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RE-FEMINIZING MEDIATION GLOBALLY

Deborah Rubin*

INTRODUCTION

Mediation—the involvement of a neutral third party in a dispute for the purposes of helping the disputing parties achieve a mutually acceptable resolution¹—has sometimes been referred to as the feminization of the legal system.² Mediation is a departure from the adversarial nature of litigation that has its roots in patriarchal norms and ideals of justice.³ Many feminists find mediation effective for women in a way that litigation is not. Women can better articulate their needs and interests in mediation and, at the very least, be heard and feel validated.⁴ At the international level, however, women are generally excluded, suggesting that mediation in this context is far from feminized. There has been recognition among international leaders that including women in international mediations is both beneficial and necessary in addressing women's human rights concerns. What needs greater recognition is that mediation at the international level must return to the feminist values which influenced its development domestically to promote equality and human rights globally.

Interestingly, international mediation influenced the growth of mediation domestically.⁵ Prior to the 1960s there was not much scholarly interest in international mediation, but there was growing interest in mediation starting in the 1960s and 1970s because more

* J.D., 2009, City University of New York School of Law. The author would like to thank Law Professor Ruthann Robson for her encouragement, suggestions, and guidance, Law Professor Beryl Blaustone for being an inspiration and committed teacher in the field of mediation, and Law Professor Cheryl Howard for her insight as a mediator. The author is also grateful to the entire staff on the *New York City Law Review* for their dedication and hard work on this publication.

¹ See Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution; A Myth: Bridge Makers Who Face the Great Mystery*, 25 U. TOL. L. REV. 253, 257 n.10 (1994).

² See Christine B. Harrington & Janet Rifkin, *The Gender Organization of Mediation: Implications for the Feminization of Legal Practice*, INST. FOR LEGAL STUDIES WORKING PAPERS SERIES 4, 40 (1989).

³ See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60 (1988) (discussing how domestic law is rooted in "masculine" ideals "in terms of their intended beneficiary and in authorship").

⁴ See *infra* notes 81–82 and accompanying text.

⁵ See C.R. Mitchell & K. Webb, *Mediation in International Relations: An Evolving Tradition*, in NEW APPROACHES TO INTERNATIONAL MEDIATION 1, 11 (C.R. Mitchell & K. Webb eds., 1988).

high-profile figures were using negotiation techniques to try to resolve international conflicts.⁶ This stimulated more interest, development, and experimentation of alternative dispute resolution techniques domestically,⁷ including mediation and arbitration.⁸ Domestically, many found mediation to be more successful for the parties involved because it enabled more direct involvement in developing solutions, it was more cost-effective and time-efficient, and it could address many underlying interests and needs, and create longer-lasting solutions.⁹ Additionally, some feminists have found mediation to be particularly conducive for women and other marginalized persons.¹⁰

The feminist development of mediation domestically has not translated into the same development internationally, which could be a result of process differences in which international mediators lack a feminist perspective for resolving disputes. However, some of the lessons learned from domestic mediation, and many of the feminist forces behind domestic mediation, should be used to influence international mediation so that it can become more successful and empowering for the parties involved in intractable conflicts.

The first section of this Article will explore feminist perspectives on mediation domestically. This section will address the nature of mediation as a feminist response to the traditional legal system, as well as the negative feminist reactions to mediation in certain contexts. The section will also explore who mediators are and whether gender or sex matters for the role of mediator as well as for the disputants. Communication and behavioral tendencies of men and women will also be discussed and evaluated in terms of how these tendencies could affect mediations. Lastly, this section will address power imbalances between genders and explore the different responses to mediating more controversial cases. The sec-

⁶ *Id.* at 7–8. International mediation does not just occur in cases of intractable conflict, but can also include environmental concerns, labor disputes, and commercial disputes. The focus of this paper is on international intractable conflicts that often involve human rights violations.

⁷ *Id.* at 10.

⁸ Arbitration involves a neutral third party who has the power to impose a decision on the parties to a dispute, whereas mediation involves a neutral third party who helps facilitate a discussion between the parties to enable the parties to determine their own outcome. American Arbitration Association, Arbitration & Mediation, http://www.adr.org/arb_med (last visited Mar. 24, 2010).

⁹ Mitchell & Webb, *supra* note 5, at 10; see also Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 56–57 (1995).

¹⁰ See *infra* text accompanying notes 20–29, 54–61, 81–82.

ond section of this Article will provide context for mediation in the international arena and address the lack of women's involvement in international mediations. This section will survey various case studies of international mediations showing that women are typically excluded from formal peace processes. This section will also show that the systemic exclusion of women from international mediations is a human rights violation. Lastly, this Article will conclude that it is important for women—or at the very least a feminist perspective—to be a part of international mediations, to not only address gendered concerns, but also to create more inclusive, lasting solutions.

I. FEMINIST PERSPECTIVES ON MEDIATION IN THE UNITED STATES

A. *Standards of Mediation*

The Model Standards of Conduct for Mediators¹¹ serves as an ethical guide and code of conduct for mediators, but does not have the force of law, except where it has been judicially enforced.¹² The Standards contain provisions that are significant for feminist interests. Standard I requires that a mediation be conducted in a way that allows party self-determination, meaning that each party comes to the mediation and may come to an agreement voluntarily and uncoerced.¹³ Each party must be allowed to make “free and informed choices as to process and outcome.”¹⁴ If a mediator recognizes an imbalance of power affecting self-determination, then the mediator must try to balance this power difference.¹⁵

Standard II requires that the mediator remain impartial, and must terminate a mediation if he or she loses the ability to remain impartial.¹⁶ While a mediator is ethically bound to be an impartial third party, this can be a difficult task to achieve for those who are unaware of their preconceived gender and cultural stereotypes. Standard V requires that the mediator “maintain the confidentiality of all information” disclosed during the mediation unless the

¹¹ The Model Standards of Conduct for Mediators (2005), *available at* www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf. The Model Standards of Conduct for Mediators was jointly created by members of the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. The first version was drafted in 1994, and the revised version was drafted in 2005, and both have been approved by the participating organizations. *Id.* at 2.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4.

parties have agreed, otherwise, or the law requires otherwise.¹⁷ This means that all communications during a mediation cannot be later used in a judicial proceeding and the mediator cannot be subpoenaed. This standard also requires the mediator to keep confidential all communications and information that occur when meeting with the parties individually, unless the parties permit disclosure.

Beryl Blaustone asserts four values in mediation that promote mediation as a process that allows the parties to explore “mutually acceptable outcomes” rather than promoting a process that *must* result in settlement.¹⁸ These core values also promote a feminist understanding of mediation. The four values include: the principle of self-determination, taking responsibility for individual actions, understanding the experiences of other disputants, and acknowledging that understanding.¹⁹ These values are important for women in mediation because firstly, the principle of self-determination gives women an opportunity to speak for themselves and convey their experiences; secondly, in taking responsibility for individual actions both men and women will have to see how their actions have affected each other; in order to take responsibility, often each disputant will first have to understand the others’ experiences; thirdly, this can be empowering for women because it creates an opportunity for men to see experiences through women’s perspectives, which provides a way in which men and women can relate to each other;²⁰ finally, talking about understanding the others’ experiences is the way in which understanding those experiences becomes acknowledged.

B. Does Mediation Advance a Feminist Agenda?

For some feminist scholars, mediation is seen as an empowering, non-adversarial approach to addressing conflict that is a departure from the male-dominated, patriarchal legal system.²¹ Janet Rifkin clarifies the differences between the traditional legal system and mediation. She states, “Traditional legal pedagogy is deeply wedded to a patriarchal conception of law. This wedding is characterized by hierarchy, adversarialness, linearity, and rationality, a

¹⁷ *Id.* at 6.

¹⁸ Blaustone, *supra* note 1, 257–58, n.10 (1994).

¹⁹ *Id.* at 257–58.

²⁰ See Kate McCabe, *A Forum for Women’s Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 472 (2001).

²¹ See Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. 21 (1984).

paradigm in which reason is synonymous with rule and the ideal of the reasonable man is the fundamental frame of reference for making decisions.”²² In contrast, mediation encourages dialogue; it asks different questions that invoke concerns of “responsibility and justice” as opposed to turning explicitly to “individual rights,” which are intrinsically defined in male terms.²³ Rifkin argues that the study of mediation is not only feminist because of its antipodean position to the traditional legal system, but also mediation requires a “feminist pedagogy fundamentally different from traditional legal pedagogy.”²⁴ The mediator is a facilitator of “discussion, clarification, and compromise,”²⁵ and the development of these skills and methods are not learned through traditional legal pedagogy.

Many feminists have criticized the traditional legal system for “failing to take emotions and personalities into account, [and] . . . for failing to take women’s interests into account.”²⁶ Mediation creates a place for women to speak about their experiences, and—perhaps more important—to have their story heard and validated.²⁷ Understanding mediation from a feminist perspective “enables the dialogue to move out of the patriarchal legal framework, with the potential of providing women with a ‘room of their own’ for dispute resolution.”²⁸ Mediation is not governed by the patriarchal norms that structure the adversarial system; therefore, it “allows women to speak for themselves, about themselves, and put into the discussion issues and concerns not recognized by the

²² *Id.* at 23–24 (citing Janet Rifkin & Peter d’Errico, *Response to Zillah Eisenstein*, ALSA Forum: A Journal of Interdisciplinary Legal Studies, issues 2 & 3 (combined issue) (1983)).

²³ Rifkin, *supra* note 21, at 24.

²⁴ *Id.* at 23–24.

²⁵ *Id.* at 25.

²⁶ Barbara Stark, *Bottom Line Feminist Theory: The Dream of a Common Language*, 23 HARV. WOMEN’S L.J. 227, 241 (2000). See West, *supra* note 3, at 58–61 (1988) (claiming that jurisprudence is masculine for failing to address women’s fundamental differences and for failing to protect women’s experiences); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1506 (1992) (In discussing divorce and other family law matters, Singer states, “The adversarial system is ill equipped to perform the essentially nonlegal tasks associated with ongoing family management.”); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L. J. 39, 44–45 (1985) (quoting Frances Olsen, *The Sex of Law* “Given that women were long excluded from the practice of law, it should not be surprising that the traits associated with women are not greatly valued by law. Moreover, in a kind of vicious cycle, the ‘maleness’ of law was used as a justification for excluding women from practicing law.”).

²⁷ McCabe, *supra* note 20, at 459.

²⁸ *Id.* at 468.

adversarial legal system.”²⁹

Feminists, however, are also skeptical of mediation as an empowering forum for women to resolve their disputes. Critics claim that the growth of mediation may have more to do with states wanting to cut spending by creating a more informal process for *less important* matters, which may have racial, class, and gendered implications.³⁰ For instance, in the context of family law, many women’s rights were being addressed publicly in the court system, only to return to a more private forum with the increasing use of mediation.³¹ That certain matters will be filtered out of the court system and sent to mandatory mediation is a valid concern for persons with less success in the court system due to their race, sex, or other protected class.³² The legal system provides a way for marginalized groups to fight for their legal rights, which, in turn, sets precedents for others benefit. Just imagine if *Brown v. Board of Education*³³ and *Roe v. Wade*³⁴ had been mediated. Critics also claim that mediation may harm women, especially those who are less empowered and can benefit from—or may even need—“aggressive legal representation” to protect their rights and gain further relief through litigation.³⁵ As Professor Trina Grillo expresses, “To the extent that the mediation process makes it difficult to assert rights, the positive implications of rights-assertion for women, the poor, and minorities of either sex will be lost.”³⁶ The assumption here is that women have a tendency to not advocate strongly for their rights and beliefs, and therefore need the adversarial process to advance their interests. There is also the assumed fear that women in mediation will be easily persuaded to accept an outcome that does not adequately address their needs, interests, or their rights. While some women may benefit from aggressive legal representation, just as

²⁹ *Id.* at 472.

³⁰ See Rifkin, *supra* note 21, at 22.

³¹ See Gunning, *supra* note 9, at 61–62.

³² The Civil Rights Act of 1964 provides protection against discrimination of persons on the basis of race, color, religion, sex, and national origin. 42 U.S.C. §§ 2000e–2000e-17 (2006).

³³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The Court in this landmark decision held that segregating Black and white students from each other in public schools violated the Equal Protection Clause of the Fourteenth Amendment.

³⁴ *Roe v. Wade*, 410 U.S. 113 (1973). The Court in *Roe v. Wade* held that state anti-abortion laws violated the right to privacy under the Due Process Clause of the Fourteenth Amendment.

³⁵ Rifkin, *supra* note 21, at 22 (citing Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1542 (1983)).

³⁶ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1567 (1991).

men may benefit, their choice to enter mediation should not be hindered based on a generalized notion of what is best for women. Nor should one assume that legal rights are superior to other interests that typically cannot be represented through litigation.

Another fear is that mediation may be becoming “corrupted by the persistence of adversarial values,”³⁷ which is inherently dangerous because it goes against the purpose behind mediation. It “invites the process to become strongly grounded in patriarchal concepts of power, empowerment, and justice”³⁸ and slowly removes the feminist influence underscoring mediation. As mediation becomes more institutionalized, the results can be precarious because there are uncertainties around the safeguards for preventing power imbalances, the guidelines which mediators will follow, and whether legal rights will be ignored or fiercely pursued.³⁹ Some states require that mediators be lawyers, especially in divorce proceedings,⁴⁰ and other future, institutionalized mediation programs are likely to require that mediators be attorneys as well.

Grillo argues that mediation can actively harm women, particularly in situations when mediation is mandatory, but also in situations when mediation is voluntary.⁴¹ Some state court programs now require mediation prior to going before a judge in particular conflicts—often conflicts involving family law.⁴² In mandatory mediation, the parties have no choice over who will be their mediator, and the parties often may not be allowed to decide the degree of their lawyers’ involvement.⁴³ Some court programs suggest the parties try mediation with an on-site mediator, but a party may feel pressured to participate in the mediation even though it is considered voluntary.⁴⁴ In addition, although reaching an agreement is voluntary, parties may feel pressured to reach an agreement, or ex-

³⁷ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 37 (1996).

³⁸ Leda M. Cooks & Claudia L. Hale, *A Feminist Approach to the Empowerment of Women Mediators*, 3 DISCOURSE & SOCIETY 277, 297 (1992).

³⁹ Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 22 (2004).

⁴⁰ Cooks & Hale, *supra* note 38, at 297.

⁴¹ Grillo, *supra* note 36, at 1550.

⁴² *See id.* at 1547.

⁴³ *Id.* at 1581.

⁴⁴ As an intern in the Mediation Clinic at CUNY School of Law, I have observed parties feel pressured by court clerks into accepting mediation prior to going before a judge. Some parties enter mediation initially thinking that the process is not voluntary, when, in fact, it is. There may, however, be cases in other court systems where mediation is mandatory.

perience trauma in the mediation, whether or not an agreement is reached.⁴⁵ Another danger to the disputants in mediation exists within the mediator herself. A mediator is ethically bound to be a neutral third party,⁴⁶ but there are situations where a mediator is not impartial and may not remain neutral, and worse, these factors may be hidden from the parties.⁴⁷ Typically, the parties to a mediation have never met the mediator before, and it is the mediator's duty to explain the process and her role as a neutral third party. The mediator may break her impartiality subconsciously and conduct the mediation in an imbalanced yet subtle way without the parties being aware of the mediator's loss of control over her own biases. The mediation may also be noticeably imbalanced due to the mediator's inability to remain impartial, but for parties who have never experienced mediation, they may not realize that the mediator's behavior is unacceptable and unethical.

C. *Does Gender Still Matter?*

When mediation first gained momentum domestically in the late 1980s, approximately seventy percent of mediators in the United States were women.⁴⁸ However, Christine Harrington and Janet Rifkin's study of women in mediation at that time revealed that women tended to be concentrated in less prestigious and lower paid mediation positions than their male counterparts, and women lawyers were over-represented in mediation positions as opposed to other legal positions.⁴⁹ While the statistics indicating how many women are practicing as mediators in the United States today are hard to find, there is growing speculation that the number of

⁴⁵ Grillo, *supra* note 36, at 1582. "The mediator also can set the rules regarding who talks, when they may speak, and what may be said. The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. This can make the parties feel less, not more, in control of the process and its consequences for their lives." *Id.* at 1585–86.

⁴⁶ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005). "[N]eutrality" is most often defined as the obligation for mediators to act with 'impartiality'—the 'freedom from favoritism or bias in word, action or appearance, and include[ing] a commitment to assist all participants as opposed to any one individual.'" James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminant on Mediator Values Behind Self-Determination and Neutrality*, 5 CARDOZO J. OF CONFLICT RESOL. 65, 73 (2004) (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard I (1994); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard IVA (2001)).

⁴⁷ Grillo, *supra* note 36, at 1586–87.

⁴⁸ Harrington & Rifkin, *supra* note 2, at 2.

⁴⁹ *Id.* at 4.

women mediators is rapidly decreasing.⁵⁰ This news should cause alarm, not just because of the danger that mediation will be defeminized and overpowered by the patriarchal legal system, but also because there have been studies showing that women mediators also have much to gain from and bring to mediation.

A study in Georgia's Cobb County Superior Court of their mandatory mediation program revealed that women mediators had a twenty percent higher settlement rate than male mediators.⁵¹ This study looked at 578 mediations conducted from 2006 to 2007. While some commentators would argue that settlement rates are not necessarily a good measure of a successful mediation,⁵² this study is especially telling because most of the mediations involved family law matters, which may have achieved settlement due to the tendency for women to have a greater appreciation and understanding for the parties' relationships.⁵³

In a study by Helen R. Weingarten and Elizabeth Douvan, personal interviews of mediators revealed that men did not feel their gender had any impact on the mediation, while women mediators felt that gender did have an impact.⁵⁴ Women mediators also tended to feel "co-equal" with the disputants.⁵⁵ Scholars Leda Cooks and Claudia Hale describe the fundamental differences between a feminist approach to interviewing and a non-feminist approach to interviewing. The feminist approach "promotes a non-hierarchical relationship between the researcher and that which is researched."⁵⁶ The interviewer and the interviewee are considered co-equals in the process.⁵⁷ The non-feminist or traditional approach to interviewing is about getting information from a "subject" with a clearly unequal and hierarchical relationship.⁵⁸

Cooks and Hale questioned four women mediators at a community mediation center in individual interviews and group interviews. Cooks and Hale drew conclusions about how the mediation

⁵⁰ Diane Levin, Mediation Channel, Missing in Action: Where are all the Women Who Mediate?, <http://mediationchannel.com/2008/06/22/missing-in-action-where-are-all-the-women-who-mediate/> (last visited Mar. 25, 2010).

⁵¹ Practical Dispute Resolution, Correlation of Mediator Gender to Settlement Rate, <http://cobbmediation.wordpress.com/2008/11/11/correlation-of-mediator-gender-to-settlement-rate/> (last visited Mar. 27, 2010).

⁵² See Blaustone, *supra* note 1, at n.10.

⁵³ Practical Dispute Resolution, *supra* note 51 (drawing this conclusion based on Carol Gilligan's theory). See *infra* notes 63–64, 67–68, and accompanying text.

⁵⁴ Cooks & Hale, *supra* note 38, at 279.

⁵⁵ *Id.*

⁵⁶ *Id.* at 281.

⁵⁷ *Id.* at 282.

⁵⁸ *Id.* at 281.

process affects woman mediators. They found that the mediator is empowered by giving power to others—having others take “ownership and responsibility for their conflict.”⁵⁹ By listening and hearing the parties talk about their stories, the mediators felt empowered.⁶⁰ For the women interviewed, mediation was “meta-empowering,” because it empowered the parties and it empowered the mediators by virtue of their skills to build that empowerment in the parties.⁶¹

Gender may not only play a role in mediation in terms of the mediators, but also in terms of the parties. Mediating issues between disputants can be understood in terms of differences in communication modes and behaviors where one mode—the male mode—tends to dominate the female mode.⁶² For instance, Carol Gilligan drawing on many different psychological studies hypothesizes that there are gendered modes of behavior. She posits that women are governed by their abilities to care; they define and judge themselves in terms of their nurturing qualities and their development of relationships and connections with others.⁶³ Men, on the other hand, tend to “devalue that care,” and they are more autonomous and focused on their own individual achievement.⁶⁴ Gilligan’s theories on gendered communication tendencies still persist. More recently, scholar Peter Kunsmann drew similar conclusions noting that gender as well as status in society influence speakers.⁶⁵ Trina Grillo uses Gilligan’s theory to argue that those governed by an ethic of care in mediation are more likely to act “selflessly,” which can influence the mediation process and affect the outcome.⁶⁶ Additionally, Gilligan suggests that through examples in popular culture and psychological theories, society views the human experience in male terms.⁶⁷ Further, because of this phenomenological social construction, many women have a tendency to defer to men when making critical decisions, particularly

⁵⁹ *Id.* at 288.

⁶⁰ *Id.* at 293.

⁶¹ *Id.* at 296. Cooks and Hale recognize the flaw in their study that interviewing only four women mediators cannot generalize how women mediators feel across the board. *Id.*

⁶² See *infra* text accompanying notes 67–68.

⁶³ CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 17 (1982).

⁶⁴ *Id.*

⁶⁵ Peter Kunsmann, *Gender, Status and Power in Discourse Behavior of Men and Women*, Linguistik Online, 2000, http://www.linguistik-online.de/1_00/KUNSMANN.HTM (referencing several studies on gender and conversation).

⁶⁶ Grillo, *supra* note 36, at 1603.

⁶⁷ GILLIGAN, *supra* note 63, at 5–6.

when they feel they have been “excluded from direct participation in society.”⁶⁸

In conflict situations, studies show that women try to avoid risk and competitive circumstances more than men.⁶⁹ Linguistic specialist, Deborah Tannen, suggests that communication for men becomes their way of preserving their independence and negotiating their higher status in society, while the language and communication techniques that women use more consistently involve “establishing connections and negotiating relationships.”⁷⁰ Tannen also suggests that women are better listeners and more empathetic, while men are more domineering and assertive with their own views.⁷¹ In relationships, women tend to “consult” with their partners before reaching a decision on their own, while men tend to make decisions without consulting with their partners.⁷² Interestingly, many studies show that men not only talk more than women and tend to talk for longer periods of time than women,⁷³ but also men interrupt women more.⁷⁴ Men talk more “at meetings, in mixed-group discussions, and in classrooms where girls or young women sit next to boys or young men.”⁷⁵ Tannen explains that because of how most men and women are socialized as children, men feel more comfortable with “public speaking,” while women feel

⁶⁸ *Id.* at 67.

⁶⁹ Michelle R. Evans, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 OHIO ST. J. DISP. RESOL. 145, 157 (2001) (citing Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 312 (1999)).

⁷⁰ DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION 77 (1990).

⁷¹ See *id.* at 26–27; see also Antonia Potter, *We the Women: Why Conflict Mediation is Not Just a Job for Men*, OPINION (Ctr. for Humanitarian Dialogue, Geneva, Switz.), Oct, 2005, at 14–15, available at <http://www.hdcentre.org/files/We%20the%20Women.pdf>. Antonia Potter is Project Manager at the Centre for Humanitarian Dialogue in Geneva. This paper is from a series of Opinion Pieces that members from the Centre for Humanitarian Dialogue (HD Centre) have written. See also Ctr. for Humanitarian Dialogue, *Strengthening Practice: Mediation and Gender*, <http://www.hdcentre.org/projects/strengthening-practice/issues/mediation-and-gender> (last visited Mar. 27, 2010). The mission of the HD Centre is to act as an impartial and neutral organization that strives to create international peace through conflict resolution efforts. About the HD Centre, <http://www.hdcentre.org/about> (last visited Mar. 27, 2010).

⁷² TANNEN, *supra* note 70, at 27.

⁷³ *Id.* at 75.

⁷⁴ *Id.* at 188–89 (“It is deeply satisfying because it refutes the misogynistic stereotypes that accuses women of talking too much, and it accounts for the experience reported by most women, who feel they are often cut off by men.”). Tannen states, “The researchers most often cited for the finding that men interrupt women are Candace West and Don Zimmerman. However many others have come to similar conclusions.” (citation omitted). *Id.* at 306; see also Kunsmann, *supra* note 65.

⁷⁵ TANNEN, *supra* note 70, at 75.

more comfortable with "private speaking."⁷⁶ Men also have a greater tendency to use more persuasive language than women, and women tend to feel less confident in persuading others.⁷⁷ Tannen explains that men are more comfortable using commands when speaking in a group, while women are more prone to encourage participation.⁷⁸ This phenomenon is based on the theory that women will go to great lengths to avoid conflict.⁷⁹ Tannen states, "To most women, conflict is a threat to connection, to be avoided at all costs. Disputes are preferably settled without direct confrontation. But to many men, conflict is the necessary means by which status is negotiated, so it is to be accepted and may even be sought, embraced, and enjoyed."⁸⁰ These differences, if we accept them as fact, can be problematic in a mediation where the parties are of the opposite sex. Tannen's and Gilligan's findings suggest that women are more likely to acquiesce to male desires and not assert their needs or interests as persuasively or powerfully as men.

From another perspective, if communication tendencies are in fact different for men and women, the mediation process actually "complements women's strengths and provides them with an alternative forum, thus promising an opportunity for women to share their individual and collective experiences."⁸¹ Not only does mediation provide women with a voice, but also it provides them with a voice in a legally unconventional, non-adversarial setting that is more natural for their communication tendencies.⁸²

It seems that Tannen and other researchers⁸³ have assumed that women will have specific communication tendencies because they are women; however, this does not clarify whether women are born with different communication tendencies than men or if they are socialized to communicate differently than men. Environmental and social factors may play a role in shaping one's communication tendencies for both sexes. However, regardless of whether or not communication styles are biologically determined, the stereotypes that accompany gender will likely create behavioral expectations, which can influence mediations and communication

⁷⁶ *Id.*

⁷⁷ See Evans, *supra* note 69, at 157-163.

⁷⁸ TANNEN, *supra* note 70, at 154.

⁷⁹ *Id.* at 150.

⁸⁰ *Id.* at 149-50.

⁸¹ See McCabe, *supra* note 20, at 459.

⁸² See *id.* at 471.

⁸³ See *supra* notes 63-68, 81-82, and accompanying text.

differences.⁸⁴ This is not necessarily problematic as long as these differences are recognized. The mediator must be aware that such differences could lead to power imbalances and that an effort must be made in mediation to equalize any power imbalances that result from gendered communication styles and behaviors.⁸⁵

Questions a mediator should ask are whether one party is speaking more than the other, whether the party who is speaking less is getting everything she wants to say across to the other party, whether one party is more prone to interrupting the other party, and whether the language used by the parties may be socially influenced by their genders. If a mediator becomes aware of gendered conversational styles (what Tannen calls “genderlect”)⁸⁶ and these styles are apparent in a mediation between parties with a close relationship, it might be worthwhile to explore these communication styles with the parties because as Tannen suggests, “Once people realize that their partners have different conversational styles, they are inclined to accept differences without blaming themselves, their partners, or their relationships.”⁸⁷ This awareness could enable further communication and enhance a relationship going forward.

Certain theoretical approaches to mediation may also be affected by gendered communication and behavioral tendencies and stereotypes. For instance, “[s]ome mediation literature suggests that mediators should proceed by discouraging the expression of anger.”⁸⁸ In mediations involving divorce, discouraging anger may be harmful for women who are entitled to feel angry and want to express their anger.⁸⁹ Moreover, society already discourages women from being angry because “it is considered unfeminine,”⁹⁰ which prevents women from being “directly, clearly, and self-assertively angry.”⁹¹ Yet, there is no logical reason why women are discouraged from feeling and expressing anger, which may be the same anger fueling hotly contested legal disputes in the formal legal system.

Understanding gender as a social construction with men in a superior position and women in an inferior position can create a

⁸⁴ See Evans, *supra* note 69, at 158.

⁸⁵ *Id.* at 158, 169.

⁸⁶ TANNEN, *supra* note 70, at 297.

⁸⁷ *Id.*

⁸⁸ Grillo, *supra* note 36, at 1574.

⁸⁹ *Id.* at 1572.

⁹⁰ *Id.* at 1576.

⁹¹ *Id.*

power imbalance in mediation where men set the terms and women acquiesce. Feminist theorist Catharine MacKinnon argues that gender is socially constructed by the patriarchal structure of society; the social construction of gender creates a power imbalance, placing women in the inferior position and men in the superior position.⁹² The result is an ongoing power struggle that plays out in every social context from the privacy of the home to the public space of the work force.⁹³ Girls are raised and conditioned to be feminine, which means being sexually attractive to men.⁹⁴ MacKinnon states, "Gender socialization is the process through which women come to identify themselves as . . . sexual beings, as beings that exist for men, specifically for male sexual use."⁹⁵ MacKinnon argues that sexuality itself—the difference between male and female—becomes the basis for socially constructing male superiority and female subordination. We live in a social hierarchy with men at the top and women at the bottom; as a result, men define the world in their terms and women find their place in that definition.⁹⁶

Barbara Stark notes that some feminists have concerns that "power imbalances will resurface, and remain uncorrected" in mediation.⁹⁷ Further, from Trina Grillo's own inquiries of women who have been required to participate in mandatory mediation, they "often describe it as an experience of sexual domination, comparing mandatory mediation to rape."⁹⁸ Grillo notes, however, that many women also feel this way about the adversarial process.⁹⁹ The notion of feeling sexually dominated in mediation is tied to MacKinnon's theories of gender as a process of "power relations" in which men attempt to exert control over women's sexuality.¹⁰⁰ In mandatory mediation, the discussion is forced, and women may have few support networks, if any, in the room—which allows for, as Grillo puts it, a "psychic rape."¹⁰¹

⁹² Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516–17 (1982).

⁹³ See *id.*

⁹⁴ CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF STATE, 109–10 (1989).

⁹⁵ *Id.* at 110.

⁹⁶ See *id.* at 121–22.

⁹⁷ Stark, *supra* note 26, at 242.

⁹⁸ Grillo, *supra* note 36, at 1605.

⁹⁹ *Id.* at 1606.

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 1606.

D. *The Dangers of Mandatory Mediation*

It has become fairly common for divorce and family law matters, such as custody and visitation, to be handled in mediation rather than a formal judicial proceeding.¹⁰² Some states require that these matters be mediated before going before a judge.¹⁰³ Most feminists reject mandatory mediation, no matter what the case is about or how amicable the parties are towards each other.¹⁰⁴ Despite this, studies have overall shown mediation to be more successful for the parties than litigation. For instance, in terms of divorce, studies show that mediation participants are happier with their outcomes than those who take the litigation route.¹⁰⁵ Studies also show that divorce mediation saves more time and money than litigation; it is more humane, and the terms agreed to are more realistic for the parties' lives, which as a result, are more likely to be followed.¹⁰⁶ Another noted advantage of mediation is that parties involved in custody and visitation disputes tend to comply more with agreements that are reached in mediation.¹⁰⁷ Riskin finds divorce mediation particularly useful for the parties "because the strong emotional forces at work may call for more delicately wrought measures than could be provided in a court-imposed solution."¹⁰⁸ However, divorce mediation does not work for every couple; the couple has to involve two people who are willing to listen to each other and work together to create a solution that meets both parties' needs.¹⁰⁹

A more controversial area in mediation involves mediating domestic violence. Domestic violence can include physical abuse, sex-

¹⁰² Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 469 (2008); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280-81 (2004).

¹⁰³ Evans, *supra* note 69, at 152; *see also* Singer, *supra* note 26, at 1545.

¹⁰⁴ *See* Stark, *supra* note 26, at 243.

¹⁰⁵ *E.g.*, Grillo, *supra* note 36, at 1548-49, n.7-8. "Jessica Pearson and Nancy Thoennes found that more than three-quarters of the mediation clients in their studies expressed satisfaction with the process and would recommend it to others." *Id.* at 1548 (citing Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH* 9, 19 (1989); Jessica Pearson & Nancy Thoennes, *FINAL REPORT OF THE DIVORCE MEDIATION PROJECT 1* (1984); Jessica Pearson & Nancy Thoennes, *Mediation and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984)). *See also* Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989 (2000) (discussing a survey of many different studies around mediation).

¹⁰⁶ *E.g.*, Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33 (1982).

¹⁰⁷ Beck & Sales, *supra* note 105, at 991.

¹⁰⁸ Riskin, *supra* note 106, at 33.

¹⁰⁹ *See id.*

ual abuse, psychological abuse, and economic abuse.¹¹⁰ Women are more likely than men to be victims of domestic violence. Stark notes, "The absences of process protections, a third party decision maker, and clear guidelines make it too easy for victims of domestic violence to be further victimized."¹¹¹ While mediators try to exhibit some degree of control over the mediation, a mediator can never know when a disputant is going to suddenly say something that triggers strong emotions and perhaps traumatic events for the other disputant. Grillo warns, "The trauma inflicted upon a vulnerable party during mediation can be as great as that which occurs in other psychologically violent confrontations."¹¹² Moreover, some theoretical approaches to mediation try to equalize all the members of a family so that everyone is "equally implicated" in what has transpired.¹¹³ Following this model, a domestic violence victim may believe she deserves her fate and is responsible for the abuse she suffers.¹¹⁴ Additionally, in a domestic violence situation, an abuser tends to exhibit a more pleasant demeanor in public, and will appear more "dominant, charming, agreeable, and socially facile in comparison to his less assertive wife."¹¹⁵ Not only can this create power imbalances in the mediation itself, but also it can further victimize the abused party. Mediating domestic violence cases is even more controversial in mandatory mediations. Grillo explains that "forcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them, good for their children, or good for the system."¹¹⁶

In spite of this, there have been some positive reactions to mediating domestic violence cases. As discussed, there are different models and approaches to mediation. One approach is the transformative model, where the goal is to change the quality of the conflict interaction to one that empowers both parties and also allows for each party to recognize and understand each other's position.¹¹⁷ Some mediation centers have used this transformative

¹¹⁰ Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 CARDOZO J. CONFLICT RESOL. 253, 257–58 (2007).

¹¹¹ Stark, *supra* note 26, at 242–43.

¹¹² Grillo, *supra* note 36, at 1607.

¹¹³ *Id.* at 1561.

¹¹⁴ *Id.* at 1561–62.

¹¹⁵ *Id.* at 1583.

¹¹⁶ *Id.* at 1607.

¹¹⁷ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 13–15, 22–25 (2005).

model to change how they handle domestic violence cases.¹¹⁸ Where the general practice may have been to screen for domestic violence cases and not accept them for mediation, with the transformative model, some centers decided to have their screeners ask more open-ended questions in the screening process and allow the parties to decide whether or not mediation was appropriate for them.¹¹⁹ Members from one mediation center in particular felt it was important to recognize the capacity of the parties to judge what is in their best interests by giving them the power to decide whether or not to participate in mediation.¹²⁰ Using this model, commentators have observed that this acknowledges the experience of some victims for the first time; it also validates the decisions of others not to participate in mediation, and for others, it is empowering because it allows victims to take affirmative steps in addressing their situations.¹²¹

Some theorists suggest that the adversarial process could escalate the conflict in domestic violence situations, and therefore mediating domestic violence cases may provide a safer alternative under specific conditions.¹²² Moreover, the adversarial process could be a more imbalanced process for domestic violence victims because many victims may not have the means to afford an attorney.¹²³ Professor Desmond Ellis advances an approach to mediating domestic violence cases that involves a risk-assessment process to determine what type of mediation would be suitable for the parties involved.¹²⁴ For instance, parties who may be involved in a physically violent domestic violence situation would be assessed as high risk and may involve a telephone mediation, an on-line mediation, or a mediation where the parties are scheduled to meet with the mediator at separate times.¹²⁵ Ellis also stresses the importance of domestic violence training for mediators, judges, and any personnel involved in the mediation screening process.¹²⁶

Despite these innovative approaches, mediating domestic violence cases is still controversial because of the potential for unequal bargaining power, lack of mediator training in the area, and

¹¹⁸ See *id.* at 116–118.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 117.

¹²¹ *Id.* at 118.

¹²² E.g., Desmond Ellis, *Divorce and the Family Court: What Can Be Done About Domestic Violence?*, 46 FAM. CT. REV 531, 532 (2008).

¹²³ Davis, *supra* note 110, at 268.

¹²⁴ Ellis, *supra* note 122, at 533.

¹²⁵ *Id.*

¹²⁶ *Id.* at 533–534.

safety concerns for victims.¹²⁷ Some victims of domestic violence may have reached a point of learned helplessness where they either do not know how to advocate for their own well-being, or they fear for their safety if they do.¹²⁸ Without proper training, mediators may not recognize this danger. While these are important factors to consider when determining how to proceed in domestic violence cases, an approach that allows victims of domestic violence to decide for themselves whether mediation is appropriate for them should trump any system that denies them this opportunity. Deciding to go forward with mediation can be the first step towards regaining empowerment and control over oneself.

E. Should Domestic Mediation Influence International Mediation?

Professor Carrie Menkel-Meadow argues that using mediation, as developed in the United States, on international conflicts can be problematic.¹²⁹ Mediation is typically forward-looking, leaving the facts of the past in the past without addressing remedial relief for the present.¹³⁰ Menkel-Meadow states, “Attempts to avoid the conflicts and disagreeable arguments about ‘what happened’ before in the standard forms of mediation will not work as peace seekers attempt to mediate longstanding ethnic conflicts, especially when marked by bloodshed, violence, longstanding economic inequalities, or other historical unfairness.”¹³¹ It is especially imperialistic of Western peacekeepers and mediators to impose Americanized mediation in “reticent cultures or in cultures where social unequals cannot meet and discuss to consensually negotiate their problems.”¹³² However, calling for the inclusion of women in international mediations does not impose Western notions of what women must do or ask for; rather, it provides the opportunity for women who have not had a voice to finally speak about what they want and what they feel, which may or may not match up with Western ideals.

Overall, mediation in the United States has been developing in a way that advances a feminist forum for women’s concerns and interests to be addressed, not just in practice, but theoretically as

¹²⁷ Davis, *supra* note 110, at 269–71.

¹²⁸ *Id.* at 270.

¹²⁹ Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 338 (2003).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 339.

well. Scholars are interested in how mediation can benefit women more than the traditional adversarial process. Scholars are also concerned that mediation does not become infused with adversarial tactics that are influenced by patriarchal norms. The following section will turn to mediation at the international level and discuss how a feminist vision of domestic mediation can impact international mediations involving intractable conflicts to better serve the women involved.

II. INTERNATIONAL MEDIATION

A. *The Fundamentals of International Mediation*

Mediation in the international context is substantively the same as mediation in the United States—a neutral third party intervenes in a conflict to help the parties reach a mutually acceptable resolution.¹³³ While mediating international conflicts is a common practice,¹³⁴ the conflicts tend to be more complex, involving threats to peace and security and human rights violations.¹³⁵

International relations scholar Jacob Bercovitch finds mediation appealing to many involved in international conflicts because “it is ad hoc in nature, non-coercive, and voluntary, which makes it less threatening than other possible conflict management options.”¹³⁶ Out of seventy-eight international conflicts between 1945 and 1986, fifty-six were mediated.¹³⁷ International actors are clearly opting for mediation more often, however, of these mediations very few were successful.¹³⁸ Another appealing aspect of mediation according to Bercovitch, is that it is “non-evaluative and non-judgmental,” and it leaves the outcome ultimately up to the parties involved.¹³⁹ Professor Baruch Bush would disagree and finds that the approach often taken in international mediation

¹³³ See Jacob Bercovitch, *International Mediation and Intractable Conflict*, BEYOND INTRACTABILITY, Jan. 2004, http://www.beyondintractability.org/essay/mediation_intractable_conflict.

¹³⁴ International Online Training Program on Intractable Conflict, <http://www.colorado.edu/conflict/peace/treatment/mediation.htm> (last visited Mar. 25, 2010). See also MARIEKE KLEIBOER, *THE MULTIPLE REALITIES OF INTERNATIONAL MEDIATION* 11 (1998) (Mediating international conflicts has been a practice for hundreds of years.).

¹³⁵ *Id.* See also WILLIAM G. O'NEILL, CTR. FOR HUMANITARIAN DIALOGUE, *MEDIATION AND HUMAN RIGHTS*, <http://www.hdcentre.org/files/Mediationandhumanrights.pdf>.

¹³⁶ Bercovitch, *supra* note 133.

¹³⁷ International Online Training Program on Intractable Conflict, *supra* note 134 (citing a study by Jacob Bercovitch conducted in 1991).

¹³⁸ *Id.*

¹³⁹ Bercovitch, *supra* note 133.

does not let the parties involved decide on the ultimate outcomes.¹⁴⁰

When entering an international conflict the mediator has a number of difficult tasks ahead because of the complex issues involved.¹⁴¹ As a result, it is important for a mediator to gain as much understanding of the conflict as possible—knowing who the political and military leaders are on all sides, what their tendencies are, how they perceive the other parties to the conflict, and their preferred outcome to the conflict.¹⁴² There are a number of other factors that contribute to the success of a mediation at the international level, including: the timing of the intervention, which is optimal when the parties have exhausted each other out and want to see the end to the conflict; the use of multiple mediation approaches and techniques; having a mediator with resources, expertise, and patience; having all sides committed to stopping the violence; including “recognizable leaders” from each side, where no major power has a stake in the process.¹⁴³

B. *Who Mediates International Disputes*

Mediators can be trained individuals, official representatives of states, actors working for non-governmental organizations or religious, civic, or humanitarian organizations, or international organizations such as the United Nations (“U.N.”).¹⁴⁴ Individual mediators typically lack substantial resources, but they all have “knowledge, experience, and commitment to peaceful conflict resolution.”¹⁴⁵ When states and official governments are involved in mediation, this is referred to as “track one diplomacy.”¹⁴⁶ John W. McDonald and Louise Diamond developed the concept of multi-track diplomacy, which is an “expansion of the original distinction made by Joseph Montville in 1982, between track one (official, governmental action) and track two (unofficial, non-governmental action) approaches to conflict resolution.”¹⁴⁷

¹⁴⁰ Mariya Yevsyukova, Article Summary, *Expectations for International Mediation*, <http://www.beyondintractability.org/articlesummary/10091/?nid=5789> (Last visited Mar. 24, 2010) (summarizing Robert Baruch, *Expectations of International Mediation*, 8 INTERACTION: CONFERENCE REPORT 5, 18 (Summer 1996)).

¹⁴¹ Bercovitch, *supra* note 133; see also O'Neill, *supra* note 135.

¹⁴² Kleiboer, *supra* note 134, at 55.

¹⁴³ Bercovitch, *supra* note 133.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ John W. McDonald, *Multi-Track Diplomacy*, BEYOND INTRACTABILITY, Sept. 2003, http://www.beyondintractability.org/essay/multi-track_diplomacy.

¹⁴⁷ *Id.* The expansion includes nine tracks, which are in numerical order: govern-

States usually become involved because they are motivated by some interest of theirs that is at stake. State-level involvement means that a greater supply of resources is available during the mediation.¹⁴⁸ When non-governmental organizations become involved, they often operate informally and sometimes secretly.¹⁴⁹

When the U.N. becomes involved in an international mediation, the parties to the mediation must accept a "mediation mandate."¹⁵⁰ The mandate requires that the parties accept the U.N. as a mediator, which gives authority to the Secretary-General or his envoys to meet with parties of the conflict and other interested groups, listen to their needs, and brainstorm ideas and solutions to develop a resolution.¹⁵¹ The parties are not bound by the outcome unless the Security Council actively enforces the mediated agreement.¹⁵²

Many international conflict mediators come from a range of places including states and international organizations.¹⁵³ From all of these places, there are few or no women at all in top positions qualified to mediate.¹⁵⁴ It is also rare for women to be involved as participants in the mediation process.¹⁵⁵ Whether or not women are involved as mediators or participants, perhaps most crucial is the lack of a feminist voice in the mediation process.

Another problem facing international mediations is that there is minimal guidance for how to conduct mediations in the international context. Article 33 of the U.N. Charter recognizes several methods, including mediation, for reaching peaceful settlements in international disputes.¹⁵⁶ In addition, Article 36 provides that

ment; professional conflict resolution; business; private citizens, research, training and education; activism; religious; funding; and public opinion/communication. Each track has its own advantages and varying level of resources, but when the tracks come together to resolve conflicts they bring forth a more solid force for resolving conflict. *Id.*

¹⁴⁸ Bercovitch, *supra* note 133.

¹⁴⁹ Common non-governmental organizations that get involved under track two of the multi-track umbrella in international mediations include: Amnesty International, International Alert, The Carter Center, The International Committee of the Red Cross, Center for Humanitarian Mediation, and Oxfam. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Potter, *supra* note 71, at 3.

¹⁵⁴ *Id.* at 4.

¹⁵⁵ Antonia Potter, Gender Sensitivity: Nicety or Necessity in Peace-Process Management?, (Ctr. for Humanitarian Dialogue, Geneva, Switz.), 2008, at 56, available at <http://www.hdcentre.org/files/Antonia%20Potter%20Gender%20sensitivity%20WEB.pdf>.

¹⁵⁶ U.N. Charter art. 33.

the Security Council may “recommend appropriate procedures or methods of adjustment.”¹⁵⁷ However, without an international “Model Standards of Conduct,” international mediations have hardly any procedural safeguards for providing important principles such as self-determination,¹⁵⁸ impartiality, and confidentiality. It is difficult to provide assurance to vulnerable parties that mediation is a safe and fair process for resolving their conflict without knowing the standards and ethical guidelines that international mediators follow.

Scholar Hugo Slim drafted suggestions for an international ethical code for mediators relying on a number of codes that many mediators use and respect.¹⁵⁹ His suggestions stress particular values such as facilitating a mediation that allows for voluntary agreement and maintaining impartiality.¹⁶⁰ Slim also suggests standards that a mediator should strive for, including gaining the trust of the parties involved, upholding confidentiality, and only sharing information between the parties on which the parties have agreed.¹⁶¹ In advocating for quality of the process, he suggests that mediators must consider “who qualifies as an appropriate participant [and] how the views and needs of men, women, children and minorities are fairly represented in [the] discussions.”¹⁶²

C. *Where Are All the Women?*

Generally, and “[a]lmost without exception, formal peace processes have strikingly low female presence, among both parties and mediators.”¹⁶³ Including women in international mediations is easier said than done, however, because there are many barriers hindering the effective participation of women including threats or actual experiences of “sexual and gender-based violence.”¹⁶⁴ Culturally, in many parts of the world women are excluded from “male

¹⁵⁷ U.N. Charter art. 36.

¹⁵⁸ Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 283 (2006).

¹⁵⁹ See Hugo Slim, *Towards Some Ethical Guidelines for Good Practice in Third Party Mediation in Armed Conflict*, (Ctr. for Humanitarian Dialogue background paper), available at <http://www.hdcentre.org/files/TowardssomeEthicalGuidelinesforGoodPracticein3rdPartyMediationinArmedConflict.pdf>.

¹⁶⁰ *Id.* at 79.

¹⁶¹ *Id.* at 79–80.

¹⁶² *Id.* at 81.

¹⁶³ Potter, *supra* note 155, at 56.

¹⁶⁴ U.N. Dev. Fund for Women (UNIFEM), WOMEN BUILDING PEACE AND PREVENTING SEXUAL VIOLENCE IN CONFLICT-AFFECTED CONTEXTS (2007), available at http://www.unifem.org/attachments/products/WomensBuildingPeaceAndPreventingSexualViolence_eng.pdf [hereinafter WOMEN BUILDING PEACE].

dominated decision-making forums.”¹⁶⁵ Many women also lack the financial support and are met with public resistance to their participation, especially when their involvement may challenge cultural traditions. There is also often strong resistance to women who try to take on public roles. Women may also be deterred if they have families with children.¹⁶⁶ A report conducted by the U.N. Development Fund for Women (“UNIFEM”) found that:

Women may face resistance to their engagement in decision-making from formal and informal sources, including community members and their own families; in many cases it is extremely difficult to go against traditional practices without creating backlash and outright obstruction. Furthermore, challenges are often compounded by women’s lack of access to justice mechanisms and support services for survivors of [sexual and gender-based violence].¹⁶⁷

These factors not only affect female parties to mediations, but also impact the shortage of female mediators. Men in some cultures may not tolerate talking to a female mediator they do not know.¹⁶⁸ Because women are typically expected to take on domestic responsibilities such as childcare, participating as a mediator in a situation with an unpredictable timeline in a dangerous location also deters many women from such roles.¹⁶⁹ Additionally, track one mediators are typically chosen from a small pool of high-level government officials and diplomats, who are mostly men, which makes the pool of potential women mediators even smaller.¹⁷⁰

D. Attempts to Include Women in the Mediation Process

In 2000, the U.N. Security Council adopted Resolution 1325, which recognized the importance of the equal inclusion and involvement of women in reaching resolutions in international disputes.¹⁷¹ Resolution 1325 specifically “[u]rges Member States to ensure increased representation of women at all decision-making levels . . . for the prevention, management, and resolution of conflict.”¹⁷² The Resolution calls for the Secretary-General “to provide Member States training guidelines and materials on the protection,

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.*

¹⁶⁸ See Potter, *supra* note 71, at 9.

¹⁶⁹ *Id.* at 8.

¹⁷⁰ *Id.* at 7.

¹⁷¹ S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 2000); see *infra* Appendix for the full text of Security Council Resolution 1325.

¹⁷² *Id.* at ¶ 1.

rights and particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures.”¹⁷³ Among many other urgings and expressions of the importance of including women and their needs in the conflict-resolution process, the Resolution encourages the adoption of a gender perspective in resolving disputes.¹⁷⁴

UNIFEM released a report in 2005 containing guidelines and considerations to help mediators and peace facilitators implement Resolution 1325.¹⁷⁵ The report suggested that “women are more likely to make an impact on negotiations when they convene as a constituency of women with a common agenda for peace.”¹⁷⁶ In doing so, there must be efforts to bring different women’s voices together from different groups, perspectives, and backgrounds to determine the shared interests of women from these different constituencies and have these interests represented by a critical mass.¹⁷⁷ The different groups have to be identified and there must be a facilitation of their communication.¹⁷⁸ While this report recognizes the significance of including women in the process, the mediator or mediation team must be “gender balanced” and “cognizant of gender issues.”¹⁷⁹ One way of doing this is to appoint a “gender advisor” whose main duty will be to provide “a gender analysis,” which will encompass the interests and needs of women and girls and infuse the negotiation process with a gender perspective.¹⁸⁰

Despite the U.N.’s attempts to encourage the need for and ensure women’s equal participation in international dispute resolutions, studies have shown that women are still seldom directly involved in formal peace processes.¹⁸¹ Other studies suggest that the

¹⁷³ *Id.* at ¶ 6.

¹⁷⁴ See *infra* Appendix for the full text of Security Council Resolution 1325.

¹⁷⁵ UNIFEM, SECURING THE PEACE: GUIDING THE INTERNATIONAL COMMUNITY TOWARDS WOMEN’S EFFECTIVE PARTICIPATION THROUGHOUT THE PEACE PROCESS (2005), available at http://www.unifem.org/attachments/products/Securing_the_Peace.pdf [hereinafter SECURING THE PEACE].

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.* at 5, 7. Negotiating parties should have a “minimum of 30% women’s representation in their delegations.” *Id.* at 7.

¹⁷⁸ *Id.* at 5–6.

¹⁷⁹ *Id.* at 9.

¹⁸⁰ *Id.*

¹⁸¹ Dianne Otto, *A Sign of “Weakness”? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325*, 13 MICH. J. GENDER & L. 113, 142 (2006) (citing UNITED NATIONS SECRETARY-GENERAL, WOMEN, PEACE AND SECURITY: STUDY SUBMITTED BY THE SECRETARY-GENERAL PURSUANT TO SECURITY COUNCIL RESOLUTION 1325 (2002); ELISABETH REHN & ELLEN J. SIRLEAF, WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS’ ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WO-

Resolution has been successful in “support initiatives” of peace negotiations in at least fifty-eight countries.¹⁸² While many local women’s organizations around the world have seen the Resolution as a step in the right direction, studies continue to show that most of women’s involvement in the peace process takes place outside of the formal setting of mediations and other modes of conflict resolutions. Moreover, local U.N. workers are not encouraging or facilitating the formal participation of women as Resolution 1325 urges; rather, women’s involvement in the peace process gains its momentum mostly from the local women’s organizations.¹⁸³

E. Mediations Where Women Were Seldom Involved

This section includes a few examples of conflict resolutions where women’s involvement in the formal peace process has been marginal prior to and even after the adoption of U.N. Security Council Resolution 1325. Not only are there few women participants, but also there are few women involved as mediators. The absence of women in both areas contributes to less comprehensive peace negotiations for a number of reasons, which can lead to immediate unsuccessful outcomes as well as long-term problems for the communities involved as a whole. Of the few instances where women were involved in the formal peace process, they brought women’s concerns to the table.¹⁸⁴ Additionally, at the grassroots level, negotiations that involve a diverse group of women from different sectors of society lead to more interests and concerns raised than if only a few women representatives were to advocate for all women.¹⁸⁵ However, the following examples from Bosnia and Herzegovina, Afghanistan, Timor-Leste, Darfur, and Kenya, demonstrate that when women are excluded from the formal peace process as mediators and as participants, women’s concerns are often neglected.

1. Bosnia and Herzegovina

Prior to the adoption of Resolution 1325, there was little pressure for peace negotiators to ensure the inclusion of women in the

MEN’S ROLE IN PEACE-BUILDING (2002), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FMCM2/\\$file/unicef-WomenWarPeace.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5FMCM2/$file/unicef-WomenWarPeace.pdf).

¹⁸² *Id.* at 143–44 (citing Peace Women: Women, Peace and Security Initiatives: Country Index, <http://www.peacewomen.org/campaigns/countriesindex.html> (last visited Apr. 11, 2009)).

¹⁸³ *Id.* at 144.

¹⁸⁴ See *infra* notes 258–60 and accompanying text.

¹⁸⁵ See WOMEN BUILDING PEACE, *supra* note 164.

peace process, but their exclusion was noticed. When Bosnia declared independence from Yugoslavia in 1992, a brutal civil war broke out between ethnic groups for control of the land.¹⁸⁶ Representatives from the Contact Group nations—the United States, Britain, France, Germany, and Russia¹⁸⁷—along with a special negotiator from the European Union—helped broker peace in the region at the Dayton Peace Accords in Dayton, Ohio.¹⁸⁸ The mediation specifically excluded women and those who actually lived through the conflict.¹⁸⁹ During the conflict, many women were raped and sexually abused.¹⁹⁰ The mediation never addressed these atrocities. During the conflict, however, women's organizations played a major role in providing humanitarian assistance and keeping the communication as open as possible across lines of conflict.¹⁹¹ Despite their efforts and their interests in the conflict, women were not even informed of the mediation.¹⁹² As a result, they could not provide any insight or information in the reconstruction of their state. In the General Framework Agreement, there is no mention of women, rape, or equality.¹⁹³

After the peace agreement was reached, the International Fund for Agricultural Development ("IFAD") noted the heavy financial impact that hit women particularly hard.¹⁹⁴ Funding for social services and family benefits decreased, many women's jobs were eliminated, and those who were able to remain in the workforce received considerably less pay than their male counterparts.¹⁹⁵ Additionally, traditional laws that discriminate against women, such as by excluding them from the right to own land, has made the transition from conflict to peace extremely burdensome for women, especially the women who are heads of households ac-

¹⁸⁶ Ruth Grove White, *Bosnia and Herzegovina Guide*, ONEWORLD.NET, Sept. 2005, <http://uk.oneworld.net/guides/bosnia/development>.

¹⁸⁷ BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, SUMMARY OF THE DAYTON PEACE AGREEMENT (Dec. 11, 1995), *available at* <http://www.state.gov/www/regions/eur/bosnia/dayton.html>.

¹⁸⁸ *Id.*

¹⁸⁹ Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT'L L. 103, 149 (2001).

¹⁹⁰ HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 291 (2000).

¹⁹¹ Chinkin & Paradine, *supra* note 189, at 150.

¹⁹² *Id.* at 149–50.

¹⁹³ See The General Framework Agreement, Bosn. & Herz, Dec. 14, 1995, *available at* http://www.ohr.int/dpa/default.asp?content_id=379.

¹⁹⁴ Bosnia and Herzegovina Gender Profile, United Nations, The International Fund for Agricultural Development (IFAD), <http://www.ifad.org/english/gender/cen/profiles/bih.htm> (last visited Mar. 27, 2010).

¹⁹⁵ *Id.*

counting for approximately a quarter of all households.¹⁹⁶

2. Afghanistan

The post-September 11th invasion of Afghanistan is a prime example where Resolution 1325 should have been implemented in rebuilding the country during mediation, but was not. The Taliban, an extremist Islamic group, gained control of the country in the mid-1990s and “committed massive human rights violations, particularly directed against women and girls.”¹⁹⁷ Afghanistan provided sanctuary to Osama bin Laden, a Saudi national and terrorist leader of Al-Qaeda, who also politically and financially supported the Taliban. As a response to bin Laden’s September 11th attacks on the United States and the Taliban’s refusal to turn over bin Laden, the United States invaded Afghanistan and put pressure on the Taliban to restore stability to the country.¹⁹⁸ No reference was made to Resolution 1325 in the efforts of rebuilding the country. It was only after women activists from all over the world mobilized and applied pressure on the U.N. that six women were included in the beginning stages of negotiations at the Bonn Conference in December 2001, and the women were involved in the beginning stages of negotiations.¹⁹⁹ Although women’s involvement in the peace process did not come easily, as a result, “the Bonn Agreement included a commitment to the eventual establishment of a broad-based, gender-sensitive, multi-ethnic, and fully representative government.”²⁰⁰ As part of the agreement, the thirty-member Interim Administration included two women appointees as the Ministers for Women’s Affairs and Health.²⁰¹ Their involvement was short-lived, however, because in later negotiations and crucial political decision-making, most women were left out.²⁰² Moreover, many women in Afghanistan faced obstacles to taking part in the

¹⁹⁶ *Id.*

¹⁹⁷ Background Note: Afghanistan (November, 2008), Bureau of South and Central Asia Affairs, U.S. Dep’t of State, <http://www.state.gov/r/pa/ei/bgn/5380.htm> (last visited Mar. 27, 2010).

¹⁹⁸ *Id.*

¹⁹⁹ Otto, *supra* note 181, at 145.

²⁰⁰ Otto, *supra* note 181 (citing Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Dec. 5, 2001, *available at* <http://www.unhcr.org/refworld/docid/3f48f4754.html>).

²⁰¹ *Id.*

²⁰² *Id.* at 146 “[M]ost of the decisions about the final form of the interim government took place behind closed doors, which enabled Afghanistan’s military and warlord factions to, in many ways, further increase and legitimize their hold on power.” *Id.* (citing HUMAN RIGHTS WATCH, *KILLING YOU IS A VERY EASY THING FOR US: HUMAN RIGHTS ABUSES IN SOUTHEAST AFGHANISTAN* (2003)).

peace negotiations, including security issues, lack of resources to travel, and no childcare.²⁰³

3. Timor-Leste

Likewise, Timor-Leste, also known as East Timor, is another example where Resolution 1325 did not play a big enough role in mobilizing women. Historically controlled and fought over by the Dutch and Portuguese throughout the 19th and 20th centuries, Timor-Leste was invaded and occupied by Indonesia in 1975.²⁰⁴ The country was then forcibly annexed by Indonesia, which stirred fighting between guerrilla forces of Timor-Leste and Indonesian troops for the next twenty-three years.²⁰⁵ There are reports of widespread violence and repression throughout this time.²⁰⁶ The U.N. called for Timor-Leste's independence in 1981, but this attempt failed.²⁰⁷ Finally, a U.N. sponsored referendum vote in 1999 resulted in seventy-eight percent of the Timor-Leste people choosing independence.²⁰⁸ The violence, however, continued until the U.N. intervened with an Australian-led peacekeeping force, the International Force for East Timor ("INTERFET") that same year.²⁰⁹ The U.N. Transitional Administration in East Timor ("UNTAET") was given authority to exercise control and remain in Timor-Leste until democratic elections were held.²¹⁰ Timor-Leste was officially recognized as an independent nation on May 20, 2002, but U.N. forces have remained.

This long, violent conflict has affected the people of Timor-Leste in many ways. Many men fought in guerilla forces against the Indonesian army; others were "murdered, imprisoned, or tortured."²¹¹ Many women were left to raise families on their own, they were raped and harassed, or "forced into 'marriages' with

²⁰³ Christine Chinkin, *Gender, Human Rights, and Peace Agreements*, 18 OHIO ST. J. DISP. RESOL. 867, 872 (2003).

²⁰⁴ E.g., Greg Barber, *East Timor: Under Indonesian Rule*, Online NewsHour, Apr. 2002, http://www.pbs.org/newshour/bb/asia/july-dec99/timor_background.html (last visited Mar. 27, 2010); Timor-Leste, C.I.A. World Fact Book, Oct. 23, 2008, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html> (last visited Mar. 26, 2010).

²⁰⁵ Barber, *supra* note 204.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Timor-Leste, *supra* note 204. See also Hilary Charlesworth & Mary Wood, "Mainstreaming Gender" in *International Peace and Security: The Case of East Timor*, 26 YALE J. INT'L L. 313, 314 (2001).

²⁰⁹ Timor-Leste, *supra* note 204.

²¹⁰ Charlesworth & Wood, *supra* note 208, at 314.

²¹¹ *Id.* at 314-315.

members of the occupation army.”²¹² By 2001, conditions for women were still poor as domestic violence constituted approximately forty percent of the nation’s crime.²¹³ A 2004 report indicated that “‘domestic violence, rape, attempted rape and sexual assault’” were still common.²¹⁴

The Security Council Resolution establishing UNTAET called for including personnel with training on gender-related issues pertaining to international and human rights law.²¹⁵ Despite this, women’s involvement was minimal and many women’s organizations felt excluded.²¹⁶ When the peace process was first initiated, many local women’s organizations used Resolution 1325 to push for their greater involvement in the process. When only three women were included in the National Consultative Council, which has fifteen members in total, local women’s organizations began lobbying for greater involvement.²¹⁷ As a result of these efforts, thirteen women were included in the National Consultative Council of thirty-three members. Local women’s organizations continued to play a large role in making sure women were involved in the peace process and the development of a new government. While many women’s organizations called for at least thirty percent of the seats to be granted to women on the Constituent Assembly, (the body charged with drafting Timor-Leste’s new constitution), less than thirty percent were elected.²¹⁸ Out of eighty-eight members on the Constituent Assembly, twenty-four were women.²¹⁹

Some other attempts were made by UNTAET to address women’s concerns, such as establishing a “Gender Affairs Unit” (“GAU”) in 2000. The GAU established a “Gender and Law” group that encouraged women to “provide input on UNTAET’s policy and legislative proposals.”²²⁰ Other efforts have been made by the GAU to address women’s human rights concerns; however, there

²¹² *Id.* at 315.

²¹³ *Id.*

²¹⁴ Otto, *supra* note 181, at 150 (citing U.N. High Comm’r for Human Rights, *Advisory Services and Technical Cooperation in the Field of Human Rights* ¶ 52, U.N. Doc. E/CN.4/2004/107 (Jan. 19, 2004)).

²¹⁵ Charlesworth & Wood, *supra* note 208, at 314.

²¹⁶ See *id.* at 315; see also Otto, *supra* note 181, at 147 (“At a workshop called ‘Women’s Liberation in the Transition to Independence’ held in February 2000, women agreed that they had not been included in important decision-making by either the National Council for Timorese Resistance (CNRT) or UNTAET . . .”).

²¹⁷ Otto, *supra* note 181, at 148. The National Consultative Council was created to assist UNTAET in rebuilding East Timor. *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

was confusion about the GAU's mandate, especially since it was staffed by only six employees who were all foreign nationals, and East Timorese women had no say in what functions the GAU should serve. Additionally, the GAU was poorly funded and lacked "institutional support."²²¹ More recent efforts by the U.N., however, have shed more light on these issues and encouraged greater equality for women.²²²

Despite the women who were able to take part in the peace process and legislative process, there were many barriers in place to most local and less-privileged women. Many women in Timor-Leste were illiterate, did not have access to information about the transitioning government, did not have transportation, and felt oppressed by the patriarchal culture.²²³ Many women were also expected to return to their traditional roles in the home, and were discouraged from taking a more public role.²²⁴

4. Darfur

While some gains have been made in implementing Resolution 1325, it became clear in Darfur that much more needed to be done. Conflict began in Darfur, a region in western Sudan, in 2003, when rebels of the Sudan Liberation Movement/Army ("SLM/A") and the Justice and Equality Movement ("JEM") attacked government targets because of the government's oppression of Black Africans over Arab Africans.²²⁵ Since the conflict began, violence has ensued among many other rebel groups, government forces, and Arab militias, which has greatly hindered mediation efforts.²²⁶ The violence in Darfur has resulted in many killings and women raped or abducted as sex slaves.²²⁷ A survey conducted in 2006 estimated that at least 200,000 lives have been lost.²²⁸

Several mediation attempts prior to 2005 excluded women

²²¹ Charlesworth & Wood, *supra* note 208, at 315–316.

²²² See U.N. DEV. PROGRAMME, UNDP Supports Gender Equality in Timor-Leste as the National Parliament Advances Women's Empowerment Agenda, Oct. 27, 2008, <http://www.tl.undp.org/undp/newsnews.html>.

²²³ Otto, *supra* note 181, at 150–151.

²²⁴ Charlesworth & Wood, *supra* note 208, at 315.

²²⁵ Q&A: *Sudan's Darfur Conflict*, BBC, <http://news.bbc.co.uk/2/hi/africa/3496731.stm> (last visited Mar. 27, 2010).

²²⁶ *Id.*; Senait Woldu Tesfamichael, *Negotiating Peace for Darfur: An Overview of Failed Processes*, BEYONDIRTRACTABILITY, March, 2008, http://www.beyondintractability.org/case_studies/negotiating_peace_for_darfur.jsp?nid=6809.

²²⁷ Q&A: *Sudan's Darfur Conflict*, *supra* note 225.

²²⁸ *Id.*

and proved to be unsuccessful.²²⁹ In December 2005, fifteen women participated in the seventh round of peace talks led by the African Union ("AU"). UNIFEM was instrumental in influencing the AU to create a "gender strategy" to inform the process by including persons with "gender expertise" and include more women in the decision-making process.²³⁰ The following year, a twenty-member, all-women "Gender Experts Support Team" ("GEST") provided recommendations to the mediation team on gendered issues and other issues, entitled "Women's Priority Concerns for Reconstruction in Darfur"²³¹; although, it is suggested that contributions from the women's groups involved were not reflected in the final agreement.²³² The 2006 peace agreement failed and some of the reasons for its failure include: creating an agreement that was not acceptable to all involved in the conflict, and creating an agreement that was not practical. Additionally, some rebel groups and civilian representatives with varied interests and stakes were excluded from the process.²³³

In October 2007, civilians were requesting greater representation in the mediation process.²³⁴ Another concern raised by Safaa Al-Aagib Adam, the Secretary-General and Gender Advisor of the Community Development Association, was "the lack of women's representation in delegations of both the government and the rebel movements."²³⁵ Adam stated, "This is a message to both delegations; we need to see women in their midst as this is an opportunity for peace and dialogue that should involve especially women who suffer the most in conflict."²³⁶ The U.N. Security Council recently noted that while small gains have been made in encouraging more women's involvement in the peace process in Darfur, Resolution 1325 is "far from being fully implemented."²³⁷

²²⁹ Joyce Mulama, AllAfrica.com, Sudan: Women Boost Darfur Talks, <http://allafrica.com/stories/200810010005.html> (last visited Mar. 25, 2010).

²³⁰ UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, Darfur, <http://unifem-usnc.com/?q=darfur> (last visited Mar. 26, 2010).

²³¹ *Id.*

²³² Tesfamichael, *supra* note 226.

²³³ *Id.*

²³⁴ GlobalSecurity.com, Sudan: Unarmed Darfur Groups Demand Role at Peace Talks, <http://www.globalsecurity.org/military/library/news/2007/10/mil-071029-irin02.htm> (last visited Mar. 26, 2010).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Press Release, Security Council, Security Council Strongly Condemns all Violations of International Law Committed Against Women and Girls During, After Armed Conflict, in Presidential Statement, U.N. Doc. SC/9487 (Oct. 29, 2008), *available at* <http://www.un.org/News/Press/docs/2008/sc9487.doc.htm>.

5. Kenya

Kenya is yet another example where women and Resolution 1325 were overlooked. Violence broke out in Kenya between different ethnic groups after the “perceived rigging”²³⁸ of the Presidential election in December 2007 between different ethnic groups.²³⁹ Over 1,500 people were killed, and approximately 300,000 left their homes.²⁴⁰ Kofi Annan, the former U.N. Secretary-General, took over the mediation efforts shortly after the violence ensued.²⁴¹ Women in Kenya, however, were initially excluded from the Annan Mediation Talks. Comprising over fifty percent of the population, the women were outraged and urged Kenya to recognize Resolution 1325 with no success.²⁴² The Kenyan Women’s Consultation Group on the Current Crisis in Kenya submitted a memorandum to the mediation team to inform them of the importance of including women and to address in written words the concerns that Kenyan women had in resolving the conflict.²⁴³ While it was not exactly what they asked for, an eminent female advisor, Graça Machel, and two lead female negotiators as well as a female senior-level political advisor from the U.N.²⁴⁴ did participate in the mediation and an agreement was reached between the government in power and the opposition party in February 2008, which created a power-sharing coalition government.²⁴⁵ A commission was formed to investigate the post-election violence, and the report that resulted from the commission is expected to be used to hold persons responsible for the violence that took place;²⁴⁶ yet, many Kenyans remain skeptical

²³⁸ *Tribunal Urged for Kenya Violence*, BBC, Oct. 15, 2008, <http://news.bbc.co.uk/2/hi/africa/7671080.stm> (last visited Apr. 11, 2009).

²³⁹ Nick Wadhams, *New Post-Election Violence in Kenya Kills at Least 45*, VOICE OF AMERICA, Jan. 26, 2008, <http://www.voanews.com/english/archive/2008-01/2008-01-26-voa7.cfm?CFID=59645558&CFTOKEN=43428671> (last visited Mar. 26, 2010).

²⁴⁰ *Tribunal Urged for Kenya Violence*, *supra* note 238.

²⁴¹ *Kofi Annan Takes Over Kenya Mediation: Former U.N. Chief Will Attempt to Get Rivals Kibaki and Odinga To Meet*, CBS, Jan. 10, 2008, <http://www.cbsnews.com/stories/2008/01/10/world/main3695650.shtml>.

²⁴² Elizabeth Mwai, *Kenya: Women Decry Exclusion from Mediation Talks*, THE STANDARD (KENYA), Jan. 30, 2008, available at <http://www.afrika.no/Detailed/15899.html> (last visited Apr. 11, 2009).

²⁴³ See Women’s Memorandum to Kenyan Mediation Team, Feminist Peace Network, <http://www.feministpeacenet.org/2008/02/01/womens-memorandum-to-kenyan-mediation-team/> (last visited Mar. 27, 2010).

²⁴⁴ Potter, *supra* note 155, at 56–57.

²⁴⁵ For a further discussion of the agreement see *Key points: Kenya Power-Sharing Deal*, BBC, <http://news.bbc.co.uk/2/hi/africa/7269476.stm> (last visited Mar. 27, 2010).

²⁴⁶ *Tribunal Urged for Kenya Violence*, *supra* note 238.

that this alone will not (is this supposed to have the “not”?) solve the underlying problems behind the conflict.²⁴⁷

F. Despite Attempts to Include More Women, Women Have Not Been Heavily Involved

These examples show that women’s participation and involvement in international conflict mediations is still lacking. On October 29, 2008, the executive director of UNIFEM, Inés Alberdi, gave a speech on the importance of including women in peace processes at the U.N. for the U.N. Security Council Open Debate on Women, Peace and Security.²⁴⁸ Providing an overview of how little women have been included in peace processes, Alberdi stated, “Women averaged seven percent of negotiators in the five comprehensive agreements for which data were available. They averaged twenty-four percent of official observers in three recent peace processes for which data were available. They barely number at all among appointed envoys, mediators and facilitators.”²⁴⁹ These numbers are inadequate to afford women equal participation in peace processes, and to address their concerns and interests, which are recognized as different from men’s concerns.²⁵⁰ Simply put, a peace activist from Liberia told Alberdi that including women in the peace process “is a sign that women are valued.”²⁵¹

III. FEMINIST PERSPECTIVE ON INTERNATIONAL MEDIATION

A. Women Have Separate Concerns From Men in International Conflicts

In international conflicts, women have concerns that are separate from men’s concerns because they are specifically gendered in nature. For example, rape, sexual assaults, and sexual violence are common war crimes committed against women.²⁵² Other gendered concerns include childbirth, sex-work, human traffick-

²⁴⁷ See *Waki Commission: Kenya Voices*, BBC, <http://news.bbc.co.uk/2/hi/africa/7673304.stm> (last visited Mar. 27, 2010).

²⁴⁸ Inés Alberdi, Executive Director, UNIFEM, Women’s Equal Participation and Full Involvement in All Efforts for the Maintenance and Promotion of Peace and Security, Address at the UN Security Council Open Debate on Women, Peace, and Security (Oct. 29, 2008), available at http://www.unifem.org/news_events/story_detail.php?StoryID=753.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² CHARLESWORTH & CHINKIN, *supra* note 190, at 11, 13.

ing, maintaining feminine hygiene, female genital mutilation,²⁵³ as well as achieving equality by preventing discrimination in education, employment, healthcare, politics, cultural life, and the law.²⁵⁴ Women also tend to compose a large number of refugees in armed-conflict situations.²⁵⁵

Theorists Chinkin and Paradine stress the importance of including women as parties to mediations because women's experiences during conflict are different than the experiences of men. Chinkin and Paradine state:

Excluding both governmental and local-level women from peace settlements limits the agenda by omitting consideration of female experiences in proposals for reconstruction. Women's experiences of the war were diverse, but their perspectives would differ from those of their male counterparts. Thus, the inclusion of women would offer a wider range of opinions about the causes of conflict and priorities and strategies for reconstruction, including experience in grassroots peace discussions across ethnic divides.²⁵⁶

The process in Northern Ireland was one particular case where women were more heavily involved and successful in the mediation process. Their involvement in this process shows that women's involvement is crucial for addressing gender-related concerns including the repercussions of gender-based violence.²⁵⁷ In reconstructing democracy after years of conflict, the formal mediation process in Northern Ireland was comprised of members of local nongovernmental organizations ("NGOs"), including the Northern Ireland Women's Coalition.²⁵⁸ Their involvement "ensured the centrality of equality and human rights issues."²⁵⁹ The agreement included a provision that gave women the right to "full and equal political participation."²⁶⁰ Including women not just as parties, but also as mediators in the process brings attention to women's needs and concerns, and also brings to the table other important issues such as promoting human rights, education, and social services.²⁶¹ Some theorists argue that women's presence in

²⁵³ *Id.* at 226.

²⁵⁴ *Id.* at 217.

²⁵⁵ *Id.* at 276.

²⁵⁶ Chinkin & Paradine, *supra* note 189, at 151.

²⁵⁷ Potter, *supra* note 71, at 14.

²⁵⁸ Chinkin & Paradine, *supra* note 189, at 152.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Potter, *supra* note 71, at 14. "The inclusion of these issues can only serve to cement the chance for peace to last." *Id.*

mediations “can seem less threatening” to parties in conflict, resulting in a more peaceful atmosphere.²⁶² There have been actual accounts where interlocutors have observed how women’s involvement at different levels of negotiations made people more comfortable, and contributed to a warm atmosphere, which influenced positive relationship building.²⁶³

Women have played an important role informally in other conflicts.²⁶⁴ For example, in Uganda women commonly acted as mediators between different factions; this is easier for women to take on than men.²⁶⁵ In Somalia, intermarriage between different clans allowed women to move between them serving as message carriers, in a way that men could not.²⁶⁶ Women’s organizations in Colombia, despite attacks and “threats against women leaders,” continue to organize and try to implement peace negotiations.²⁶⁷ A businesswoman in Sri Lanka started an “awareness-raising campaign” to initiate peace negotiations in 2001.²⁶⁸ Women leaders who took part in peace negotiations in El Salvador brought a gendered perspective to the table, ensuring that women stakeholders in the outcome were taken into account.²⁶⁹ Women’s organizations in Liberia complemented the official peace negotiations by aiding in the disarmament of factions, and raising “funds to buy and subsequently destroy weapons.”²⁷⁰ These examples support the notion that including women as mediators and parties to mediations can advance the interests of everyone involved in conflict.

B. *Women Have Voices—They Must Be Heard*

Numerous international treaties and covenants grant women the right to equality and protection from sex discrimination. The Universal Declaration of Human Rights,²⁷¹ the International Covenant on Civil and Political Rights,²⁷² and the Convention on the Elimination of All Forms of Discrimination against Women

²⁶² *Id.* at 11.

²⁶³ *Id.*

²⁶⁴ See generally SECURING THE PEACE, *supra* note 175, at 1–3.

²⁶⁵ Potter, *supra* note 155, at 62.

²⁶⁶ *Id.*

²⁶⁷ SECURING THE PEACE, *supra* note 175, at 1–2.

²⁶⁸ *Id.* at 2.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

²⁷² International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

("CEDAW")²⁷³ all provide for equality and equal protection under the law. Additionally, the Beijing Platform for Action, which was adopted at the 1995 U.N. Fourth World Conference on Women, explains the need to "'ensure equality and non-discrimination under the law and in practice' and to 'revoke any remaining laws that discriminate on the basis of sex.'"²⁷⁴

These declarations, coupled with the U.N. Security Council Resolution 1325, provide ample support for the inclusion of women in mediations; however, the current state of systematically excluding women from international mediations perpetuates women's inequality and contributes to their inferior status both socially and politically in the nations in which they live. We have already seen how women bring different concerns to international mediations, such as gender-based violence and other gendered issues that typically are not addressed by men. Excluding women from international mediations prevents attention to these crucial issues. Moreover, excluding women from mediations prevents women from having a voice in repairing the nation in which they live. As MacKinnon would argue, it further divides the social hierarchy in which men dominate and define the world from their view and women passively accept the roles that are given to them. Data, reports, and statistics show that "[t]hroughout the world women are economically, socially, politically, legally and culturally disadvantaged compared with similarly situated men."²⁷⁵ Giving women a voice in international mediations is one way to start addressing these disadvantages. Until they have a voice, their continued exclusion—and forced silence—should be viewed as a human rights violation based on the declarations and covenants, which hold that women should be treated equally with men.

C. *A Forward-Looking Feminist Vision*

While it is evident, heavily supported, and in some cases seriously attempted, women should participate in international mediations involving conflicts in which they are affected. However, women should not be forced to participate and we should not wait for a conflict to erupt before giving women the power to partici-

²⁷³ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979).

²⁷⁴ Jessica Neuwirth, *Unequal: A Global Perspective on Women Under the Law*, Ms., Summer 2004, available at <http://www.msmagazine.com/summer2004/globalwomenlaw.asp>.

²⁷⁵ See CHARLESWORTH & CHINKIN, *supra* note 190, at 4–14.

pate if they choose. Women may bring new perspectives to the negotiating table, they may speak differently than men, and they may provide for a more balanced settlement—but it is not this simple.²⁷⁶

Most women who have been involved in international mediations are privileged women in their societies; they often have the means, education, and some level of public support, but they do not necessarily represent the interests of all women, particularly the women most affected by violent conflicts, who have been raped, displaced, poverty-stricken, and left to care for families and children alone.²⁷⁷ These women may not have the means to take part in mediation, and even if they did, just as dangers present themselves to domestic violence victims of being re-victimized in mediation against their abusers, women who have been raped or sexually assaulted during conflict may be re-victimized by talking with representatives of their rapists. The answer may not always be to include more women—although everything should be done to include them when they actively seek to be included; rather, international mediators should be trained from a feminist perspective—the underlying force behind mediation domestically—to be gender sensitive and culturally sensitive to address the needs, interests, and concerns of everyone involved in the conflict, and not just aim for peace.

International mediators do not necessarily have formal training in mediation the way that mediation trainings have developed in the United States. Many international mediators are political leaders who may not be concerned with or aware of following a particular method, style, or process of mediation that encompasses a feminist approach. In building a feminist perspective into international mediations it is important to look at the fundamental feminist forces behind mediation domestically and ask whether these perspectives apply cross-culturally. Moreover, it is important for international mediators to be aware of these perspectives in terms of

²⁷⁶ As a young white woman who has grown up in New York for most of my life, I can hardly claim to generalize women's potential contributions around the world in a variety of conflicts based on my research or experiences. I believe everyone is different, no two persons can ever experience life in the same way, let alone approach mediation in the same way, and so while empirical evidence may show that women tend to be more similar in their actions, experiences, and perceptions than men, we must be careful to claim that all women can be represented by a particular person or view.

²⁷⁷ See Otto, *supra* note 181, at 151; see Potter, *supra* note 155, at 57–58.

mediation's utility in advancing women's participation and its dangers.

Many theorists and international mediators have argued that the fundamentals driving many peace processes are based on male perceptions of stability.²⁷⁸ In many ways this is similar to the legal system domestically, which is rooted in a patriarchal ideology that puts forth a male perception of legal rights and justice. Feminist theorists have identified how mediation can be used to further the interests of women in ways that the adversarial process either does not or cannot—by identifying underlying needs and interests, allowing for self-determination, equalizing power imbalances, and communicating more naturally. Theorists have also identified dangers present to women in mediations in some contexts—the perpetuation of power imbalances, safety concerns, feeling pressured or coerced, and not gaining rights to which they may be legally entitled. International organizations, leaders, and mediators can learn from these techniques and approaches to work towards more inclusive and comprehensive mediations that have a greater chance of putting forth a longer-lasting resolution, which takes women's concerns into account.

While a gendered perspective may lead to greater stability, it will not necessarily create the perfect solution.²⁷⁹ However, if mediators enter international conflicts with an understanding of the different experiences of the men and women involved in the conflict, their different needs, and their desires and abilities to contribute, mediators gain more information and tools to work with in creating peace.²⁸⁰ Going forward with peace negotiations from a male-only perspective is like holding a child custody mediation without the mother. Women comprise almost fifty percent or more of the global population,²⁸¹ and are arguably necessary for the continued existence of the human race. To deny them a say in their own existence and the future of their own children just because they are women should not be tolerated.

CONCLUSION

International conflict mediations do not adequately address women's human rights concerns. One could claim that the ap-

²⁷⁸ Potter, *supra* note 155, at 58.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 65.

²⁸¹ GeoHive, Total Population by Gender and Gender Ratio, by Country (2007), http://www.xist.org/earth/pop_gender.aspx (last visited Mar. 27, 2010).

proach taken in many peace negotiations further contributes to human rights violations against women by generally excluding them from the process. Their inclusion is certainly recognized as important, and there are many efforts on the part of several international actors trying to include more women in the peacemaking process, but while their inclusion may still be problematic in many cases, what is more important is a return to the feminist force behind mediation domestically. Mediation is seen by many to be a departure from patriarchal conceptions of justice and fairness. Meanwhile, from the data on international conflicts available, most international mediations have been driven by male leaders, male mediators, and male notions of peace.

APPENDIX

S.C. RES. 1325, U.N. Doc. S/RES/1325 (Oct. 2000)

The Security Council,

Recalling its resolutions 1261 (1999) of 25 August 1999, 1265 (1999) of 17 September 1999, 1296 (2000) of 19 April 2000 and 1314 (2000) of 11 August 2000, as well as relevant statements of its President, and *recalling also* the statement of its President to the press on the occasion of the United Nations Day for Women's Rights and International Peace (International Women's Day) of 8 March 2000 (SC/6816),

Recalling also the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the twenty-third Special Session of the United Nations General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-First Century" (A/S-23/10/Rev.1), in particular those concerning women and armed conflict,

Bearing in mind the purposes and principles of the Charter of the United Nations and the primary responsibility of the Security Council under the Charter for the maintenance of international peace and security,

Expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and *recognizing* the consequent impact this has on durable peace and reconciliation,

Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and *stressing* the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

Reaffirming also the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts,

Emphasizing the need for all parties to ensure that mine clearance and mine awareness programmes take into account the special needs of women and girls,

Recognizing the urgent need to mainstream a gender perspective into peacekeeping operations, and in this regard *noting* the

Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (S/2000/693),

Recognizing also the importance of the recommendation contained in the statement of its President to the press of 8 March 2000 for specialized training for all peacekeeping personnel on the protection, special needs and human rights of women and children in conflict situations,

Recognizing that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,

Noting the need to consolidate data on the impact of armed conflict on women and girls,

1. *Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;

2. *Encourages* the Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;

3. *Urges* the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard *calls on* Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster;

4. *Further urges* the Secretary-General to seek to expand the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;

5. *Expresses* its willingness to incorporate a gender perspective into peacekeeping operations, and *urges* the Secretary-General to ensure that, where appropriate, field operations include a gender component;

6. *Requests* the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures, *invites* Member States to incorporate these elements as well as HIV/AIDS awareness training into their national training programmes

for military and civilian police personnel in preparation for deployment, and *further requests* the Secretary-General to ensure that civilian personnel of peacekeeping operations receive similar training;

7. *Urges* Member States to increase their voluntary financial, technical and logistical support for gender-sensitive training efforts, including those undertaken by relevant funds and programmes, inter alia, the United Nations Fund for Women and United Nations Children's Fund, and by the Office of the United Nations High Commissioner for Refugees and other relevant bodies;

8. *Calls on* all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:

(a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction;

(b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements;

(c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary;

9. *Calls upon* all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court;

10. *Calls on* all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;

11. *Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard

stresses the need to exclude these crimes, where feasible from amnesty provisions;

12. *Calls upon* all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design, and recalls its resolutions 1208 (1998) of 19 November 1998 and 1296 (2000) of 19 April 2000;

13. *Encourages* all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants;

14. *Reaffirms* its readiness, whenever measures are adopted under Article 41 of the Charter of the United Nations, to give consideration to their potential impact on the civilian population, bearing in mind the special needs of women and girls, in order to consider appropriate humanitarian exemptions;

15. *Expresses* its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women's groups;

16. *Invites* the Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution, and *further invites* him to submit a report to the Security Council on the results of this study and to make this available to all Member States of the United Nations;

17. *Requests* the Secretary-General, where appropriate, to include in his reporting to the Security Council progress on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls;

18. *Decides* to remain actively seized of the matter.