's General Secretariat (ISS) from November 1, 2020 to February 10, 2021. The ISS is an NGO which defends children's rights throughout the world. They are just as involved in advocacy as they are in the establishment and the development of international standards related to the care of children deprived of their family or at risk of being so. As many NGOs in Geneva, the ISS does cross-border services and benefits from an important network which allows it to treat various intercountry caseworks. After several weeks spent documenting myself on the NGO's different poles, I finally decided to focus on the International Family Mediation's pole. I chose, as the subject of my report, the phenomenon of cross-border child abduction by one of its parents, due to domestic violence, and the use of international family mediation (IMF) as a dispute resolution. To be completely honest, I did not know much about this topic before entering the ISS but the NGO played a major role in the development of this practice worldwide, so I had plenty of documents to learn about it. The ISS gave me not only full access to their archives but also an initial contact with several international family mediators. This internship has been very useful in my research process and made me understand the role of coordinator played by the NGO. Indeed, the ISS is particularly involved in the institutionalization of the international family mediation. In 2014, the organization created a guide to international family mediation to inform people of the possible use of mediation in issues of divorce, separation and parenting. The guide, thus, offers an alternative to costly and time-consuming legal procedures. This guide is intended to be comprehensive and includes information, testimonials, empirical studies and practical advice directly addressed to parents. Moreover, the ISS guide has been supported by Ms Bartsch, who represented the Permanent Bureau of The Hague Conference on Private International Law, which gives it an international legitimation. In addition to this contribution, the ISS published in 2017 the "Charter for International Family Mediation Processes: A Collaborative Process" which is considered an international reference document. This charter is the result of an international working group composed of 55 professional mediators from the seven continents and should serve to strengthen the dialogue and cooperation between mediators and administrative and legal authorities. The ISS General Secretariat played the role of facilitator and coordinator and had the privilege of bringing together all specialized structures and networks as well as independent professional mediators

working for public services or within the ISS network. This charter, initiated by the NGO and used worldwide, represents a huge step forward in the development of international family mediation. Thus, this stimulating environment allowed me to write this report in the best possible conditions.

1.2. Global framework

In 1991, Sally Field was the main character in a movie entitled “Not Without my Daughter” in which she played an American wife living with her Iranian husband and their daughter in the United States. In a few words, the movie illustrates the case of a parental child abduction by her father who decides to take his daughter to Iran where he has family. He detains the child there and refuses to return her to the United States. During the entire movie the mother tries to bring her daughter back to her country of birth which she eventually manages to do by having someone kidnap her back (Messitte, 2020).

The movie, made 30 years ago, portrays a phenomenon that is still present nowadays. Indeed, the issue of international child abduction, is not new and represents an extremely serious global problem. International child abduction, usually by one of the parents, is a current and relevant topic due to the considerable increase in the number of cases detected (Mondekova, 2013). This particular abduction act generally refers to “the “wrongful removal” or “wrongful retention” to another country of a child by the child’s parent or guardian” (González, 2015).

For many years, the situation was particularly fraught because many countries automatically or consistently preferred the native-born kidnapping parent, clearly approving or at least accepting the retention of the child in its native country (Messite, 2020). Sadly, this was where most stories ended. However, in 1980, several nations decided to negotiate a multilateral treaty developed by the Hague Conference on Private International Law (HCCH): *The Hague Convention on the Civil Aspects of International Child Abduction*. The aim of this convention is to secure the prompt return of the child, under the age of 16, who has been wrongfully removed to or retained in another country than her/his habitual residence (Dejonghe, 2019). In 2020 the convention has been signed by more than 100 states and is largely approved, even though important states, such India or Jordan, have not ratified it yet (De Ruiter, 2020)¹. The Convention has been signed by every European country (Dejonghe, 2019). However, as

¹ The list of all the countries that have signed the Convention can be found at the following address: <https://www.hcch.net/fr/instruments/conventions/status-table/?cid=24>, (accessed on April 20, 2021).

globalization grows, so have child abductions. Indeed, international child abduction, usually by one of the parents, remains a current and relevant topic due to the considerable increase in the number of cases detected (González, 2015). Between 1995 and 2010, the number of abduction cases reported worldwide increased by 164% (Mondekova, 2013). The rise in cases continued and researchers noticed an increase of 88% from 2010 to 2017 (Gaille, 2017). In 2019, *Missing Children Europe* recorded 7582 calls involving cases of missing children and 22.7% were cases of parental abductions². The most telling example of the magnitude of the problem is the case of the United States. In the U.S., approximately 200'000 children are abducted by a family member every year (Pahrand, 2017). It is notable that the U.S. play an important role in the transparency of data regarding international child abduction and contribute, through its “Annual Reports on International Child Abduction” to highlight the non-signatory states³. Thus, it confirms that, in 2019, 41 percent of requests for the return by American citizens of abducted children in India remained unresolved for more than 12 months (Morley, 2019). On average, these cases were unresolved for 3 years and 6 months (Morley, 2019). This kind of information contribute to pressure non-signatory countries and to emphasize the role of the Hague Convention.

The international child abductions expansion may be explained by several factors. First, the internationalization of family relations (González, 2015). Economic globalization implies a boost of international travel, tourism, university exchanges and chosen or forced migration. This international mobility may be one of the reasons to explain the increases of bi-national marriages and thus international child abductions. Secondly, the crisis of family as an institution, and more specifically of marriage as an institution, as well as the increasing number of crises among couples account for this rise (González, 2015). Lastly, now there is an establishment of a progressive legal framework (González, 2015). Indeed, the adoption of community and international instruments specifically dedicated to this phenomenon had become necessary in view of the awareness of the impact on the child (De Ruiter, 2020). Some of these instruments have been written by the Hague Conference on Private International Law, an intergovernmental organization whose purpose is to contribute to the progressive

² Missing Children Europe. [Online], <https://missingchildren.ch/nos-actions/etudes-statistiques>, (accessed on April 20, 2021).

³ The list of all U.S. Annual Reports on International Child Abduction can be found at the following address: <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/legal-reports-and-data/reported-cases.html>, (accessed on April 20, 2021).

harmonization of private international law rules (Dejonghe, 2019). In 2021, the Hague Conference is composed by 87 members (86 states and the European Union) and there are currently 72 parties that are not members of the Hague Conference but have signed, ratified or acceded to one or more Hague Conventions (Dejonghe, 2019). Indeed, states do not need to be members of the Conference to be part of the Conventions (Dejonghe, 2019).

The first convention adopted by the Hague Conference is the *Hague Convention of 1980 on the Civil Aspects of International Child Abduction*. Its role is to combat international child abduction as we have explained above. The Convention establishes a presumption that the return of the child to the state of her/his habitual residence is in her/his best interests and, hence, it wants to restore the *status quo ante raptum* (Perez-Vera, 1982: 431). To guarantee the prompt return of the child, the Convention imposes on the contracting states a reference period of six weeks to decide on the request for return (Perez-Vera, 1982). This first judicial decision will not have any influence on the merits of the conflict, which will be made by the court of the child's state of habitual residence, established before the abduction⁴. In order to reach this objective, the Convention asks for the creation of a Central Authority responsible for the cooperation between the judicial and administrative authorities of the contracting states (Perez-Vera, 1982). The Central Authorities have to ensure the immediate return of the child and achieve the other objectives of the Convention such as her/his localization and facilitate her/his voluntary surrender⁵. In addition, five Guides of Good Practice have been published to facilitate the practical implementation of the Hague Convention which only have a theoretical value (Dejonghe, 2019).

The second convention adopted by the Hague Conference is the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* which was created has a support and a complement of the first Convention (Lagarde, 1996). It covers, on one hand, civil measures of protection concerning children, ranging from orders concerning parental responsibility and contact to public measures of care or protection⁶. On the other hand, it covers matters of representation regarding the protection of children's property⁷.

⁴Hague Convention of 25 October 1980, supra, Article 16.

⁵Hague Convention of 25 October 1980, supra, Article 7.

⁶Hague Convention of 19 October 1996, supra.

⁷Hague Convention of 19 October 1996, supra.

In parallel, an *International Hague Convention Network of judges* has been created and aims to ensure the effective operation of the Hague Conventions between the contracting states, through direct judicial communications between the judges of this Network (Dejonghe, 2019).

In addition, the European Council has produced two supplementary regulations in order to clarify and update these conventions (Dejonghe, 2019). This is how the regulation *Brussels Ibis* appeared in 2003 (Motte, 2016). Its role is to promote cooperation between European institutions regarding family law which includes preventing and combating child abduction (Motte, 2016). This regulation concerns all European Union members' states, except Denmark (Dejonghe, 2019). It is on the same guideline as the Hague Convention of 1980 regarding the principle of prompt return of the child and makes it easier by promoting free circulation of return orders between Member States based on the principle of mutual trust (Pfeiff and Collienne, 2009).

In June 2019, the second version of this regulation called *Brussels Ibis(recast)* was adopted. It will be applicable from August 1, 2022, to previously drawn up legal instruments, as well as previously agreements registered and initiated legal actions (Dejonghe, 2019). This second regulation was established to correct several imperfections of the first legislation and to complete it (Motte, 2016). The changes made to the original version concern the simplification of private agreements and authentic acts, the creation of new delays of procedure and the promotion of the use of family mediation (Dejonghe, 2019).

As we can observe, the legal framework regarding international child abduction has become more detailed and seeks to encompass all possible scenarios. The legal and institutional focus on such a phenomenon and the highlights of this practice may greatly contribute to the expansion of identified cases of abduction. Indeed, the more detailed the law will be concerning this topic, the more these abductions, which have always existed but never been so legally highlighted, will be punished.

Nevertheless, although the Hague Convention of 1980 has been modified and completed with other regulations since its ratification, some problems remain. Indeed, in this paper we are going to focus on a particular issue of the Convention; the cases of international abductions due to domestic violence. As we will explain clearly later in this report, the drafters of the Convention did not anticipate the phenomenon of mothers abducting their child to escape domestic violence (Tuohley, 2005). It is on these cases that we will concentrate.

This paper will be divided into two specific but complementary parts. In the first part we will analyze the principle of prompt return and its legitimation in cases involving domestic violence. First of all, we will introduce in detail this main element of the Hague Convention and see how it has been impacted by the gender change of the abductor. Then, we will examine and discuss with several interviewees the current use of this principle in such cases and whether it does serve the child's best interests. In the second part of our report, we will concentrate on the possible use of international family mediation as a useful alternative conflict resolution process for cases involving domestic violence. Indeed, despite the fact that international family mediation is promoted by the Hague Convention and the regulation Brussel Ibis(recast), the specific aspects of couples, or ex-couples, where there is domestic violence make it difficult, but not impossible, to proceed to mediation (Jaumotte, 2015). Thus, we will discuss the countabilities and uncountabilities of international family mediation and domestic violence in order to determine if such a method can be used. Again, to complete our study we will interview several international specialists with the view to receive their opinions and experiences.

2. Research Puzzle

2.1. The principle of the prompt return of the child and domestic violence

In 2021, we are celebrating the 38th anniversary of the creation of the Hague Convention on the Civil Aspects of International Child Abduction, a treaty that has made easier “the prompt return of children wrongfully removed or retained in any Contracting State “(González, 2015: 356) which means the quick return of the child to her/his habitual home. For more than 30 years the rational underpinning the 1980 Hague Convention remained virtually unchallenged (González, 2015). The common view was to say that a wrongfully retained or removed child should come back to her/his state of habitual residence and her/his return should be executed without delay to decrease the harmful effects of unilateral action (McEleavy, 2015). At that time, return was thought to be the best option for the child as affirmed by Pérez-Vera in her Explanatory Report on the 1980 Hague Convention (1982). She explains: “The two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the “best interests of the child” (Pérez-Vera, 1982: 432). The drafters thought it was beneficial in two ways (Tuohley, 2005). It was a way to deter unilateral action and it would offer an effective framework for the child of a divided international family unit to keep in touch with both parents (McEleavy, 2015).

Exceptions to the obligation to secure the prompt return of the child are justified only in exceptional circumstances including where “there is a grave risk that her/his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”⁸. It was recognized that, in a small number of cases, a repatriation might not be in the interest of the child and so exceptions were incorporated, which, if established, would provide courts with a discretion as how to proceed⁹. The drafters of the Convention considered the policy of prompt return to be in the best interest of the child generally. However, since its ratification in 1980, new issues and challenges have surfaced, the most important being the quickly changing proportion of mothers and fathers abducting, with mothers becoming the major abductors in most of the signatory-states, even sole abductors in some (McEleavy, 2015). The initial paradigm of the non-custodial father abducting to gain more control over the life and cultural/religious upbringing of the child is, hence, being substituted by mother abductors, who are, in most cases, the primary carers of the children (Mondekova, 2013). The main reasons and motivations for abducting the children by mothers may provide help in grasping the actual nature of the phenomenon (Mondekova, 2013). A combination of elements might be responsible for this situation such as women’s empowerment, more women having sufficient or higher education and a rise in cross-border mobility. These factors permit women to travel, relocate and ultimately proceed with the abduction (Mondekova, 2013). As we have explained above, we are going to focus on a specific motivation for women to abduct their children: escape from domestic violence.

According to Lubin (2005) and Norris (2010), domestic violence seems to be one of the main reasons for the growing numbers of abductions. As Norris (2010) argues, due to domestic violence and the home state’s failure to guarantee women’s protection, lots of them decide to flee the country. Despite the fact that domestic violence has reinforced and gained in relevance in the past decades, the specific context when a child is also removed across borders has made a very different response emerged (Mondekova, 2013). It is a surprising paradox to notice that the maternal abductors have become more and more frequent in many regions and yet, the changing nature of the phenomenon is almost not reflected in the legal practices of different countries (Mondekova, 2013). Consequently, the abducting mother hence holds is in a very ambiguous situation; on one hand escaping from domestic violence looking for safety for both

⁸ Hague Convention of 25 October 1980, *supra*, Article 13(1)(b).

⁹ Hague Convention of 25 October 1980, *supra*, Article 13(1)(b).

the child and herself and opposed to the return, either based on the affirmations regarding the child as the “direct victim”, or as the “indirect victim” where the child confronts to the effects of domestic violence directed towards the mother, and, on the other hand, transgressing international law (Mondekova, 2013)¹⁰. The “grave risk of harm” advocate may also be raised in cases where the abducting mother is not able to return with the child because of the fear of the child’s father; the resulting separation from the primary carer mother may be considered to be a grave risk for the child (Trimmings and Onyoja, 2021).

However, even if there has been a change in how we think about domestic violence which has positively affected the way we view that topic in legal framework, the situation significantly changes when a child is involved (Hester, 2011: Norris, 2010). The reality of escaping domestic violence often takes a back seat and, as Norris (2010) argues, is not taken into consideration by courts (Norris, 2010). The best interests of the child are defined simply in terms of her/him being able to return to her/his place of habitual residence (Mondekova, 2013). The mother's reasons for fleeing, namely domestic violence, are considered secondary by the court, as well as by the Convention (Norris, 2010). The mother herself is often seen as an enemy of the child (Mondekova, 2013). She is characterized first and foremost by her act of abduction and the context of domestic violence may not be even considered relevant (Mondekova, 2013).

Although domestic violence against the abducting mother might present an article 13(1)(b) defence: “[e]vidence of the existence of a situation of domestic violence, in and of itself, is [...] not sufficient to establish the existence of a grave risk to the child”¹¹. The application of the grave risk of harm defence is limited to a strict minimum in intra-EU child abduction cases as Article 11(4) of the Brussels IIa Regulation prevents a court from rejecting the return of the child on the basis of Article 13(1)(b) of the Convention if it is stated that adequate dispositions have been made to guarantee the protection of the child after her/his return (Trimmings and Onyoja, 2021). The key question is whether the effect of domestic violence on the child upon her/his return to the state of habitual residence will meet the high threshold of the Article 13(1)(b) exception. Arguably, this evaluation can only be reliably executed if a prior evaluation

¹⁰ Permanent Bureau of the Hague Conference on Private International Law, ‘Draft Guide to Good Practice on Article 13(1)(B) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’.

¹¹ Permanent Bureau of the Hague Conference on Private International Law, ‘Draft Guide to Good Practice on Article 13(1)(B) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’.

of the merits of the allegations of domestic violence has been undertaken by the court in the return proceeding which is not always the case (Trimmings and Onyoja, 2021).

In addition, once the principle of prompt return is applied, the child and the mother have to come back to the state of original residence. However, despite the establishment of conventional mechanisms, "the law cannot resolve everything in these conflicts where the emotional, psychological and relational aspects take precedence" (Ganancia, 2004: 326). As previously stated, international parental abductions affect the parties beyond the jeopardizing of their legal situation. This unilateral act committed is in absolute contradiction with the prosperity of the child, it generates indelible traces at this innocent age (Dejonghe, 2019). The practice of these conventional mechanisms has shown that they are not able to fully meet the expectations of the parties facing this family dispute (Dejonghe, 2015). Because of the complexity of these events, their resolution transcends the legal sphere (Dejonhe, 2019). A multidisciplinary approach is recommended, in order to offer several possibilities of resolution (Pali and Voet, 2012). This approach gives the parties a free choice, depending on the particularities of the case. Indeed, there has been a growing understanding and recognition of the fact that traditional family dispute resolution does not always ease the conflict within the family and might impact the child, particularly in cases of domestic violence (Katarina and Onyojs, 2021). This observation gave rise to the desire to apply alternative approaches and, since the 1980s, such approaches have been developed to deal with relationships during post separation and divorce, named by the literature as the alternative dispute resolution process (Emery, Sbarra and Grover, 2005; Pali and Voet, 2012).

2.2. Alternative Dispute Resolution Methods

Many alternative dispute resolutions have been established on the basis of a consensual approach, that means that the parents themselves decide the procedure and the result (Pali and Voet, 2012). In this section, we will concentrate on family mediation as a possible dispute resolution method involving domestic violence. However, before analyzing the use of mediation in cases of domestic violence in depth, it is important to differentiate, first of all, the different existing methods of alternative dispute resolution in order to have a complete picture of the different possibilities. To do so we will clarify very briefly some of the main terms used in the field of alternative dispute resolution. The purpose is to clarify the differences between several approaches and mediation. In a second step, we will aim to describe what family

mediation is, compared to other types of mediation. Finally, we will question the possible use of international family mediation in cases of domestic violence.

2.2.1. Approaches of alternative dispute resolution

Conciliation

Conciliation is a method used in some of the civil law countries like France, Spain or Italy where it is more established than mediation (Pali and Voet, 2012). The aim of the process is to build a positive relationship between the parties in dispute (Pali and Voet, 2012). Although there are multiple similarities with mediation, which explains its interchangeability with it, conciliation differs on several points (Pali and Voet, 2012). The conciliator has an active role; she/he is impartial and helps the parties by structuring their negotiations and guiding them to an agreement (Pali and Voet, 2012). The conciliator plays an active role in the discussion by advising the parties and making precise suggestions for reconciliation (Pali and Voet, 2012). Unlike mediation, in which the mediator maintains her/his neutrality and impartiality, the parties, in a conciliation, look for guidance and find agreements based on the proposals made by the conciliator (Pali and Voet, 2012). In contrast to mediation which the mediator structures through different steps like introduction, joint session, caucus and agreement, the conciliator does not follow an agreed process but instead, drives the resolution process as a traditional negotiation process (Pali and Voet, 2012).

In addition, conciliation, on the one hand, is exploited almost preemptively. From the moment a conflict or misunderstanding emerges, a conciliator prevents a substantial dispute from expending (Pali and Voet, 2012). Mediation, on the other hand is used after the establishment of a dispute which is difficult to resolve without professional assistance, because both parties admit that their conflict has grown potentially serious (Pali and Voet, 2012).

Negotiation

Negotiation is a dispute resolution process in which two or more participants intend to find a joint decision on a shared issue in situations where they are in disagreement or dispute (Pali and Voet, 2012). Unlike mediation, a third party is required (Pali and Voet, 2012). Instead, the participants have the responsibility to decide the terms of any settlement (Pali and Voet, 2012). The process of negotiation is informal, voluntary and without a defined method regarding the presentation of arguments (Pali and Voet, 2012). Finally, if an agreement is reached, the arrangement is not subject to judicial review (Pali and Voet, 2012).

Adjudication

This method usually refers to the processes of decision-making which involves a neutral third party with the power to determine a binding resolution through some form of judgement (Pali and Voet, 2012). There are many forms of adjudication, such as a dispute resolution process outside the court, but it ordinarily takes place in a court system (Pali and Voet, 2012). The parties present their case to the adjudicator whose role is to study the different facts presented and make a decision based on legal forms, which are definitive, irrevocable and enforceable (Pali and Voet, 2012).

Facilitation

Facilitation is a procedure by which a third party supports the coordination of the activities of a group, serves as a process intermediary during reunions, or helps a group prevent or manage tension and usually moves toward decisions (Pali and Voet, 2012). Its role can vary from simple group coordination and meeting the management to intensive multi-party dispute mediation (Pali and Voet, 2012). Just like the dispute resolution we saw above, facilitation is voluntary and not a public procedure (Pali and Voet, 2012).

Arbitration

Arbitration refers to a process where the parties in conflict expose their dispute to an arbitrator or a group of private, independent and professional arbitrators (Pali and Voet, 2012). As in the mediation process, the parties choose their arbitrator who acts as a private person and not as an official authority mandated by a court (Pali and Voet, 2012). The parties often select an arbitrator who has a specific expertise in the nature of their dispute (Pali and Voet, 2012). Arbitration has limited jurisdiction which is mostly defined by the construction of the respective arbitration consent (Pali and Voet, 2012). A conflict that may, in another way, go to court might be handled through arbitration with the agreement of the parties. In that regard, arbitration is tied to a contract (Pali and Voet, 2012). Thus, the procedure is adjudicatory or determinative but not binding or executory, unless commissioned by a court (Pali and Voet, 2012). However, arbitration can also be ordered by a court whereby the arbitrator is nominated by a judge or government official (Pali and Voet, 2012).

Mediation

Mediation is a process in which disputants are assisted by a neutral and impartial third party, the mediator (Pali and Voet, 2012). The mediator's role is to help resolve conflict by facilitating discussion and negotiation and encourage the disputants themselves to reach a mutual satisfactory settlement (Pali and Voet, 2012). The mediation procedure is voluntary and the parties choose their mediator (Pali and Voet, 2012). The process is private and confidential and not open to the public (Pali and Voet, 2012). Despite the flexibility of mediation, the process is structured with a panel of procedural stages and a particular ensemble of protocols (Pali and Voet, 2012).

The entire mediation procedure is based on the fact that the mediator is impartial and does not have the power to enforce an agreement on the parties (Pali and Voet, 2012). On the other hand, the duty of the mediator is to help parties in the creation of a deliberate, functional and lasting settlement (Pali and Voet, 2012). In addition, in mediation, parties are allowed to stop the process whenever they want and refer the dispute to the court system or arbitration (Pali and Voet, 2012). If an agreement is found between parties, that settlement can subsequently be made enforceable as a contract (Pali and Voet, 2012).

As we mentioned earlier, mediation is a flexible process and the practice of mediators vary greatly (Pali and Voet, 2012). In most cases, mediators spend at least some time discussing with parties together but practices vary regarding private and separate sessions with the disputants (Pali and Voet, 2012). However, the practices of mediators differ on other points. For example, some mediators focus the process on the strengths and weaknesses of the parties' legal arguments (Pali and Voet, 2012). Some mediators encourage the presence of lawyers, while others desire to minimize their participation (Pali and Voet, 2012). Others prefer to avoid the legal dimension and focus on the underlying interests and needs of the disputants (Pali and Voet, 2012).

In research on mediation, scholars have defined different types of mediation, such as mediation in labor disputes, understood in labor law as a continuation of private company or collective autonomy by other tools, namely as a mediation process with a mediator as a neutral "manager of negotiation" (Hans-Juergen, n.d.), but also mediation in civil and commercial disputes, also called interest-based mediation, which works on the same guidelines as the "general" mediation we explained above¹². In those cases, parties involved in a lawsuit are encouraged to use mediation in order to define their interests and succeed in co-producing an agreement which

¹² What is Civil/Commercial Mediation?, *Mediation International*, [Online], <https://mediationinternational.eu/what-is-civil-commercial-mediation/> (accessed on April 27, 2021).

their all support¹³. No solution or agreements are imposed by the mediator¹⁴. We can also cite neighbor mediation, also called “community mediation” which acts like interest-based mediation but with the aim that the mediation process goes beyond merely solving disputes in the neighborhoods or between families (Kichamu Lusisa, 2010). First of all it aims to bring about efficient communication in order to establish trust among parties in dispute (Kichamu Lusisa, 2010). Secondly, mediation is used as a response to the ineffectiveness of legal solutions in neighbor and community conflicts (Kichamu Lusisa, 2010). In another context, mediation is also applied in cases of a crime between the victim and the perpetrator (Bright, n.d.). Victim/offender mediation is a process which provides the victims involved with an opportunity to meet their offender in a safe and structured setting and engage in a mediated discussion of the crime (Bright, n.d.). Helped by a mediator, the victim is able to tell the offender about the crime’s physical, financial and emotional impact in order to receive responses to lingering questions about the crime and the offender (Bright, n.d.). The purpose of the mediation is for the victim to be directly involved in developing a restitution plan for the perpetrator to pay back his or her financial debt (Bright, n.d.).

However, the objective of this report is not to develop an exhaustive theory for every social practice that could possibly be defined as mediation. We will only concentrate on family mediation which will be defined below.

2.3. Definition of International Family Mediation

To date, no official definition has been established but we can cite the relevant International Social Service’s definition:” International family mediation is a structured process in which an unbiased mediator enables members of a family in crisis, generally the parents, to speak in a constructive way about their conflict” (Caratsch, 2014:6). In the international cases, mediation helps separated or separating couples, living in two different countries, to re-establish communication and to seek agreements on their own in a spirit of parental co-responsibility (Dejonghe, 2019). The purpose of international family mediation is to resolve the conflict through communication and exchange and examine solutions, taking into account the needs of

¹³ What is Civil/Commercial Mediation?, *Mediation International*, [Online], <https://mediationinternational.eu/what-is-civil-commercial-mediation/> (accessed on April 27, 2021).

¹⁴ What is Civil/Commercial Mediation?, *Mediation International*, [Online], <https://mediationinternational.eu/what-is-civil-commercial-mediation/> (accessed on April 27, 2021).

each of them and particularly those of the children, with the aim to get an agreement that works for all family members (Caratsch, 2014).

This subject, that is international family mediation, has been addressed in a variety of international forums and took an important place in the Hague Convention. Most of the Hague Family Conventions explicitly encourage mediation for finding relevant solutions on cross-border family disputes and soft law initiatives have been implemented (González, 2011). The interest in mediation expressed by the Hague Convention is reflected in the fifth Guide to Good Practice, written in 2012 and dealing exclusively with this subject (Dejonghe, 2019). This guide is very precise and contains many recommendations. It contributes to the harmonization of the implementation of this mediation between contracting and non-contracting states (González, 2015). As mentioned earlier, emphasis was placed on the promotion of amiable compromises and thus the encouragement of alternative dispute resolution processes through mediation by the agency of a current Guide to Good Practice on Mediation (González, 2015).

The interest of the procedure is the presence of a neutral and impartial third party, the mediator, who helps parents to resolve their dispute (Caratsch, 2014). The mediator's role is to encourage and facilitate discussion between the parents to reach a mutually acceptable agreement on their own (Caratsch, 2014). As a voluntary process, the parents can choose the person who will act as mediator (Pali and Voet, 2012). The mediation sessions are private and confidential, which provides an intimate setting in which participants feel comfortable and can clearly express their views (Pali and Voet, 2012). However, despite its flexibility, mediation is regulated by a structured process (González, 2015). In this context the mediator "assumes that the parents are the most equipped agents to make good decisions about the needs of their children" and "even if parents want to make child-rearing decisions with which the mediator does not personally agree, her/his job is not to interfere" (Mayer 2004:256). The mediator's role is to focus on helping the parties articulate and evaluate their own fears (Salminen, 2018). During the mediation, it is up to the parents to determine what the discussion is about and if there is, for example, need for a legal discussion (Salminen, 2018).

2.4. The possible use of international family mediation in cases of domestic violence

As we explained, family mediation requires the collaboration of the participants in order to reach a compromise (Salminen, 2018). The parties are therefore players in the decision and must be able to find the solution that puts an end to their differences of opinion, which requires sufficient openness to discussion (Salminen, 2018).

But what if one of the spouses is a victim of domestic violence? The difficulty lies in understanding what is meant by "domestic violence". Domestic violence should not be confused with the conflict or dispute inherent in married life. It is expressed in different ways: physically, verbally, psychologically, sexually or economically (Jaumotte, 2015). Domestic violence is part of a repeated model, the cycle of violence, in which the perpetrator exercises total control over the victim (Jaumotte, 2015). This cycle develops, in the victim, a feeling of shame, guilt and dependence on this violent system (Jaumotte, 2015). Additionally, the victim's fear increases and her/his self-confidence and self-esteem decrease (Jaumotte, 2015). On the other hand, the aggressor tends to deny and trivialize the violence suffered by the victim (Jaumotte, 2015). In this context where everything is often hidden, the use of family mediation is that straightforward.

2.5. Research questions

As explained above, the present report is divided in two complementary topics. In the first part of the paper, we are going to concentrate on the principle of prompt return and we will try to answer the following research question: *"Is the principle of prompt return, as defined by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in the child's best interests in case of domestic violence on one of the parents?"*

Indeed, while domestic violence is recognized as a good reason to flee a violent partner, when the removal of a child is involved, the violence situation which the aggressed partner gets away from typically loses its relevance (Mondekova, 2013). Thus, insofar as the Hague Convention aims to guarantee the best interests of the child, one can legitimately ask the question of the relevance of a forced return to the country of habitual residence.

Furthermore, as noted in the research puzzle, once the mother and child return to the original state of residence, the Hague Convention recommends the use of alternative dispute resolution methods (Pali and Voet, 2012). In this work we have decided to focus on the possible use of mediation. However, there is a real debate about the use of such method in cases involving domestic violence¹⁵. Indeed, mediation and in our case international family mediation, needs a specific framework in order to provide a favorable environment for discussion and amicable resolution of the conflict. In the second part of this paper, we will analyze the possibility of

¹⁵ See the Literature Review (section 2.6).

using the environment provided by mediation in the case of domestic violence. Thus, the question that will be examined will be the following one: “*Is international family mediation a possible solution in cases of domestic violence, in pursuit of the child’s best interest?*”

2.6. Literature Review

A major debate is underway as to the future of the grave risk of harm defense in the Hague Convention child abduction cases (Morley, 2021). The foundation of the principle of prompt return is challenged by those who believe that the Hague Convention discriminates against mothers who expatriated due to domestic violence and who return to their countries of origin with their children (Morley, 2021). To clearly understand the debate, it is necessary to concentrate on a fundamental aspect of the Hague Convention which is the implication of the Convention in the future custody of the child (Morley, 2021). Indeed, the Convention proceeding does not decide on the custody but rather decides which country has jurisdiction to take such a decision (Morley, 2021). Consequently, the Convention states that any pending custody procedures must be interrupted, from the moment a Hague proceeding has been initiated (Morley, 2021). Nevertheless, the drafters of the Convention decided to add an article to provide a defense in case that there was a substantial risk for the child to be harmed if he returned to the habitual state of residence (Morley, 2021). Therefore, Article 13(b) of the Hague Convention states: “Notwithstanding the provisions of the preceding Article, 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”¹⁶. The current debate is related to the meaning of the words “grave risk, physical or psychological harm and intolerable situation” (Morley, 2021).

On one side of the debate are the ones who argue that Article 13(b) must be interpreted narrowly (Morley, 2021). Their opinion is, in part, based on the Explanatory Report of the Hague Convention. This document, which is accorded significant authority in Hague cases, affirms that a restricted interpretation of the grave risk of harm defense, together with two other limited defenses is required to prevent a failure of the entire structure of the Convention (Morley, 2021). Thus, the Explanatory report states:” [T]he three types of exception to the rule concerning the

¹⁶ Hague Convention of 25 October 1980, *supra*, Article 13(1)(b).

return of the child must be applied only so far as they go and no further. [A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration" (Perez-Vera, 1982: Paragraph 34). This approach has been demonstrated in the seminal case of *Friedrich v Friedrich* (1996), in which an American servicewoman stationed in Germany and married to a German citizen decides, after their separation, to move, with their child, to her family's home in Ohio without informing the father (Morley, 2021). In court, the Sixth Circuit held that a grave risk of harm for the purposes of the Hague Convention subsists in only two situations. Firstly, if the prompt return would put the child in direct danger before the resolution of the custody dispute decided by the court of the country of habitual residence (Morley, 2021). These circumstances are related to returning the child to a zone of war, famine or disease (Morley, 2021). Secondly, a situation in which there is evidence of grave abuse or neglect of the child or exceptional emotional dependence and that the court of habitual residence does not, or cannot, intends to give the child appropriate protection (Morley, 2021). Finally, in *Friedrich v Friedrich* (1996), the child returned to Germany (Morley, 2021). This traditional approach has been followed in many cases, for example, *Rydder v. Rydder* or *Nunez-Escudero v. Tice-Menley* (Morley, 2021).

Since approximately 2000, there has been a fundamental change in the opinion of scholars and in the response of courts towards permitting the defense in Hague Convention cases (Morley, 2021). One major example is the case *Walsh v. Walsh* (Morley, 2021). In this case, in addition to the recognition by the court to the fact the exposure to domestic violence is a relevant risk to oppose to the children's return, the court allowed the appeal based mainly on three factors (Morley, 2021). Firstly, the children had witnessed the father's violence upon the mother (Morley, 2021). Secondly, social science literature established a solid theory arguing that fathers using domestic violence against the mother, frequently use it against the children (Morley, 2021). And thirdly, both state and federal U.S. laws have recognized that there is an important risk for children to be physically or psychologically injured when they face a spousal abuser (Morley, 2021). Consequently, the court considers that these elements are sufficient to demonstrate a grave risk of exposure to physical or psychological harm (Morley, 2021).

In addition to the existing court cases, many scholars often position in favor of a non-return because of a risk of domestic violence on the child and the mother. We can cite, for example,

Professor Merle Weiner who published a series of articles (Weiner, 2002) regarding the fact that the use of the return mechanism is appropriate if the abductor is a non-custodial parent but it is inappropriate when the abductor is the primary caretaker who left the country to protect herself and her child from the other parent's violence (Weiner, 2002). In these cases, the remedy of return imposes an intolerable choice to the mother who can return to the State of habitual residence with her child and hence be exposed to further violence or she can stay in the foreign country but then she leaves her child in close proximity to her batterer without protection (Weiner, 2002). A few years later, Professor Carol S. Bruch published an article intitled: "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" (2004) in which she contests the courts' reluctance to apply the Article 13(b) defense and calls on courts to be more rational in refusing to send mothers and children back to a context of domestic violence. In 2013, Taryn Lindhorst and Jeffrey L. Edleso published a book on a study of the cases of twenty-two women who had a petition filed against them for wrongful removal and reported that they were in a situation that could be construed as domestic violence. Recently, Katarina Trimmings and Onyója Momoh published an article intitled: "Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings" (2021) in which they question the interpretation of the Article 13(1)(b) and the meaning of "grave risk of harm" in cases involving allegations of domestic violence by the abducting mother against the left-behind father and the risk of returning for the mothers.

Nowadays, most of the scholars have joined their side and we have seen a multitude of articles and researchers taking a stand for an interpretation of the words "grave risk, physical or psychological harm and intolerable situation" involving domestic violence on mothers. There has been an increasing realization that the return of the child is inappropriate in cases she/he will face domestic violence. Scholars agree that a full evaluation of the nature of the prior abuse is required, joined by an evaluation of the likelihood that the authorities in the country to which the child is being returned will fully guarantee the child and her/his abused mother's protection.

In parallel to the debate regarding the prompt return in cases involving domestic violence, scholars also discuss on the use of family mediation, after the return of the mother and the child, in the case of the same violence. Indeed, while mediation is commonly used in custody negotiations, there is no consensus regarding its applicability in domestic violence cases (Feresin et al. 2018). Some scholars argue that mediation is always inappropriate when a couple

has an history of domestic violence (Landrum, 2014). They base their argument on concerns regarding the imbalances of power that can exist in a mediation involving domestic violence and are persuaded that mediation is often not appropriate in that context. As Fuller (2007:947) observes:” “[t]he dynamics of domestic violence are such that the abuse can be continuing in the mediation right in front of the attorneys and the mediator,” in the form of “meaningful looks” and short, innocuous references to past threats”. They state that the victim is inclined to give in on issues that she should not give in on because she wants to get out of the mediation session as quickly as possible or because she fears revenge if she opposes her aggressor (Hart, 1990).

Other scholars are convinced that while mediation in cases involving domestic violence should not be advised against, it should generally not be encouraged (Grillo, 1991: Howe and McIsaac, 2007: Edwards et al. 2008: Ver Steegh, 2006). According to them, there is no voluntary participation in mediation for a victim of domestic violence (Howe and McIsaac, 2007: Edwards et al. 2008). They claim that victims might feel that they cannot refuse to mediate because of either pressure from the court or from the abuser (Fuller, 2006).

A third group concentrates on mandatory mediation and claims that mediation should not be imposed when the relationship has a history of domestic violence, unless the victim wishes to go through mediation (Hart, 1990: Gagnon, 1996). They believe that there should be a case-by-case evaluation through screening to determine whether mediation is adequate, that there could be many situations where mediation could be appropriate even when there has been a history of domestic violence but only on a voluntary basis (Landrum, 2014). Finally, a few scholars argue that family mediation can be used efficiently in almost any case, even those in which domestic violence is present (Edwards, 2007: Edwards et al. 2008: Salem and Dunford-Jackson, 2008). According to them, if properly designed and operated, mediation provides a safe, effective way of resolving custody disputes (Edwards, 2007). In addition to the fact that scholars and mediators still debate these issues, very few empirical studies have measured the efficiency of mediation in cases involving domestic violence (Pearson, 1991: Murphy and Rubinson, 2005). These studies are limited and involve a small number of subjects (Pearson, 1991: Murphy and Rubinson, 2005). Even if it helps to establish a preliminary understanding of the issues discussed above, much more needs to be achieved until we completely understand what effects domestic violence has on the mediation process and its outcomes.

2.7. Relevance of the report

The first part of this paper, the use or not of the principle of prompt return in cases involving domestic violence, finds its relevance in the fact that it is a current debate. As we explained above, obviously domestic violence against mothers is not new, but the phenomenon of mothers fleeing their country with their child because of that violence is more and more highlighted which questions the rationality of the Hague Convention of 1980. As we saw in our literature review, although the traditional interpretation of Article 13 is still applied in many countries, a majority of scholars have adopted an “innovative” approach by describing the violence against the mothers as an intolerable situation for the child. Thus, the legitimate question of whether or not the mother, who has been subjected to violence, and her child, should return to their state of habitual residence takes place in a current political debate. With the women’s emancipation that we have been witnessing for several years, it is rational to ask whether they are not discriminated by the Hague Convention. Through this work, we have tried to make an additional contribution to the existing literature concerning this very current topic and show our support for this cause.

Additionally, like our first part, the second part of this report finds relevance in a current debate. For years, the use of mediation was unthinkable in cases involving domestic violence. Today, there is a considerable interest in the debate and diverse opinions are expressed. As we have seen so far, domestic violence is more and more publicized and several alternative dispute resolution mechanisms are employed to try to reach an agreement between parties out of the court. In this paper, we would like to contribute to this political debate by proposing an additional analysis to the existing literature, of the possible use of international family mediation in cases involving domestic violence. Through an objective description and study of the advantages and disadvantages of the use of such a method, our aim is to demonstrate that there are alternative ways other than through the courts where victims of domestic violence can express their feelings and become independent from their aggressor.

3. The legitimation of the principle of prompt return of the child

3.1. Contextualization

The prompt return of the child to her/his country of habitual residence is defined in chapter III of The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

This chapter includes sections 8 to 20 which explain, in detail, the child's return procedure¹⁷. These sections are based on the presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interest of the child, and that her/his return to the country of habitual residence will promote her/his interests by vindicating the right of the child to have contact with both parents¹⁸. The purpose of this measure is to support continuity in the child's life and to guarantee that any decision of the issue of custody or access is established by the most appropriate court having regard to the likely availability of relevant evidence¹⁹. On the other hand, the principle of prompt return is used as a discouragement to abductions and wrongful removals²⁰. The return order is an answer to several concerns. It represents the desire to re-establish a situation unilaterally altered by the abducting parent and thus, to restore the status quo but also to take away any benefits that may otherwise be gained by the abduction (Freeman, 2015).

However, it is important to understand that, despite the fact that the principle of prompt return is to deprive the abductor of any advantage, the procedure is not made easy for the left-behind parent (Freeman, 2015). Indeed, the requirements to be met by an applicant for a return order are rigorous²¹. Indeed, she/he must confirm a few criteria. First of all, it must be established that the child was legitimately residing in the other country. Secondly, that the act of removal or retention of the child by her/his parent represents a violation of the custody rights attributed by the law of her/his country of residence. Thirdly, that it was the applicant who was currently exercising the aforementioned rights at the time of the abduction²².

It is also essential to keep in mind that the prompt return of the child is not a custody determination²³. It is basically an order that the child is placed under the jurisdiction which is most appropriate to adjudicate custody and access (Dejonghe, 2019). That statement can be found in Article 19 which specifies that a return order is not a decision on the merits of any

¹⁷ Hague Convention of 25 October 1980, *supra*, Chapter III.

¹⁸ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

¹⁹ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

²⁰ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

²¹ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

²² Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

²³ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

custody issue²⁴. This specific aspect explains the requirement in Article 12 that the return decision be made “forthwith” and of Article 16 that a court confronted with an abduction case is not allowed to decide on “the merits of rights of custody” until it has been decided that there subsists a justification for not ordering return, or the request is not submitted within a reasonable time²⁵.

Finally, even where the left-behind parent has furnished a “prima facie case” under Article 3(b), there is still the possibility of the application being refused under Article 13²⁶. As expressed by Article 13, the demand can be rejected if a consent or a subsequent acquiescence by the child to the removal or if there is a grave risk that returning to the permanent country of residence would expose the child to psychological or physical harm or otherwise place the child in an unbearable context²⁷. On the other hand, Article 13 gives the possibility to a child who has reached a certain age and maturity, to reject her/his return, which might be a basis for refusal. In addition, Article 12 furnishes the choice not to return a child if the request was filed more than a year after the removal or retention and that the child is now settled into her/his new environment²⁸. Moreover, Article 20 gives a last possibility to block a child’s return²⁹. Under it, a return can be refused if it cannot be authorized by the fundamental rules regarding the protection of human rights and fundamental freedoms of the country concerned³⁰.

3.1.1. The change of abductor; from father to mother

Aside from the growing total numbers of children abducted across borders, the patterns of abductions also appear to reflect more general shifts in society. In the past, the common thought was to design fathers as the main abductors due to their wish to control the cultural upbringing of the child or because of their alleged fear of losing a relationship with the child (Mondekova, 2013). However, as explained by Tuohey (2005), this image of the male abductor, very present during the 1970s and early 1980s, was actually a default scenario because fathers had rather restricted contact with the child as a consequence of being the non-custodial parent. Thus, a disadvantaged custody settlement was generally the main motivation to abduct. (Tuohey 2005).

²⁴ Hague Convention of 25 October 1980, *supra*, Article 19.

²⁵ Hague Convention of 25 October 1980, *supra*, Article 16.

²⁶ Hague Convention of 25 October 1980, *supra*, Article 3(b).

²⁷ Hague Convention of 25 October 1980, *supra*, Outline, [Online], <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf> (accessed on April 20, 2021).

²⁸ Hague Convention of 25 October 1980, *supra*, Article 12.

²⁹ Hague Convention of 25 October 1980, *supra*, Article 20.

³⁰ Hague Convention of 25 October 1980, *supra*, Article 20.

In 1970s, a research conducted by Tuohey (2005) and the International Social Service covering ninety-nine abduction cases throughout several countries confirmed that the first common condition which constituted and contributed to increase the risk of abductions was, in fact, the international character of the parents. The study also revealed that cultural differences were the second greatest risk factor followed, in third position, by the issue of access (Tuohey, 2005). The latter was pinpointed as essential in half of the cases and legally granted visits provided the opportunity for abduction in most of these cases (Mondekova, 2013). The ISS' analysis demonstrated that the general trend of paternal abductors in the 1970s expressed the insecurities relative to access to the child after separation of the parents (Tuohey, 2005). Hence, one of the principal factors contributing to the change in paradigm nowadays is undoubtedly the inclusion of the child contact principle into the legal practice (Mondekova, 2013). This incorporation has affected the dynamics of abductions and consequently the number of father abductors has been gradually dropping (Mondekova, 2013). Indeed, several studies estimate that as many as 63% of abductors in Hague cases are women (Mondekova, 2013). U.S. case law also has shown an increase in abductions by mothers with only 33% of recent cases involving fathers abducting their children (Mondekova, 2013).

In the same way, the ratification of the Hague Convention on the Civil Aspects of International Child Abduction has certainly been an important factor in shaping the current abduction model and the drop in father abductors (Mondekova, 2013). As Bruch (1999) outlines, the Convention acts as a dissuasive tool for many non-custodial parents. Yet, this logic could justify why fathers are more likely to abduct in non-Convention countries where no jurisdiction is established to enforce the return of the child to the place of habitual residence (Mondekova, 2013). It would also explain the major role of the Convention as directly contributive to the decrease in incidence of paternal abductions (Dejonghe, 2019). Therefore, despite the fact that the role and profile of the abductor were not clearly expressed in the Convention to ensure neutrality, many scholars and family law practitioners agreed that the father abductor was implied in the formulation of the objectives and understanding of the child's best interests (Mondekova, 2013).

On the other hand, the numbers have been rising for maternal abductors. In her study, Dejonghe (2019) points out that 70% of the abductions in Belgium are perpetrated by mothers. The same phenomenon has been identified in the Netherlands where mothers are also responsible for 70%

of parental abductions, against 25% for fathers³¹. Abductions by mothers seem to be responding to a different ensemble of elements which have not yet been answered in the framework of the Hague Convention (1980). This phenomenon may be the result of a combination of different factors, the most important of which being definitively women's empowerment; more women having sufficient or higher education as well as an increase in cross-border mobility (Freeman and Taylor 2020). These changes provide women with more opportunities to travel, to relocate and eventually to proceed with the abduction (Mondekova, 2013). As Freeman and Taylor (2020) argue, there are important factors which seem to significantly contribute to the growing numbers of abductions, domestic violence being the crucial one.

3.2. Domestic violence and the prompt return of the child

Domestic violence, and its treatment under the Convention, have long been concerns for commentators in this field (Greif and Hegar 1993, Kaye 1999, Bruch 2004 and Hale 2017). A notable explanation for this has been the change in the profile of abductors from non-custodial father abductors to primary and joint primary carer mother abductors (Freeman and Taylor, 2020). However, before analyzing in depth the effects of domestic violence on international child abduction, generally by the mother (Tuohey, 2005), it is important to define what domestic violence is and the many forms it can take.

The concept of "domestic violence" is not easy to understand or to define. For this paper we use the definition given by The United States Department of Justice because we think it furnishes a clear and detail portrayal of that phenomenon. According to them, "[t]he term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction"³². This description is interesting considering the fact that it implies that domestic violence is not always against the mother but

³¹ Statista Research Department (2020), *Distribution of international child abduction cases Netherlands 2018, by perpetrator*, [Online], <https://www.statista.com/statistics/1033154/distribution-of-international-child-abduction-cases-in-the-netherlands-by-perpetrator/> (accessed on April 25, 2021).

³² What is domestic violence?, *The United States Department of Justice*, [Online], <https://www.justice.gov/ovw/domestic-violence> (accessed on April 25, 2021).

may be against the father or/and the child. Although we will focus here mainly on domestic violence against mothers as a reason for them to leave their state of habitual residence with their child and so abduct them, we think it is necessary to clarify this point. This choice is supported by the fact that, in 2020, domestic abuses are perpetuated mainly by men³³. According to the National Domestic Violence Hotline, over 1 in 3 women (35.6%) and 1 in 4 men (28.5%) in the US have experienced rape, physical violence and/or stalking by an intimate partner in their lifetime³⁴.

In the collective imagination, domestic violence is in majority physical but in reality, domestic violence can take on many forms. If people think that physical violence is the most common form of domestic violence it is because it is the most important and emphasized one (Jaumotte, 2015). Indeed, according to the National Coalition Against Domestic Violence (NCADV), 1 in 3 women and 1 in 4 men have experienced a kind of physical violence by an intimate partner³⁵. This includes hitting, burning, biting, slapping, or choking, which in some cases can be extreme (Jaumotte, 2015). Physical violence occurs when the victim resists the control and psychological violence of the perpetrator (Jaumotte, 2015). These physical aggressions express a refusal of otherness the perpetrator marking his possession on the victim (Jaumotte, 2015). The aggressor in fact cannot stand the image of the other nor his body; he modifies it and wounds it according to his desire (Jaumotte, 2015). Physical domestic violence is usually the consequence of verbal violence which consists in intimidating and humiliating the other by threats such as shouting, insults, screaming, degrading words, threats of suicide or blackmail (Jaumotte, 2015). A third category is psychological violence which represents an intentional and repetitive behavior expressed through different communication channels, such as words, looks or posture, in an active or passive, direct or indirect way with the purpose of reaching the other person and hurting her/him emotionally (Jaumotte, 2015). This violence is motivated by the perpetrator's willingness to maintain a position of superiority, to control, to terrorize and denigrate his victim (Jaumotte, 2015). The fourth category concerns sexual abuse. In these cases, the author obliges, by fear or force, a person to have unwanted sexual relations (Jaumotte, 2015). The prize is not pleasure, but the control of the other and the desire for power (Jaumotte,

³³ Domestic Violence Statistics, *National Domestic Violence Hotline*, [Online], <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (accessed on April 25, 2021).

³⁴ Domestic Violence Statistics, *National Domestic Violence Hotline*, [Online], <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (accessed on April 25, 2021).

³⁵ National Statistics, *The National Coalition Against Domestic Violence*, [Online], <https://ncadv.org/STATISTICS> (accessed on April 25, 2021).

2015). They thus represent an attack on the physical integrity of the victim (Jaumotte, 2015). We can notice that sexual violence is not limited to rape (Jaumotte, 2015). Indeed, the perpetrator can impose his/her sexual desire on his/her partner, in any form (degrading jokes, display of extramarital relations and comparisons between partners, insults, unwanted touching...) (Jaumotte, 2015). In 2021, estimates published by the UN point out that about 1 in 3 (30%) women around the world have been exposed to either physical and/or sexual intimate partner violence³⁶. Finally, a less highlighted form of domestic violence: economic violence (Jaumotte, 2015). This last category of violence is characterized by a financial or professional control on the partner (Jaumotte, 2015). It can involve a withholding of means and goods, proof of expenses or even suppression of bank cards (Jaumotte, 2015).

Precisely, because of domestic violence and the home state's failure to protect women, many of them choose to flee the country. The Convention does not contain specific aspects relating to domestic violence concerning the obligation to return the child. As mentioned by Weiner (2002:278):" the Convention was not drafted with this fact pattern in mind, and it often works unjustly in these cases". In the same guideline we can also cite Quillen (2014:622) who is concerned that the tension between protecting victims of domestic violence and preventing international child abduction manifests itself in the "unjust treatment of domestic-violence victims under the Hague Convention". However, in order to remedy this problem, several countries such as Switzerland or Japan have included specific provisions relating to domestic violence in their enabling legislation (Freeman and Taylor, 2020).

In Switzerland, an intolerable situation in Article 13(b) exists in International Child Abduction and the Hague Conventions on the Protection of Children and Adults (Freeman and Taylor, 2021). What is considered as an intolerable situation is when, firstly, the decision to place the child with the parent who filed the application is visibly not in the child's best interests, secondly, when the abducting parent cannot, given the context, guarantee a stable situation to the child in her/his state of habitual residence or that this cannot reasonably be demanded from this parent, and thirdly, to place the child in foster care is manifestly not in her/his best interests. (Freeman and Taylor, 2020).

This Swiss initiative has been welcomed by the international community due to the fact that it has long been recognized that children are considerably impacted by the violence and abuse which takes place between their adult carers (Freeman and Taylor, 2020).

³⁶ The World's Women 2020: Trends and Statistics, *United Nations: Department of Economic and Social Affairs*, [Online], <https://www.un.org/en/desa/world%E2%80%99s-women-2020> (accessed on April 26, 2021).

Furthermore, domestic violence is mentioned within Article 9 of the United Nations Convention on the Rights of Children³⁷. This Article specifies two important points. On the one hand, that the failure to return a child to his/her habitual residence encourages child abduction and denies the right of the child to be in direct contact with both parents (which implies to avoid any separation)³⁸. On the other hand, it also provides a specific separation between the child and the parents for the child's best interest in cases involving abuse or neglect of the child by parents³⁹. If we assume the fact that abuse towards the child might occur through violence between the parents, the specific separation under Article 9 regarding the non-return of the child to her/his habitual residence is evident. Therefore, in a case involving domestic violence, the non-return of the abducted child and the resulting separation from one of the parents could be entirely justified as being in the child's best interests within Article 9⁴⁰. Domestic violence also justifies the requirement for States Parties to protect the child from physical or mental violence within Article 19⁴¹.

The inclusion of a specific domestic violence protocol in several countries, like Switzerland and Japan, has created an unequal playing field for domestic violence victims and their abducted children within the Convention countries (Freeman and Taylor, 2020). In cases where the country in which the abducting mother has settled down with her child, does not provide a domestic violence "defense" as part of the Convention, the mother must solicit Article 13(1)(b) of the Convention to oppose the return of the child to the state of habitual residence on the basis of the risk of prejudice to the child due to the violence perpetrated against her (Freeman and Taylor, 2020). Under this provision, the prompt return may be refused by a court in a requested state, if there is a grave risk that return would confront the child with physical or psychological harm or that action will place the child in an intolerable situation (Freeman and Taylor, 2020). However, due to the fact that drafters did not intend to include domestic violence in the Convention, this is a difficult objective to satisfy. Indeed, the exceptions to return, under Article 13, tend to be applied in a restricted way so the Convention would not become a dead letter (Perez-Vera, 1982). Thus, if the grave risk threshold is not reached, the return of the child will be approved and the mother will have to decide whether to return with her child, and so risk further abuse to herself, or to accept that the child will return without her (Freeman and Taylor,

³⁷ Convention on the Rights of the Child (1989), *supra*, Article 9.

³⁸ Convention on the Rights of the Child (1989), *supra*, Article 9.

³⁹ Convention on the Rights of the Child (1989), *supra*, Article 9.

⁴⁰ Convention on the Rights of the Child (1989), *supra*, Article 9.

⁴¹ Convention on the Rights of the Child (1989), *supra*, Article 9.

2020). In either case there is a real risk of harm to the child. We can imagine that a possible reason for the reluctance to treat allegations of domestic violence in the abduction context could be the concern about diminishing the Convention's status if domestic violence is used as a defence ground to oppose returning an abducted child to the state of habitual residence. However, the balance between favoring this policy over the dangers of exposing the child to domestic violence is really risky and can have a severe impact on the mother and the child who are fleeing abuse (King, 2013).

Therefore, behavior that can harm children should be addressed by Convention proceedings if this objective is to be reached. Where there is no condition regarding domestic violence in a jurisdiction's implementing legislation, as is the case in Switzerland and Japan, then Article 13(1)(b) is the only appropriate provision for dealing with this concern. Nevertheless, its questionable interpretation can put both an abducting mother who is running away from domestic violence and her child in an intolerable situation. This is unacceptable when the damage from domestic violence to the child is beyond doubt.

4. Methodology

In order to complete our theoretical knowledge, we conducted four semi-directive interviews with internationally recognized mediators. We decided to proceed with them specifically for several reasons. First, they all have worked in the field of international family mediation involving violence for more than 10 years which provides them to have an approved legitimation. Second, each of them practices a different kind of international family mediation, as we will explain below, hence, our data cover multiple visions of the method. Third, our four interviewees exercise in three different countries; Switzerland, Belgium, and Canada. Although we recognize that Switzerland and Belgium have similar cultures which is felt in the discourse of our speakers and thus hides a little bit our will to have varied visions, we appreciate our Canadian interviewee who brings a different approach due to the local culture.

The purpose of these interviews is to understand the opinion of these mediators towards the provisions of the Hague Convention regarding cases of domestic violence. Our interview grid is divided into two main themes: we first ask the mediators about their opinion on the principle of prompt return of the child and its relevance at the present time and we then focus on the compatibilities and contradictions of this same principle in cases involving domestic violence. In addition, several questions oriented in the law are also raised such as their own interpretation of Article 13 and what they consider to be exceptions to the return of the child.

Then, we focus on the possible use of international family mediation in the case of the same violence, its strengths and weaknesses, before concluding this second part with an example of mediation that has marked them. Thus, our two themes are treated through 20 questions.

The different participants were selected with the help of the International Social Service. All of the interviewees have, at some point, collaborated or been in contact with the organization. Therefore, when we did our internship there, the NGO gave us access to its contacts. The various interviews were conducted by Skype and by telephone, according to the participants' choice. We would also like to point out that a request for interviews was made to more than 15 international family mediators, but that many of them were unable to attend due to unavailability or incompatible schedules. As the number of interviews was too small to establish generalities, it would be appropriate to repeat the experiment with a larger number of testimonies. However, the data provided by our 4 interviewees remain relevant and undeniably bring a complementary aspect to the theoretical basis of a work of this scope.

To facilitate the comprehension and guarantee our interviewees' anonymity, we will refer to these interviews through the order in which we carried them out. Consequently, our first interview has been conducted with a French lawyer practicing in Canada and specialized on civil and family law for ten years. She is also counsel to the Consulate General of France in Montreal. We realized our second interview with a Belgian mediator working in the direction of the Brussel International Mediation Center and administrator of the A.M.E., Association of European Mediators. In addition, our second speaker is responsible for the international development section and member of the EGMM, the European Grouping of Magistrates for Mediation. Our third interview was conducted with a recognized mediator based in Switzerland and active in family mediation, inter-cultural mediation and victim-perpetrator mediation. This mediator is also one of the directors of the International Social Service in Geneva, which allowed us to meet her during our internship. Finally, we did the fourth interview with a Swiss mediator specialized in international and national family mediation and a practitioner of distance mediation involving two parties in two different geographical locations. She worked a few years for the ISS too.

5. Should the principle of prompt return be applied in cases involving domestic violence on one parent?

The Hague Convention on the Civil Aspects of International Child Abduction was initially designed to prevent children's cross-border abductions and to encourage respect for custody

and access arrangements in countries from which children were abducted (King, 2013). As we demonstrated above, the Hague Convention, in practice, has unintended consequences as it often does not account for the severe impact on (typically) women and children who flee abuse (King, 2013).

We asked our interviewees, in the first place, what their opinion about the principle of the prompt return of the child was. According to our first interviewee, this principle is in the child's best interests. She argues that even though, the abduction of the child occurs, sometimes, in very critical situations, taking her /him out of her/his life represents a total uprooting that harms the child⁴². She considers it to be a good think to return the child to her/his habitual environment in order to bring her/him a certain stability⁴³. After that, we ask her for her opinion on the principle of prompt return in cases involving domestic violence by one parent. Again, she supports this principle and argues that before considering leaving the country with the child, the parent victim of domestic violence should use all the procedure and tools at her disposal, which is often not the case⁴⁴. She pursues by saying that: "*... a situation of domestic violence is horrible but, again, there is not one parent who sets a good example, in the sense that the parent who is a victim doesn't send the right messages to his child either because the person who ended up as a victim didn't know how to set her/his limits, I really don't want to say that people who are victims of domestic violence deserved it because it's really horrible for everyone, but for the child, there is not one parent who is worse than the other in domestic violence, in the sense that both do not set a good example and neither of them protect their child and taking a child out of the country, I don't think it's the right idea whatsoever, unless you are in a country that absolutely does not recognize domestic violence and does nothing to protect the parent*⁴⁵". She adds that, domestic violence between the father and the mother does not necessarily mean that there is a bad relationship between the father and the child and, hence, fleeing the country, even if it is because of domestic violence is not in the child's best interest⁴⁶. However, she specifies that: "*... I think that the return of the child is a good thing, but not the return of the child to his living environment as when he left it but rather the return of the child to his country, with a judge in the country who will be able to rule justly according to the*

⁴² Interview I, March 11, 2021.

⁴³ Interview I, March 11, 2021.

⁴⁴ Interview I, March 11, 2021.

⁴⁵ Interview I, March 11, 2021.

⁴⁶ Interview I, March 11, 2021.

*interests of the child*⁴⁷“. She also reminds us of two important facts. First of all, that the Hague Convention’s role is to protect the child so it has to be proved that the violence is linked to the child and impacts her/him directly⁴⁸. Secondly, that, at least in Canada where she practices, domestic violence is taken very seriously and no judge will force a victim to face her/his aggressor and, thus, measures are put in place to guarantee the safety of the victim, and, if concerned, the child⁴⁹.

Our second interviewee, follows the same line of thought as our first interviewee regarding the principle of prompt return. According to her:” *this principle of prompt return establishes, in any case, a rule of vigilance because if there was no rule of vigilance, then everyone would do what they wanted when they wanted and then the child would be even more torn apart*⁵⁰”. Nevertheless, she considers that, in cases of international family abduction due to domestic violence by the abductor, the principle should be applied case by case⁵¹. She emphasizes the fact that, although it is not a generality, in most cases she treated when there was physical violence or humiliation towards the mother, there was also some towards the child⁵². Thus, each case has to be dealt with individually and she agrees with our first interviewee’s opinion about protection measures for the parent and the child.

Our third interviewee, shares the same view as our first two respondents and points out that one important problem of the Convention is the fact that it tries to recreate an “initial situation” which does not exist anymore⁵³. To order the return of the child, and therefore of the mother, does not solve the reasons for their departure.

Finally, we asked the same question to our fourth interviewee. According to her:” [...] *to leave with the child is not ideally in the child's interest, so I think that the principle of prompt return remains valid, but the problem is that it is a bit of a generalization and in each situation, it is still to be evaluated, the problem is that it has to be evaluated quickly, in the interest of the child it should be evaluated quickly*”. In such situations she promotes the use of distance mediation as a way to keep contact, during the process of return, with the abductor and the child and to evaluate the reasons for her/ his departure and the means to put in place for her/his return.

⁴⁷ Interview I, March 11, 2021.

⁴⁸ Interview I, March 11, 2021.

⁴⁹ Interview I, March 11, 2021.

⁵⁰ Entretien II, March 11, 2021.

⁵¹ Entretien II, March 11, 2021.

⁵² Entretien II, March 11, 2021.

⁵³ Entretien III, March 11, 2021.

To conclude our first analysis, all of the four mediators we interviewed think that the principle of prompt return of the child is in the child's best interests and should be applied, even in cases involving domestic violence. However, the four mediators emphasize the importance of guaranteeing the safety of the child and the mother when returning to the habitual residence.

6. Is mediation in the child's best interest in case of domestic violence?

6.1. The emergence of international family mediation in the context of the Hague Conference

The Hague Conference has always had a key function in the development of cross-border family mediation. It has previously promoted the use of amicable dispute resolution in general through the adoption of these conventions. Subsequently, the activities of the Hague Conference to promote international family mediation have multiplied (Dejonghe, 2019). Thus, "international family mediation has made its appearance in international texts, timidly and implicitly at first, to then gradually become a recommended solution" (Ganancia, 2007:80).

The Child Abduction Convention implicitly encourages contracting states to mediate through central authorities and their devolved powers (Dejonghe, 2019). In the following terms, "Central Authorities shall co-operate with each other and take all appropriate measures: c) to secure the voluntary return of the child or to facilitate an amicable resolution"⁵⁴. It is therefore not surprising that the Hague Conference expressly encourages Contracting States, through the Convention on the Protection of Children, to the use of mediation⁵⁵. In addition, the prospect of developing a Convention on cross-border family mediation is on the agenda of future legislative projects of the Hague Conference⁵⁶.

The first official references to cross-border family mediation were observed during the meetings of the Special Commission on "the operations of the Child Abduction Convention and the implementation of the Child Protection Convention", conducted by the Permanent Bureau⁵⁷. The first formal mentions to cross-border family mediation came from the meetings of the Special Commission on "the operation of the Child Abduction Convention and the

⁵⁴ Hague Convention of 25 October 1980, *supra*, Article 7(c).

⁵⁵ Hague Convention of 19 October 1996, *supra*, Article 31(b).

⁵⁶ Information available on : www.hcch.net/fr/about

⁵⁷ Hague Conference on Private International Law, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, p.5.

implementation of the Child Protection Convention", conducted by the Permanent Bureau⁵⁸. Then, with the publication of the five Guides to Good Practice, the Convention once again highlighted this practice (Dejonghe, 2019).

Finally, a formal reference to international family mediation has equally taken place through the Malte Process (Dejonghe, 2019). A working group on mediation has been created within it and it has published the "Principles of the implementation of Mediation Structures in the Context of the Malta Process"⁵⁹. As a result, states are advised to designate a central contact point for cross-border family mediation within their central authority⁶⁰.

6.2. The emergence of international family mediation in the European context

First of all, it is important to understand that before concentrating on international family mediation, European institutions allowed a harmonization of regular family mediation in Europe (Voet and Pali, 2012). This first step provided the recourse to family mediation in the management of private conflicts and a legitimization of this practice which paved the way to family mediation (Ferrand, 2015). This acceptance of mediation as an efficient dispute resolution process is definitely an essential factor in the emergence of regulations on international family mediation (Dejonghe, 2019). Therefore, European states assisted successively in the establishment of two sets of rules promoting cross-border mediation. First of all, in 2003, the Brussels II Regulation formally encouraged contracting States to use international family mediation, assisted by central authorities (Dejonghe, 2019). Then, in 2019 the so-called Brussels IIbis(recast) which expressly encouraged states to a greater use of international family mediation, still in cooperation with central authorities. The advocacy of mediation was promoted through a new article intitled :”Alternative dispute resolution methods” which institutes that “as early as possible in the proceedings and at any stage of the proceedings, the court or tribunal, either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to enter into mediation or other alternative dispute resolution procedures, unless this would be contrary to

⁵⁸ Hague Conference on Private International Law, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, p. 5.

⁵⁹ Working Group on Mediation in the Malta Process, "Principles for the Implementation of Mediation Structures in the Malta Process", 2010, available at: www.hcch.net.

⁶⁰ The Central Contact Points for International Family Mediation, already established by the States Parties, are available at: www.hcch.net

the best interests of the child, inappropriate to the circumstances of the case or would unduly delay the proceedings” (Lazić and Stuij, 2017: Article 25).

In this section we have attempted to add a complement to the general framework we outlined in the introduction. The recognition of cross-border family mediation at a supranational level shows that the development of international family mediation cannot be achieved in an exclusively national framework (Ganancia, 2007). It requires incentives and supranational legitimization. For several years now, state organizations, such as the European Union and the Hague Conference, have become aware of this and have promoted its expansion. Nowadays, we share a common political will to give credit to international family mediation and to make it a real complement to the judicial way (Dejonghe, 2019). We can be pleased with this major step forward and especially with the adoption of the recast of the Brussels IIbis Regulation which grants the court seized of the case the competence to propose and evaluate the appropriateness of an amicable solution, at any stage of the proceedings, in view of the circumstances of the case (Dejonghe, 2019). However, it is important to notice that there still does not exist a legal framework regarding the specific operating mode that it requires. Until now, only formal initiatives have been taken in this regard (Dejonghe, 2019).

6.3. Similarities and differences between ordinary family mediation and international family mediation

Before going deeper into the analysis of international family mediation as a possible dispute resolution process for domestic violence, it is necessary to describe its similarities and differences with ordinary mediation. International family mediation was born as an extension of ordinary family mediation (Dejonghe, 2019). Therefore, it is natural that it has elements of similarity with it. Nevertheless, it is appropriate to examine its own specificities which distance it from its precursor.

6.3.1. Similarities

Most of the similarities stem from European interventions in this field aimed at coordinating the practice of Member States and promoting the use of mediation in general (Dejonghe, 2019). Firstly, in both kinds of mediation, the voluntary participation of the parties in the conduct of the mediation is a common standard (Reynaud, 2007). However, in respect to court-ordered mediation, this voluntary nature has been altered by the latest legislative amendment, empowering the judge to order an attempt at mediation if she/he considers it appropriate, with

the accord of at least one party (Dejonghe, 2019). Secondly, both family mediation processes are conducted in a confidential manner, unless the parties decide otherwise (Alexandre and Hirsch, 2007). Confidentiality promotes a relationship of trust with the mediator, as well as sincere communication (Alexandre and Hirsch, 2007). This process must be conducted fairly by a qualified mediator. Nevertheless, this does not prevent the mediator from working closely with the judicial and administrative authorities (Dejonghe, 2019). In cases of international family abduction, the cooperation between the mediator, the central authority, the embassy and the judicial authorities is crucial (Dejonghe, 2019). Lastly, the goal of ordinary family mediation and international family mediation is the same, namely: “to restore communication, listening and mutual understanding, precisely in order to preserve the links, which are essential for the well-being of the child” (Renchon and van Kerkhove, 2008:98).

6.3.2. Specificity of international family mediation

Naturally, the main distinction between regular family mediation and international family mediation is the cross-border factor. Indeed, geographical distance between parents seriously complicates the organization of mediation (Dejonghue, 2019). It is better to proceed to mediation in the child’s state of refuge, despite the costs of travel and accommodation that it entails for the left-behind parent who goes there (Dejonghe, 2019). As a result, mediation must take place within a limited period of time (Reynaud, 2007). Prompt action is required in the best interest of the child (Reynaud, 2007).

In addition, the mediator must take into account the cultural and linguistic specificities of both parties (Alexandre and Hirsch, 2007). Thus, the mediation involves at least two legal systems, which each have their own rules regarding the process, such as, for example, the accreditation of the mediator and the approval of the memorandum of understanding (Dejonghe, 2019). Therefore, despite the fact that these specificities require a singular methodology in comparison to traditional family mediation, both mediations differ mainly in the form of the process but not in the substance (Dejonghe, 2019). Thus, in the next section the question about the use of international family mediation in the case of domestic violence will be treated both with references to ordinary family mediation, as well as with references to international family mediation.

6.4. International Family Mediation as an adequate dispute resolution process for domestic violence?

In 2012, the practice of mediation was formally adopted by the Hague Conference and the Council of Europe as a dispute resolution method in cases of domestic violence (Vugers, 2011). As expected, it caused long debates between scholars who recommended to place the perpetrator and the victim in a peaceful context in the child's best interest and scholars who affirmed that any abuse suffered, generally by the mother and/or the child, could engender an acute imbalance in bargaining power and so disadvantage the victim and go against the child's best interests (Reynaud, 2007; Alanen, 2008; Vigers, 2011; Zemans, 2015; Jaumotte, 2015). Indeed, mediating disputes related to domestic violence allegations has proven particularly challenging and very controversial in the domestic context (Alanen, 2008). Many specific domestic violence factors such as power and control can prejudice the mediation process, compromise victims or produce a coerced result (Alanen, 2008). As we explained above, international family mediation and ordinary family mediation have similarities but the internationality of the first category impacts the process in consequence (Dejonghe, 2019). Thus, considerations regarding domestic violence allegations in the international context can seriously vary from those present in a domestic dispute (Alanen, 2008). Many elements can justify these differences: states' conflictual and social norms, incompatible family laws, and an absence of an efficient domestic violence policy. Moreover, child protection and parental kidnapping institutions may expose the parties and deeply influence the mediation procedure and the result (Alanen, 2008).

6.4.1. Preliminary approach

In a mediation process which deals with domestic violence, the mediator must first ask himself a series of questions in order to fully understand the context of such violence: "What meaning does this violence have, what is behind it? Why, when and how did it happen? What do the parties expect from mediation, what can it bring them when there has been violence? Is the violence reactionary or structural?" (Descamps, 2002)⁶¹. From the mediator's point of view, of all these questions, the last is probably the most important because it reflects the nature of the violence and thus, the behavior she/he will have to follow.

⁶¹ The questions are originally in French, we translated them in English.

In a situation of reactionary violence, the mediation process has a better chance of succeeding (Jaumotte, 2015). Indeed, reactionary violence is characterized by the use of physical or verbal violence as a response to a provocation (Jaumotte, 2015). Even if these acts are extremely serious, they remain isolated and occasional (Descamps, 2002). However, these acts are not domestic violence, but rather marital conflicts in which the individuals have a relationship of equal power (Jaumotte, 2015). This symmetry within the couple is the main difference between domestic violence and marital conflicts. A marital conflict can be destructive for the couple, nevertheless, one's identity is not endangered (Jaumotte, 2015). Conflict is a relational mode that implies reciprocity between the protagonists, whereas conjugal violence is univocal and is characterized by the control and repetition of acts aimed at exercising power over the other (Jaumotte, 2015). However, it can happen that the conflict tips over into a dynamic of domestic violence or that the violence dissolves into a dynamic of conflict (Jaumotte, 2015). Thus, the symmetric relationships of power between parties are more adequate in a mediation process (Jaumotte, 2015). Such violence can be illustrated in a simple way; the husband hits his wife violently. When he is asked why he did it he responds that he felt under tension because of the separation. His wife provoked him and he lost his mind, he could not control himself (Jaumotte, 2015)⁶². This example is simply theoretical but demonstrates in depth what reactional violence looks like. During our first interview, the interviewee, told us about a particular case of reactional violence in which the mediation session was going great and suddenly: *“a parent is going to go crazy, is going to get up, is going to call her a whore, is going to call her an asshole and who is going to throw his violence around like that”*⁶³. As explained by the mediator: *“There is a tension that is created and there the person is ashamed, the other has been subjected to violence”*⁶⁴. On the same line, our second interviewee confirms treatability through mediation: *“[...] As to the violence in response (the reactional violence), well I think that in principle there too, it depends on the context because I have seen people who are violent because they do not feel understood by the other person or that there was an activation phenomenon in the interaction, if you will, because it touched on wounds and it provoked a violent reaction in return because the person knew how to activate one , the woman knew how to activate one for example in connection with the man and it was unbearable. From the moment we see a couple*

⁶² In our example, the aggressor is the man and the victim the women, this choice is motivated by statistics from the Ananias Foundation which show a hegemony of aggression by men on women. Information available on: <https://www.ananiasfoundation.org/domestic-violence-statistics/> (accessed March 10, 2021).

⁶³ Interview I, March 14, 2021.

⁶⁴ Interview I, March 14, 2021.

for a mediation meeting, we must understand the situation of one and the situation of the other, well this phenomenon will be less activated since we will be in the know and we will update this phenomenon of interaction as it is activated”⁶⁵.

In contrast, structural or long-established violence is more complex to understand and can be a reason not to take charge in mediation (Jaumotte, 2015). This second type of violence takes on many forms, such as physical, psychological, moral, sexual or economic aggression (see section 3.2.) and is characterized by the establishment and the maintenance of an asymmetrical power relationship (Jaumotte, 2015). In such violence, one of the partners creates a stabilized and permanent domination over the other (Jaumotte, 2015). This leads to the attribution of clearly defined dominant and dominated roles which tend to be associated with fixed behaviors and reactions (Jaumotte, 2015). This violence is not a matter of conflict or dispute and may even continue when the couple is separated (Descamps, 2002). Indeed, the violence might persist despite the separation through the relational links that may still exist, most often through the children (Dieu and Suhart, 2008). Structural violence does not correspond to a conflict but to a problem in itself: this violence is difficult to address in a specific framework because it is part of the personality structure of one of the protagonists (Jaumotte, 2015).

These two types of violence do not have the same chance of a positive outcome through mediation. In the first case, reactionary violence can be treated and mediation is possible. Although this type of violence is very common, it cannot be assimilated to a domestic violence situation as we defined in section 3.2. but rather to a spontaneous episode of violence which occurs at a certain point in time (Jaumotte, 2015). In the second case, structural or long-established violence are part of the couple’s way of functioning and are, therefore, more difficult to handle in mediation (Jaumotte, 2015).

7. Incompatibilities and compatibilities of international family mediation and cases involving domestic violence

In this chapter, we will first explain the problems of using international family mediation in these specific cases and, then, we will treat the positive aspects of such a method in cases involving domestic violence.

7.1. Incompatibilities

⁶⁵ Interview II, March 11, 2021.

Recourse to family mediation in the event of domestic violence could lead to certain abuses. In certain aspects, domestic violence would be borderline situations even contraindicated in mediation.

7.1.1. A dominator-dominated relationship

First, and most importantly, international family mediation could involve negative effects for the victim. Indeed, as we explained earlier, domestic violence is characterized, in most cases by an asymmetric relationship between parties (Descamps, 2002). There is an effective domination by one party on the other and that could be incompatible with mediation, which needs a minimum balance of power between parties (Descamps, 2002). Concerning this point, our first interviewee, although she is in favor of the use of international family mediation in cases of domestic violence, admits that:” [...] *I think that in cases of domestic violence there is a possibility to use mediation, unless there is no opportunity to negotiate or to speak, because there is one person who really has too much control over the other and who has gone too far; because in general it is man, he is not able to listen to what the other has to say*”⁶⁶.

According to many, and to our third interviewee, international family mediation is not designed to handle domestic violence because the pressure felt by the dominated person is too great. According to her:” *we (the victims) do not have our full power to discuss and find commitments because the threat or pressure is too great*”⁶⁷. As explained by Gresson (2002), family mediation does not have enough resources to reverse the balance of power inherent in domestic violence. It would instead take the risk of ratifying them. Mediation that is lighter and less authoritarian than the judicial system risks gently to impose unequal relations (Jaumotte, 2015).

7.1.2. The difficulty of highlighting violence

In many cases, the victim, but also the perpetrator, find it difficult to give a name to violence (Jaumote, 2015; Freeman and Taylor, 2021). The violence is denied and trivialized which makes it difficult to use mediation. Indeed, this kind of refusal to acknowledge the violence will make it difficult for the parties to communicate the extent of the problem and will result in a defensive silence which will block the mediator’s actions and prevent her/him from investigating prior to the violence and properly assessing its dangers (Jaumotte, 2015).

⁶⁶ Interview I, March 11, 2021.

⁶⁷ Interview III, March 14, 2021.

This situation occurred several times to our first interviewee but she was struck by one particular case:” *There was once where they were separated but they didn't see the problem (of violence) at all. There are people who don't see that there is violence, people who will say: "But that's how I was raised, my parents were like that", there are signals that we hear from children; children who are extremely afraid of their parents' anger, children who complain about the anger, children who feel all the tension and they (the parents) will talk to us about the children and I say to them: "But do you think they are okay? "And they say, "Yes, they're fine, I went through that when I was a kid and I was okay," so there are parents who don't see. These are situations where either the parents don't see the problem, it's normal because in their family it was like that, so there is a kind of horrible tension*”⁶⁸. There is a real paradox. On the one hand, the more violence mechanisms are part of the relationship, the more it should impact and make the victim react (Jaumotte, 2015). But, on the other hand, the more violence is great, the less the victim feels it (Jaumotte, 2015). Thus, violence becomes an element in the relationship and is no longer perceived as violence by the victim and the perpetrator (Jaumotte, 2015). In this way, the circle of violence continues and, without the admission of, at least, one party, the mediator cannot name the violence and hence, try to work on it. Our second interviewee corroborated this fact by adding:” [...] *besides I'll tell you, when people call and come you don't know their whole story*”⁶⁹, words confirmed by our first interviewee:” *I can't work miracles, we work with what they want to give us*”⁷⁰.

7.1.3. The importance of feeling safe in the mediation process

There is no doubt that the safety of the victim is fundamental in a mediation procedure involving domestic violence. However, the purpose of mediation is to allow both parents to discuss and reach an agreement, in their child’s interest, that they both find acceptable (Freeman and Taylor, 2021). To do so, the victim of domestic violence, in most cases the mother, must feel safe in order to come forward and say what happened (Jaumotte, 2015). Nevertheless, mediation faces a dilemma. On the one hand the mother may refuse to participate in the mediation arguing that it is because she is afraid to be in the same place as her aggressor but on the other hand, she risks being seen as selfish and not looking out for her child's best interests. Following this logic, if the mediation process continues the father will get plenty of information about the mother

⁶⁸ Interview I, March 11, 2021.

⁶⁹ Interview II, March 11, 2021.

⁷⁰ Interview I, March 11, 2021

through his right to maintain a relationship with his child, including telephone and postal contact or else. The mediation process, whose purpose is to guarantee the child's best interests and the victim's safety, will indirectly give the aggressor some crucial information such as the new address of the mother and, as we mentioned earlier, a separation between parents does not mean an end to violence (Jaumotte, 2015). According to our second interviewee: " *So obviously, if it's structural, we can say that from the moment he does it, there's a risk of it happening in the mediation space... and therefore, consequently, we can't guarantee her safety and therefore we don't do mediation*"⁷¹.

Our first interviewee raises another important aspect of the feeling of safety. According to her, sometimes it is the victim's apprehension about the practice of mediation that is problematic. As she explains: " *Also, in mediation sometimes it is too early. Sometimes the person who has experienced violence will be afraid of being taken advantage of in mediation, so she will agree to things in mediation but afterwards she will say to herself: " At the time I was not ready, at that time I was still under the influence" and it is true. While agreements are sometimes good, they (the victims) will be afraid during the mediation*"⁷². The victims risk signing an agreement that is not representative of what they really want, worse, their rights may be violated if the mediator does not detect domestic violence (Jaumotte, 2015). On the same line, if the mediator is not sufficiently attentive, he/she might miss the domination of the aggressor on the victim during the mediation sessions (Freeman and Taylor, 2021). If the victim feels pressure from her perpetrator, she may become withdrawn and no longer seek to express herself freely (Freeman and Taylor, 2021). As a result, mediation might create an increased violence in the relationship and make the victim feel powerless; she feels victimized once again (Jaumotte, 2015). Thus, a potential incompatibility of mediation with these types of situations would be the inability of mediators to make victims feel safe in the mediation space.

7.1.4. The risks of manipulation

This may seem obvious but it is important to mention it. There is a grave risk of manipulation from the aggressor on, first the victim, but also on the mediator (Jaumotte, 2015). Indeed, the dominator-dominated relationship, characteristic of structural violence, implies some manipulation skills from the aggressor and these skills may be used to convince the mediator and guide her/his behavior to get her/him where he wants to go (Jaumotte, 2015). If the mediator

⁷¹ Interview II, March 11, 2021

⁷² Interview I, March 11, 2021.

feels the manipulation, she/he correctly stops the mediation as explained by our second interviewee:” *if the person is a psychopath, if the person is a manipulator, in quotation marks, if he does it with, somehow, a kind of hidden ruse, that makes it better to stop the mediation process right away. It's a case of harassment for example or it would not be justified obviously*”⁷³. The mediator who has not been trained enough to detect this practice may be oriented wrongly. In addition, if the use of domestic violence hinders the detection of domestic violence, the mediation may have the opposite effect for the victim and the violence might continue during the entire process.

Nevertheless, most of the mediators who work on cases involving domestic violence, follow a training course in order to avoid all kinds of manipulation, which was the case for our four interviewees. Sooner or later, manipulation reveals itself and the mediator, also due to her/his experience and intuition, will recognize quite quickly if there is an unequal balance of power between parties.

7.2. Compatibilities

7.2.1. Naming the violence

Naming the violence is an essential step on the way to a successful mediation. The mediation process cannot be successful if domestic violence, the main objective of a mediation, is hidden and avoided in the conversation.

However, due to her/his neutrality, the mediator must remain impartial and not incriminate one party. As explained by our first interviewee, the mediator’s role is not to confront a victim and a perpetrator but rather two individuals who are there to reach an acceptable agreement:” *When we talk about violence I will say: "Ok, so I hear that there were episodes that, for you, constitute violence", because I don't qualify it, it is not my role to qualify it [...] But I'm never going to say, "Your domestic violence," it's going to be, "Okay, there's an episode, I feel like it's coming back," because they've been talking about it 45 times, "we're going to talk about what happened, you're going to listen to each other until the end, you're going to listen to what the other one went through, we're not talking about accusations, we're talking about what you went through. [...] To recognize that it exists, we can work with it. It doesn't mean that we accept it, it doesn't mean that we justify the behavior, it just means that we recognize it and give it its place and*

⁷³ Interview II, March 11, 2021.

show that we can still work together”⁷⁴. The fact of naming the violence will remove the taboo around it and make easier to open the discussion between parties, they feel listened to.

Our second interviewee confirms this phenomenon:” *The more you uncover this interaction between people, the more you uncover the wound on which he will over-react, and then you will see that the person will finally limit his reaction and therefore at least you will be able to solve concrete things*”⁷⁵. Thus, if the mediation is not named and avoided in the discussion, the process will have few chances of succeeding.

7.2.2. Breaking the relationship of domination

Breaking the relationship of domination in place between both parties and restoring a new channel of communication is one of the main uses of mediation involving domestic violence (Jaumotte, 2015). To do so, it is fundamental to understand where this particular relationship and consequently the violence originates.

One possible way to proceed is to go back to the couple’s past in order to find the origin of this toxic relationship and unblock the situation. Our first interviewee often uses this method:” [...] *to unblock situations we need to go back to what may have happened in the past, so sometimes we will have to deal with the hold that may have been there by discussing it [...] it’s a process where they have to give us access to what happened, they have to give us access to their way of communicating before, so that we can deconstruct it but there are some who don’t want to*”⁷⁶.

Because of the longevity of the dominant-dominated relationship that has been established in the couple, there is a feeling of superiority of the aggressor and a total loss of self-trust of the victim who lives in fear and guilt. In these situations, both parties are dependent on that way of functioning. However, even if there is a clear positioning of who is the dominant person and who is the dominated one:” [...] *when we manage to make them understand, they feel liberated because they don’t become a victim or an executioner, they just become a person who has felt things and hasn’t been able to express them, that’s the role of the mediator*”⁷⁷. Mediation is a process in which both parties are equally listened to and considered in order to be able to open up and express their feelings. The mediator, to break this toxic relationship must balance the power between parties.

⁷⁴ Interview I, March 11, 2021.

⁷⁵ Interview II, March 11, 2021.

⁷⁶ Interview I, March 11, 2021.

⁷⁷ Interview I, March 11, 2021.

Another method to give both parties equal power in the mediation sessions is by controlling the way they interact within the mediation and, hence, reteach them to communicate alternatively than by violence. To do this, the mediator must not hesitate to interrupt an act of violence taking place during the session and make the victim and the aggressor face the problem. This is the technique our first interviewee uses after an act of violence, she immediately reacts:” *There’s a tension that’s created when you say, “Okay, the episode is over,” and then the person is ashamed, the other person has been abused, and my way of dealing with the abuse right now is to say to the other person (the abused person), “Are you okay? Do you need us to stop? Do you want to talk about it? “And then I turn to the abusive parent and say, “Wow, can you feel the tension in the room? I was a little scared when you talked like that, I understand what you’re going through, it can’t be easy. You, Sir, you must be feeling bad, I can see that you are not well. Madam, I can see that you’re not doing well, you’ve experienced violence”, I name it in these cases, “I understand your child too, because I am an adult, I have tools and I feel extremely bad but I say to myself, your child, who does not have the tools that I have, it must be horrible for you”*⁷⁸. As we see, the mediator should not hesitate to interrupt the aggressor in order to give the opportunity for the victim to express what she feels. By doing that the mediator breaks the toxic relationship and the dominated party can liberate herself and regain her decision-making capacity. Nevertheless, it is important to clarify a point. The fact that the mediator gives opportunities for the victim to express what she feels at any time of the discussion, even by interrupting an act of violence, as demonstrated by our first interviewee, does not mean that she/he favors one party rather than the other one. As summarized by our second interviewee:” [...] *they each have their place in the system, so in the end, I intervene as little as possible, but just facilitate and ask questions or reformulate, reframe, in other words, all the communication tools that we use so that, without fear of conflict, we can ensure that the people can, well, move forward in the process*”⁷⁹. Indeed, the role of the mediator is not to defend or incriminate one party, but rather to put in place a new type of communication by ensuring that everyone participates in the debate.

7.2.3. Willingness to act in the child’s best interests

Finally, the main justification for parents to use mediation, in cases of domestic violence, is their willingness to act in the best interest of the child. Our third interviewee explains to us that,

⁷⁸ Interview I, March 11, 2021.

⁷⁹ Interview II, March 11, 2021.

the decision to participate in a mediation process is motivated by the fear of a geographical distance between the parent and the child which implies the risk of breaking the link with the parent⁸⁰. To corroborate our analysis, we asked the same question to our fourth interviewee. Her answer was the same as our third interviewee's. According to her: " *It is always this idea that we can have parents who are fixated on certain points, always in the interest of the child; it is still a very powerful lever for which parents are ready to do a lot*"⁸¹. Through mediation, the mediator might highlight the importance for the parents to reach an agreement for the child's best interests. She/he can emphasize the child's needs. The purpose is not in itself to make the conflict disappear, but rather to "deal with it" beyond anger, suffering and resentment, to retrieve a parental or family dialogue and cooperative solutions that respect the needs and interests of everyone and particularly those of the child who is the focus of attention. Indeed, if parents accept to participate in a mediation process, despite their mutual fear, it is to find the tools to find the best solutions for them and, most of all, for their child. They know that they will not be free if they go to court and that will irremediably affect their child, hence, the mediation provides them with a place to speak and communicate.

8. Conclusion

In the first part of our report, we tried to find answers to questions concerning the legitimation of the principle of the prompt return of the child established by the Hague Convention on the Civil Aspect of International Child Abduction in cases involving domestic violence for the parent abductor. As we saw, the drafters of the Hague Convention considered the principle of prompt return to be in the best interest of the child overall. Nevertheless, over the years, new issues and challenges have surfaced. The primary paradigm of a non-custodial father abducting the child to gain more control over her/him has been replaced by mother abductors. As demonstrated, many reasons explain this change, such as a woman's right to be emancipated, an easier access to higher studies or, more globally, women's empowerment. In this paper, we decided to focus mainly on the phenomenon of child abductions by their mothers due to a situation of domestic violence. We chose to analyze the paradox of asking victimized mothers, who decided to flee their child's habitual residence, to return with their child in order to guarantee the child's best interests.

⁸⁰ Interview III, March 14, 2021.

⁸¹ Interview IV, March 19, 2021.

According to our study, which includes a solid theoretical basis completed by the opinion of several recognized mediators, the principle of prompt return should be applied even in cases involving domestic violence. Indeed, the main purpose of the Hague Convention of 1980 is to guarantee the child's best interests and taking her/him out of her/his habitual residence forever is not beneficial to her/him. However, as mentioned by our four interviewees, each case involving domestic violence should be treated independently and the safety of the mother, if she decides to follow her child and return to her country of residence, is almost as important as the child's. Hence, the principle of prompt return should be exercised but, if protective measures cannot be taken in order to guarantee the safety of the child and the mother, then the use of article 13 of the Hague Convention must be applied.

In the second part of our paper, we asked if the possible use of international family mediation as an alternative conflict resolution in cases involving domestic violence is viable. The role of mediation is to re-establish a new channel of communication between parents who are no longer able to communicate. It does not settle conflicts at first glance, but restores a parental channel of communication where the couple's connections were dissolved. It is not up to the mediator to impose a decision on them as a judge would. The outcome of the mediation and therefore the conclusion of an agreement rests exclusively on their shoulders. However, as we see, a mediator is not passive; she/he structures and orientates the discussion.

The specific form of domestic violence, characterized by repetitive instrumental aggression (physical, verbal, psychological, sexual or economic) and an intention to control the other party does not create an egalitarian power relationship but rather an asymmetrical relationship.

Theoretically, the dominator-dominated relationship between the parties is in total contradiction with the use of international family mediation. However, we have noted the benefits of using mediation in such circumstances. A series of conditions must obviously be met. We determined the different compatibilities and incompatibilities in cases involving domestic violence and we asked our interviewees about the practice of that kind of mediation in order to solidify our theory. Out of four interviewees, three are actively practicing international family mediation related to domestic violence. We share the idea that mediation is worth trying. We agreed with our interviewees on the positive effects that international family mediation can have on participants, particularly in the way they communicate. Even if it does not succeed, it will nevertheless have allowed them to communicate in other ways than through violence, which is already an achievement. Obviously for the mediation to succeed, a multitude of conditions must be met and we cannot objectively affirm that international family mediation works in every case

involving domestic violence. Indeed, each situation is different and requires a case-by-case analysis.

We would like to conclude this report with a crucial aspect of both international child abduction and international family mediation when it involves domestic violence. Because the Convention of 1980 has been such a welcome development, it has generally been insulated from the scholarly and critical examination to which any area of the law should be subjected. In particular, a dimension that has escaped attention when evaluating the success of the Convention is that the circumstances surrounding removals are inevitably gendered. Indeed, the aim of the Convention is to guarantee the child's best interest and operates in the basis that it is in the best interests of all children for issues of their welfare to be determined by the courts of the country in which they are habitually resident (Kaye, 1999). As we saw in this text, the Convention does provide some (limited) tools for opposing to the prompt return of the child to the habitual residence, such as Article 13 but as Perez-Vera explains in her Explanatory Report (1980: 426):" a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration". This major concern not to undermine the Convention implies that a decision to return a child will be, in most cases, considered a good decision *per se* (Kaye, 1999). Thus, the rationale for the Convention, that is prompt return of children promotes a lack of gendered analysis. Yet in 1995, Richard Collier (1995: 178) stated that: «it is no longer possible for [domestic] child custody to be constructed as an apolitical research topic, to be studied neutrally". This seems to be exactly how the Convention rules on international child abduction – as an apolitical legal research topic.

This same gender bias can be applied in international family mediation. Indeed, the main feminist critique on family mediation, and consequently, on international family mediation is on the nature on power imbalance within intimate relationships as well as the consequences of these phenomena for dispute resolution. In the context of negotiation or mediation, power can be defined simply as the capacity to bring about expected outcomes (Semple, 2012). The feminist critique suggests that the male party will generally have more power than the female party after the dissolution of the intimate relationship (Semple, 2012). Two reasons may explain the power imbalance in favor of the man. First, the tangible resource imbalances (Semple, 2012). On average, men earn higher incomes and possess more property than women, making them wealthier at the time of the relationship dissolution (Semple, 2012). Wealth creates power

and influences mediation. During the process, the poorer party may be more willing to settle for less due to a greater fear of proceeding to trial or a greater immediate need for the financial settlement (Bryan, 1992). In cases involving domestic violence, victims may also have an intense need to put the relationship behind them as fast as possible (Jaumotte, 2015). Second, the intangible resources imbalances (Semple, 2012). In addition to the money, status, dominance, self-esteem and reward expectation are among the 'resources' that men are more likely than women to bring into family mediation (Semple, 2012). By contrast, women may more likely to feel psychological impediments such as depression, fear of achievement, and guilt arising from the end of the relationship (Semple, 2012). Resources and impediments of this kind play a major role in disparities in persuasive strength (Semple, 2012). Thus, the mediation procedures, encouraged by the institutions and the legal system, are not spared from gender bias. It would therefore be welcome to think of ways to rebalance the power relations within mediation.

9. . Bibliography

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