

Challenges to the Involvement of the Child in International Child Abduction
Mediation under the Hague Convention on the Civil Aspects of International
Child Abduction

ความท้าทายในการนำเด็กเข้าสู่กระบวนการไกล่เกลี่ยข้อพิพาทกรณีการลักพาเด็กข้ามชาติ
ภายใต้อนุสัญญาว่าด้วยลักษณะทางแพ่งในการลักพาเด็กข้ามชาติ

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Abstract

The focus of this paper is on the provision in the Guide to Good Practice that encourages the involvement of the child in the mediation. Even though it is perceived that the child is entitled with the rights to be heard and even though there are benefits of getting the child involved in mediation, there are potential drawbacks or challenges that the authorities and practitioners need to be taken into consideration. What I argue in this paper is that in the very specific area of international child abduction mediation there are some challenges that might make the involvement of the child in mediation more problematic.

Keywords : Child in meditation, child abduction, Good practice

บทคัดย่อ

บทความนี้มุ่งศึกษาตัวบทของแนวทางการปฏิบัติที่ดีที่ส่งเสริมการมีส่วนร่วมของเด็กในกระบวนการไกล่เกลี่ยข้อพิพาท แม้ว่าจะเป็นที่รับรู้ของเด็กนั้นมีสิทธิที่จะร้องเรียนเพื่อความเป็นธรรมและแม้ว่าจะเป็นที่รับรู้ถึงประโยชน์ของการสนับสนุนให้เด็กมีส่วนร่วมในกระบวนการระงับข้อพิพาท แต่กระนั้นกระบวนการดังกล่าวก็มีทั้งข้อดีและประเด็นท้าทายซึ่งผู้มีอำนาจและผู้ปฏิบัติจึงต้องนำไปคิดคำนึงถึง สิ่งที่ผู้เขียนมุ่งเสนอในบทความนี้ได้แก่ สิ่งท้าทายในประเด็นการลักพาเด็กข้ามชาติอันอาจส่งผลทำให้การมีส่วนร่วมของเด็กในกระบวนการระงับข้อพิพาทเกิดปัญหา

คำสำคัญ : การมีส่วนร่วมของเด็กในกระบวนการระงับข้อพิพาท, การลักพาเด็กข้ามชาติ, แนวทางการปฏิบัติที่ดี

1. Introduction and Background Information

As the world has been globalized and as international communication has been expanded, there has been an increase in marriage between people from different countries.¹ However, when the days go rough and these couples get divorced, sometimes one parent takes the child away from the country. The Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention) has been enacted to govern this type of situation and to ensure that the child is returned to his or her habitual residence promptly.² With the perception that either wrongful retention or child abduction to the new environment unfamiliar to the child is not in the child's best interests and may have harmful effect towards the child, the Hague Convention structured a procedure where the left-behind parent could petition for a return order from the judicial or administrative authorities.³ After the return, both parents are to deal with custody hearings according to domestic law.⁴

As mediation has been increasingly accepted as an appropriate means of dispute resolution in family matters in many countries, the Hague Conference has recognized the importance of mediation in facilitating amicable solutions between parents and, therefore, published the Guide to Good Practice under the Hague Convention on Mediation (Guide to Good Practice) in 2012.⁵ The mediation under the Hague Convention does not focus only on resolving the conflict at the 'return' stage, but can also reach other aspects on the merits of the dispute, such as custodial details.⁶ This advantage makes mediation more effective than litigation in the realm of international child abduction, in addition to the fact that mediation saves time and money, and allows parents to come to an agreeable solution, rather than an unpredictable court order.⁷

¹ Jennifer Zawid, 'Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators' (2008). 40. University of Miami Inter-American Law Review 1, p 4.

² Hague Convention on the Civil Aspects of International Child Abduction, 1983, [hereinafter Hague Convention]

³ Ibid, art 8. See also 'Hague Conference on Private International Law, Outline Hague Child Abduction Convention' (HCCH 2008) <www.hcch.net/upload/outline28e.pdf> accessed 10 November 2020.

⁴ Ibid, Hague Conference on Private International Law

⁵ 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Mediation' (2012), intro and para. 31, <www.hcch.net/upload/guide28mediation_en.pdf.html> accessed 10 November 2020. [hereinafter Guide to Good Practice]

⁶ Sarah Vigers, *Mediating International Child Abduction Cases: The Hague Convention* (Bloomsbury Publishing 2011), pp 39-42.

⁷ Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview' (2014). 48. Family Law Quarterly. 319, p 321.

The focus of this paper is on the provision in the Guide to Good Practice that encourages the involvement of the child in the mediation. Even though it is perceived that the child is entitled with the rights to be heard⁸ and even though there are benefits of getting the child involved in mediation, there are potential drawbacks or challenges that the authorities and practitioners need to be taken into consideration. The issue of the involvement of children in family matters has long been controversially debated. What I argue in this paper is that in the very specific area of international child abduction mediation there are some challenges that might make the involvement of the child in mediation more problematic. This paper is divided into three parts. The first part gives background information about the encouragement from the Hague Conference to involve the child in mediation as well as the literature review on pros and cons of the involvement of children in family disputes mediation. The second part, which is the main section of the paper, discusses challenges to the involvement of the child in international child abduction mediation that might make it difficult or ineffective to listen to child's voices. These challenges demonstrate that the arguments against the involvement of the child may be reinforced when it is in the context of international child abduction mediation. Moreover, with the unique characteristics of international child abduction mediation, there might be some risks of having the child involved. In the final part, I conclude that it is time to think about "how" to have children involved in this kind of mediation in the way that avoid risks and harm that might occur according to the analysis I provide.

1. Encouragement of Having the Child Involved in International Child Abduction Mediation and Literature Review of Arguments For and Against the Involvement of the Child in Family Matters Mediation

Article 13(2) of the Hague Convention indicates an exception to granting a return order when there is an objection from the child.⁹ This provision, interpreted alongside with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), which provides children with the right to be heard¹⁰, is the fundamental source for encouraging the

⁸ United Nations Convention on the Rights of the Child

⁹ Hague Convention, art 13(2) "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

¹⁰ United Nations Convention on the Rights of the Child, art. 12 "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in

involvement of the child in international child abduction mediation, according to the Guide to Good Practice.¹¹

Generally, involvement of children in family dispute mediation serves some beneficial purposes. First, as stated in the Guide to Good Practice, hearing the voice of the child can distract parents from their own conflicts and instead focus on the interests of the child.¹² Moreover, having the child involved is a way to inform them about the current situation in their families.¹³ Empirical research has also found that having children as a part of the mediation does reduce conflicts between parents and promotes positive collaboration.¹⁴ Also, it is claimed that active participation is what children desire¹⁵ as well as what helps children familiarize with the new structure of their families¹⁶ and increases their senses of responsibility.¹⁷

On the other hand, the Guide to Good Practice does not mention other research showing that involvement of the child in mediation may have adverse impacts. First, children can easily be manipulated by one parent to choose the side they want to stay with.¹⁸ Even if the parent's control arguably did not meet the level of manipulation, many parents taught

particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." This provision has been extended to cover alternative dispute resolution according to the 2009 General Comment by the Committee on the Rights of the Child. Guide to Good Practice, para 248.

¹¹ Guide to Good Practice, chapter 7.

¹² Ibid, para 237.

¹³ Ibid.

¹⁴ Research Report of Department of Justice Canada, 'The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review' (Department of Justice Canada 2009) <<http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/pdf/vcsdm-pvem.pdf>> accessed 15 November 2020. pp. 12-13. (citing Jill Goldson, 'Hello, I'm a voice, let me talk: Child-inclusive mediation in family separation' (Center for child and family policy research 2006) <<http://www.familiescommission.govt.nz/download/innovativepractice-goldson.pdf>> accessed 10 November 2020.)

¹⁵ Ibid, p 9. (citing Judy Cashmore and Patrick Parkinson, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' (2008). 46(1). Family Court Review 91, pp 91-104.)

¹⁶ Ibid, p 10. [citing Ian Butler, Lesley Scanlon, Margaret Robinson, Gillian Douglas and Mervyn Murch, *Divorcing children: Children's experience of their parents' divorce*. (Jessica Kingsley Publishers 2003)]

¹⁷ Ibid, pp 10-11. [citing Carole Brown, 'Involving children in decision making without making them the decision makers' (Seminar for Directors of Court Counseling and Casework Supervisors, Victor Harbour, South Australia 1996). As cited in Richard Chisholm, 'Children's participation in litigation' (Third National Family Court Conference and Goldson, Melbourne Australia 1998)]

¹⁸ Ibid, p 13. (citing Carole Brown, 'Involving children in decision making without making them the decision makers')

their children what to say and what should not be said in the mediation.¹⁹ This leaves the child with loyalty conflict and anxiety in mind.²⁰ Second, there is a risk of giving the child too much power and burden to make a decision.²¹ Even though mediators might be careful not to give children the power to make a decision, this might not be true in the context of high conflict and intense emotion.²² Lastly, there is a risk of disappointing the child when his voice is heard, but disregarded in the end.²³

After all, according to the Guide to Good Practice, age and maturity of the child should be taken into consideration in order to ensure a meaningful participation of the child in mediation.²⁴ Research has shown that children from the age of eighteen months to five years are not appropriate for taking part in mediation due to the limitation of their language ability and cognitive development.²⁵ It is recommended that the youngest child, being able to participate in mediation, is the one at the age of eight years (or around eight to ten years) because children at this age have developed the feeling of empathy, the understanding of the process and the ability to express their worries.²⁶ However, children at the age of five to seven years, despite their language ability, are very easy to be manipulated by one parent and, therefore, suffer loyalty conflict in their mind.²⁷ For the analysis of the involvement of the child in international child abduction mediation in this paper, it is based on the presumption that the child is mature enough to have a meaningful participation in mediation.

¹⁹ Robert E. Emery, 'Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's Resolving Child Custody Disputes' (2002). 10. Virginia Journal of Social Policy & the Law, 164, pp 166-167.

²⁰ Research Report, Department of Justice Canada, 'The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review' (citing Carole Brown, 'Involving children in decision making without making them the decision makers'.)

²¹ Ibid, pp 13-14. (citing Richard A. Warshak, 'Payoffs and pitfalls of listening to children' (2003). 52(4). Family Relations, 373, pp 373-384.)

²² Robert E. Emery, 'Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's Resolving Child Custody Disputes'. p 165.

²³ Research Report, Department of Justice Canada, p 14.

²⁴ Guide to Good Practice, sec. 7.2.

²⁵ Cassandra W. Adams, 'Children's Interest-Lost in Translation: Making the Case for Involving Children in Mediation of Child Custody Cases' (2011). 36. University of Dayton Law Review, 353, 357. [citing American Bar Association, 'A Judge's Guide: Making Child-Centered Decisions in Custody Cases' (Diane Boyd Rauber (ed.), (2nd edn.,) 2008)]

²⁶ Ibid.

²⁷ Ibid.

The next part will illustrate how these potential drawbacks can be reinforced in the context of international child abduction mediation as well as other risks and problems derived from the characteristics of international child abduction mediation.

2. Challenges to the Involvement of the Child in International Child Abduction Mediation

With characteristics of international child abduction mediation under the Hague Convention, there are factors and risks that may reinforce the negative effects of having the child involved in mediation and may also make it difficult and problematic to have the child involved. Factors that should be taken into consideration include 1.) The high conflict nature of international child abduction dispute along with the potential domestic violence behind the dispute 2.) The growing use of online mediation in international child abduction mediation 3.) The nature of “Convention Mediation” and the potential criminal charges involved.

2.1 The High Conflict Nature and the Potential Domestic Violence behind International Child Abduction Dispute

Researchers who have been advocating for the involvement of the child in mediation agreed that the involvement of the child is not recommended in high-conflict disputes.²⁸ In her official report for the Australian Government, Jennifer McIntosh, although strongly advocating for the idea of child-inclusive mediation, described that either child-focused intervention or child-inclusive intervention did not work with couples with long-term high conflicts.²⁹

Child abduction has been recognized as an indication of high-conflict divorce.³⁰ For example, Dr Larry Friedberg mentioned a study by Depner and her colleagues based on California data, which categorized child abduction as an indication of high-conflict family dispute.³¹ It makes sense to think that the conflict in this kind of case must be so grave that

²⁸ Research Report of Department of Justice Canada, ‘The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review’ p. 14. (citing Goldson, Fiona Garwood, ‘Children in conciliation: The experience of involving children in conciliation’ (1990). 28. Family and Conciliation Courts Review, 43, pp 43-51.)

²⁹ Jennifer E. McIntosh, ‘Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors’ (2007). 1. AFRC Issues: Australian Family Relationships Clearinghouse 1, pp 1-22.

³⁰ Larry M. Friedberg, ‘High-conflict Divorce’ <<http://www.drlarryfriedberg.com/interventions-high-conflict-divorce/>> accessed 4 December 2015.

³¹ Ibid.

one parent cannot tolerate the other any longer and takes the child away to another country, not just another province, despite the risk of being arrested for a criminal charge.

Moreover, domestic violence is not rare in international child abduction dispute.³² Statistics show that 54 percent of child abduction cases involve domestic violence between parents.³³ There are possibly various forms of domestic violence. Initially, the Hague Convention recognized domestic violence only in the pattern of a father abducting a child from a mother as a kind of abuse to her. However, nowadays the mother is the one who takes the child with her, crossing international borders to escape from domestic violence.³⁴ In Australia and New Zealand, for instance, 100 percent of international child abduction cases are involved with a mother as the child abductor.³⁵ The child himself can also be the direct victim of domestic violence when being abused by a parent.³⁶

All these kinds of domestic violence made it inappropriate to have the child involved in the mediation process. Researchers like Jill Goldson and Jennifer McIntosh, despite arguing for child-inclusive mediation, agree that disputes involving domestic violence need to be carefully screened or excluded from mediation because it needs a higher level of therapy.³⁷ Domestic violence also plays a key role in the debate of whether there should be mediation at all. Many practitioners argued that in trying to remain neutral, mediators are not able to equalize the bargaining power between the abuser and the victim, who reasonably feared his or her abusive partner, leading to a resolution that might not actually be acceptable to the victim.³⁸ The post-mediation consequence is also alarming. There is no effective measure to protect the victim after mediation, and statistics show that there is more violent abuse happened after mediation than after trial.³⁹

³² Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', p 343.

³³ Karen Brown Williams, 'Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases' (2011). 4. *John Marshall Law Journal* 39, p 44.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', p 343.

³⁷ Research Report of Department of Justice Canada, 'The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature' (citing Interview with Jill Goldson, social worker and principal researcher for the (2006) study, *Hello, I'm a voice, let me talk: Child-inclusive mediation in family separation* and Interview with Dr. Jennifer McIntosh, psychologist/researcher and Director of Family Transitions, Australia.)

³⁸ *E.g.*, Kerry Loomis, 'Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court' (1999). 35. *California Western Law Review* 355, pp 362-366.

³⁹ *Ibid.*

Having the child involved in international child abduction mediation, which is likely to be of high-conflict nature with domestic violence background, may reinforce the drawbacks of the involvement of the child. First, the pressure put on the child might be a lot more than the pressure in regular custody mediation. Robert Emery made a point that in high-conflict dispute mediation, there is a risk of giving the child too much burdensome power to decide which side he should choose even though the mediator might be already careful not to give the child such power.⁴⁰ Moreover, in my opinion, the higher the conflict is, the more the parent may want to manipulate the child when being interviewed in the mediation. Additionally, domestic violence, which affects the child, has been listed in the Hague Convention as an exception of granting a return order.⁴¹ This might affect the mediation where the mediator is told and trained to be aware of domestic violence. We can imagine of a child requesting to be with the abuser with whatever reason he believes in. In this case, the result of the mediation might go against the child's wish and thus disappoints him.

2.2 The Growing Use of Online Mediation in International Child Abduction Mediation

Even though the Guide to Good Practice did not mention online mediation, online mediation has gained a lot of attention and been recognized as an important platform for resolving international child abduction dispute.⁴² However, the use of online mediation may make it problematic to have children involved in the mediation.

Many scholars and practitioners have promoted the use of online mediation in international child abduction because of its several potential benefits.⁴³ For instance, online mediation can solve the problem of immigration⁴⁴ and jurisdictional issues.⁴⁵ Mediation can

⁴⁰ Robert E. Emery, 'Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's Resolving Child Custody Disputes'

⁴¹ Hague Convention, art. 13(b) "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

⁴² Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', p 345.

⁴³ E.g., Ibid. and Elizabeth Cunha, 'The Potential Importance of Incorporating Online Dispute Resolution into A Universal Mediation Model for International Child Abduction Cases' (2008). 24. Connecticut Journal of International Law 155.

⁴⁴ Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', p. 345.

⁴⁵ Courtney Hawkins, 'ODR and the Hague Convention' (PREZI, 22 June 2014) <https://prezi.com/4yma_6kwewhy/odr-and-the-hague-convention/> accessed 10 November 2020.

be held even though one participant faces immigration issues that may impede him or her to come to the mediation venue or even though one parent is in the country over which the Hague Convention does not have jurisdiction.⁴⁶ Also, online mediation renders a more comfortable atmosphere in high-conflict dispute mediation and for victims of domestic violence in lieu of face-to-face meeting.⁴⁷

On the other hand, one might argue that with the emotional nature of family dispute, as opposed to commercial dispute, it might be more effective to mediate through face-to-face mediation to detect emotions right at the scene.⁴⁸ Generally, in the mediation in which the child has been involved, mediators need to work harder, and sometimes need to be specially trained, to get the child to talk and figure out the child's real views, which might be hidden behind his outward expressions.⁴⁹ So, in distant communication like online mediation, it might be even harder to know what really is in the child's mind. The mediator may have no idea whether the child was the one typing the message or whether the child was told to say sentence-by-sentence behind the screen. There is definitely a chance of manipulation by the parent who is with the child. Moreover, despite assertion that online mediation saves time, it can be counter-claimed that online mediation is actually more time-consuming than face-to-face mediation because the environment does not force participants to give a response at once; instead, they can break the flow and respond whenever they want.⁵⁰ There is a claim that online mediation can take as long as four or five times longer than face-to-face mediation.⁵¹ In my view, the longer the mediation process, the more likely the risk of putting pressure and burden on the child.

⁴⁶ Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', pp. 345-347 ; Courtney Hawkins, 'ODR and the Hague Convention'

⁴⁷ Melissa A. Kucinski, 'The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases' (2010). 2010. *Journal of Dispute Resolution* 297, p 318.

⁴⁸ Nuria González Martín, 'International Parental Child Abduction and Mediation: An Overview', p 346.

⁴⁹ Jennifer Winestone, 'Best Interests and Little Voices: Child Participation in the Family Mediation Dialogue' (MEDIATE, January 2015) <<http://www.mediate.com/articles/WinestoneJ3.cfm>.> accessed 10 November 2020.

⁵⁰ Melissa A. Kucinski, 'The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases', p 316.

⁵¹ Ibid. (citing Nicole Gabrielle Kravec, 'Dogmas of Online Dispute Resolution' (2006). 38. *University of Toledo Law Review* 125, p 129.)

2.3 The Nature of Convention Mediation and the Potential Criminal Charges Involved

In this section, it is argued that the nature of Convention Mediation and the potential criminal charges involved may impede the inclusion of the child into mediation or make it inappropriate.

Unlike general mediation, convention mediation is considered as only a part of the whole application process under the convention; therefore, authorities have been much involved from the outset since the application was filed even though one purpose of mediation in general is to reduce the interference of state authorities and leave the disputes to be resolved by parties themselves.⁵² The decision to include children in mediation, thus, is in the hand of the authorities, who are exposed to the application in the first place, rather than the parents.⁵³ Research has demonstrated that in Germany, the country with great reputation of listening to young children's voices in judicial settings, it is rare that children are listened to in international child abduction mediation.⁵⁴ Nevertheless, even in the case that parents are invited to bring the child into mediation, they hardly accept that invitation.⁵⁵ On the other hand, if the authorities decide to include the child in the mediation, against parents' intention, this might reinforce the harm of the pressure burdened on children as being put in the middle of the high conflict where even parents themselves do not want the child to be involved. In Switzerland, the one who decides the involvement of children in mediation is the authority or sometimes the mediator while it can be the responsibility of the court in Germany.⁵⁶

One thing that may reinforce the authority of the state officials to take control of the mediation and the decision to include children in mediation is such criminal charges as kidnapping that can be involved in international child abduction dispute. Even if the child's voice might be heard in this kind of situation, the child might be disappointed by having his voice undervalued because the authority and the mediator may have to prioritize the consequence of the criminal charges over the child's needs.

It is true that the Hague Convention deals only with the civil aspects of child abduction, however, criminal charges in the country of the child's habitual residence against the taking

⁵² Sarah Vigers, *Mediating International Child Abduction Cases: The Hague Convention*, pp 86-90.

⁵³ Ibid.

⁵⁴ Ibid, p 86.

⁵⁵ Ibid, p 87.

⁵⁶ Ibid, pp 87-88.

parent affect the momentum of the return process⁵⁷ and, possibly, the mediation, as a part of that process. United States is one big example of the country that concerns much about the criminal charges and does not order a return if the taking parent is going to be arrested once arrived at the country of origin.⁵⁸

3. Conclusion

In conclusion, there are both benefits and drawbacks of having the child involved in family dispute mediation. However, with the unique characteristics of international child abduction mediation, it is obvious that there are challenges that might make it problematic to encourage the involvement of the child in this kind of mediation. The high-conflict nature of international child abduction cases along with domestic violence, the growing use of online mediation, the nature of convention mediation and the potential criminal charges involved may all reinforcing the drawbacks of the involvement of the child in mediation. The question that we should try to answer now is ‘how’ to have the child involved in international child abduction mediation in the way that is effective and not harmful to children.

⁵⁷ Nuria González Martín, ‘International Parental Child Abduction and Mediation: An Overview’, p 336.

⁵⁸ Ibid.