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Complex Dispute Resolution: Volume III: Introduction and Coda: International Dispute Resolution

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International Dispute Resolution

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Contents

Introduction

> 'There never was a good war or a bad peace.'
>
> *Benjamin Franklin*

Origins of Dispute Resolution

Many of the theories and practices of conflict resolution reviewed in the first two volumes in this series (*Foundations of Dispute Resolution* and *Multi-Party Dispute Resolution, Democracy and Decision-Making*) are in fact derived from the oldest practices of dispute resolution that originated in lands far away from Anglo-American-European legal and institutional developments. Whether dispute resolution began with King Solomon's choice about whether to 'split the baby' (was that arbitration or mediation?) or had its ancient origins in the practice of mediation in African moots or in Confucian China, human beings began resolving disputes long before any formal legal systems were developed (Roberts and Palmer, 2005). In that sense, dispute resolution is both older and more varied in form than formal legal systems and it is also, in its origins, a multicultural and multinational phenomenon.

Since disputes between people were taking place long before the existence of national boundaries, and since they now occur across so many national (and cultural, ethnic, religious) and other boundaries, conflict resolution processes are, and have always been, multicultural and transboundary: they draw upon a variety of both cultural and some 'uniform' practices, such as the use of third parties to either facilitate or decide in dispute matters (Shapiro, 1981), that existed long before there was any international 'rule of law'.

It is somewhat ironic that great efforts are now being made to transmit and 'export' modern developments in dispute resolution – especially game theory and strategic decision-making which really have their basis in attempts to understand and study 'foreign' or 'international' interactions during the Cold War – from hegemonic (primarily American) regimes to other places (see, for example, European Directive on Mediation, 2008; Woolf, 1996), including some of the places where 'alternative' dispute resolution first began – China (Lubman, 1967; Cohen, 1966; Palmer, 1989) and Africa (Nader and Grande, Chapter 16, this volume; Gulliver, 1979).

This volume, then, explores comparative, multicultural and transnational forms of dispute resolution – models, forms, and practices of conflict resolution that are not limited to national legal systems and formal courts. From their original location in small villages or homogeneous communities, dispute resolution processes have now moved into their own more formal institutions at local, national and international levels. At the same time, modern transnational life has also spawned new developments in the creation of many hybrid, multinational, international and informal, as well as formal, forms of dispute resolution, including both generalist and more specialized tribunals for various kinds of dispute resolution, such as the

Tribunal for the International Law of the Sea, ITLOS (Merrills, 2005) and the ad hoc criminal courts for crimes against humanity (Hagan, Chapter 14, this volume).

This volume also explores the creation of new forms of conflict resolution where 'resolution' may be conceived of in many different ways – apologies, forgiveness, restitution and reconciliation – and not only in more traditional forms of adjudication and decision, with monetary awards or injunctions or other judicial orders. Modern transnational dispute resolution is, in many ways, returning to some of its earliest roots (pun absolutely intended as, in some cultures, the eating or drinking of root-based substances forms the basis of reconciliation practices).

Different modes of dispute resolution in transnational and comparative settings have their origins in more varied, if simpler and older, forms than the movement towards 'A(lternative/ Appropriate)'DR in many legal systems. Especially in Anglo-American legal systems, the use of mediation, negotiated settlement and arbitration has recently increased as a reaction to overburdened and brittle (in terms of binary outcomes) court and litigation settings. In other systems and transnational settings, where courts and tribunals are largely a product of twentieth-century international law development, negotiation, mediation and some forms of arbitration have been part of both formal diplomacy and informal international relations for hundreds of years. In civil law systems, including both European and Asian court and legal systems, requirements to mediate or seek some alternative to commanded court-enforced judgment have been common for many years. Thus, in a sense, there has always been more choice about what forms of dispute resolution to use in transnational settings – for example, informal negotiation or mediation, diplomacy, political processes – and only more recently has some form of court or tribunal adjudication been available for some kinds of international or transnational disputes.

In the international arena some forms of dispute resolution are as old as commerce itself – from the earliest years of 'pre-national' trade, markets and traders needed dispute resolution for issues concerning price, quantity, quality and delivery of promised goods – thus was born private international dispute resolution, now more formalized in the many institutions which offer private international arbitration (for example, the International Chamber of Commerce (Paris), the London Court of International Arbitration (LCIA) and the China International Economic and Trade Arbitration Commission (CIETAC)) for disputes among private parties about commercial and trade issues.

Public international dispute resolution (addressing the more formal disputes between and among nation-states) is relatively new to the conflict resolution stage. A variety of developments, beginning with the first international recognition of the problem of piracy, to post-Peace of Westphalia (1648) state recognition, to the sad developments of modern wars in the nineteenth and twentieth centuries began to foster the creation of formal bodies for the adjudication, arbitration and negotiation of national boundary disputes, post-war treaties, maritime and admiralty issues, and, eventually, many modern treaties, on a wide variety of global issues of cooperation (nuclear disarmament, environment, health, human trafficking, human rights, commerce and trade, cultural matters and, now, anti-terrorism efforts).

Thus, the relationship of public and private dispute resolution to courts, governments, states and the rule of law, while complicated enough in more domestic settings, is even more complex in the international setting. On the one hand, there is less law and formal tribunal adjudication (there is no court of last resort with compulsory jurisdiction in international

disputes); on the other hand, there is also greater risk of the use of force, violence and lawlessness to 'resolve' disputes in the international arena, as our sad human history has made clear. At the same time, incentives to resolve disputes without courts and formal tribunals and to use more and other methods of dispute resolution may be stronger – consider the need to resolve contract and other disputes in order to continue economic relations and the need to resolve diplomatic issues in order to continue to exist. As is now popularly, if still contestably, said, the globalization of trade, communication and all forms of human interaction (both positive in cultural exchanges and travel and negative in terrorism and war) has increased the need for new forms of 'globalized' (and accessible) dispute resolution across national boundaries and legal regimes, including both 'hard' and 'soft' law (Twining, 2009; Slaughter, 2004; Friedman, 2005).

International conflict resolution increasingly also offers the possibilities of multiple venues, processes and choices of law as parties may increasingly 'forum–shop' between national, regional and international courts, as well as between private or hybrid arbitral tribunals, such as the International Centre for Settlement of Investment Disputes (ICSID) depending on the location and subject-matter of the dispute (see Project on International Courts and Tribunals, 1997). Thus, in the international arena, *process pluralism* (Menkel-Meadow, 2011) is also *legal pluralism* (Berman, 2007) so that it is now possible for a single dispute (such as, for example, *Loewen Group* v. *United States*, 2003) to be heard in several different venues and the question of how different levels of dispute resolution bodies (sometimes across legal systems) respond, defer to or follow each other has become one of the major issues in modern legal globalization studies (see Ahdieh, Chapter 17, this volume).

With the development of new treaty obligations and new regional and international tribunals, particularly in new human rights undertakings and responsibilities – such as the European Court of Human Rights (Strasbourg) and the Inter-American Court of Human Rights (Costa Rica) – individuals and international organizations, in addition to state actors, may now have standing to make claims or be sued in a variety of dispute resolution venues. With the advent of new tribunals, old questions about the relationship of less formal processes (such as whether human rights claims should be negotiable and able to be settled outside of tribunals) to more formal, law-based rulings in courts have re-emerged along with issues about transparency and accountability for, or 'privatization' of, 'global justice' issues. As in any form of conflict resolution, questions of how power-and resource-based endowments differentially affect outcomes remain problematic – and are particularly well studied in some instances, such as private–state investor disputes (Franck, 2007) and trade disputes in the WTO (Ginsburg and Shaffer, 2010).

From Informalism to Formalism and Back Again

While anthropologists and historians may debate about what came first – command (adjudication and arbitration – remember King Solomon!) or consent (negotiation and mediation) – in human dispute processing, it is likely that informal forms of dispute resolution pre-date the development of more formal forms of third-party decision-making, with rules of procedure and evidence. In human communities the need to restore peace, coordinate action (hunting, farming, cooking, childrearing, protection and building) for human survival has required that somehow parties negotiate and resolve their differences, seeking some third-

party assistance when they need to. In what are probably over-nostalgic appeals to such 'golden days' of community dispute resolution, we think of the advantages of informalism – speed of resolution, direct communication, easy enforcement and, yes, even transparency, publicity and precedent creation.

As communal life became more complex and humans ventured further than their own communities, disputes occurred between those with different values and cultural practices, and conflicts over resources and functions – not to mention the beginning of identity, control, colonization, domination, territorial and other forms of both interpersonal and intersystemic disputes (among the many causes of war) – resulted in the development of more complex forms of dispute resolution. We now regard it as human progress that we have moved from religious orders, trial by ordeal or battle, duels (Yarn, 2000) and Star Chambers to courts with rules of procedure, law and evidence (Langbein, 2003), which promise neutrality, fairness, equity and precedents (at least in the common-law world), even if they are also accompanied by complexity and formalism, delay, distance and 'limited remedial imaginations' (Menkel-Meadow, 2005).

While many legal and political science scholars still revere the formality of courts, rule of law and rules of procedure, dispute resolution scholars and practitioners (of whom I am one) see the modern developments of various forms of 'A'DR as a further elaboration in the evolutionary process of human decision-making. Courts and adjudication are one form of dispute resolution (formal, usually based on winner takes all, public, appealable in most systems, law-interpreting and law-making in common-law systems), but other forms of less formal dispute resolution have other attributes and potential advantages in some settings. One form of dispute resolution will not fit all, especially where we need contingency and flexibility, some ongoing accountability and, in some cases, privacy and often different kinds of outcomes than courts are authorized to award.

In legal history courts and formal and less formal tribunals developed simultaneously with many parallel forms of justice in secular and religious communities; they started at local levels and then proceeded to more centralized state institutions and to increasingly specialized units of dispute resolution – consider separate and specialized merchant courts and arbitration, religious mediation and arbitration, ethnic communities, workplaces and family forms of dispute resolution, all of which created their own dispute resolution, if not 'justice,' systems, separate from formal courts, in Asia, Europe and the United States (see for example, Roberts and Palmer, 2005; Bernstein, 1992; Auerbach, 1983; Greenhouse, 1986; Stone, 2001; Merry and Milner, 1993; Roberts, 1997; Saposnek, 1985). How formal institutions and courts influence bargaining endowments and negotiated outcomes and out-of-court behaviour has become as important a question in international dispute resolution as in general theory. This is evidenced by efforts to assess whether more human rights treaties and courts for crimes against humanity reduce certain forms of violence, (Kim and Sikkink, 2010), serve an educative function for the general population (Gibson, 2006) or create incentives to settle in international economic tribunals, just as in domestic (Busch and Reinhardt, 2000).

All of the basic processes of dispute resolution have been and are being used in international individual, private and public state settings. Private parties negotiate transnational business contracts (and then usually contract for private international arbitration to resolve any disputes). Diplomats, as public figures (and their delegates in private), conduct negotiations for political purposes (Fisher, Kopelman and Schneider, 1994), often having to rely on

informal, but significant, political and economic endowments to achieve their goals. In hybrid variations of public and private processes, states negotiate treaties, often utilizing 'two-track' negotiations (Putnam, Chapter 3, this volume) with public and private faces; consider the Oslo peace accords for the Middle East which were essentially totally private negotiations with 'second-tier' negotiators. Treaty and other public negotiations track the categories of domestic conflict resolution with both dispute resolution (ending or pacifying wars and violent conflicts) and deal-making purposes (environmental, trade, economic and cultural treaty-making). The complexity of general negotiation theory is further complicated by issues about cultural differences in negotiation styles (see Salacuse, Chapter 4, this volume; Acuff, 2008). In public international negotiation, the question of whether negotiations should occur at all with truly evil regimes or individuals is even more important than the same question asked in non-public domestic settings (Margalit, 2010; Mnookin, 2010; Menkel-Meadow, 2010).

Theory development in international negotiation has been particularly rich, providing some of the canonical concepts now being tested in negotiation theory generally, including 'ripeness' and 'hurting stalemates' (Zartman, Chapter 6, this volume), multiple tracks of negotiation operating simultaneously, constituent and agent–principal issues, information-sharing strategies, and general trust and enforcement issues. There is also a growing richness in the dialogues between generalist or domestic theorists and international theorists as they test whether concepts developed in one sphere can inform another (Menkel-Meadow, Chapter 2, this volume; Watkins and Rosegrant, 2001; Graham and Requejo, 2008; Kremenyuk, 2002).

Adding a third party to both private and public international conflicts also replicates some of the foundational issues explored in Volume I: should the third party merely 'facilitate' communication between the parties, or should the 'muscle mediator' with its own power (consider the force and threats of US grants or refusals of aid when Henry Kissinger 'mediated' in the Middle East, Jimmy Carter 'mediated' in North Korea, or George Mitchell 'mediated' in Northern Ireland (Curran, Sebenius and Watkins, 2004, this volume)) use his clout to evaluate or even 'force' a settlement (consider Richard Holbrooke and the Dayton Accords for the Bosnia conflict (see Curran, Sebenius and Watkins, Chapter 5, this volume)? Should the mediator be 'neutral' or interested like a 'wise elder' in the community? As in domestic mediation, modern forms of private international mediation draw on expertise (intellectual property, technology and technical, as well as economic, expertise in international investment and construction disputes) and often use 'interested' or 'embedded' (in the relevant technical community) third-party neutrals. As explored in Volume II, questions of who should sit at the table of an international mediation – who are all the relevant stakeholders? – and whether the mediation should be conducted privately (and with caucuses) or publicly (through diplomatic efforts) are issues of great moment in international mediation.

Third-party neutrals who decide between states (public international arbitration) has long been part of the international dispute resolution repertoire, including important boundary decisions arbitrated by kings, presidents and other leaders from faraway continents. More recently, UN leaders (Kofi Annan and others) have used their public international office to both mediate and arbitrate significant international (and civil war) conflicts. Should decision-makers, such as arbitrators, be 'notables' with portfolios that include experience, reputation and 'clout'? Do parties need to know that their decision-makers have the authority to somehow enforce their judgments (say, by imposing sanctions of international organizations and through diplomatic tools) and 'awards' when there is no obvious or likely world court to

enforce such decisions, in contrast to the legal effects of the UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified by over 140 countries) which makes enforcement of private international arbitration awards relatively easy?

Formal adjudicative tribunals are relatively weak in the international sphere, with the so-called 'world court' (the International Court of Justice in The Hague) actually having only consensual, not compulsory, jurisdiction over disputes between states. In the formal arena the relationship of regional courts (the European Court of Justice, the European Court of Human Rights) to national courts (doctrines like 'margins of appreciation' (Hutchinson, 1999) and 'proportionality' allow for some national discretion in law-making) remains dialogic, complex and sometimes unclear. Comparative legal scholars now mine layers of legal regulations to debate whether the harmonization of laws and doctrine is desirable or even possible. Formality can have its costs when national sovereignty reasserts itself in some contested areas, now seen in migration, security, economic policy, trade restraints and human rights contexts in the European Union.

New international treaties and organizations have increasingly provided for 'tiers', layers and choices among and between both formal and informal processes of dispute resolution. Thus, the Law of the Sea Treaty permits choices of mediation, negotiation, arbitration and a specialized tribunal to resolve maritime and other disputes regarding water rights. The World Trade Organization has institutionalized a sort of hybridized arbitration system with experts that permits arguments, appeals and now *amicus curiae* briefs that are really closer to a litigation and adjudication system, while always preserving the option of negotiated settlements. The International Centre for Settlement of Investment Disputes, another hybrid arbitral system, now allows private investors to sue public states and to appeal in certain limited settings, creating a new international cadre of specialized professionals in dispute resolution – economists, lawyers, diplomats and arbiter-judges. Other international organizations, like the Bretton Woods organizations (the United Nations, World Bank, International Monetary Fund and now the World Trade Organization), which operate outside of any sovereign or international legal system, have created their own internal dispute resolution systems (usually mixtures and choices of informal mediation, settlement and Ombuds services, with more formal administrative court-like hearing processes) to promise justice to their own employees, clients and beneficiaries (see, for example, the World Bank's integrated dispute resolution processes for employees and Inspection Panel for investigations and dispute resolution of recipient–donor claims).

With the proliferation of new international tribunals and venues for dispute resolution, perhaps the greatest innovations have been new international processes and tribunals for human rights violations (principally new treaties and new courts, like the International Criminal Tribunal), post-conflict (both international and intrastate or civil wars) and democracy-generative processes and tribunals. Starting with post-military dictatorship transitions to democracy in Latin America, to the abolition of apartheid in South Africa, to post-genocide transition in Rwanda, and transitions from civil wars and newly independent nations (for example, East Timor) and reparations or other hearings on past atrocities (Cambodia), new forms of 'conflict resolution' have emerged, including truth and reconciliation commissions (Hayner, 2002) and hybrid institutions drawing on local and indigenous processes (for example, *gacaca* in Rwanda (Bolocan, Chapter 15, this volume), as well as combinations of international and domestic personnel and tribunals (Stromseth, Wippman and Brooks,

Chapter 13, this volume.) These processes, derivative of new 'alternative' processes in criminal law, 'victim–offender mediation' (Menkel-Meadow, Chapter 12, this volume) and deliberative democracy efforts (reviewed in Volume II), are truly innovative and varied, and combine elements of both more formal justice with the more direct forms of communication in informal 'meditative' processes. When these sometimes less formal processes are combined with public transparency (as with the publicly televised South African truth and reconciliation commissions, Gibson, 2006), ordinary citizens have been able to witness, if not participate in, new forms of conflict handling (if not resolution), including apologies, restitution and, in some cases, forgiveness. All of this has been accompanied by its own controversies and new canons of concerns:

- When should *amnesty* be permissible?
- Who decides who should be *forgiven?*
- What is the relation of less formal 'truth' commissions to formal *prosecutions* for crimes against humanity and redress for individual victims?
- How should informal institutions be *constituted?*
- What is the *authority* or legitimating source behind these new institutions?
- How *ad hoc* or *permanent* should these new institutions be?
- What is the relationship of temporary or ad hoc tribunals to *capacity-building* for the creation of *permanent* justice institutions in new regimes?
- What *remedies* should these new and hybrid processes provide?
- How do we know when a dispute or conflict has been truly *accounted* for?
- When does (or should) *transitional justice* be merged into more permanent governmental institutions, including both courts and other law-making bodies? (Consider whether *constitutive* bodies or transitional bodies should be permitted to 'morph' into more permanent bodies in new regimes).

Without resolution of these and other questions, international dispute resolution continues to provide new processes and venues for dealing with even more complex problems (online disputes, refugee border crossings, humanitarian aid, health, natural disasters and more gradual environmental degradation, new forms of atrocities, including human trafficking, viral wars and conflicts, transnational gangs, cyber warfare, terrorism and so on). While new forms of globalization increase human contact through travel and communication across borders, increased cross-border and cross-cultural contact also potentially increases the numbers, sources and sites of conflicts. As with all process pluralism, questions remain about the relation of informal conflict resolution to formal institutions and the rule of law. In international settings, this question is all the more difficult and poignant to deal with because of the relative absence of final and authoritative institutions; as several scholars in this volume argue, international adjudication may be adjudication in 'anarchy' (Ginsburg and McAdams, Chapter 11, this volume) or too much 'pluralism' (Berman, 2007). How do we determine how much process choice or process pluralism is 'optimal'? What is the proper relationship of informal to formal conflict resolution and justice?

Culture and Comparative Processes

As if all of these issues in dispute resolution generally were not difficult enough, international conflict resolution also presents the problems of negotiating, mediating, arbitrating and adjudicating among and between cultures (and races, ethnicities and classes as well). Legal systems, and their precursors and parallel processes in less formal institutions, are embedded in cultural systems of value, meaning and practices. Some nations deal with these issues as they attempt to deal with conflicts within increasingly multi-cultural societies, even within the same legal systems (consider immigrant-based nations like the United States, or the current populations of former colonial powers now 'reaping' what they have 'sown' as the formerly dominated colonized migrate to the colonizing powers (for example, United Kingdom, France, the Netherlands, Belgium, Italy, and Spain, to name but a few).

As supranational, religious and other legal systems, such as Shar'ia law, take hold in a variety of nation-states, conflicts of law proliferate as well. What decision rules should be used in subcultures within formal legal systems? Should separate religious or family law courts be recognized (Büchler, 2011)? Should religious practices (for example, the 'veil', female circumcision, 'honour' killings, polygamy) be formally recognized, permitted, prohibited or punished? (As this book goes to press, these issues are being decided in many national court systems, with different treatments of religious autonomy, tolerance or prohibition (though required secularism) in the United States, Canada, the UK, Australia, Germany, Turkey, Switzerland and France, just to name a few – see for example, *Begum (R)* v. *Headmaster of Denbigh High School*, 2006; Okin *et al.*, 1999). These are often questions to be considered by formal courts and are now receiving different treatment in many different venues, as scholars consider what should be the role of 'foreign' (or indigenous or religious or 'other') laws within any one sovereign legal system (Jackson, 2010). In some settings, informal courts or mediation or arbitration centres act in parallel to, or outside of, formal courts.

Consider how cultural differences can be handled, if not managed, in less formal dispute resolution venues. As scholars explore different ways of dealing with cultural differences in mediation, arbitration and negotiation (Kahane, 2003; LeBaron, 2003; Waldman, 2011), it is argued that less formal forms of dispute resolution, making use of more direct communication, translation or co-mediation, can better accommodate cultural differences with members of different cultures 'matching' the cultural, racial, ethnic or other identities of the parties, as it is termed in mediation (Gunning, 1995). Recently, the International Institute of Mediation in The Hague has developed criteria and credentialling for 'intercultural competence' in mediation (International Mediation Institute, 2011).

Other scholars criticize the treatment of 'culture' as a falsely reified dimension of conflict, where participants to disputes often belong to several cultural groups simultaneously (nationality, religion, professional or work culture, class and so on) and where culture itself is not a 'thing' but a constantly evolving context in any conflict situation (Avruch, 1998). Following the events of 11 September 2001, extreme claims of 'clash of civilizations' (Huntington, 1994) gained some ground whereas others in the conflict resolution field argued for more complex understandings of the interaction of demographic, political and economic issues in national, as well as individual, conflicts (Ignatieff, 1993; Lederach, 1995; Anderson, 1999), and still others suggested that, with education and practice in negotiation and other

forms of dispute resolution, conflict resolution learning and practices might create their own form of 'cosmopolitan' practice and culture (Rubin and Sander, 1991).

Culture (in diversity) may also matter within dispute resolution processes as cultural, racial, gender, ethnic or class differences are deployed in conflicts differentially by both parties and third-party neutrals (Gadlin, 1994). Is 'neutrality' ever possible when people (both parties and neutrals) interact from different backgrounds (Gadlin and Pino, 1997)? And, as scholars Dezalay and Garth (Chapter 8, this volume) describe, conflict resolution professionals may themselves compete for hegemony as contesting cultures of dispute expertise, evidenced in the competition between the European 'grand old men', as founders of the field of international arbitration, and the newer litigation-oriented Anglo-American arbitration 'technocrats'. Yes, even conflict resolution has its own cultural disputes (Menkel-Meadow, 1997), even as it attempts to facilitate multicultural conflict resolution.

Finally, it is interesting to contemplate the 'culture' of international conflict resolution expertise. To the extent that the essays in this volume demonstrate rich and deep theoretical and practical expertise about the field itself, it remains a paradox to note how many professional diplomats, politicians and other conflict-handlers still proceed to create and attempt to resolve international conflicts without paying much heed to the academic and professional knowledge developed by those represented on these pages (and elsewhere in the literature). Just why this field remains so resistant to joining up theory and practice (and assessment) remains perplexing (Ginsburg and Shaffer, 2010). Are there generalizable principles and patterned empirical outcomes in international dispute resolution or are all international or intercultural disputes and conflicts *sui generis* or epiphenomenal, dependent on the characteristics of the conflicts, parties and would-be conflict resolvers? Only further work in this field will tell.

The Essays

This volume, which is divided into five Parts, provides descriptions, illustrations, and analyses of the great variety of forms of international dispute resolution from formal processes and institutions to newer informal processes, and hybrid tribunals, as it concludes with some provocative issues that confront the development of the field and its efficacy in the world.

Formal Dispute Resolution Processes: Negotiation, Mediation, Arbitration, Adjudication

Part I begins with a useful review essay by Andrea Kupfer Schneider (Chapter 1) describing the variations of dispute resolution forms of negotiation, mediation, arbitration and new hybrid tribunals in both private and public international law. In Chapter 2 Carrie Menkel-Meadow asks whether key canonical concepts developed in general or domestic dispute resolution theory also apply in international settings and vice versa – are deadlines or 'ripeness' in negotiations different, depending on context? Are the functions of third-party neutrals different in different settings?

Robert Putnam (Chapter 3) provides one of the classic descriptions of constituent–agent and secondary and secret processes in international processes in his description of 'two-track' negotiations in diplomacy settings. In Chapter 4 Jeswald Salacuse begins to explore the complex issues implicated in cultural differences as barriers to negotiation in international settings.

Applying different theories of third-party intervention and mediation, Daniel Curran, James Sebenius and Michael Watkins (Chapter 5) contrast the mediation styles of George Mitchell in Northern Ireland and Richard Holbrooke in Bosnia, demonstrating how personal qualities, context and type of dispute, as well as timing, can all affect whether disputes will be resolved collaboratively or with more command and 'muscle mediation' processes. This is a timely set of considerations as George Mitchell, an otherwise successful mediator, has, at the time of writing this Introduction, withdrawn from efforts at mediating the ongoing Middle East (Israel–Palestine) dispute.

William Zartman, one of the first contributors to international dispute resolution theory is represented here (Chapter 6) by his classic formulation of whether 'hurting stalemates' provide 'ripe moments' and incentives for third-party intervention to resolve disputes. Next, in contrast and in response to Zartman, long-time activist practitioner of peace John Paul Lederach (Chapter 7) suggests that there are no single 'ripe' moments in international dispute resolution – with good intentions and motivations, those engaged in disputes and conflicts can almost always accomplish something in dealing with their differences through engaged dialogue. Unlike 'fruits', disputes do not have a few 'good' (or bad) days. As we all know, they can linger and be 'dealt with' (or not) over much longer periods of time.

In Chapter 8 French sociologist Yves Dezalay and American legal scholar Bryant Garth provide a rich qualitative analysis of the development of international commercial arbitration. They describe the origins of the field in the work of European professors and practitioners in creating both a legal process and a new international *lex mercatoria* which is now being challenged by a younger group of 'legal technocrats' who seek to use Anglo-American litigation techniques to 'legalize' that which had been developed to provide more private and customized dispute resolution. This study is a model of how rigorous empirical study from both above and below (in-depth interviews with the major players) can reveal larger patterns and trends – in this case, the increasing competition for 'dispute resolution business' between conflict-resolution entrepreneurs offering different expertises and human, economic, professional and organizational capital.

To conclude Part I we return to the work of international dispute resolution scholar Andrea Kupfer Schneider (Chapter 9). Her summary and analysis of the evolution of a variety of old and new tribunals and legal regimes in the area of international economic trade is not only excellent in itself but is also useful and evocative in tracing the evolution of new international tribunals in various other areas of mixed competitive–cooperative strategic behaviour.

New Processes: Institutions, Informal and Hybrid Dispute Processes

Part II previews a variety of 'newer' processes and tribunals in international dispute resolution. In Chapter 10 Herbert Kelman describes the inventive 'problem-solving workshops' he and his group of colleagues pioneered to bring second-tier notables (not formal state officials and diplomats) to the table to discuss elements of difficult (and often intractable) international (and internal civil) conflicts, as in the Middle East and other highly conflict-ridden areas in the world.

Tom Ginsburg and Richard McAdams (Chapter 11) theorize another role for the multi-layered complexity and Babel-like quality of international dispute resolution tribunals and venues: even if the multiplicity of formal institutions cannot always clarify or enforce diverse

international legal norms, the very existence of so many venues to elaborate, make and interpret international norms can result in 'expressive', if symbolic, norm creation which may, in fact, have an enforcement value of its own, even without a 'court of last resort' or a fully effective international legislature or army.

In Chapter 12 Carrie Menkel-Meadow describes the theories of restorative and restitutive justice, initially developed in domestic criminal and indigenous settings, which have inspired the formation of new kinds of transitional justice processes – truth and reconciliation processes at the national level and returns to, or revisions of, older local processes for 'reintegrating' torn societies after great violence and conflict, as in Rwandan *gacaca*, more fully described in Maya Goldstein Bolocan's essay (Chapter 15).

Jane Stromseth, David Wippman and Rosa Brooks (Chapter 13) describe a variety of new conflict resolution processes, intended to build legal, judicial, democratic and dispute resolution capacity in strife-torn or newly democratic societies. Some of these new tribunals (for example, in East Timor) draw on the now decades-old experience of ad hoc war crimes tribunals, but innovate and experiment with mixtures of international and local personnel and processes. Empirical assessment of these new hybrid processes continues apace, even as new forms are being developed (for example, prosecutions in the new court in Cambodia for the long ago, but still remembered, genocidal atrocities perpetrated by the Khmer Rouge regime). In Chapter 14 John Hagan reports on his studies of the prosecutions, for all too modern war crimes, in the specialized and ad hoc International Criminal Tribunal for the Former Yugoslavia, with in-depth interviews of prosecutors, judges and other participants, following adaptations made to the path-creating Nuremberg trials for crimes against humanity. How the learning of these institutions will affect developments in the now-permanent International Criminal Court remains to be seen (and studied) as the first prosecutions are now underway.

Issues in New Forms of International and Transnational Dispute Resolution

Part III surveys a variety of critical issues raised by both conventional and newer forms of international dispute resolution. Laura Nader and Elisabetta Grande (Chapter 16) argue strongly that the modern export of conflict management ideologies is just another form of imperialism or colonialism. Negotiated or mediated settlements in conflicts about resources (water, oil and land), especially when between developed and developing nations, tend to recapitulate power relations. Dispute resolution techniques become just another instrument in the hegemonic power of the rich over the poor, the North over the South, and the West over the East.

In Chapter 17 legal scholar Robert Ahdieh surveys the tensions created by the proliferation of so many new international tribunals. Do courts of different jurisdictions view each other as part of either horizontal or vertical lines of influence? Do regional courts 'determine' the outcomes for national courts (consider the relationship of the European Court of Human Rights to the national courts (and legislatures) of the members of the European community)? Can private international arbitration panels be in 'dialogue' with each other and with national and regional courts, or is the relationship more competitive and dialectic?

David Dyzenhaus (Chapter 18) criticizes the functioning of the South African Truth and Reconciliation Commission on the grounds that the judges and lawyers who facilitated and enforced the unjust apartheid regime did not appear before the commission and make full

account of their especially significant 'guilty' complicity in that unjust regime. What is justice if the lawyers and judges responsible for unjust laws are not held to account? What are the limits of some of the newer and more 'forgiving' (through legal amnesty) forms of conflict resolution and reconciliation? In the next essay (Chapter 19) Carrie Menkel-Meadow suggests that these issues of reconciliation and mediated solutions must find some way to accommodate both justice for the past and peace for the future – there may be many processes and also great human variation in how individuals (and particular nation-states and cultures) seek to come to terms with past wrongs. Who has the power to forgive? Victims? The state? The community? Who should be punished for aggregate acts of inhumanity? The leaders? The implementers? What forms of restitution are possible? 'Rights of return' to land, to property (consider disputes over art seized by the Nazis and others), compensation for lost lives? These issues remain timelessly and sadly current as human conflicts continue to proliferate.

In a second essay Carrie Menkel-Meadow (Chapter 20) then explores how dispute system designers (those who create processes for conflict resolution in so many international and intranational, post-conflict settings) should consider the ethical dilemmas in their work. For whom are conflict processes created? Victims of great harms, new governments seeking stability, citizens seeking democracy or at least accountability of past regimes? To whom are system designers accountable? The users of conflict processes? The governments, international organizations or 'clients' who hire them? Others outside of the conflict? Their own profession? Similarly, Jean Sternlight, in the final essay of this volume (Chapter 21) asks the persistently relevant and difficult-to-resolve question of whether efforts to create new, less formal and more responsive processes of conflict resolution outside of courts is, or ought to be, consistent with the rule of law, assuming that we can establish what *the* rule of law is in our modern international, transnational and globalized existence.

Coda

While the efforts to develop more efficacious forms of international conflict resolution continue, seeking responsiveness and variability to more diverse and complex situations, it remains a concern of our field to assess how world peace and justice can best be achieved, especially where it is not really clear whether they can always be achieved together.

A final Coda at the end of this volume concludes with some final reflections on these questions.

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Coda

As the essays in this volume illustrate, international conflict resolution is a growth industry, as well as field of study, not only because human conflicts continue to proliferate in our increasingly globalizing and increasingly complex world, but also because we continue to invent more processes for attempting to resolve, or at least manage, those conflicts.

All of the basic and foundational processes of conflict resolution – negotiation, mediation, arbitration, adjudication, fact-finding, conciliation, enquiries, complex multi-party consensus-building (whether facilitated or not), and public policy formation and negotiation (for example, in treaty negotiations and peace conferences) have been and are being utilized in transnational dispute resolution. Many of these processes are now initiated in private (commercial), public (formal adjudication) and hybrid (investor–state) settings. In addition, conflict resolution in the transnational, national and subnational (for example, civil war) spheres have spawned a variety of new processes, such as truth and reconciliation commissions, and adaptations of older, indigenous processes, such as *gacaca*, further elaborating on and modifying older processes with cultural, political and economic variations, now called 'bespoke transitional justice' (Ramji-Nogales, 2010).

The expansion of conceptions of what constitutes 'international' or 'transnational' conflict resolution, including the ability of individuals to sue or make claims in new venues such as the regional courts for human rights violations (Schneider, 2009) and the growing role of non-governmental organizations as parties and advocates in disputes – for example, the 'anti-globalization' efforts against the WTO (Held and McGrew, 2007) – demonstrate how conflict creation and conflict resolution are ever changing and responding to new conditions. It would seem unlikely, then, that conflict resolution in a transnational context will ever become any single or stable system. As new conflicts and situations arise, new forms of process seem to be continuously evolving to offer new and different approaches to new conditions, new parties and new configurations of political and other organizational life. As many scholars in the field of international law and relations have argued, new 'governance' in international relations is often international, transnational and subnational, all at the same time (Twining, 2000; Shaffer, 2010), meaning that policy, law-making, and dispute resolution are all conducted in a variety of different sites, including formal bodies, but also including informal networks and other locations of action (Slaughter, 2004).

As these three volumes have illustrated, the field of conflict resolution has developed a wide range of theory about human behaviour, in both formal and informal settings, and has developed its own canons, concepts and claims about how people in conflict do (descriptive) and should (prescriptive) behave. Adding consideration of 'foreign' (to Western- and Northern-dominated theory development – see Ramraj, 2011; Sen, 2009; Sornarajah, 2010), 'transnational' and 'comparative' perspectives on conflict resolution, as offered by many of the essays in this volume, suggests that many of those principles, concepts and ideas not only might be culturally specific or variable, but also might require both more conceptualization

and empirical study as we look more broadly at different forms of conflict resolution in increasingly diverse and complex settings.

Consider some examples of conflict resolution theory and practice challenged by international or multicultural settings:

- How do we know when parties have reached an *agreement?* (What different expressions of *consent* are there in multicultural and multi-party settings?)
- Who has *authority* in transnational settings? Government/formal representatives only? Others? How many different *tracks* of engagement are possible in international conflicts? State to state? Private parties? Mixed – for example, trade and economic issues, terrorism policy?
- Who makes *decisions* in state conflict resolution? Are there *democracy deficits?* Does that matter for all issues? Whose democracy? Is *deliberation* and democracy essential for good conflict resolution? (See Volume II.)
- How can consensual agreements in transnational settings be *enforced* without command institutions (courts) or effective 'rule of law' (Ginsburg and Shaffer, 2010)? What *alternative incentives* are there for compliance with international conflict resolution agreements and other international undertakings (Koh, 1997)?
- How do *processes or organizations of conflict resolution* and *transitional justice* (Teitel, 2000; Stromseth, Wippman and Brooks, 2006) affect the development of more permanent dispute resolution mechanisms, legitimacy and/or democratization of regimes? Is *legalization* or *judicialization* inevitable? A good thing?
- Should we continue to encourage some *informalism* and *experimentation* in dispute system design in multicultural or post-conflict settings –consider the hybrid processes in East Timor, among others (Stromseth, Wippman and Brooks, Chapter 13, this volume)?
- What is the role of, and how effective are, *formal international organizations* (for example, the UN, World Bank, International Red Cross and the International Crisis Group) in sponsoring dispute resolution?
- How does conflict at *group or nation-state* levels differ from *individual conflict?*
- How do *state-sponsored* dispute resolution efforts compare to the efforts of *private organizations* (both *formal* – for example, the International Chamber of Commerce – and *informal* as in the variety of peace-seeking NGOs)?
- If parties' needs, interests, objectives and goals are multiple and complex in any one society or social or legal setting, how are *needs, goals and objectives* to be assessed in more multicultural settings?
- What is the relationship of the resolution of *individual disputes* in the multinational arena to *state and international* policy (Dunoff, Ratner and Wippman, 2010; Schneider, 1998; see, for example, the Iran Claims Tribunal) and to *legitimacy* of process and justice for whole regimes (consider the amnesty processes in many truth and reconciliation processes).
- Is *neutrality* ever possible or desirable in multicultural, international settings?
- How can transnational agreements be achieved across great *value divides?*
- What is the proper relation of truth-finding and punishment for *past* wrongs to *reconciliation* and healing for the *future* (Nino, 1991)?

- What *remedies* are available in international dispute processes? Which are implementable or enforceable?
- What is the relationship of *truth, justice and peace* in international (or any) dispute resolution process (Menkel-Meadow, Chapter 20, this volume)?
- How do *basic dispute resolution concepts* – BATNAs (best alternatives to negotiated agreements), ZOPAs (zones of possible agreements), resource- or pie-expanding outcomes, 'principled' or 'objective' solutions – have to be adapted or changed in the *international or multicultural* arenas?
- What *concepts* ('ripeness', 'hurting stalemates', 'two- or multiple-track' negotiations), initially developed in *international relations*, might have some explanatory purchase in more general dispute resolution theory?
- How much flexibility or 'plastic' process development is optimal in international dispute resolution? When is a court no longer a court? When is mediation no longer mediation? Does or should each dispute resolution process have its own 'process' integrity, ethics and logic (Fuller's (2001) 'process integrity' principles)?

The essays in this volume, as only a small representation of all the centuries of experience and more modern theory development, demonstrate that conflict resolution in the international and multicultural sphere will continue to develop more 'memes' or ideas as new parties participate, more and more 'cultures' and people interact with each other, and new ideas and forms of process are created. It is hoped that readers of these volumes will themselves become the new 'process architects', seeking new ways for people to continue to flourish and to achieve peace and justice simultaneously wherever possible. It is clear that both more study and much more practice is necessary in this field of complex international dispute resolution.

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