

THE EVALUATION OF INTERNATIONAL MEDIATION IN  
TERMS OF POLITICAL THEORIES OF JUSTICE

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## **ABSTRACT**

This thesis explores the connections between theories of justice and international mediation. Modern theories of justice examine how to achieve a just resolution of conflict in a bargaining framework. These theories can examine, therefore, the international mediation process because it is a political bargaining process that has become triadic. Against the prevailing views in the mediation literature, this thesis argues that normative standards of justice are possible to be placed on the mediator and the participants to an international mediation. Evaluative criteria for a just mediation are developed to test the real world application of these standards. The criteria are applied to two mediations, the Dayton peace talks, and the Oslo Back Channel. These case studies show that it is possible to examine justice in international mediation.

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## INTRODUCTION

When the people vote on war, nobody reckons  
 On his own death; it is too soon; he thinks  
 Some other man will meet that wretched fate.  
 However, if death faced him when he cast his vote,  
 Hellas would never perish from battle-madness.  
 Yet we men all know which of the two words  
 Is better, and can weigh the good and the bad  
 They bring; how much better is peace than war!

-EURIPIDES, *Suppliant Women*

One can only imagine the sense of satisfaction for those who successfully negotiate the settlement of an international conflict. Yet with the benefits of peace so high, the temptation must become so very great to do anything possible to broker peace. On the settlement of these disputes, we often hear that the negotiated settlement will bring to the parties a 'just and lasting peace'. Yet the concept of *justice* is something that is difficult to define. Unless we know how to achieve or determine what is justice *within the context in which it is being used* this elusive notion will always remain in contention.

This is not a recent dilemma. Socrates in Plato's *The Republic*, argued that if we *knew* what justice was, then being just would be a comparatively simple exercise. Socrates believed that knowledge needed to be applied to moral notions such as justice as vigorously as it is to any other subject to overcome one's ignorance and confusion. Political philosophy has continued to develop theories of justice within society in the belief that social arrangements are a human construction and a theory of justice is a theory about the kinds of social arrangements that can be defended by society (Barry 1989).

Consequently, political theorists have established that one way in which justice can be explained is as a social contract, where the corresponding bargaining process (negotiation environment) becomes the mechanism to develop and evaluate rules formed within societies. Within this framework, political theorists believe that the role

of justice is the regulation of social co-operation. It achieves this by promoting a standard for the way people should conduct themselves within a social environment (Ryan 1993).

Political theorists believe that it is difficult to separate the question of what is justice from the question why be just, and that the content of justice has to be such that people will have a reason for being just (Barry 1989). Therefore, the study of justice within a bargaining framework will require an examination of the question:

*What motivates actors within a negotiation or bargaining environment to be just?*

This thesis will examine justice within the context of international mediation. It will argue that the principles of justice that have been developed by political theorists can assist in the development of a framework to assess the justice of the international mediation process because:

Whatever its specific characteristics, mediation must in essence be seen as an extension of the negotiation process whereby an acceptable third party intervenes to change the course or outcome of a particular conflict. The third party, with no authoritative decision-making power, is there to assist the disputants in their search for a mutually acceptable agreement (Bercovitch 1996: 12).

Within this political bargaining process, participants to a mediation make agreements that affect the political rights of the constituents (the populations or societies the participants represent) and will develop rules in these negotiated agreements to avoid conflicts. Therefore, it is appropriate that justice and hence, the *moral motivation* of the parties to a political bargaining process, *should* be examined within the triadic negotiation environment of international mediation. As Eighteenth century philosopher Immanuel Kant suggested, if someone can affect another through their actions then they *ought* to enter into relations that encompass justice and just institutions must be established if the action of one affects the other (Kant 1795).

Current mediation theory discusses justice only from the viewpoint of the participants, and only in hindsight (Peachey 1989). While such evaluative non-normative analysis

of people's beliefs about a mediation are no doubt important, this thesis argues that there are prior normative questions to be asked. Primarily, what standards of justice ought to be placed on the mediator and the parties to a mediation? This is important, not only for the theoretical integrity of international mediation itself, but also for the constituents of the parties to the mediation. For it is the constituents' political rights that will be affected by the mediation, and where individuals' political rights are affected the normative questions of justice must be answered. Where those questions remain unanswered, there will always remain the possibility of doubt as to the justice of a mediated agreement. And where such doubts remain, the stability and durability of the agreement is in doubt.

## ***I Thematic Organisation***

Chapter one of this thesis will review the existing literature on justice in mediation and will explain why, in certain circumstances, an examination of international mediation in terms of a political theory of justice is necessary. In Chapter Two, a modern critique developed by Brian Barry will be used to review the literature on the political theories of justice to determine the principles of justice that should be applied to international mediation. Brian Barry believes that the literature on justice follows two general lines of thought which he categorises into two contemporary theories, *justice as mutual advantage* and *justice as impartiality*. These theories are essentially the theoretical frameworks for explaining what motivates actors within a bargaining environment to promote just relationships. Barry's justice as mutual advantage will be examined and applied to international mediation, but emphasis will be placed on what Barry considers the most satisfactory theory of political justice, the theory of justice as impartiality. This theory delivers a contemporary approach to the study of justice and will be the political theory of justice this thesis applies to international mediation. In addition, Chapter Two will explain what constitutes fairness within this political theory of justice, and will demonstrate why this conception of fairness is important to the international mediation process. As international mediation involves states, this chapter will then argue that at some level, nation states possess a motivation to be moral, since this is a necessary pre-condition for the application of the theory of justice as impartiality to international mediation. This chapter will conclude with a



definition of a just negotiation environment in terms of the theory of justice as impartiality.

Chapter three will apply the political theory of justice, justice as impartiality, to the international mediation process. It will describe the process of international mediation through a 'contingency model'. It will show the types of behavioural strategies that mediators have at their disposal to influence the decision-making process of the parties within the negotiation environment. Given this ability to influence decision-making, it is important that the mediation style is analysed to ascertain its impact on a negotiation environment in terms of the theory of justice as impartiality. Chapter Four will outline a set of evaluative criteria for applying the theory of justice as impartiality so that a real world mediation event.

Chapter Five will use this evaluative criteria to analyse the Dayton negotiations to see how the actions of the mediator affected this negotiation environment in terms of a political theory of justice. Chapter Six will use the same evaluative criteria for the Oslo Back Channel as a comparison.

## ***II Research Design***

For the purpose of this thesis, the pronoun for a mediator will be referred to in the masculine. This does not connote gender. When this thesis refers to parties, it means the parties to a conflict excluding the mediator, and is inter-changeable with the word participants.

Mediation is a complex social process. Current research, especially empirical research and the development of the contingency approach to mediation provides us with an analytical framework for the mediation process. This approach is based in a social-psychological framework and has been derived from negotiation theory (Bercovitch 1986; Druckman 1977; Sawyer and Guetzkow 1965). The contingency approach describes a range of factors that have an impact on the mediation process. The model is developed through clusters of variables that will affect a mediation event. Such

clusters are organised by context. They will be conditions that are antecedent (historic context of dispute), current (actual mediation process) or consequent (outcome of dispute) (Bercovitch 1996). This approach will be diagrammatically represented in Chapter Three. The contingency approach enables scholars to identify the type of mediator behaviour and the consequent negotiation environment that is present in a mediation. Specifically, it identifies the types of mediator behaviour that detrimentally affect the negotiation environment in terms of justice as prescribed for in the theory, justice as impartiality.

Five questions have been formulated to evaluate international mediation in terms of a political theory of justice. These are :

1. Were there pre-conditions placed on the framework for negotiations?
2. Were the parties free to deliberate on the procedures for the negotiations and consequences of any outcome?
3. Were the parties equally well-placed in the negotiation environment?
4. Did the mediation style involve the use of directive strategies to direct outcomes?
5. Did the parties feel that they have done as well as they could reasonably hope?

This thesis will apply the above criteria to two documented real world mediation events to answer whether or not a just negotiation environment existed in terms of the theory of justice as impartiality. The two specific real world mediation events chosen are the Dayton negotiations and the negotiations between Israel and Palestine that were developed by the Oslo Back Channel. The reasons why these mediation events have been chosen are two-fold. First, each event resulted in a mediated agreement that affected the basic political rights of the constituents to the mediation. Second, each mediation had different levels of mediator intervention, which enables a comparison between mediation styles and the effect these styles have on a just negotiation environment in terms of justice as impartiality. A detailed account of the actual mediation processes can be ascertained from the relatively comprehensive memoirs of

the diplomats and negotiators. From these accounts answers to the above questions can be obtained.

The study of specific cases of international mediation enables this thesis to meet the two criteria for a successful project as outlined by Jeffrey Rubin (Bercovitch 1997; Rubin 1981).

1. That it deal with real world events;
2. Use of a theoretical perspective.

The criteria developed in this thesis do not make for a hypothesis that must be tested empirically but rather, provide a theoretical perspective on international mediation in relation to justice that will create a standard to examine, critically, the mediation process. This theoretical perspective allows the actions of a mediator within a specific case of mediation to be assessed against a theory of justice which enables an awareness of how a mediator should or should not act if his behaviour is to be evaluated in terms of justice.

This study assumes that there is a long-term benefit to a negotiated agreement that promotes a just peace. Future research could be undertaken to determine, empirically, if there is a correlation between the endurance of mediated agreements by a process that has been determined by this study's evaluative criteria for justice and those that have not.

# 1 RELEVANCE OF POLITICAL THEORIES OF JUSTICE TO INTERNATIONAL MEDIATION

Our task as philosophers requires that we try to imagine new, better political structures. Yes, we must be realistic, but not to the point of presenting ...the essentials of the status quo as unalterable facts.

-Thomas Pogge, *An Egalitarian Law of Peoples*.

There is an important assumption that must be made about international mediation before it can be assessed in terms of justice. The assumption is that mediation is not a value-free process. Even though it is a voluntary process, the mediator does affect the negotiation behaviour of the parties. Mediation research supports this assumption.

In the past, mediator characteristics have been examined in depth as requisites for mediator ability, effectiveness and success. Conclusions from this line of research (e.g., Brett, Drieghe, and Shapiro 1986; Carnevale 1986; Shapiro, Drieghe, and Brett 1985; Young 1967) suggest that a mediator is a powerful catalytic agent whose presence alone can influence the parties' negotiating behaviour (Bercovitch and Houston 2000: 180).

If the mediator does affect the parties' behaviour then the justice of the mediator's actions and thus, the justice of the mediation is able to be examined.

This chapter will show that there is a need to extend the existing research criteria for the assessment of mediation. The existing mediation literature on justice relies on a social-psychological framework to develop categories of justice that are applied to a mediation event. This chapter will show that this approach is not always appropriate for the evaluation of mediator behaviour within the international mediation context. The social-psychological categories consider justice in terms of how the parties to a mediation perceived the outcomes, mediator behaviour and process. They are participant specific and retrospective. The role of justice within a political framework on the other hand is to regulate social behaviour by promoting a standard of behaviour by participants within the political bargaining process. It will be shown that

international mediation outcomes can detrimentally affect political rights, and therefore, in this context the behaviour of a mediator and the consequent mediated agreement *ought* to be assessed in terms of a political theory of justice (Kant 1795).

### ***1 Existing Criteria for the Examination of Justice in Mediation***

The mediation literature determines what is just for a mediation event by using various social-psychology developed categories of justice that have been adopted from participant viewpoints. The following are the major categories of justice in the assessment of mediation developed in the literature:

*Distributive Justice* has been defined as the fairness of the distribution of the conditions and goods that affect individual well-being (Deutche 1985).

*Procedural Justice* refers to the individual's perception of fairness of the rules of procedure that regulate a process or give rise to a decision (Peachey 1989; Austin and Tobiason 1984; Folger 1977; Leventhel 1976; Deutche1975).

*Interactional Justice* refers to how people react to their perceptions regarding the social sensitivity of the inter-personal treatment they receive from decision makers (Rahim, Magner, and Shapiro 2000; Bies and Moag, 1986).

*Restorative Justice* refers to the restoration of a situation or relationship as best one can, following damage, injury or other wrongdoing and includes processes of retribution, restitution, compensation and forgiveness (Peachey 1989).

An example of the use of these categories is in *What People Want from Mediation* (Peachey 1989). Peachey believes that mediation *is not a value-free process* where parties arrive at whatever outcome they can agree to. He argues that such a focus on outcomes has created a confusion in the literature between process and outcome. Consequently, he uses the categories of procedural justice along with an additional category of restorative justice to assess what justice is within the mediation context.

Recent studies have introduced an additional category of *interactional justice* for the determination of justice within the mediation context. Interactional justice examines participants' perceptions of the inter-personal treatment that they have received from decision-makers (Rahim, Magner, and Shapiro 2000; Bies and Moag, 1986).

These categories have been developed to examine justice from the viewpoint of how the participants reacted to the mediation process and consequent outcomes. By developing social-psychological standards, the assessment of justice becomes subjective to *each* participant and their individual responses to the procedures and outcomes of mediation. This approach reinforces the commonly held belief that justice depends on what the participants themselves believe as just. For example, in response to Golda Meir's assertion that it was unfair for them to make concessions when they did not start the 1967 war, Kissinger reinforced to Golda Meir the notion that each side to a conflict has its own definition of justice (Pruitt 1989). If justice is subjective (or if there is an intrinsic norm of justice) then the only way that it can be studied in the context of mediation is to examine how the actions of mediators affected the participants' perceptions of justice, or how actual outcomes from the mediation process affected each party to a negotiation (although recent studies have confirmed that the two are inter-related) (see Sheppard, Lewicki, and Minton 1992).

Research on justice has been conducted on this premise. For example, in an inter-personal mediation study by Lissak and Sheppard (1972) interviews were conducted to assess the parties' perceptions of the fairness of mediation procedure. In an international mediation study by Arad and Carnevale (1994) mediator bias was examined in terms of parties' perceptions of mediator fairness: "In a recent study, we (Arad and Carnevale 1994) demonstrated that perceived bias is in the eye of the beholder" (Bercovitch 1996: 46).

For an assessment of specific mediation outcomes, the mediation literature uses a normative framework, in other words, a specific criteria to determine whether the outcomes were fair to the parties. What this means is that if normative criteria is developed to determine whether or not a mediation outcome is fair to the parties, then

the mediation would be considered as successful when the specific criteria of fairness has been met. The mediation literature has identified problems with this approach. It has been argued that by attempting to define what is fair by a normative criteria, scholars have introduced the problem of conflicting standards:

First, outcome fairness is extremely difficult to define since many, often-conflicting standards exist for evaluating whether a particular outcome is fair. (Leventhal 1976), including equity, equality, need, code, contract, precedent, intentionality, legitimacy, and right (Lissak and Sheppard 1972: 46).

To summarise, in a social-psychological framework, the purpose of introducing a notion of justice is to evaluate mediation in terms of the parties' perceptions of justice, or in relation to outcomes, the creation of a standard to evaluate mediation in terms of the perceived effect of the outcome on the parties.

## ***II A Political Theory of Justice***

A political theory of justice, however, does not look at participant perceptions because the role of justice is to regulate social behaviour by developing a standard for the way people behave within a social environment. A political theory of justice based on a bargaining framework considers what motivates participants to be just within the negotiation environment itself. Specifically, the theory of justice as impartiality, which is taken as the key framework for this thesis, is distinct from the psychological categories of justice in that:

1. It looks at the negotiation environment itself and what is the motivation of each participant to be just toward the opposite party while they are negotiating political agreements.
2. The fairness of an agreement is what the parties themselves decide is fair within a negotiation environment that has been deemed to be just in terms of the theory of justice as impartiality.

## ***Conclusion***

International mediation is about the political bargaining behaviour of states. A political theory of justice is needed to examine why the participants *should* be just to the opposing party in the political process of bargaining. This is important for international mediation because people may have to accept restrictions on their basic political rights in order to achieve a peaceful settlement of a dispute. Within a political theory of justice it is the motivation of the participants in the bargaining process to be just that creates the conditions for outcomes to be just, and not simply the nature of the outcome, or the participants' perceptions of the mediation process and outcome. This study will now proceed to review the political theories of justice within the theoretical perspective developed by Brian Barry and show how they can be applied to international mediation. It will also show why the theory of justice as impartiality has been chosen as the key theory for this thesis.



## 2 THEORIES OF JUSTICE AND BARGAINING POSITIONS

honeste vivere, neminem laedere, suum cuique tribuere.

(the usefulness of rules, which enforce honesty, prevents harm, and secures each person his own).

It is assumed in this thesis that the regulation of social co-operation is based on the notion of a social contract where agreements are reached between conflicting parties to alter or affect their behaviour toward each other. It is also assumed that rules are developed within society based on these agreements and the rules of justice are, “the kind of rules that every society needs if it is to avoid conflict - on any scale from mutual frustration to civil war” ( Barry 1998: 202).

Three main theories of justice have been developed by political theorists to explain the motivation of the participants within the negotiation environment that create these rules of justice. These three theories of justice can be distinguished by their primary assumptions about the motivation to be just. Two of the theories seek to provide a theoretical model for human behaviour to explain the participants’ behaviour. The other theory takes a principled approach and provides a standard under which participants should behave to be just.

Brian Barry summarises and categorises the lines of thought running through the literature on justice into either the motivational or the principled approach. From this analysis, he develops two theories of justice. The first is based on the motivational approach where justice is derived through “the sense of the long-term advantageousness to one-self of being just” (Barry 1989: 359). This theory of justice is present in the works of Plato and runs through the Seventeenth century theorists Hobbes, Hume and took mathematical shape this century in the *Theory of Games and Economic Behaviour* by J. von Neumann and O. Morgenstern (1944). Barry names this the theory *justice as mutual advantage*. The second theory is based on the enlightenment principles developed by Kant and refined by John Rawls in *A Theory of Justice*. Barry names this theory a theory of *justice as impartiality*.

A third general theory of justice exists, and is posited by Barry as a theory of *justice as reciprocity*. Rawls is said to represent this theory, which will be examined even though Barry considers the theory of justice as reciprocity only a hybrid of the other two. These theories are essentially the theoretical formats for explaining how just relationships are developed in society through a process of bargaining.

We can now examine the mechanisms of these theories. In doing so, we can explore what these theories say about what motivates the parties to be just, and how the parties *should* behave within the negotiation environment to be just, in their attempt to find an agreement. It is anticipated that a critique of these approaches to justice will provide a framework to understand the motivation to be just for the negotiation environment of international mediation.

### ***Justice as Mutual Advantage***

The essence of a theory of justice as mutual advantage (JMA) is that co-operation between members of a society is better than a state of perpetual conflict: “Peace is better for everyone than a war of all against all” (Barry 1989: 6).

While this theory makes no determination of the notion justice within the negotiation environment, it justifies the inequality that exists within societies on the basis that co-operation will place members of a society in a better position than if no co-operation existed at all. It assumes that members of society have the ability to make rational decisions about the larger benefits of co-operating even where such co-operation seems detrimental.

The inequalities that may develop through the negotiation process or trade-off are less important than the establishment of a state of peaceful co-operation. On this basis the motivation behind the settlement of a conflict of interest is:

one that reflects the balance of forces – the strategic advantage and dis-advantages of the parties – so that they have an equally strong incentive to comply with its requirements on condition that others do so as well (Barry 1989: 283).

The motive to be just within the bargaining environment, according to the theory of JMA, is self-interest. It is preferable in the end for parties to agree to restrict or restrain their behaviour for the sake of co-operation. To represent this underlying motivation within a bargaining framework theorists have developed a general theory of rational behaviour, which provides a prescriptive approach to the examination of human behaviour within a bargaining model. The game theoretic models of bargaining developed under the general theory of rational behaviour provide an excellent analytical framework to consider the notion of mediation under the theory of JMA. It is interesting to note, utilising the theory of a social contract Hobbes, (and later, Hume) found an excellent analytical tool to assess the concept and justification of private property rights.

## Concepts of Game Theory

Game theory provides an analytical representation of bargaining where the party's motivation is self-interest. Game theory was originally developed from the article *Theory of Games and Economic Behaviour* published by von Neumann and Morgenstern (1944). The theory has been defined as:

the theory of rational behaviour by two or more interacting rational individuals, each of them determined to maximise his own interests, whether selfish or unselfish, as specified by his own utility function (pay-off function). (though some or all players may very well assign high utilities to clearly altruistic objectives, this need not prevent a conflict of interest between them since they may possibly assign high utilities to quite different and perhaps strongly conflicting, altruistic objectives) (Harsanyi 1986: 89).

Nash (1950) introduced the notion of bargaining within this framework and developed a model of game theory which could mathematically represent the bargaining process between interacting rational individuals. Nash introduced an analysis for non-co-operative bargaining by examining various equilibrium points on an axis from which

the pareto frontier, the non-agreement point and co-operative surplus, could be developed. However, this has been criticised: “if all we can say is that the outcome of the game will be an equilibrium point ... then we are saying little more than that almost any thing can happen in a game” (Harsanyi 1986: 105). Harsanyi therefore introduces the Batesian solution for non-co-operative games, which overcomes this analytical flaw, by introducing a specific equilibrium point as a solution to the game.

Nash assumed that rational people will only obtain an agreement that will make them better off than their original position of non-agreement. The specific equilibrium point, therefore, must always generate a co-operative surplus. In other words, rational individuals under this theoretical bargaining process will only make an agreement where there is a ‘mutual advantage’ to do so.

The outcome of bargaining will lie on that part of the pareto frontier that is above the non-agreement point. This process and the resultant outcome have become known as the “Nash Solution” being the position where; “Rational Bargainers will finish up at the point where the product of utilities of the parties is maximised when the non-agreement outcome is assigned zero utility to each party” (Barry 1989: 14)

The outcome of this bargaining will still, however, reflect the parties’ power differential. If a party has greater power, then their satisfaction level will be different to the other party’s as they are in a position to upset any solution with which they are not content.

A lecture by Braithwaite, *A Theory of Games as a Tool for the Moral Philosopher* (1955) showed additional ways the theory could be developed as a representative model of bargaining behaviour. In this lecture, Braithwaite put forward the idea that the non-agreement point of the parties is determined by optimal threats. The non-agreement point is not pre-determined, but rather is based on these threats. Reaching an agreement is achieved through the preservation of the parties’ relative positions at their non-agreement point. This is in contrast to the Nash Solution, where equilibrium is found at the point where both parties are risking the same utility loss (in terms of

their own utilities) from pressing for more concessions rather than accepting what has been negotiated (Barry 1989).

In summary, the difference between Nash and Braithwaite is the way in which parties move to the pareto frontier (being the set of pareto-optimal points). For Nash, it is the motive to gain a benefit from the negotiation in the light of each parties' bargaining strength. For Braithwaite it is how each party can affect the other parties' negotiating position through their relative bargaining power at the non-agreement point (i.e. their optimal threats). These game theoretic models, therefore, show two ways in which rational individuals with a motivation to maximise their own interests behave in attempting a negotiated outcome from a position of non-agreement or possible conflict.

## **Mediation and Game Theory**

As already, stated international mediation is about introducing a third party to the negotiation process. The *raison d'être* for the third party in the game theoretic model is to avoid a deadlock between the parties during the bargaining process. If each party makes a stated final offer then it would be very difficult after this revelation to retract and maintain credibility. A neutral third party is able to assess the bargaining power of the parties and seek a solution, which will reflect the parties' hypothetical agreements, had they not been frustrated by their unwillingness to alter their so-called final threat. Any other solution is not stable, because if one party receives an outcome that is inconsistent with his threat advantage or without a co-operative surplus, then he can disrupt or withdraw from negotiations.

A mediated solution (especially as mediation is a voluntary process) will reflect direct negotiations in a rational framework. It is the solution the parties would have accepted themselves after considering the benefits over and above a non-agreement had they not been frustrated (Barry 1989).

## **Justice in Game Theory**

The concept of a co-operative surplus (being the gain that will be achieved by the parties from a negotiated agreement) is the foundation for the theory of mutual advantage and makes an assessment of justice in mediation simple. Given mediation is based on a voluntary bargaining process, both parties have certain rights that cannot be affected by the bargaining process. The consequent division of the co-operative surplus must, by definition, result in a gain to each party that would not have occurred without the bargaining process.

Any consideration of morality during this bargaining process is 'rationalised' out of the equation because moral rules are simply rules that will be advantageous to the parties in the long-term: "There can be no competition between the claims of morality and those of self-interest, because morality is simply the form that self-interest takes under certain conditions" (Barry 1989: 84).

In this analytical framework, the unfairness of an unequal division of the co-operative surplus through the inequality of bargaining positions does not matter. The important point is that a surplus exists. The means of obtaining such an advantage is less important than the fact that a co-operative agreement has been achieved which has made the parties better off than if they had not engaged in the bargaining process at all.

## **The Limitations of Game Theory**

Game theory shows how bargaining mechanisms work when actors are rational individuals maximising their own conflicting self-interests. Game theory is therefore about "how our aims are achieved and not what our aims should be" (Elster 1986: 2).

Game theory may describe a very interesting model of bargaining behaviour, but it does not provide a standard for human behaviour within a bargaining context (other than maximising one's own interest).

Barry, summarising Hume, states that justice becomes a virtue because moral judgements require a common standard and that standard, as far as Hume was concerned is an impartial sympathy with the interest of all affected (Barry 1989: 49).

Game theory provides no such sympathy, but rather reflects behavioural patterns, and therefore cannot provide any standard of behaviour on which parties are to negotiate. There does not seem to be any purpose to the examination of justice using game theory. Justice is a virtue of humanity. A theory of justice should be based on the motivation of people within the context of their societies rather than the consequence of their behaviour.

Game theory is one branch of the general theory of rational behaviour, so by definition it makes two essential assumptions about human behaviour, first: that parties themselves will be rational individuals; and second, that the parties intend to maximise their own good. The theory becomes predictive of actual behaviour because it assumes that during the decision-making process preferences are made based on self-interest. As stated by Rawls “what connects the theory of justice with the theory of Rational Choice is that we have to ascertain which principles it would be rational to adopt given the contractual situation” (Rawls 1972: 17).

Under the theory of JMA, our preferences, being based on self-interest, will create principles of justice that serve the self. Any outcome that is detrimental in the short term will simply be a trade-off for a greater long-term gain. For example, altruism does not have any short-term benefits, but there may be a long-term benefit of security associated with such benevolence. In a circular argument characteristic of game theory, Graftstein (1992) makes the point that the cultural framework for organizing beliefs and preferences are rationally learned. This means that social norms will always ensure that an outcome is *rational*. If one is to assume that self-interest is indeed the basic motivating criteria for a bargaining framework, Barry still proceeds to most successfully defeat the theory of JMA by turning the argument onto itself.

As explained, the motivation for being just within a rational framework is the fact that it is in one's own long-term interest. It is in the interest of the parties to accept

restrictions from institutions that create a long-term benefit. Consequently, a long-term benefit will accrue from the short-term cost of a just agreement. However, if the essential motivating criteria are self-interest, then the parties (out of their own self-interest) will attempt to avoid the consequences of the agreement whenever they can because they have no moral obligation to refrain from cheating. Barry states: “that no system of penalties can be set up among people motivated purely by self-interest that can ensure a degree of compliance sufficient to prevent the scheme of co-operation from collapsing” (Barry 1998: 217). The concept of mutual advantage is therefore fundamentally flawed because, “the motive that led people to assent to it is also a motive that leads them to re-nege on it” (Barry 1998: 117).

In summary, the theory of justice by mutual advantage embodies the simple notion that co-operation between the parties is better than non-co-operation, in the long-term. To get beyond the non co-operative ‘baseline’ human behaviour is motivated by the pursuit of the individual’s self-interest or ‘good’ because it is assumed that there is a long-term benefit in an agreement to co-operate. Game theory has provided an analytical model to illustrate the process and outcomes of bargaining behaviour from the assumptions made within the theory.

The assumption used in the general theory of rational behaviour is that the parties are motivated by self-interest. Barry uses this premise to show that agreements made in the pursuit of each parties self interest will always be self-defeating, because the parties would always find ways of reneging on their responsibilities. To look at the justness of a negotiation one needs to look beyond rational self-interest because game theory provides no long-term incentive to maintain an agreement. Thus, one needs to examine other reasons for being just.

## ***II Justice as Reciprocity***

The theory of Justice as Reciprocity (JAR) is based on the principle that it is reasonable to expect that those who gives benefits should receive equivalent benefits in return. This is the fundamental principle in the work *A Theory of Justice* by John



Rawls. Rawls claimed that there was a duty of fairness that applied to all just societies. This concept embraces a normative framework where rights and duties between parties are inextricably linked: “the obligation which participants who have knowingly accepted the benefits of their common practice owe to each other to act in accordance with it when their performance falls due” ( Rawls 1962: 146).

The theory still utilises the basic motivational approach of JMA, (self-interest), but adds fairness as the motive for limiting a person’s desire to maximise his own interests. Reciprocity of benefits will ensure that a self-interested approach by one party does not create such an unequal division or burden that one could not possibly justify the outcome.

Barry believes that Rawls’ notion of fairness is based on three premises from which his theories of justice are based. These are; the fundamental equality of human beings; that the distribution of resources must be able to be justified by those who will receive the least; and that must always exist a ‘separateness of persons’ (Barry 1998: 188) The concept of the ‘separate of persons’ means that the individual is the essential element in the consideration of justice, and moral values are based on the individual and not with society in aggregate. Policies, therefore, cannot be justified because they will benefit the majority. In essence, this is where justice-based considerations and utilitarianism diverge (Ryan 1993).

Unequal bargaining positions, and the corresponding unequal outcomes from a bargaining framework, cannot satisfy the Rawlsian notion of fairness. Rawls devises a hypothetical construction to address the inherent unfairness created by the unbridled pursuit of the good. Motivation to bargain is still based on self-interest, but the outcome or division is restricted by the introduction of a construction that will set arbitrary limits to the exploitation of one party by another.

## **The Rawlsian Construction**

In order to create fairness Rawls develops a hypothetical construction for the bargaining framework, being an 'original position' from which the principles of justice are derived. Justice exists (the circumstances of justice) when these principles are upheld (Rawls 1972: 118-130). The parties will uphold these principles because, as explained above, they are maximising their long-term benefits by accepting restrictions or burdens in the short-term (Rawls 1972). Rawls creates the original position by casting a 'veil of ignorance' over the parties, which denies the parties knowledge of their position and identity in society (Rawls 1972: 136-142). The veil denies access to information to remove any bias in their decision-making. The parties are able to generate a fair bargain between them because all parties are equal at the original position, so bargaining inequalities cannot eventuate to affect the outcome. The parties will have identical information and will be pursuing the same objectives. In fact, as Barry states they become "inter-changeable" (Barry 1998: 190).

In summary, the parties are still motivated by self-interest. Rawls attempts, however, to overcome any inequality of bargaining power at the negotiation baseline by introducing a 'veil of ignorance' over the parties. This creates hypothetical pre-conditions necessary to develop just principles that envelop the notion of fairness into the outcome, in other words, equality.

## **The Limitations of Justice as Reciprocity**

Unfortunately, the 'veil of ignorance' in making each party inter-changeable makes the whole notion of bargaining redundant. The parties, through their lack of information, cannot ascertain their actual conflict situation, yet the rules of justice are those rules that are needed to avoid conflict (Barry 1995). Although the parties in Rawls 'original position', behind the 'veil of ignorance' are fundamentally equal, the operation of the 'veil' unfortunately prevents the satisfaction of the other two fundamental principles espoused by Rawls. The parties who would be most affected

by a distribution of resources cannot be identified under a 'veil of ignorance' nor could there be a 'separateness of persons', as by construction the parties in the veil are 'inter-changeable' with each other under.

Although Barry's work draws significantly from Rawls' theories of justice his comments reveal a serious flaw in the application of JAR to negotiation theory and the need arises for another contractually based theory. This need is answered by Barry with his theory of justice as impartiality.

### ***III Justice as Impartiality***

The motivation to be just in the theories of JMA and JAR is self-interest. Agreements created out of self-interest reflect the bargaining power of the parties. Parties with the greater power would have the ability to alter the agreement at any point if they were not satisfied with the trade-off between their short-term and long-term interests.

JAR attempts to overcome this inequality by imposing hypothetical pre-conditions to the bargaining environment, but this prevents actual bargaining behaviour. Therefore, it provides no method to regulate the results of agreements.

The theory of Justice as Impartiality (JAI) is different because it develops an alternative motivation to self-interest and in the process detaches justice from bargaining power. Justice as Impartiality states "that justice should be the content of an agreement that would be reached by rational people under the conditions that do not allow for bargaining power to be translated into advantage" ( Barry 1989: 7).

Instead of self-interest, the motive for being just becomes: "The desire to act in accordance with principles that could not reasonably be rejected by people seeking an agreement with others under conditions free from morally irrelevant bargaining advantages and disadvantages" ( Barry 1989: 8).

The moral motivation to act in accordance with principles that could not reasonably be rejected is based upon the desire to be in a position where one can justify an action to oneself or to others. Barry speculates that the human experience of inter-dependence generates a pre-disposition to acquire the pre-requisite moral motivation of reasonableness. Inter-dependence, he believes, encourages people to consider the reasonableness of ones' own behaviour in light of others. Barry accepts that at first instance this motivation is conceptually weak in comparison to the motive of self-interest. He defends his position, however, by stating that the pursuit of self-interest is no more an empirically tested norm than the desire to be impartial: "The equation of rationality with the efficient pursuit of self-interest is, as far as I can see, pure assertion. It can therefore fitly be opposed by the counter-assertion, namely, that it is equally rational to care about what can be defended impartially"(Barry 1989: 285). Also, unlike the notion of self-interest, there is no need to prove the universality of the theory of JAI, since it develops a standard of behaviour. Self-interest, for example, in game theory must be a universal norm for game theory to have a predictive effect. Oppositely, JAI operates as a touchstone, a litmus test, since Barry defines his appeal to reason as not one of logical deduction but of "reasoned argument, from premises that are in principle open to everyone to accept" (Barry 1989: 7).

The appeal to reason is not an appeal to reasoned logic, which triggers the use of mathematical deduction and modelling to prescribe outcomes. There is no need for methodological enquiry, because Barry's theory, unlike the general theory of rational behaviour, is not trying to predict an outcome based on human behavioural patterns. Barry believes that a notion of justice that embodies an appeal to reason overcomes the fundamental flaw of JMA and JAR. It overcomes, that is, the ability of JMA and JAR to prevent an advantageous outcome to those with a stronger bargaining position.

## **The Scanlonian Construction**

Barry accepts without question the underlying ideas of Rawls' *A Theory of Justice* and the three basic 'building blocks' of his theory. The building blocks, as already explained, are the fundamental equality of human beings, the justification of the

distribution of resources by those most affected by it, and the concept of 'separateness of persons'. As explained earlier, Barry does not believe that the Rawlsian construction delivers an outcome that would incorporate the three building blocks Rawls himself has established as the minimum criteria for the development of principles of justice that are fair. Barry believes that a construction originally devised by T M Scanlon more effectively allows the development of Rawls' above mentioned principles within a bargaining environment. The basic premise of this construction is:

An act is wrong if its performance under the circumstances would be dis-allowed by any system of rules for the general regulation of behaviour, which no one could reasonably reject as a basis for informed, unforced general agreement (Scanlon 1982: 110 ).

In this construction, the parties are aware of their identities and are not motivated solely by self-interest, but also by "the desire for reasonable agreement" (Scanlon 1982: 115).

Barry believes that the Scanlonian construction will embody Rawls' fundamental building blocks by imputing a common standard of reasonableness (Barry 1989: 191). Equality is maintained because "all those affected have to be able to feel that they have done as well as they could reasonably hope to " (Barry 1995: 7).

Discrimination based on race, for example, could not reasonably be expected to be accepted by those against whom the discrimination is made as any principle that develops a notion of inequality would not be accepted by any rational person who is to be restricted by such a principle.

The 'separateness of persons' is also maintained under the Scanlonian construction, because a person who was to be badly affected by an agreement would be justified in refusing to agree to it. Every party, as long as the objection is reasonable has a power of veto. The operation of a veto ensures that the outcome will be justified to those who least benefit from the outcome. The parties, as explained, know each other's identity so those who are most affected by a negotiated outcome are identified and can implement the veto. The operation of the veto, however, is only effective if it is

tenable for the parties to return to the non-agreement point. A party may be forced into an agreement to avoid the untenable position of non-agreement.

With JMA the non-agreement point becomes the frame of reference for determining outcomes. The non-agreement point itself is the standard from which the parties are working, and the fear of returning to a non-agreement position creates the bargaining power of the parties. This bargaining power, however, does not create injustice because it is assumed that the essence of bargaining is the achievement of a co-operative surplus. JAI places no such significance to the non-agreement point:

Whether or not those with superior natural endowments can legitimately claim to reap advantages in a just society is something to be thrashed out in the Scanlonian choosing situation. However, there is one argument that the parties cannot appeal to, and that is the argument that they would do relatively well in the absence of an agreement. For the theory supplies no basis for saying that the non-agreement point is itself a just starting place (Barry 1998: 226).

To avoid the exploitation of one party's unequal bargaining position (being in a more vulnerable position at the non-agreement point) the Scanlonian construction determines that an agreement should be unforced. The parties, therefore, should not be coerced into an agreement out of fear of the consequent 'state of nature' (a situation brought about by unconstrained attempts of each party to maximise their good without any agreement) if no agreement is reached or by any threat advantage from the other party to the bargain.

The Scanlonian construction further requires that there should be an informed agreement. Barry believes that: "The idea of an 'informed agreement' is meant to exclude agreements based on superstition or false belief about the consequences of actions, even if these beliefs are ones which it would be reasonable for the person in question to have" (Barry 1995: 69).

This clearly raises the question, on what premise does one judge whether one, or someone else is informed? For instance, if it is upon a religious premise, then the

background knowledge and assumptions of the party will be entirely different to the assumptions of a person whose premise is one of science.

Barry tries to overcome this problem by stating the contractual theory should embody a system of resolution for disagreements about the consequences of an agreement. He believes that if we assume that people are well informed, concerned to further their own interests and their conceptions of the good, then they will be capable of recognising reasonable objections on the part of others (Barry 1995: 99). Just agreements will arise from informed deliberation of the consequences and rules that no one could reasonably reject and the justification of outcomes will be openly arrived at (Barry 1995). Amy Gutmann (1999) reinforces this notion and suggests that deliberation is the most satisfactory mechanism to resolve moral disputes. She believes that deliberation can lead to resolutions that have a greater chance of being morally defensible because it promotes mutual respect among equal citizens.

To summarise, the Scanlonian construction places on the negotiating parties the requirement that bargaining outcomes will be informed, unforced and reasonable. Deliberation within a bargaining process ensures that the parties to the negotiation are fully informed. In these circumstances they can accept a reasoned argument. The right of each party to veto an unreasonable argument will ensure that the process will be unforced.

In summary, the theory of JAI simply states that the 'rules of justice' as developed through bargaining must be reasonable. Barry compares his theory with that of Rawls by stating that "For Rawls, justice constrains the content of the good" while in the theory of Justice as Impartiality "justice constrains the pursuit of the good" (Barry 1995: 57).

Barry, therefore, replaces the Rawlsian original position with the Scanlonian construction, a construction that satisfies the Rawlsian criterion of fairness but allows an effective negotiating environment to exist between two competing parties.

The principles or 'rules of justice' that are reasonable (being those that are developed through reasoned argument) are deemed impartial because they: "capture a certain

kind of equality: all those affected have to be able to feel that they have done as well as they could reasonably hope to" (Barry 1995: 7).

Barry summarises his theory of justice as impartiality by asking:

*What are the institutional arrangements most conducive to making outcomes depend on reasoned argument rather than on the alignment of political forces?*

Since JAI is the most satisfactory, and thus the most stable, for the parties involved it is chosen as the most appropriate theory to examine international mediation.

#### ***IV Justice as Fairness***

The concept of justice as fairness within the political theories of justice has a particular meaning. For Rawls, in "A Theory of Justice" it meant the following:

'Justice as fairness' it conveys the idea that the principles of justice are agreed to in an initial situation that is fair. The name does not mean that the concepts of justice and fairness are the same, any more than the phrase "poetry as metaphor" means that the concepts of poetry and metaphor are the same (Rawls 1972: 12).

Fairness within the theory of JAI is defined by the actual negotiating environment created by the theory:

we can already begin to discern from this the outlines of the generic conception of fairness for which we now need to look. *It will make fairness what can freely be agreed on by equally well-placed parties.* Justice as impartiality-the theory of justice we arrive at by pursuing this idea...In rough terms, the criterion of just rules and institutions is that they should be fair, and the motive appealed to is the desire to behave fairly (Barry 1995: 51).

In essence, Barry believes that two conditions need to be satisfied before an agreement will be fair. That the parties must be *well informed* and *equally well placed* to negotiate. This does not mean, however, that there must always be equal bargaining



power between the parties at the theoretical baseline. Rawls needed the parties' bargaining power or position to be equal, because the motive to be just within the negotiation environment was self-interest, which does not allow the regulation of social co-operation other than what is in one's own long term self-interest.

In the context of JAI, the parties will only need to be *equally well placed* at the negotiation baseline. This means that the parties will still seek to advance their interests but will limit their demands to what is reasonable. A non-agreement point must still exist to motivate the parties to commence negotiations and to establish the bargaining position, but for a negotiated agreement to be fair the parties must *be motivated by a desire to reach agreement on reasonable terms*. The parties cannot rely on their pre-negotiation positions to justify their argument. Therefore, the conditions established under JAI will provide outcomes that will be just and fair for the mediating parties because acting fairly reinforces fair behaviour:

Justice as Impartiality, however, has the structure of an assurance game. If I am motivated by a desire to behave fairly, I will want to do what the rules mandated by Justice as Impartiality require so long as enough other people are doing the same. Thus, people motivated by fairness reinforce one another's motives (Barry 1995: 51).

## **Incorporating the Social-Psychological Categories of Justice**

We have seen that a criterion of the Scanlonian construction is that the parties *have to feel* that they have done as well as they could reasonably hope to, which in theory would ensure that the cognitive need for participants and their constituents to believe that an outcome is fair has been met. This cognitive or psychological need by participants to a mediation event has been the basis for the assessment of justice in the majority of the literature on mediation. The literature considers fairness within the mediation context by using various social-psychology developed categories of justice that have been adopted for participant viewpoints.

The construct of fairness within the theory of justice developed by Barry automatically ensures that the requirements for fairness represented by these established categories

of justice are met. JAI produces a stable agreement, because, if the parties' perception is that they have done as well as they could reasonably hope to, then the various categories of justice described above become subsumed by this requirement. The argument, for instance, about whether the distribution of resources should be based on equity, where rewards should be distributed in proportion to their contributions, as opposed to equality, where all parties receive an equal share of goods or on a distribution based primarily on need, is not necessary. The negotiating environment produced by the Scanlon construction will automatically produce a fair distribution because it will ensure that the allocation of resources will be in such a manner that all parties will feel that they have done as well as they could reasonably hope to. Furthermore, those who are most affected have the ability to veto any agreement and those who are most likely to have reasonable objections will be those who are most affected by an outcome (Barry 1998).

Likewise, if the mediated agreement is fair, it has been freely agreed to by equally well-placed parties. This means that the procedures will automatically be fair within this environment because prejudicial procedures create unequal bargaining positions. Interactional justice (the right to social sensitivity) will also exist within a Scanlonian construction because the common standard of reasonableness requires that parties in their motivation to be fair will respect such conditions. If one party is not respected then they will consider that they have not done as well as they could reasonably hope.

JAI promotes the idea that justice as fairness is the way the negotiation process takes place. Whether or not a negotiated agreement is fair is according to this conception is dependant on the negotiation environment. Consequently, there is no need to place an outside criteria of fairness onto the parties' decision, so long as the decision-making process has been fair in terms of JAI. What is fair is determined by the parties themselves in a negotiation environment where the parties are well informed, well placed, and the agreement has been reached freely. This approach overcomes the problem of conflicting standards for outcome fairness in mediation.

## ***V Reasonableness in International Mediation***

It has been established in the theory of JAI that fairness is developed within the negotiating environment by the parties' desire to behave fairly. This desire to behave fairly will ensure that the parties limit their demands to what is reasonable, in other words, demands that can be justified by reasoned argument. As explained, previously, Barry suggests that interdependence requires people to consider the reasonableness of their actions in light of others. In terms of international mediation parties realise that negotiated agreements need to be supported by their constituents, which provides another layer of interdependence. Without constituent support there is little chance an agreement will be implemented.

There is anecdotal evidence within international mediation that reasonableness does exist in a format similar to that prescribed by the theory of JAI. An example can be found in Princen's analysis of Jimmy Carter's thoughts about Camp David:

My colleagues and I decided to develop a reasonable proposal.... hoping that public opinion and the general desire for peace might be decisive"....In other words, from Carter's perspective, the public knows that peace transcends all else and when he can finally bring Begin to this realisation, agreement will be in hand. Reasonable people may dis-agree, but a 'reasonable proposal' cannot readily be rejected (Princen 1982: 291).

The discussion between Golda Meir and Henry Kissinger repeated below also illustrates how reasonableness in negotiations can be the basis of support for a mediated agreement:

*Meir:* none of our neighbours – certainly not Syria – is prepared to negotiate real peace. All the Syrians want to talk about after two wars in six years is the engagement of forces- so we cannot just brush aside the military arguments of our chief of staff. Besides, regimes change in the Arab world. Suppose something happens to Sadat and someone more anti-Israel and pro-Soviet comes to power? What happens then to all these agreements?

*Kissinger:* In that case a great deal would depend on how *reasonable* Israel has been in negotiations. *Meir:* We did not just get up one day in 1967 after all the shelling from the Heights and decide to take Golan away from them. In October we had 800 killed and 2000

wounded in Golan alone- in a war *they* started. They say this is their territory. Eight hundred boys gave their lives for an attack the Syrians started. Assad lost the war-and now we have to pay for it because Assad says it is *his* territory!

*Kissinger*: Each side has its own definition of justice. Remember what this is all about- to keep the negotiating process alive, to prevent another round of hostilities, which would benefit the Soviet Union and increase pressure on you, on us, and on Sadat to rejoin the battle... (Sheehan 1989: 68).

Kissinger states how important it is to be 'reasonable' and then goes on to say that justice is subjective. In this sense he is talking about just outcomes through negotiation, while in the second he is talking about how people describe or interpret specific events in terms of justice.

Another example can be found during the Oslo Back Channel negotiations where the Palestinian delegate Abbu Alaa stated: Your obstinacy is to no avail, we must sit around the table. Here is our voice calling out to you; listen to the voice of reason, look to the future of your children (Mahmoud Abbas 1995: 7).

In summary, the conditions established through the Scanlonian construction in the theory of JAI will automatically provide outcomes that will be fair for the mediating parties and their constituents even in terms of the social-psychological categories of justice. The fairness of a mediated agreement is developed from a just negotiation environment in terms of the theory of JAI. The theory of JAI provides an argument to suggest that in an assessment of the fairness of a mediated agreement, emphasis can be placed on the process of mediation. Outcome fairness and the participant view of such fairness will, in justice theory, follow on from a just negotiation environment.

## ***VI Justice as Impartiality and Nation States***

International mediation is focused on the resolution of conflicts that has occurred in, or between, states, so in order to apply a fully developed theory of justice to international mediation we must first determine whether states can indeed regulate

their behaviour to produce just agreements. For sovereign states to have the capacity to freely negotiate a 'reasonable agreement' with each other or with non-state actors, there must be some element of moral motivation in their behaviour to pursue such an outcome. Essentially, as stated by Barry, moral motivation is "a psychological phenomenon rather than a logical one" (Barry 1991: 179). It has been shown that there is anecdotal evidence to suggest that parties will be *reasonable* during the bargaining process, but does this translate to a motivation to be moral?

## **Nation State Morality**

It is argued that states (through the notion of sovereignty) have a paramount duty to their citizens that over-rides any duty to another state, and this is especially so in times of conflict (Teson 1998). It could be assumed, from this idea, that state morality is different to individual morality and that relations between states are not subject to individual moral standards. Barry argues against state amorality by comparing it with a lower level of abstraction. A person, he maintains, has a special obligation to his family, a duty that exceeds his obligation to his neighbour. This obligation, however, does not justify or legitimatise harm to his neighbour in order to benefit his family. Similarly, a state cannot justify, or does not have

moral licence to do anything to advance the national interest without regard to possible violation of the legitimate interests of others...Why should this one level of association be exempted from moral constraints that apply to all others? (Barry 199: 165).

Teson (1998) agrees with Barry suggesting that a morality does not exist that is peculiar to international relations:

It is of course true that government officials face peculiar 'conditions' in foreign policy. However, that does not mean that they operate, or should operate, under a different logic, morality or rationality (Teson 1998: 42).

A second argument that attempts to dispute the idea that morality exists between states is that rules of international conduct cannot truly exist because there is no common social cohesion between states. Each state observes rules out of choice, so they are not members of a community governed by 'common rules of conduct' (Nadin 1983). Barry argues, oppositely, that in everyday life moral norms are not always backed by legal sanction nor are they universal but are still effective in controlling behaviour. Likewise, Kant believed that international order should be no different to the national order and that the desire to maintain reason over a 'state of nature' exists equally in the international arena as it does within states and this was proven by states attempting to justify their behaviour in terms of laws:

The homage that every nation pays to the concept of law proves...that there is in man a still greater, though presently dormant moral aptitude to master the evil principle in himself and to hope that others will also overcome it (Kant 1795: 116).

## **The Level of Moral Motivation by Nation States**

Although it has been demonstrated that moral motivation can, and indeed should, exist between states (because what exists between individuals within states should not be different to what exists between states), it must be accepted that the moral motivation of the international community is less than what exists within domestic community structures. States are less interdependent so there is less social cohesion between them than in domestic structures. However, not having a strong moral climate does not suggest that the conduct of foreign policy should preclude or justify future behaviour that would promote the development of reasonable agreements by states (Nadin 1983).

The theory of JAI does not describe or predict international relations between states. It is a non-prescriptive theory of justice that provides a litmus test to determine the justice of agreements. It does not try to make presumptions from the theory to represent reality. It is a theory that enables us to determine whether the behaviour of

states is just. Therefore, the level of moral motivation of states is unimportant to the theory of JAI.

## Conclusion

This chapter has identified various political theories of justice put forward by Brian Barry. It showed why the theory of JAI should be the key political theory of justice to explain what *should* motivate parties within a political bargaining process to be just.

The theoretical building block for the theory JAI is the Scanlonian construction. That construction allows Barry to assert that an agreement will only be just in terms of JAI if the parties are *informed*, have *freely* agreed to it, and that it could not be *reasonably rejected* by the parties. Barry believes that in applying this construction the principles of justice developed will be fair because the agreement has been freely agreed to by equally *well-placed* parties.

The theory of JAI suggests that being *informed* means that the parties are capable of recognising reasonable objections on the part of others and *reasonableness* is what can be agreed to by reasoned argument. *Fairness* is what is determined by parties, themselves, when they are *informed* and *equally well placed* within the negotiation environment. A just negotiation environment for international mediation in terms of the theory of JAI is therefore:

**Where a mediating State's behaviour is such that it will not use an alignment of political forces to make the parties reach a specific agreement, but rather will assist the parties to freely negotiate an informed agreement based on reasoned argument.**

This study will now proceed to examine international mediation in the context of the political theory of justice, JAI. Consequently, the definitions 'informed', 'reasonable' and 'fair' and the phrase 'just negotiation environment' are those developed in this chapter.

### 3 INTERNATIONAL MEDIATION AND JUSTICE

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust.

JOHN RAWLS- *A theory of Justice*

#### ***1 Introduction***

The theory of JAI provides an hypothesis on the sort of negotiation climate that should exist before a set of rules can be developed that are fair.

Justice is, of course, a moral concept: it is wrong to behave unjustly because that is to breach the terms of fair agreement for mutual constraint. However, justice as impartiality provides the ground rules that set the legitimate limits to the pursuit of any particular moral system's precepts..... For justice as impartiality is not designed to tell us how to live. It addresses itself to a different but equally important question: how are we to live *together*, given that we have different ideas about how to live (Barry 1995: 77).

The theories of justice that have been examined in this thesis were originally developed to evaluate the fundamental relationships that are formed within societies. In JAI impartial rules that are supposed to emerge from the Scanlonian contract are intended to provide a way members of a society can live together with competing conceptions of the good (Weale 1998).

This thesis contends that the political theory of justice, JAI, developed by Barry can be applied in certain circumstances to the political process of international mediation. This assumption is based on the idea that international mediation has the capacity to:



1. Affect *basic political rights* - how people live within their nation in relation to each other; and
2. Establish a framework to prevent the onset of conflict between societies. i.e. the *Rules of Justice*.

The Oslo Accords are one example of this. Stage One of the accords involved interim self-government arrangements that affected the basic human rights of the Palestinian People. The Gaza Jericho Agreement involved the establishment of legislative powers to the Palestinian Authority. Article VII states that: "The Palestinian Authority will have the power, within its jurisdiction, to promulgate legislation, including basic laws, laws, regulations and other legislative acts."

Furthermore, it has been argued in this thesis that states have the theoretical capacity to be reasonable in the conduct of their relations with other states even if, such motivations often are not primary. If nation states, and therefore, the representative participants to a mediation event, have the *theoretical ability* to be motivated morally, and mediation events involve the negotiation of structures and rules to prevent the onset of conflict, then an examination of international mediation in terms of the theory of JAI is warranted. It may be suggested that because mediation is voluntary in participation and compliance and not part of a formal institutional process (that attaches or enforces benefits and burdens), it is precluded from an assessment in terms of the political theories of justice. However, one of the important points in Barry's theory of JAI is that he does not distinguish between rules that are enforced by the state and rules that are upheld voluntarily (Barry 1998).

International mediation is a *political process* (Touval and Zartman 1984: 7) where political rights are affected and parties develop rules that are necessary to avoid conflict. Consequently, international mediation, as outlined in Chapter Two, ought to be examined in terms of a political theory of justice. This chapter will examine the behaviour of a mediator in the triadic negotiation environment of international mediation to see how such behaviour affects a just negotiation environment in terms of JAI and will examine the motivation of mediators within this bargaining process to

determine how mediators *should* behave in the delivery of their functions to conflicting parties.

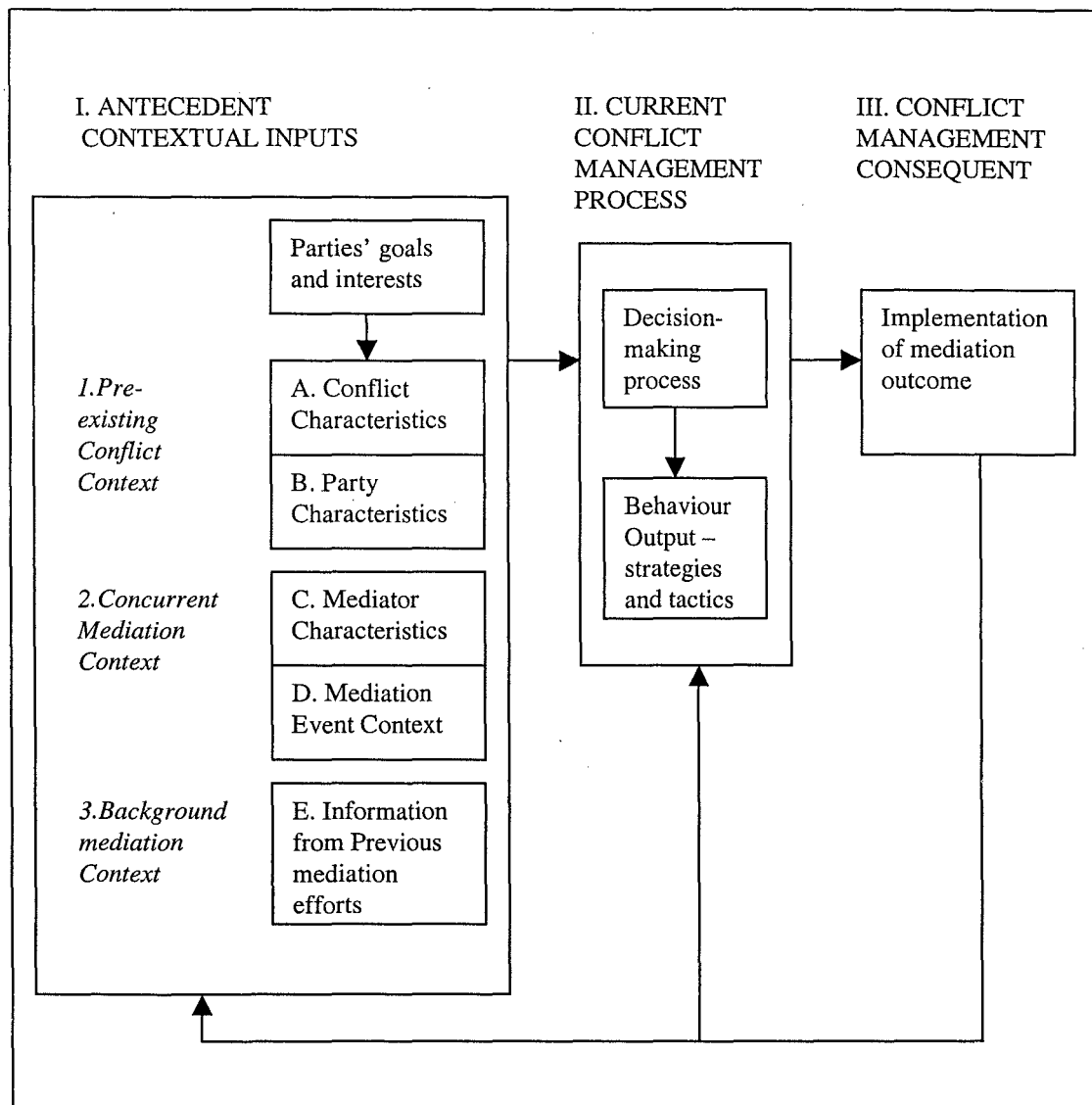
## ***II Applying JAI to International Mediation Theory***

This thesis has identified the conditions needed for a just negotiation environment in terms of JAI. Using the Scanlonian construction as a litmus test or standard, a negotiation climate can be demonstrated as just if the negotiating behaviour of the parties allows an agreed outcome that is *informed*, *unforced* that could not be *reasonably* rejected by the parties.

However, to apply this theory to international mediation, there must be an understanding of how the introduction of a third party distinguishes mediation from a dyadic negotiation environment. The difference for the purposes of thesis, between applying JAI to a mediation, rather than a negotiation, is that the mediator's behaviour affects the negotiating environment. The actions of mediator must therefore be part of any evaluation of the justice of mediation.

Bercovitch describes mediation as "a dynamic and complex social process comprising parties in dispute, a social environment or a context, a particular dispute or problem, and a mediating agent" (Bercovitch 1996: 13). As a dynamic social process a mediation event will be altered by the context in which it occurs. The contingency approach will be introduced to provide a descriptive format of the international mediation process. This approach illustrates how contextual factors affect the mediation process. The most relevant to the negotiation environment is mediator behaviour: "In essence, the practice of mediation revolves around the choice of strategic behaviour that mediators believe will facilitate the type of outcome they seek to achieve in the conflict management process" (Bercovitch and Houston 2000: 174). Therefore, the kind negotiation environment that exists in the triadic negotiation environment of international mediation is contingent on mediator behaviour. The contingency model of mediation behaviour illustrated below clearly demonstrates this.

Figure 1: A Contingency Model of Mediation Behaviour:



Source: (Bercovitch and Houston 2000: 173)

Commenting on this model Bercovitch and Houston (2000) state: “It is the interaction of these three contextual dimensions, comprising actors and situation conditions, that influence how mediator behaviour is chosen and implemented and thus the outcome of the mediation process” (Bercovitch and Houston 2000: 173). In the contingency approach, mediator strategies are divided into three categories based on the level of intervention undertaken by the mediator. These categories are described by Bercovitch and Houston (2000) as:

1. *Communication-facilitation strategies* describe mediator behaviour at the low end of the intervention spectrum. The mediator typically adopts a passive role, channelling information to

the parties, facilitating co-operation but exhibiting little control over the more formal process or substance of mediation.

2. *Procedural strategies* enable a mediator to exert more formal control over the mediation process with respect to the environment of the mediation. The mediator may determine the structural aspects of meetings and control constituency influences, media publicity, the distribution of information, and the situation powers of the parties' resources and communication processes.

3. *Directive strategies* are the most powerful form of intervention. The mediator affects the content and substance of the bargaining process by providing incentives for the parties to negotiate or by issuing ultimatums. Directive strategies deal directly with and aim to change the way issues are framed and the behaviour associated with them (Bercovitch and Houston 2000: 175).

Mediators use these strategies to influence the parties' behaviour in the negotiation environment. The different kinds of negotiation environment that develop from the introduction of a mediator will now be examined, as well as the theoretical basis of mediation, to determine if international mediation is conducive to developing the kind of negotiation environment envisaged in terms of JAI.

## **A Bargaining Process that is Informed and Unforced**

In JAI, parties must be informed. Deliberation on the consequences of any outcome where the parties are capable of recognising reasonable objections on the part of others is necessary to ensure that parties make agreements on reasoned argument rather than on their own values system (Barry 1995). Justifications for arguments must be openly arrived at so that each party can recognise the reasonable objections of the other. Procedures that encourage deliberation within a negotiation environment will provide this. Gutmann (1999) has developed the idea of deliberation as a mechanism for the resolution of moral disputes. She describes deliberation as "the value given to engaging in a give and take of arguments and understandings before making a decision" (Gutmann 1999: 2). Gutmann believes that deliberation needs to be not only about outcomes, but also about process.

International mediation needs to incorporate a process of deliberation so that the consequences of an agreement can be openly identified and justified by reasoned argument if it is to create a just negotiation environment in terms of JAI. The theoretical concept of mediation is conducive to such deliberation. The introduction of the third party is supposed to facilitate discussion. There is no formal process that inhibits the disclosure of information or invites the risk of penalty from such disclosure. Participation in mediation is voluntary so, in theory at least, the parties can deliberate on the procedural mechanisms prior to the commencement of negotiations. In sum, there is no reason why a deliberative framework could not be developed within the mediation process as a mechanism that would enable a moral resolution of conflicts in both procedure and substance.

As stated in Chapter Two, for the outcome to be unforced the parties should not enter into an agreement simply because they would be better off than if the agreement had not existed in the first place, or out of fear of the consequences from not reaching an agreement. In theory, mediation, as a voluntary social process, provides an ideal framework for a just negotiation environment. However, by being a dynamic social process and not rule based, a mediator has the opportunity to affect the conditions for a just negotiation environment in terms of JAI. The mediator in an international mediation is sometimes in a position where he is capable of making threats and may have the ability to change the threat advantage of the negotiating parties.

Kleiboer (1996) has categorised the approach taken by international mediators into four 'proto-theories':

1. re-establishing social relationships;
2. political problem solving;
3. domination; and
4. power brokerage.

The first proto-theory is based on the view that mediation should be transformative, which means that the process is more important than the outcome. The goal of the

mediator is to promote new attitudes and skills that can be used to solve not only the present conflict but future conflicts as well (Baruch-Bush and Folger 1994). In this type of mediation the mediator should “be a skilful actor with no stake in the conflict but with an ideological commitment to social change for a more humane world society” (Kleiboer 1996: 382). An effective power of veto would operate to empower the parties. Empowerment is considered one of the most important elements in this type of mediation: “The real opportunity to reject a settlement and go elsewhere is what guarantees fairness in mediation, and empowerment ensures this opportunity is real” (Barush-Bush, and Folger: 270).

The second proto-theory – closely aligned to transformative mediation – is political problem solving. Kleiboer states that in this type of mediation the mediator should “enhance the process of building trust between the opposing parties” (Kleiboer 1996: 381).

Leverage by a mediator takes place within this framework but is process-orientated. Fisher and Ury (1987) are proponents of this theory and advocate mediation as a process of diagnosis, where solutions can be formulated that will ensure a ‘win-win’ outcome. The objective is to solve issues so that agreements can be made. Mediation strategies for these two styles would involve use of communicative and facilitative mediation strategies. Behavioural techniques used by the mediator only affect how communication takes place and will not affect the actual decision making of the parties other than to provide the necessary interpretative tools and environment that will promote such decision-making. Consequently, strategies of political problem solving mediator would not detrimentally affect the just negotiation environment in terms of JAL.

Procedural strategies, similarly, do not affect the negotiation environment. The behavioural tactics employed have a greater influence by controlling procedural aspects of the mediation, but the specific behavioural tactics used within this category would not be sufficient for the mediator to influence the outcome. Baruch-Bush and Folger (1994) believe there is a tendency, however, for the use of leverage to develop into the use of directive strategies. For instance, a mediator could be in a position to

limit information flows to prevent an informed decision. Unless there was a reasonable argument by the mediator that the information should not be disclosed, then non-disclosure could affect a just negotiation environment.

The last two mediation styles discussed by Kleiboer are power brokerage and mediation as domination. The mediator will have the power to exert considerable leverage over the parties and have, especially under mediation through domination, the power to manipulate parties into accepting a specific settlement. The negotiating environment changes to one that severely limits the ability of the parties to be informed and outcomes may be forced onto the parties. This type of mediation involves the use of directive strategies to pressure or manipulate parties into a specific solution. The objective of the mediator in his use of specific behavioural tactics associated with directive strategies is to change or influence the outcome of the negotiation. Directive strategies have been defined in the mediation literature as “strategies by which the mediator actively promotes a specific solution or attempts to pressure the parties directly into ending the dispute” (Kressel 1972: 67).

Within the mediation literature use of tactics to advance the goals of the mediator is known as ‘power mediation’. Generally, power mediation is undertaken by a state that has the capacity to implement a political process characterised by directive strategies such as leverage, rewarding the party’s concessions, pressing the parties to show flexibility and promising resources or threatening withdrawal in order to obtain specific outcomes (Touval and Zartman 1985). It is doubtful that a mediator who promotes specific outcomes by way of directive strategies can create a just negotiation environment in terms of JAI. The participants will be forced into accepting an outcome, which has been negotiated by a political process that does not take into account any reasonable objections the parties may have.

### ***III Specific Strategies that Affect a Just Negotiation Environment.***

The role of the mediator in the theory of JAI is not to address the imbalance of power between the parties at the beginning or during the bargaining process, but rather to assist the parties so that they are equally well placed to negotiate based on reasoned argument. This means that the mediator himself must be reasonable when he is dealing with the parties. An assessment of the specific behavioural techniques (as listed in appendix I) reveals three major categories of behaviour within the repertoire of directive strategies that would affect a just negotiation environment in terms of JAI if used in the context of power mediation. These are: supply and filter of information; concession giving; and the promising or threatening withdrawal resources.

#### **Supply and Filter of Information.**

In the negotiation environment it is possible that the mediator will face a choice between the manipulation of the negotiation environment through the control of information and ensuring full information is provided to the parties. In negotiation literature deception has been defined as a deliberate attempt by one party to present incorrect information or to conceal or misrepresent information vital to a transaction. It includes such things as selectively disclosing information, mis-representing one's position and constructing arguments that lead an opposing party to a wrong conclusion. (Aquino 1998; Lewicki 1983). Laboratory studies have shown that the use of information by a party within a negotiation framework can affect outcomes: "The results corroborate previous studies showing that the ability to control and manipulate information is a significant source of power in negotiation" (Aquino 1998: 212).

Within the above definition of deception the tactical use of information by a mediator would be deception. Deception in the context of mediation is, however, different to a dyadic negotiation. It is a generally held belief that the motivation for deception



within a dyadic negotiation framework is based on self-interest (Aquino 1998). It is common sense to assume this as benefits accrue to each party directly by their actions. However, in the triadic relation of international mediation the motivation to deceive by a third party is less clear. In the first instance, it would seem that the use of deception by a mediator could at times be acceptable because the mediator does not always have an interest in the outcome. A motivation to deceive could be what is in the best interests of the parties. However, it cannot always be assumed that mediators act in the best interest of the parties. Furthermore, no matter what the intentions of the mediator are, care must always be taken by a mediator to ensure that the integrity of the process is maintained no matter what the circumstances. Research on dyadic negotiation structures has illustrated the importance of acting ethically within the negotiation environment. For example, an empirical basis was established for the claim that the presence of ethical standards encouraged members within an organisational framework to deal more honestly with each other (Aquino: 1998). A mediator who acts ethically may encourage similar behaviour from the parties. Deception by a mediator, however could have the opposite effect. In the words of the Eighteenth century diplomat, Francois de Callieres,

It is a capital error, which prevails widely that a clever negotiator must be a master in the art of deceit... no doubt the art of lying has been practiced with success in diplomacy, but unlike honesty... A lie always leaves a drop of poison behind, and even the most dazzling diplomatic success gained by dishonesty stands on an insecure foundation, for it awakes in the defeated party a sense of aggravation, a desire for vengeance, and a hatred, which must always be a menace to his foe ( de Callieres 1716).

Within the context of JAI parties should be free to deliberate on how information should be controlled. Deception involves non-disclosure making free deliberation impossible. Non-disclosure of information could only be justified if there was a reasoned argument to prevent disclosure. As illustrated in dyadic research, control of information is a significant source of power in negotiations, so mediators must ensure that there is a reasonable disclosure of information to the parties.

## **Concession Giving; and the Offer and Threat of Withdrawal of Resources.**

The way parties' bargain has been examined extensively in the negotiation literature. Negotiation theory has developed two theoretical constructs to categorise bargaining behaviour. These are, integrative and distributive bargaining. Distributive bargaining is defined in the literature as: "a hypothetical construct referring to the complex system of activities instrumental to the attainment of one party's goal when they are in basic conflict with those of the other party" (Walton and Mc Kersie 1968: 4). Integrative bargaining is defined as: "the system of activities which is instrumental to the attainment of objectives which is not in fundamental conflict with those of the other party and which therefore can be integrated" (Walton and Mc Kersie 1968: 5). It has been argued in the literature that both types of bargaining exist in international negotiations (Beriker-Atiyas 1995). Distributive solutions result in loss for one party. For integrative solutions both parties' needs are met by bargaining techniques such as: expanding the pie; non-specific compensation; and bridging. In terms of JAI these categories are somewhat irrelevant. Integrative and distributive solutions may be found in negotiations but they are only descriptive of techniques used and do not explain the underlying motive for their use. In JAI, the parties will seek to advance their own interests, but should limit their demands for concessions to what is reasonable. Concessions by a party should not be made on the grounds that a return to the non-agreement position is untenable or by a threat from the opposing party or for that matter, the mediator. In addition, the mediator should not encourage parties to give concessions on this basis and the mediator should only reward the parties for concessions when it is reasonable to do so.

The mediator will have at times the ability to change the party's negotiation positions by promising resources or threatening the withdrawal of resources. For example, power mediation enables a mediator to alter how well placed the parties are within the negotiation environment. As Kissinger stated,

when I ask Rabin to make concessions he says he cannot because Israel is weak. Therefore, I give him more arms, and then he says he doesn't need to make concessions because Israel is

strong; immense arms shipments to Israel was naive- my biggest mistake (Quoted in Sheehan 1976: 66).

Often a power mediator will attempt to equalise the bargaining position of the parties to ensure that one does not dominate the other. There is nothing wrong with this, per se, and it may have the effect of encouraging the parties to be fair to each other in their negotiations if their bargaining power is restricted. However, being equally well placed is an attitude. Each party must have a desire to behave fairly no matter what their bargaining strength is. As illustrated above, if the mediator supports one party only, then this may encourage the use of bargaining strength within negotiations. Therefore, to promote a just negotiation environment in terms of JAI, the mediator must seek to ensure that concessions made by the parties are reasonable. How the parties negotiate does not matter as long as they are not using their own bargaining strength to obtain concessions and the mediator is pursuing an objective of ensuring that the parties are equally well-placed in the negotiation environment.

#### ***IV The Moral Motivation of the Mediator***

The motivation of a mediator in terms of JAI is to ensure that the parties make a decision on the basis of reasoned argument. In addition, the mediator must show to the parties that his suggestions are based on reasoned argument rather than his own political alignment. It would seem in first instance that a mediator does not stand to gain materially (other than reputation) from an agreement reached between the parties, so the motivation of the mediator would always reflect what is in the best interests of the parties. However, mediators will have a bias to their own state's interest and can have a motivation that is different to the negotiating parties:

Mediation should not be confused with altruism; mediators are usually cognizant of their own interests and they have the motives, consciously expressed or not, that they wish to see promoted or protected (Bercovitch 1996: 9).

There are instances in international mediation where the mediator attempts to influence the negotiation process for his own state's interests. Henry Kissinger's shuttle diplomacy during the Arab- Israel conflict has been judged by scholars to be an

example where the interests of the mediator's state were placed ahead of the negotiating states' interests.

His priority goal was not to bring justice or a durable peace to the Middle East, but to produce a personal success so that, in theory, at some later time he could do something more important. His concern was to have USA look the driver and therefore hindered direct negotiations between General Yariv and General Gamasy of Egypt. Kissinger wanted to demonstrate that the United States role was essential for sustained diplomatic progress (Quandt 1977: 102).

Clearly, in international mediation, there can exist a motivation of self-interest within the bargaining process. However, there are also instances where mediators believe that they are motivated by a sense of morality. This is important to JAI because a desire to be morally motivated needs to exist before an examination of morality can take place (Barry 1991).

During the Oslo Back Channel negotiations, the parties' believed that the mediators were predominantly motivated by a desire to resolve the conflict itself:

Thus to attribute the concern they showed to a desire for personal political credit or enhanced international reputation for their country is clearly not right. We sensed an inner motivation and a real desire to bring peace about in the Middle East (Mahmoud Abbas 1995: 104).

Similarly, in Dayton, Holbrooke believed that the United States was motivated by morality and humanitarianism: "Strategic considerations were vital to our involvement, but the motives that finally pushed the United States into action were also moral and humanitarian" (Holbrooke 1998 : 359).

This illustrates that there is a motivation by mediators to be moral, but there is still a need to constrain the pursuit of the good. Barry believes that the conditions under JAI will provide this. Therefore, once sufficient constraint has been exercised by a desire to be just within the negotiation environment of JAI the outcomes of a mediated agreement will be fair. As explained, the fairness of a mediated agreement is what the parties themselves decide as fair, as long as there is a desire to be just within the negotiation framework. Therefore, mediators using directive strategies to force an

outcome on the parties, no matter what their motivation, must be aware that they are creating the conditions for the negotiation environment of mediation to be unjust.

### ***V A Moral Dilemma***

If the position of the mediator and the use of directive strategies enables a mediator to reach a settlement, *should* he use such strategies to settle the dispute even though it may affect the just negotiation environment in terms of JAI? Specifically, should a 'power mediator' undertake the use of directive strategies to force a specific outcome on the parties to end a conflict? This question returns us to the age-old ethical dilemma of Machiavelli; does the end justify the means?

Empirical research undertaken by Bercovitch and associates has concluded that directive strategies have led to greater instances of success in mediation:

Mediators employing directive or substantive strategies are successful, on average, 41% of the time. Mediation strategies that can prod the adversaries, and strategies that allow mediators to introduce new issues, suggest new ways of seeing the dispute or alter the motivational structure of the parties, are more positively associated with successful outcomes than any other type of intervention (Bercovitch, Anagnoson, and Wille 199: 16).

In later research, directive strategies were found to be particularly effective for short-term solutions:

Directive strategies, on the other hand, are important in the short term through the implementation of immediate cease-fires and appear to be more significant in lengthy, protracted mediation efforts in which the parties may need to be guided in stages on substantive issues to achieve a settlement (Bercovitch and Houston 2000: 192).

Peachey (1989) supports mediator intervention for inter-personal conflict because the introduction of a third party will fundamentally change the negotiating process, which necessitates an active role by the mediator:

My comments here imply that it is ethically acceptable for a mediator to encourage disputants to seek and accept a certain range of outcomes (especially settlements other than retribution). Some might argue, however, that to do so is outside the bounds of acceptable mediator behaviour because the mediator is departing from the role of manager of the process and is beginning to shape the outcome to which the parties will agree. I would reply that there can never be a dichotomy between ends and means. By my choice to enter a conflict situation as a mediator (rather than other roles such as advocate, judge, or vigilante) I am necessarily presenting a bias for a certain range of outcomes (Peachey 1989: 316).

In international mediation, the lives of people are at stake so the context of negotiations must colour the ethical considerations of the mediator. No one would blame a mediator for acting in a manner that could be described as un-ethical behaviour when the motivation is to limit bloodshed by seeking short-term solutions. It does seem acceptable that a mediator should use any means possible to end a conflict in international mediation.

However, even though the consequences of failure may be bloodshed, there may be worse results in the future if the participants feel that their political rights have been detrimentally affected. JAI makes the assumption that in these circumstances the stability of any agreement would be in question because the parties who were affected would not feel that they have done as well as they could reasonably hope to (Barry 1995). In fact, there may be serious moral issues about seeking an end to hostilities at any cost when the cessation of hostilities may not necessarily reflect or be the most satisfactory alternative:

However, the BATNA (best alternative to a negotiated agreement) may still be a morally better response than continued negotiations- to a ruthless tyrant, for example, who has demonstrated that he is intent on engaging in ethnic cleansing unless he is forcibly prevented from doing so. An immoral negotiated resolution to a moral conflict in politics may be worse than going to war or no resolution at all (Gutinann 1999: 8).

The purpose of the theory of JAI is to provide a standard for the behaviour of the parties in the political bargaining process so that impartial rules will develop that will enable people to live together because they have freely agreed to these rules. The purpose of JAI is not to assess the mediator in terms of whether a mediator should

take whatever means necessary to prevent bloodshed. However, a mediator should know how such actions will affect the negotiation environment if he is concerned about the protection of political rights of the constituents to the mediation, notwithstanding the consequences of failure, and JAI delivers this.

A situation that poses a moral dilemma that to the theory of JAI is where a party freely negotiates an agreement with a ruthless tyrant. Under the theory of JAI no agreement can be made that affects the political rights of a party without their involvement. The strongest party will need the support of the party who has been most affected as this party can use a power of veto if it is reasonable to do so (Barry 1998). No party would agree to an outcome by a ruthless tyrant who wanted to seriously affect their rights. However, an interesting question arises if a party freely agrees to enter into an agreement with a tyrant who had previously been involved in, say, ethnic cleansing of the constituents to a mediation. This notion is morally repugnant. In terms of the theory of JAI there is no real answer to this question. It would be hard to imagine how a party could reach an agreement on reasoned argument with a tyrant who had been involved in ethnic cleansing, as it would be reasonable to assume such behaviour could occur in the future.

## ***Conclusion***

The purpose of an analysis of international mediation in terms of the theory of JAI is to develop concepts so that we can understand and know what justice should look like within the context of international mediation. This thesis is not so concerned about whether or not the outcomes of a mediation process are fair, because it asserts that fairness is what the parties themselves consider as fair within a just negotiation environment. Specifically, this chapter has shown how JAI can be applied to international mediation and how certain mediator behaviour can affect a just negotiation environment in terms of JAI. A moral dilemma does exist for a mediator if he is in a position to force an agreement onto the parties when such an agreement may prevent bloodshed but would be in contravention of the behavioural requirements of JAI. However, the theory of JAI shows how a mediator should behave so that stable,

just agreements are made between parties. An agreement that is made where the parties are not satisfied is unjust in terms of the theory of JAI, and may not be any better at preventing bloodshed. Indeed, morally an unjust agreement may be no better than no agreement at all.



## **4 EVALUATIVE CRITERIA FOR JUSTICE IN MEDIATION.**

This chapter develops an evaluative criteria so that a specific international mediation event can be assessed in terms of a political theory of justice. These criteria will show how a just negotiation environment can be identified and how actual mediator behaviour can affect that environment. Mediation is contingent on mediator behaviour. The type of behavioural strategies undertaken by the mediator (mediator style) is the variable that is responsible for the different kinds of negotiation environment in mediation. The evaluative criteria must identify, therefore, the mediator behaviour which are in keeping with a just negotiating environment of JAI.

For a mediator to encourage a just negotiation environment, he must know how to achieve such an environment in the first place. The following criteria have been developed in an attempt to assist in this purpose. Below are a set of questions that this thesis suggests should be asked if a mediation event is to be evaluated in terms of justice as prescribed for in the theory of JAI

1. Were there pre-conditions placed on the framework for negotiations?
2. Were the parties free to deliberate on the procedures for the negotiations and the consequences of any outcome?
3. Were the parties equally well-placed in the negotiation environment?
4. Did the mediation style involve the use of directive strategies to direct outcomes?
5. Did the parties feel that they have done as well as they could reasonably hope?

## 1. Were there pre-conditions placed on the framework for negotiations?

In first instance, the pre-conditions placed on a negotiation must be examined. This will determine if there have been any restrictions placed on the negotiating parties that could affect a just negotiation environment. Sometimes a party may place restrictions on who they will negotiate with. Although there can be a problem in mediation about who the legitimate representatives of a group are, the notion that one party should determine how the other party is to be represented is clearly not conducive to a just negotiation environment. One example is the Palestinian and Israeli conflict. In the Madrid conference held in 1991 Israel would only negotiate with Palestinians living in the administered areas (Peres: 1995). In this circumstance James Baker organised a 'smoke-screen' through the Jordanian-Palestinian agreement where the Palestinian Liberation Organisation (PLO) was represented by this joint delegation. However, the PLO was not allowed, formally, to participate in the negotiations as representatives of the Palestinian people. Israel in effect, determined who the representatives of the Palestinians were. This clearly affected the attitude of the Palestinians: "we proved the sincerity of our intentions when we agreed to attend Madrid under unfair conditions" (Mahmoud Abbas 1995: 119).

Often mediators impose pre-conditions to a negotiation environment as a negotiation tactic to avoid negotiations from becoming affected by historic grievances. However, as argued in this thesis, the parties *must feel* that they have done as well as they could reasonably hope to and without historic grievances being addressed it would be reasonable for the parties to feel that they have not done as well as they could hope to:

A mediator or other third party observer may be frustrated by disputes that are entrenched in past grievances. But such a situation does not necessarily imply pettiness on the part of the disputants. Instead, mediators must maintain an awareness of the significance of justice when people have been wronged and explore with them ways that their sense of justice can be fulfilled (Peachey 1989: 316).

## **2. Were the parties free to deliberate on the procedures for the negotiation or the consequences of any outcome?**

The parties must be free to decide how they are to undertake negotiations. Restrictions imposed by a mediator must be freely agreed to between the parties. Parties must be in a position where there is informed deliberation about the negotiation environment and the consequences of any outcome. Where the parties are capable of recognising reasonable objections on the part of others, justifications for arguments would need to be openly arrived at so that the other party can recognise the reasonable objections.

## **3. Were the parties equally well-placed in the negotiation environment?**

Not only must the parties be informed, they must not use the argument that they could do relatively well in the absence of an agreement and must not rely on their pre-negotiation positions to justify their argument. The parties will still seek to advance their own interests, but must limit their demands to what is reasonable.

## **4. Did the mediation style involve the use of directive strategies to direct outcomes?**

As already discussed in Chapter Three, the negotiation environment is contingent on the mediation style. If directive strategies are being employed by a mediator to force the parties into a specific outcome, then the conditions for a just negotiation environment has very little chance of being met. However, if such strategies are employed in an attempt to equalise the bargaining positions of the parties or to encourage parties to make concessions when they do not feel that it is necessary to do so (because of their existing bargaining strength) then such strategies are not unjust per se. Ultimately, in terms of JAI, it is the attitude of the parties that will determine if

the parties are well placed. Notwithstanding an inequality of bargaining positions the dominant parties should seek out an agreement based on reasoned argument rather than the use of their dominant bargaining position. If mediator strategies are being employed to change the parties' perceptions about relative strengths then mediator strategies could be justified within the bargaining environment of JAI.

### **5. Did the parties' feel that they have done as well as they could reasonably hope?**

This introduces a subjective element to the criteria that is specific to the individual negotiating parties so long as the parties understand that they must justify this, objectively, by reasoned argument. Therefore, if the parties feel that they have done as well as they could reasonably hope to, then JAI asserts that a stable agreement will have been achieved.

## **Conclusion**

If these questions have been answered in the affirmative then this thesis believes that the negotiation environment will be just – under JAI – because it has been *freely* agreed to by *equally* well-placed parties. Furthermore, the mediated agreement will be fair, because fairness is what the parties decide as fair within a just negotiation environment.

This framework will now be applied to two real world mediation events. The first mediation event to be analysed is where the mediating state was a powerful state with the ability to impose conditions on the parties. The behavioural strategies employed were not only facilitative and procedural, but also directive. The second mediation event to be analysed is where the mediating state was a medium power and the level of intervention by the mediator was low. The behavioural strategies employed were either facilitative or procedural.

## 5 CASE STUDY ONE - DAYTON NEGOTIATIONS

### *1 The Background to the negotiations*

The Republic of Yugoslavia was established in 1945 and comprised of six states: Bosnia-Herzegovina, Croatia, Macedonia, Serbia (incorporating Kosovo and Vojvodina) and Slovenia. On June 25, 1991, Slovenia and Croatia declared their independence from the Republic. Bosnia-Herzegovina declared full independence on March 13, 1992, under the presidency of Alija Izetbegovic. This newly formed State was recognised by the European Community and the United Nations. The census of 1991 showed the population of Bosnia Herzegovina to be 4 365 000, which consisted of 44 per cent Muslim, 33 per cent Serbs, 19 per cent Croats and 4 per cent others. The Capital city became Sarajevo. After the declaration of sovereignty by Izetbegovic, Croat, Muslim, and Serb forces began fighting for control, culminating in civil war.

The Federal government of the Republic of Yugoslavia remained intact until 1992 even though it had lost authority over Bosnia Herzegovina, Croatia, Macedonia and Slovenia. It retained the Yugoslav National Army (Jugoslovenska Narodna Armija, JNA). On January 3, 1992, at a convention in Belgrade, the Federal Government declared it the third republic of Yugoslavia, consisting of Serbia, Montenegro, and the provinces of Kosovo and Vojvodina and became Serbia proper. In 1992, Serbia proper declared her intention to incorporate the Serbian areas in Bosnia and Croatia, which further escalated the conflict situation in the Balkans.

### **United States Peace Initiatives**

The United States became active in February 1994 with support for a federation within the Muslim and Croat regions of Bosnia Herzegovina. On March 18 1994 a federation agreement was signed between these parties. In April 1994 the 'Balkan Contact Group' was established by Russia, Britain, France, Germany and the United States to co-ordinate peace efforts. It proposed that Bosnia Herzegovina be divided between the Bosnian Serbs and the Muslim-Croat Federation on a ratio of 49 percent

to 51 percent. To bring the Bosnian Serbs to the negotiation table, NATO air strikes began on August 30, 1995 and finished on September 16, 1995. These air strikes had the effect of supporting the Federation of Croats and Bosnian Muslims. In early August the Croatian forces with assistance from the NATO air strikes regained control of the Krajina region from the Bosnian Serbs. By the middle of September the Bosnian controlled territory had decreased from 70% to 50%. On September 14, 1994 Richard Holbrooke negotiated a cease-fire with The Bosnian Serbs. Below is a summary of the U.S peace initiatives during 1995, the year of the Dayton peace accords.

### **Milestone in the United States Peace Process 1995**

<b>Date</b>	<b>Event</b>
August 16	The introduction of the US Peace Plan and the beginning of Holbrooke's mediation effort.
August 28	Bosnian Serb shelling of a market place in Sarajevo.
August 30	The beginning of NATO air strikes against Bosnian Serbs.
September 2	The suspension of NATO air strikes against Bosnian Serbs.
September 6	The resumption of NATO air strikes against Bosnian Serbs
September 8	The Geneva Accord. The question of integrity of the State was worked out.
September 16	The suspension of NATO air strikes against Bosnian Serbs
September 26	The New York Accord
October 5	The Cease-fire Agreement
November 1	The beginning of the peace talks in Dayton, Ohio

November 21	The text of the Dayton Peace Agreement documents has been initialled in Dayton.
December 14	The Dayton Peace Agreement has been signed in Paris.

Source: Beriker-Atiyas, Demirel-Pegg 2000: 364)

### **Specific Site**

The Wright-Patterson Air force Base in Dayton Ohio was chosen by Richard Holbrooke because it represented American power, was within commuting distance to Washington D.C and the mediator could control who would have access during the negotiations. As Holbrooke himself said, “the size and diversity of Wright- Patterson impressed the participants. We wanted them to see this physical symbol of American power” (Holbrooke 1998: 233).

The Air Force knocked walls out and created presidential suites for some of the participants. The Hope Conference centre, a two hundred-room hotel, was filled completely with administrative and security personnel:

We placed the American, Bosnian, Croat and combined Serbian-Bosnian Serb delegations in the four non-descript visiting officer’s quarters that faced each other around a drab rectangular parking lot... To emphasize Europe’s co-chairmanship of the conference, we gave Carl Bildt a VIP suite directly above mine in the American building. The Bosnians were to our left, the Croats to the right, and the Serbians and the Bosnian Serbs directly opposite us. The ground floor windows of my rooms looked straight into those of Milosevic across the parking lot... thus allowing us to see if he was in his suite (Holbrooke 1998: 233).

### **Duration and Process**

The talks were scheduled to last for a period of fifteen days, but in the end there were twenty rounds of negotiations over twenty days. The process was officially co-chaired between the United States and the Balkan Contact group. Warren Christopher was to

arrive at strategically important times as dictated by Holbrooke. The negotiations were divided into six areas in day two (see Appendix II). In reality, the negotiation process was controlled by the United States delegation with the Contact Group limited to negotiating on the Federation agreement:

Handling them (the Contact Group) at Dayton would be a problem. They could meet whenever they wished with the Balkan leaders. But the real negotiations with the exception of Steiners Federation efforts, would be conducted by the United States (Holbrook 1998: 236).

## ***II Evaluation of the Mediation Event in terms of a Political Theory of Justice***

### **1. Were there pre-conditions placed on the framework for negotiations?**

There were three formal pre-conditions placed on the parties before negotiation were to commence. These were:

1. Each President was required to have full power to sign agreements;
2. They had to stay as long as necessary to reach agreement without walking out;
3. No discussions with Press or outsiders were allowed.

Warren Christopher laid out four conditions for settlement in day one of the talks: Bosnia had to remain a state with a single international personality; a settlement must take into account the special history and significance of Sarajevo; human rights must be respected and those responsible for atrocities be brought to account; and finally, the status of eastern Slovenia must be resolved (Holbrooke 1998: 237).

There were a number of informal pre-conditions and promises made to parties prior to Dayton by the United States. For example, the Bosnian Muslims were promised by the United States that they would receive a better federation agreement with the Croats:



The meeting in New York was intended to help the Bosnians prepare for Dayton...Sacicbey, however, told us his government would not negotiate with the Serbs until we had forced the Croats into a new and better Federation agreement. This threatened our original scenario for Dayton, but Sacirbey had a point. Negotiating requires flexibility on tactics but a constant vision of the ultimate goal. Sacirbey's demand would slow Dayton down and could even sink the conference, but there was no alternative (Holbrooke 1998: 224).

The United States negotiating team were also under instructions from President Clinton that Sarajevo remained as one city: "I have especially strong feelings about Sarajevo, it would be a mistake to divide the city. We don't want another Berlin. if you can't unify it, internationalise it" (Holbrooke 1998: 226). On day nineteen of the negotiations Milosevic asserted that it had been agreed prior to the negotiations that the Bosnian Muslim and Croat Federation would not receive more than 51 percent of the territory.

The formal pre-conditions would not affect a just negotiation environment in terms of JAI. However, the informal discussions between the United States and various parties had a detrimental effect on a just negotiation environment. By agreeing to force the Croats into changing the federation agreement so that it became more favourable to the Bosnians prior to the negotiations, the United States commitment placed the Bosnians into a position of strength. The Bosnians did not have to convince the Croats, by reasoned argument, that changing the federation agreement was necessary. A similar argument exists for the assertion by Milosevic about the territorial distribution in the Federation. Milosevic's reaction to this on day nineteen highlights the consequence of mediator assurances prior to negotiations. Milosevic felt aggrieved because he believed that he made concessions when he did not have to. In subsequent negotiations, Izetbegovic had to give up on territory that Milosevic had already agreed to relinquish. This became a critical moment for the negotiation process and both parties felt that they had not done as well as they could reasonably have hoped to. The unilateral request by Clinton to retain Sarajevo as a unified city meant that it would not be openly justified and agreed upon by all the parties whose political rights would be affected by these actions. The pre-conditions agreed to by the United States, therefore, placed limitations on the negotiating party's behaviour, and consequent motivation to be just within the bargaining process at Dayton.

## 2. Were the parties free to deliberate on the procedures for the negotiations and consequences of any outcomes?

The United States dictated the negotiating style between the parties. For example, prior to the commencement of the formal negotiations, the American delegation studied the negotiation model of Camp David:

I phoned President Carter and listened with fascination as he described how he had tried without success to get Sadat and Begin to talk directly with each other. He had then reverted to proximity talks, a diplomatic technique originating in Mid East negotiations held in the 1940's at the U.N., in which the mediator moves between the two parties, who rarely meet one another face to face a sort of shuttle diplomacy by foot. We already assumed that this would be our pattern, and always referred to Dayton as proximity peace talks (Holbrooke 1998: 205).

The actual negotiations followed this framework; "These were true 'proximity' talks; we could walk from President to President in about a minute. On some days we would visit each President in his quarters a dozen times. Our days (and nights) became a blur of unscheduled meetings" (Holbrooke 1998: 234).

The American negotiating team developed positions for most issues that were to be addressed at Dayton and had prepared a ninety-two page draft peace agreement. For example, "Several task forces framed positions on every issue from elections to the creation of a joint railroad commission" (Holbrooke 1998: 205). The draft peace agreement became the basis for the negotiations at Dayton:

That evening, after Christopher left, we handed each Balkan delegation the draft annexes on the constitution, elections, and IFOR. Amazed at the detail and length of the documents, the three presidents began to realise that when we said we wanted a comprehensive agreement we meant it (Holbrooke 1998: 240).

Although it could be argued that this was a problem-solving approach where America was attempting to find solutions, many of the problems were attempted to be solved by the American delegation *not the parties themselves*. This creates a very different

set of circumstances for a justice framework based on reasoned argument *between the parties*.

The negotiations were set up to enhance the power of the mediator. Even though the concept of 'proximity talks' limited contact between the parties, this format, in itself, did not affect the negotiation climate. These types of limitations, although obstructive to allowing full participation, were procedural and would have had a limited effect on the parties decision-making process or bargaining positions. However, by limiting the range of outcomes that could be negotiated the United States detrimentally affected a just negotiation environment in terms of JAI.

### **3. Were the parties equally well-placed in the negotiation environment?**

If the parties are equally well placed in terms of JAI they will justify their arguments in terms of 'reasoned argument' rather than their bargaining strength prior to or during the negotiation process and the mediator will encourage this behaviour. Bargaining positions were used throughout the negotiations. The United States believed that its role was to balance the bargaining strengths between the parties. Immediately prior to the negotiations, the NATO air strikes had the effect of strengthening some of the parties' positions, in addition to forcing the Bosnian Serbs to the negotiation table;

At the very moment the President spoke (announcement of a ceasefire) our team was in Zagreb, urging Tudjman to capture more territory before the ceasefire took effect. You have five days left, thats all... What you don't win on the battlefield will be hard to gain at the peace talk. Don't waste these last days (Holbrooke 1998: 199).

During the negotiations, Tudjman was in a strong position and threatened to use it. It was understood that Tudjman could prevent a settlement until he got control of eastern Slovenia (the last piece of Serb controlled land in Croatia) and he threatened to go to war again after Dayton if he did not get the region back:

Tudjman's ability to prevent a Bosnian agreement and to threaten another war was his primary leverage over Milosevic. His influence over Izetbegovic came from his ability to break up the

Croat-Muslim Federation, whose continued survival was essential for Dayton to work. For years Tudjman had been regarded with contempt by Milosevic and hated by Izetbegovic; now he had the upper hand over his two rivals, and he knew how to exploit it for his own goals (Holbrooke 1998: 239).

On day nine of the negotiations Tudjman moved the Croatian forces closer to eastern Slovenia to highlight his bargaining strength. Clearly the actions by the parties immediately prior to the negotiations and during the negotiations demonstrate that some of the parties were prepared to obtain concessions through the threat of war, while others had to make concessions on the grounds that it would be preferable than no agreement at all. Throughout this process the mediator seemed to attempt to balance these competing interests rather than to promote decisions in terms of reasoned argument and used strategies to promote their own specific solutions, rather than that of the negotiating parties.

#### **4. Did the mediation style involve the use of directive strategies to direct outcomes?**

There is evidence that the behavioural strategies of the mediator qualified as directive. The mediator prepared most of the documentation for the agreement. Their administrative personnel to support the negotiators occupied all of the Hope convention centre (Holbrooke 1989). It was considered on Capitol Hill an agreement in Dayton would result in the commitment of twenty thousand American troops to Bosnia at a cost estimated at \$2 billion dollars for the first year (Holbrooke 1998).

Specifically, the United States used its position to encourage parties to negotiate and make concessions by offering rewards, threatening the parties over the consequences of an end to negotiations and the withdrawal of the rewards offered. For example, to encourage Milosevic to negotiate, the United States offered to lift sanctions on heating oil previously placed against it, on the initialling of an agreement, rather than on ratification. As Holbrooke noted, "This small change in our position would give Milosevic more incentive to reach agreement in Dayton" (Holbrooke 1989: 236).

To Haris Silajdzic of the Bosnian delegation, Holbrooke stated;

Changing my tone I warned him that Christopher would consider closing down the talks if we could not make progress. We had said this before but added that if the breakdown were attributable to Sarajevo there would be serious consequences to their government, including the possible suspension of our plan to equip and train the Federation forces (Holbrooke 1998: 271).

Christopher's final comment to Izetbegovic were; "President Clinton has put an enormous amount on the line to save Bosnia. But he will no longer assist your government if you turn out to be the obstacle to an agreement in Dayton" (Holbrooke 1998: 275).

Directive strategies were clearly in evidence, and used to advance the mediator's goals. They were generally not used to encourage the parties to negotiate an agreement themselves without resorting to their pre-negotiation positions. However, the mediator did attempt to expand negotiating positions and reward concessions. But rewarding positions becomes a cost to the mediator, who has the ability to threaten the withdrawal of these options to promote their own outcomes.

In terms of JAI the mediator should only offer concessions or threaten the withdrawal of resources if it is reasonable to do so. It would be reasonable to offer concessions when it promotes or rewards parties for making concessions based on reasoned argument. It has been argued in a recent study that integrative solutions were used during the negotiations for the re-distribution of resources. (Beriker-Atiyas and Demirel-Pegg 2000). The Integrative solutions identified (expanding the pie, cost cutting, non-specific compensation, log-rolling, and bridging) would be acceptable in terms of JAI when they are offered on the basis where it will not place one party in a stronger bargaining position during negotiations, or when the mediator threatens withdrawal of such resources to achieve its own preferred outcomes. A promise of resources by a mediator would only be acceptable if it was based on reasoned argument. For example, the United States offered to train and equip the Bosnian Army but subsequently threatened to withdraw this offer if the Bosnians did not agree to the terms of the negotiated agreement (Holbrooke 1998). The United States may have

expanded the pie, but their consequent actions would detrimentally affect a just negotiation environment. Furthermore, It is clear that the mediator wanted to promote its own specific outcomes. Commenting on the failure by the negotiating team to obtain all the funding for the I.P.T.F (International Police Task Force) from the United States Congress, Holbrooke stated: “This meant we could not write the rules and had to allow European input (Holbrooke 1998: 251). The actions of the mediator, therefore, were not conducive to a just negotiation environment in terms of JAI.

## **5. Did the parties feel that they have done as well as they could reasonably hope?**

For a stable agreement to exist in terms of JAI the parties must feel that they have done as well as they could reasonably hope. Although this is subjective to the parties, the parties must still evaluate the outcomes by reasoned argument. For instance, it would not be acceptable for the parties to assess the outcomes in terms of how well they exploited the bargaining position of opposing parties. As an example, when Izetbegovic was reminded of all the benefits that would accrue to him with a peace agreement, he still *believed* that the outcome was not just:

We reminded him of all the benefits peace would bring.... cessation of hostilities, the lifting of the siege of Sarajevo, the partial opening of the roads, the damage NATO had done to the Bosnian Serbs, the \$5 billion World Bank package that awaited the country after a peace agreement, the equip-and-train program for the Bosnian Army (Holbrooke 1998: 274).

However, at the conclusion of the peace process the formal words by Izetbegovic were:

And to my people, I say, this may not be a just peace, but it is more just than a continuation of war. In the situation as it is and in the world as it is, a better peace could not have been achieved. God is our witness that we have done everything in our power so that the extent of injustice for our people and our country would be decreased. (Holbrooke 1998: 312).

Consequently, no matter how hard a mediator tries to convince a party that a negotiated agreement should be accepted, it is still up to the parties themselves

whether or not they will agree to the outcome. And if they do not feel that the consequences of the negotiated agreement are not reasonable, then the stability of the agreement is in question in terms of JAI.

## **Conclusion**

The mediator was motivated by a desire to settle the dispute in terms of moral and humanitarian grounds as well as what was in their best interests. However, the United States, as mediator, had the ability to implement strategies that could force the parties into accepting a specific outcome. Through-out the negotiations, the United States used its power to force the parties into making concessions. The parties, themselves, were not motivated in the bargaining process by a desire to behave fairly. The motivation to be just by the participants was not present, and the negotiations could not be considered just in terms of a political theory of justice.

## 6 CASE STUDY TWO – OSLO BACK CHANNEL

### *1 Background to Negotiations*

The Israeli-Palestinian conflict like no other international conflict has been shaped and quite possibly defined by International Law. Many of the political issues to the dispute have been generated from the application of, and interpretation of UN Resolutions. The Oslo Back Channel itself was connected, intrinsically, to the Security Council resolutions of past. Therefore, this background analysis will focus on the legal history of the dispute and secondly, how the back channel was created.

### **Legal History of the Arab-Israeli Conflict**

The Balfour Declaration set the stage for the Arab-Israeli conflict. This was a unilateral declaration by the United Kingdom supporting a national home in Palestine for the Jewish people. Although the Balfour Declaration had immense political consequence, its legal significance was less certain. A unilateral declaration is not a treaty. However, the Balfour Declaration was incorporated into the League of Nations Mandate for Palestine which was legally binding. The League of Nations Mandate reinforced the Balfour Declaration repeating it in the preamble and spoke of putting it into effect. The operative provisions of the mandate went further by the requirement for a 'Jewish national home' on the mandatory for Palestine. In 1947 Britain declared it would terminate its mandate and referred the matter to the United Nations. Resolution 181 was adopted by the General Assembly in 1947 and called for the partition of Palestine into a Jewish State and an Arab State with Jerusalem to be a *corpus separatum*. The General Assembly can make recommendations only, so the legal effect of the resolution has always been in question. Resolution 181 was superseded by Resolution 242 of the United Nations Security Council. There was a legal argument that disputed the binding nature of Resolution 242. A Security Council Resolution is legally binding for all members under Article 25 of the UN Charter. The resolution did not invoke Chapter VII of the Charter (which confers on the Security Council the power to make decisions binding on member states). This argument is



now redundant because most of the parties accepted Resolution 242. Furthermore, Resolution 242 was reinforced by Resolution 338, which was a decision within the meaning of Article 25 of the Charter and thus binding on all member states.

## **Establishment of the Oslo Back Channel**

The FAFO (FN Forskningsstiftelsen for Studier av Arbeidsliv, Fagbevegelse og Offentlig Politikk) was a Norwegian research organisation under the directorship of Terje Rod Larsen who was an acquaintance of Yossi Beilin the Deputy Foreign Minister in the new Rabin lead Labour Government of 1992. Jan Egeland, the Norwegian Deputy Foreign Minister who was visiting this project suggested to Beilin that Norway could help set up a back channel between Israel and the PLO. Beilin put Larsen in contact with two academics Dr Yair Hirschfeld and Dr Ron Pundak not formally connected with the Israeli Government but who had operated, previously, a back channel between Beilin and the top PLO representative in the occupied territories, Faisal Husseini (Makosky 1996; Peres 1995). The two academics, approached, through an intermediary, Abu Alaa, a senior PLO representative to attend a seminar on “human resources” by FAFO to be held at Sarpsborg near Oslo. Abu Alaa returned to Tunis to consult with Yasser Arafat, Chairman of the PLO. Mahmoud Abbas a senior PLO leader saw the approach as one sanctioned by Peres and Beilin and that a channel of communication between Israel and the PLO was being sought (Mahmoud Abbas: 113). The first round of the Oslo Back Channel commenced on January 21, 1993.

## **Duration and Process**

There were thirteen rounds of negotiation beginning on January 21, 1993 and finishing on August 20, 1993. The Oslo Back Channel until the fifth round was considered as an unofficial information gathering process. Hirschfeld summarised the process up until round five. He said that they had begun with information gathering, then moved on to reaching consensus, then to getting official authorisation. In round six Peres sent Uri Savir the Director General of the Foreign Ministry which for the

first time acknowledged Israeli government involvement and the talks were up-graded to 'official' status. In round seven, Joel Singer was introduced as legal adviser, and was considered by the Palestinians to be a personal representative of Rabin. The mediator did not attend the initial negotiations but liaised between the negotiating parties and the decision-makers (Mahmoud Abbas: 1995; Makovsky: 1996). The Oslo Back Channel was conducted in secret. Indirect negotiations became direct after round thirteen. Final telephone calls were made between the leaders and the mediator to finalise an agreement.

## ***II Evaluation of the Mediation Event in terms of a Political Theory of Justice.***

### **1. Were there pre-conditions placed on the framework for negotiations?**

There were no pre-conditions placed on the negotiation environment other than ground rules that were decided between all the parties. These ground rules were: no dwelling on the past; secrecy; and retractability of all positions (Makovsky 1996). The parties could not discuss past grievances but this was agreed to between the parties, not the mediator, so in terms of JAI this would not be considered unfair. The multilateral and bilateral discussions subsequent to the Madrid Peace Conference were still operating in parallel and were affected by reliance on protocol. It would therefore not be unreasonable for the parties to limit discussion on past grievances: "We had therefore to devise another style for the Oslo Channel, a style that would deal directly with the substance and the framework of a declaration of principles" (Mahmoud Abbas: 115). Consequently the pre-conditions did not affect a just negotiation environment in terms of JAI.

## **2. Were the parties free to deliberate on the procedures for the negotiations and the consequences of any outcome?**

The first five rounds, were informal without agenda with full retractability of positions. This was an ideal environment in which to discuss the procedures for the negotiations and open discussions on reasons for the various bargaining positions. In effect the Oslo negotiating style was the antithesis of the Madrid Peace Conference.

This direction was one among a number of reasons that made us think carefully about a negotiating style other than the one currently employed. We felt that the route to success was likely to be in negotiations through a side channel. In this type of negotiation there would be a minimum of formalities and no taking of minutes so that everyone could talk freely and probe matters without inhibition. In this way, it would be easier to arrive at some common ground on specific issues which could then be forwarded to the official negotiating sessions (Mahmoud Abbas 1995: 94 ).

The style of negotiations changed once they became formal, but the previous five rounds had provided an ideal background for this change. Israel effectively replaced the academics with Government negotiators. Savir, a professional diplomat was introduced in round six. Singer a legal adviser was introduced in round seven. On his first meeting Savir asked Abu Alaa many questions on the DOP and related issues. The parties, however, recognised that this approach brought clarity to the process. “Moreover, both sides recognised that Singer’s questions brought analytic clarity to the informal talks. Whereas Savir avoided potential diplomatic land mines, Singer headed directly for them in an attempt to resolve them.” (Makovsky 1996: 53). Therefore, even the official rounds were conducive to deliberation on the justification of the consequences to the outcomes. On reviewing the minutes of round nine Mahmoud Abbas reflected how open the negotiators in the channel had become: “I was struck by the way that the Israelis had opened up to our delegation, speaking so critically of the Americans with such openness and daring.” (Mahmoud Abbas 1995: 160).

In terms of JAI, the Oslo Back Channel provided an ideal environment for the parties to deliberate on the justification of the procedures for and consequences of any outcomes. There were thirteen rounds of negotiation and as mentioned by Hirschfeld in round four the channel began without an agenda which in itself enabled deliberation without the limitation of strict procedure. Furthermore, the initial rounds were unofficial, which allowed open discussions between the parties. The subsequent official rounds did not impinge on the party's ability to openly justify their arguments by reasoned argument.

### **3. Were the parties equally well-placed in the negotiation environment?**

Not only must the parties be informed, they must not use the argument that they could do relatively well in the absence of an agreement or rely on their pre-negotiation positions to justify their argument. The parties will seek to advance their own interests, but must limit their demands to what is reasonable. Therefore, when parties bargain for concessions, they must be able to justify the concessions sought on reasoned argument. The Israeli delegation was clearly in a position of strength. The Palestinians were certainly in an unequal bargaining position as their non-agreement position was much less tenable than the Israelis. However, in these negotiations there seemed a desire in the Israelis to be fair, and not to use their bargaining power to obtain an agreement solely on their own terms. "I was determined to negotiate carefully so as to achieve a balanced accord, beneficial to both sides." (Peres 1995: 291). The mediators also attempted to ensure that the parties were well placed to negotiate.

Oslo was a genuinely neutral ground for conflict management. The Norwegians did everything to ensure that all logistical arrangements would be just perfect. the Israelis and the Palestinians had the same cars, same hotel rooms, same time for presentations, and often even the same food. This process symmetry enabled the Palestinian delegates to feel empowered and thus equal to their Israeli counterparts. the arrangements and facilities in Oslo contributed to the

“team spirit” or “spirit of Oslo”, and thus for some momentum toward effective peacemaking (Bercovitch 1997: 230).

Up until round six the Israeli delegation took a problem-solving approach. In round two Hirschfeld stated that the parties should seek agreement where no one loses (Mahmoud Abbas: 1996). Meanwhile the Palestinian delegation was attempting to justify their position through references to International Law. In round one Abbu Alaa referred to UN resolution 237 and 194 as argument over re-uniting Palestinian families. In round six distributive bargaining positions developed.

Singer also told Rabin emphatically that he favoured negotiating mutual recognition anyway, and therefore Israel should use it early on as a bargaining chip to extract concessions on issues that it deemed important. Surprisingly, Peres disagreed. Negotiating two breakthroughs simultaneously would ensure that neither was successful, he said. Instead, Peres favoured using mutual recognition as Israel’s ultimate trump card at the end of the negotiations in order to extract final concessions from the Palestinians (Makosky 1996: 54).

The bargaining style became distributive when the parties, to reach an agreement, had to offer and trade in concessions. However, the negotiation style was not dominated by the use of the parties’ bargaining strengths to obtain concessions. The bargaining process seemed to operate in good faith. The only time deceptive tactics were used to obtain concessions was in the Israeli assertion that if negotiations failed, they were preparing to reach a peace agreement with Syria. It is believed that Israeli officials made positive statements about a possible agreement with Syria during the negotiations (Makovsky 1996). In addition in a letter to Holst, contents of which were intended to be disclosed to Arafat, it was mentioned that progress was being made on contacts with Syria (Peres 1995).

The mediator did not dictate the style of negotiations between the parties other than to provide surroundings to encourage informality and neutrality for the parties.

we saw them go beyond the role of host providing conditions of comfort and total secrecy for the negotiators, right up to the direct interventions between the negotiators: to reconcile viewpoints and provide suggestions, alternatives and sometimes different scenarios. They adopted a role of a full partner in the negotiations...Sometimes they would travel to gain first-

hand understanding of the thoughts of the leaderships of the negotiating teams and try to convince them of what their representatives had brought to the negotiating table. (Mahmoud Abbas 1995: 104).

In terms of JAI the desire to be fair existed within the bargaining process. Israel, the party who was in a position of bargaining strength seemed prepared to negotiate on the basis of justifying their arguments through reasoned argument, and was prepared to look at the negotiations in terms of the other parties' perspective. The mediators actively encouraged this approach.

#### **4. Did the mediation style involve the use of directive strategies to direct outcomes?**

Initially, the Norwegians took a facilitative role, promoting an informal environment. They would receive briefings from each party after the meetings and liaise directly with the decision-makers. Holst informed Arafat on July 20 1993 that: "Norway has no personal interests and its role is one of facilitation. In Holst's opinion, the most successful negotiations take place directly between adversaries" (Mahmoud Abbas 1995: 107). Yet, this is the period when the mediators became most active. The meeting with Arafat and Larson's subsequent report to Peres was considered by both of the negotiating parties to have broken the deadlock in the negotiations over the DOP. The decision-makers from each of the parties used Holst as a method of getting their concerns across to the other. For instance, Holst relayed to Peres (in reports on the talks) the Arab concerns about Israel's cleverness in negotiations and their perception that Israel appeared to reflect US interests that, they believed were hostile to that of the PLO (Peres 1995). Peres relayed to Holst the urgency in finalising the negotiations: "I intended my Norwegian colleague and friend to convey the substance of my letter in his own parallel contacts with Arafat" (Peres 1995: 296). Holst played a vital role at the conclusion of the talks, the only time that the mediator took direct involvement in the negotiating process was during the final telephone calls between the parties.

In terms of the contingency approach, facilitation strategies were used most by the mediators. Directive strategies were rarely employed.

Whereas the United States utilised directive strategies to get Israel to participate in the official Madrid negotiations (Ashrawi, 1995), Norway used mostly communication-facilitation strategies.....Once started, the Norwegians were model, low-profile, process-oriented mediators. They provided the setting, made all the arrangements, acted as the 'communication link' between Israel and the PLO, but otherwise did not really take part in the negotiations (except during the meeting with Peres in Stockholm). (Bercovitch 1997: 232)

The only time that mediator behaviour resembled directive strategies was in the personal meetings between Holst and Arafat, and during the final telephone calls of the direct negotiations. In a report to Peres, Holst stated that he had pressed on Arafat the need for a decision: "He had been friendly but firm with Arafat, he wrote. He had pointed out that the Oslo negotiators had already exchanged" (Peres 1995: 295). Pressing the parties is classed as a directive strategy in the mediation literature, however, the goal was not to obtain the specific outcomes of the mediator. During the final telephone calls Peres suggested to Larson that he relay that Israel was considering an alternative arrangement with the Syrians ( Peres 1995). Larson new that this was an implied threat but such action could not be classed as deception.

In terms of JAI the Norwegian mediators did as much as they could to provide a negotiation environment that enabled the parties to be informed that would encourage the bargainers to negotiate with each other on the grounds of reasoned argument. The Norwegian mediators seemed to have had a genuine desire to transform the conflict.

If the human element is taken out of negotiations, they become soul-less, even if they do lead to agreements. Agreements reached in this way will always need something else to support the, consolidate and deepen them. Without doubt, a thorough understanding of the psychology of negotiation contributed to the success of the mission undertaken by the Norwegian team (Mahmoud Abbas 1995: 107).

This desire helped the parties to come to an agreement by reasoned argument. Consequently, in terms of JAI. the parties arrived at their decision by reasoned argument and not through the alignment of political forces of the mediator.

## **5. Did the parties feel that they have done as well as they could reasonably hope?**

The parties considered that the DOP was the start of a new beginning, or the beginning of the end of hostilities. Both parties felt that it was the best they could reasonably expect in the circumstances of such a long and intractable dispute. For the Palestinians their feelings of accomplishment was immediate: "By the final call, the excitement in Arafat's office was discernable over the line. When the last point was declared settled, we could hear them cheering and weeping, and we knew that they were hugging one another" (Peres 1995: 299). The Israelis felt that the DOP was a positive first step toward peace: "I feel I have earned the right to dream. So much that I dreamed in the past was dismissed as fantasy but has now become thriving reality. Peace in our region is no longer part of a dream world; it has built a permanent place for itself in the realm of reality" (Peres 1995: 307).

Reading the formal speeches of the parties at the DOP signing ceremony of September 13, 1993, one notices trepidation, but a willingness to leave behind past grievances and search for a just and comprehensive peace. There is an acknowledgement of interdependence, and therefore the need to consider issues in the light of the other party, the basis of reasonableness in terms of JAI

## **Conclusion**

The Oslo Back Channel met all the criteria this thesis believes JAI requires for a just negotiation environment. From the analysis of the negotiators' memoirs the outcomes were freely agreed to by parties who were informed, and well-placed in the negotiation environment. The approach taken by the mediator supported a negotiation environment where the parties, with competing conceptions of the 'good' could work out rules between themselves that would enable them to live together in peace. It



would be difficult to find a better example of a political bargaining process to meet the purposes of the theory of JAI.

## CONCLUSION

Human error is a permanent and not a periodic factor in history, and future negotiators will be exposed, however noble their intentions, to futilities of intention and omissions as grave as any which characterised the Council of Five. They were convinced that they would never commit the blunders and iniquities of the Congress of Vienna. Future generations will be equally convinced that they will be immune from the defects which assailed the negotiators of Paris. Yet they in turn will be exposed to similar microbes of infection, to the eternal inadequacy of human intelligence.

-HAROLD NICOLSON, *Peacemaking* 1919

Many theories of justice agree that, within a political bargaining process, the role or reason for justice is the regulation of social co-operation. Those theories, however, diverge on what motivates participants within such a process to be just. For the theorists associated with the ideas categorised under the theory of justice as mutual advantage, the motivation to be just comes from the long-term advantage to oneself of being just. They are motivated, that is, by self-interest. With the theory of justice as impartiality the motive comes from, as Plato so aptly explains, 'within the soul'. The parties are motivated by a desire to be just and their requests for concessions within the bargaining environment will be based on reasoned argument, rather than the alignment of political forces. To accept this theory one must believe that there is a moral norm of reasonableness. The level of development of this moral norm is not important, so long as there is a psychological capacity for it. Reasonableness, in this context, is the consideration of one's own behaviour in the light of others. Barry speculates that interdependence within societies or between societies encourages this. (Current research in bio-politics lend some support to this notion, Somit and Paterson 1998). Barry develops this need for the parties to be reasonable into the theory of JAI. Barry believes that the motive of reasonableness within the bargaining process operates as a mechanism within society to restrain parties from the pursuit of everything that they could achieve by their bargaining position. If the motive is self-interest then the parties would pursue all that they are able to obtain. This pursuit is justified on the basis that any agreement to co-operate will be mutually beneficial because co-operation creates a co-operative surplus. The theory of JAI and its

associated scanlonian construction provide an alternative; a negotiating environment that is fair and just. Therefore, a negotiation environment that is informed, where outcomes have been freely agreed to, which no one could reasonably reject meets the conditions for the political outcomes of an agreement to be fair because, fairness will be what the parties themselves within this negotiation environment consider as fair.

However, no matter what the motivation is for justice, its role does not change. Justice looks for a standard of behaviour to regulate social mechanisms. Whether this is learnt behaviour or part of the intrinsic patterns developed over time, the need or desire to promote such standards is the cornerstone of human society. Therefore, this thesis argues that within the social process of international mediation a standard of behaviour must be introduced by which mediators may be judged in accordance with moral norms.

The purpose of any study is to find better ways of doing things. This thesis attempts to define what justice means in the context of international mediation. It asserts that the present assessment of justice in the mediation literature is inadequate for this purpose. The analysis of mediation in terms of the social psychological categories of justice only assesses mediation behaviour in terms of how the parties to a mediation perceived the process. It develops standards of behaviour in terms of the subjective requirements of the participants, and this requirement is based on individual perceptions. A political theory of justice develops ideas on how parties should act within the negotiation environment in relation to how their behaviour affects the opposing party when they are in pursuit of their own interests.

Specifically, this thesis has examined the role of mediators and assessed their behaviour in terms of how it affected a just negotiating environment in terms of JAI. It has concluded that the strategies employed by a mediator to manipulate the parties into accepting a specific outcome or to pressure parties into ending a dispute (directive strategies) can detrimentally affect a just negotiation environment. Mediators use directive strategies (such as rewarding the parties who make concessions and threatening the withdrawal of resources) as political leverage. An examination of specific mediator behaviour in terms of justice helps establish an

argument why this behaviour is unacceptable. Mediation is a social process and with this comes the ability to change, especially if it can be shown why it is important to make such changes. In the present literature, analysis of mediator behaviour is often simply descriptive, or only examines how behavioural techniques of the mediator contribute to a narrowly defined normative criteria for success. An investigation into the reasons why behaviour is acceptable or not acceptable, has not been fully developed. For instance, the negotiation literature develops theoretical constructs to differentiate negotiating behaviour in terms of bargaining solutions. It differentiates between bargaining activity when the goals of the bargaining process are in direct conflict between the parties (distributive bargaining) and when they are not in conflict (integrative). These concepts help in describing negotiation behaviour but do not contribute to an understanding of the consequences of this bargaining behaviour on the negotiation environment. JAI describes what the motive of parties should be when the parties attempt to negotiate concessions if they are to be just. As mediation is triadic in relationship, this requirement extends to the mediator in their attempts to encourage parties to make concessions. JAI therefore helps to explain why certain behaviour is unacceptable in the context of a political bargaining process where the fundamental political rights of constituents are at stake. It is the constituents that must accept the consequences of the outcomes to this process, and generally not the mediator. If these rights have been affected then the political bargaining process must encompass a justice framework to develop standards for this behaviour. Without standards mediator behaviour cannot be judged nor can mediators actions be justified.

This thesis has shown, through a theoretical perspective, how mediator behaviour can be judged. A theoretical perspective however, is only useful if it can be applied to a real world event. This has been achieved in this thesis by the application of JAI to two real world mediations where political rights of the parties constituents were being negotiated.

The Oslo Back Channel met the criteria this thesis established for the requirements of a just negotiation environment in terms of a political theory of justice. It showed how a party who was in a position of strength had the desire to make an agreement that was fair. In addition, it seems that the process itself is transformed by the attitude of the

parties. The Dayton negotiations did not meet the criteria for a just negotiation environment in terms of JAI. The United States used its position of power to promote the outcomes that it believed were in the best interests of the parties and the region. It is ironic that this conclusion should be written on the day that eighteen people were killed in Israel by a Palestinian suicide bomber yet Bosnia Herzegovina seems to be stable. It is certainly a valid enquiry to ask what is the purpose of evaluating international mediation in terms of this criteria when the outcomes to the two mediation events studied are in opposition to the assumption that a just process will create stable political agreements. However justice is a virtue, it is not a hypothesis to be tested, it delivers to the participants a standard of behaviour in the political bargaining process. As explained by Rawls, no matter how efficient or well arranged a process may be, it must be reformed or abolished if it is unjust, because justice, is the first virtue of institutions. An enquiry into the nature of the mediation process in terms of a political theory of justice is an enquiry into the motivation of the parties to be just, it is not an enquiry into how successful the parties are in achieving their own particular goals.

This thesis does not provide specific policy prescriptions. It argues that international mediation requires rules of behaviour because it is a social process that affects the political rights of the constituents of the parties to a negotiation. It shows in a theoretical perspective the consequences of certain mediator behaviour on a political bargaining process. Specifically it shows how power mediation and the use of certain directive strategies to affect a negotiation environment, or to direct the parties to accept specific outcomes, can lead to an negotiation environment that is unjust in terms of a political theory of justice.

The general policy prescription that can be taken from this thesis is it is possible to provide a touchstone for the assessment of mediator behaviour. It is hoped that mediators will evaluate their behaviour in terms of this touchstone so that they will deliberate on their actions before they are taken. The evaluative criteria developed offer mediators the opportunity to be aware of their behaviour in terms of the consequences it may have on the negotiation environment. It allows mediators to

create agreements that will assist parties to make agreements which enable the participants' constituents to live together and to prevent the future onset of conflict. It also allows the mediator to be aware that he is not just attempting to solve a present crisis but is part of a conflict management role which incorporates the prevention of future conflict.

JAI's description of the conditions for a stable agreement is simple but brilliant in its simplicity. If a party consents to something freely, then it would be difficult for it to be bitter over the consequences of this consent if it has been fully informed as to the consequences in the first place. In negotiations, if a party understands the other party's viewpoint then it will be less likely to object and feel aggrieved over concessions made. And if a party understands what the ramifications of certain behaviour will be on another party, then hopefully there will be restraint in the pursuit of this behaviour. It is on these basic assumptions that in a just negotiation in terms of JAI, the parties, with assistance from a mediator will produce political agreements that are stable.

Finally, the purpose of justice is to promote standards so that better ways are found in which people can live together. The author was reminded of the importance of this when viewing a display of paintings depicting war by Sarajevo children in 1994. It brought a reminder of the terrible consequence of conflicts. International mediation must be promoted as a mechanism to encourage people to find better ways to resolve their disputes so that the children of the children of Sarajevo, or the children of present conflicts, will not have to illustrate the bloodshed of their surroundings in their drawings.

# **APPENDICES**

## **APPENDIX I - SPECIFIC BEHAVIOURAL TECHNIQUES**

### **1. Communication - Facilitation Strategies**

- make contact with the parties
- gain the trust and confidence of the parties
- arrange for interactions between the parties
- identify issues and interests
- clarify the situation
- avoid taking sides
- develop a rapport with the parties
- supply missing information
- develop a framework for understanding
- encourage meaningful communication
- offer positive evaluations
- allow the interests of all parties to be discussed

### **2. Formulation Strategies (Procedural) Strategies- choose meeting sites**

- control the pace and formality of meetings
- control the physical environment
- establish protocol
- suggest procedures
- highlight common interests
- reduce tensions
- control timing
- deal with simple issues first
- structure the agenda
- keep the parties at the table
- keep the process focused on the issues.

### **3. Manipulation (or Directive) Strategies**

- change the parties' expectations
- take responsibility for concessions
- make substantive suggestions and proposals
- make the parties aware of the costs of non-agreement
- supply and filter information
- suggest concessions that the parties can make
- help negotiators undo a commitment
- reward the parties' concessions
- help devise a framework for acceptable outcomes
- change expectations
- press the parties to show flexibility
- promise resources or threaten withdrawal
- offer to verify compliance with agreement)



## **APPENDIX II - PARTIES TO DAYTON PEACE TALKS**

### **Bosnia Herzegovina**

Haris Silajdzic- Prime Minister

Alija Izetbegovic- President

### **Serbia**

Slobodan Milosevic- President to the Republic of Serbia

### **Croatia**

Franjo Tudjman - President of Croatia

### **United States Negotiating Team (core team)**

Warren Christopher- US Secretary of State

Wesley Clark- Lieutenant General, U.S. Army

Chris Hill- Director, Office of South- Central European Affairs, U.S. Dept of State

Donald Kerrick- Brigadier General, U.S Army

Robert Owens- legal adviser

James Pardew- Director, Balken Task Force, Dept of Defence

### **Lead Negotiator**

Richard Holbrooke- Assistant Secretary of State for European and Canadian Affairs

### **Balkan Contact Group**

The Balkan Contact group was originally made up of representatives of Russia, Britain, France, Germany, and the United States. During the peace talks it seemed to operate separately from the United States. The group was lead by Carl Bildt (European Union Peace Envoy) who was appointed co-chair with the United States for the peace talks.

## **APPENDIX III - OVERVIEW OF DAYTON NEGOTIATIONS**

### **Day one: November 1**

Each president was met privately by Holbrooke and Christopher, to review ground rules that they had presented to the parties a month earlier. Each president made their priority clear at these meetings: for Trudjen it was eastern Slovenia; for Milosevic it was sanctions; for Izetbegovic it was an improved Federation agreement (which had already been agreed to by the Americans).

### **Day Two: November 2**

Efforts divided into six areas:

1. Michael Steiner and associates would negotiate Federation agreement between the Croats and the Muslims;
2. Bildt, Owen and Holbrooke would negotiate constitutional and electoral issues with Milosevic and the Bosnians;
3. Clark and Pardew would begin discussions on military annex;
4. Two track negotiation on eastern Slovenia, one in Dayton other in the region;
5. Internal business with Contact Group;
6. Territorial issues deferred until progress on above (Holbrooke 1998: 240).

### **Day 3: November 3**

Large daily Contact Group meetings dissolved as time consuming, reduced to six senior representatives. Missing reporter, David Rohde. Milosevic informed no agreement at Dayton unless Rohde found unharmed. Bosnian Serbs who were part of

Milosevic's delegation sidelined and isolated. Milosevic states, "I'll make sure they accept the final agreement" (Holbrooke 1998: 253).

#### **Day 4: November 4**

Social arrangements.

#### **Day 5: November 5**

To increase intensity of negotiations, Izetbegovic asked to meet with Milosevic by negotiators.

#### **Day 6: November 6**

American negotiators begin to feel concerned about the time it was taking for decisions.

Good feeling over dinner between Milosevic and Izetbegovic, which was held outside Dayton without Tudjman. Both agreed that sanctions on heating oil should have stopped on cease-fire. First time common ground on an issue was openly expressed.

#### **Day 7: November 7**

Crisis over Federal budget in Washington, meant United States Congress could only contribute \$50 million to IPTF (International Police Task Force). The American negotiators believed that: "This meant we could not write the rules and had to allow European input"(Holbrooke 1998).

#### **Day 8: November 8**

Federation negotiations on track with Steiner. Large meetings of all three sides called for. Face to face negotiations over territory. Each side invited to make an opening proposal rather than the introduction of an American map. This approach widened the differences between the parties.

### **Day 9: November 9**

Christopher's impending departure used as pressure for concessions but with little success. Overnight the Croatians increased the pressure by moving their military forces closer to eastern Slavonia. Tudjman hinted that he might prefer to conquer the region outright in a military action rather than make a deal with Milosevic.

### **Day 10: November 10**

European contact group now reduced to Bildt.

Christopher arrived, wanted breakthrough on eastern Slavonia between Milosevic and Trudjman, but they insisted on another seventy two hours. Christopher himself drafted two phase approach to remaining problem: "the lesson from Christopher's trip was clear: he should visit Dayton only when a problem was nearly solved, so that he could push it across the finish line" (Holbrooke 1998: 265)

### **Day 11: November 11**

Agreement between Milosevic and Trudjman on eastern Slovenia. Then returned to the maps but serious problems. Milosevic showed 'ludicrous' map and upset Bosnian delegation. Holbrooke says will recommend close-down possibly suspend talks to Silajdzic. Silajdzic suggests Holbrooke go to Milosevic and say will closedown, as believed that it was the only way to get his attention. This was done. Holbrooke says to Milosevic that time has come for progress or will shut down talks. Suggested on direct talks, and suggested talk to Silajdzic first. Holbrooke tells Silajdzic not to loose temper because Milosevic will begin to change at end of discussions.

### **Day 12: November 12**

Agreement on eastern Slovenia signed. New map presented by Milosevic, but it upsets Silajdzic.

### **Day 13: November 13**

American negotiators apply pressure on Silajdzic by threatening to withdraw American plan to train the Federation forces if talks fail.

Progress on maps as territorial issues becomes defined.

#### **Day 14: November 14**

Pressure by Christopher on Izetbegovic, by stating that President Clinton would no longer assist his Government if become an obstacle to peace. There was no response from Izebegovic over this threat.

#### **Day 15: November 15**

No movement on core territorial issues.

#### **Day 16: November 16**

Pressure on Milosevic by American negotiators. Holbrooke says to Milosevic that could be like Sadat and provide major gesture for goodwill. Over dinner, first negotiation on territories between Milosevic and Silijdzic by way of exchange of napkins but no resolution of differences.

#### **Day 17: November 17**

Day of high level visitors to increase pressure on parties. These visits were carefully sequenced; William Perry (U.S. Secretary of State and General Joulwan (Supreme Commander of Allied Forces Europe) would symbolise American military power and determination and: "With their straight forward warnings and uniforms bustling with medals, the generals made a powerful impression."(Holbrooke 1998: 286 )

#### **Day 18: November 18**

Christopher did not want to leave again without an agreement. Review of negotiations show most of the umbrella document agreed to but the two toughest problems unresolved, the territorial issues as represented by the maps and elections.

Sarajevo breakthrough, Milosevic offers up Sarajevo.

### **Day 19: November 19**

Chart fiasco: To convince Bosnians to make concessions, American negotiators drew list of all Bosnians achieved in negotiations, and realised that 55% of territory of Bosnia Herzegovina had been conceded to the Federation. This was presented to the Bosnians in the form of charts, which the Bosnians held on to. Later that day Milosevic saw the charts accidentally. Felt tricked as agreed to no more than 51 % prior to Dayton. Compromise deal was then negotiated by Silajdzic with Milosevic, but was rejected by Izetbegovic.

### **Day 20: November 20**

Intervention by the President. American negotiators felt time right to use this last strategy. Believed this could only occur at right moment as believed most important not to weaken the President: "The presidential coin is precious and must not be devalued."

President Clinton calls presidents, asked Trudjman and Izetbegovic for 1% to resolve map issue. President Clintons call prompts Trudjman to concede. Territorial ratio between Federation and Bosnia 52-48, 1% off the 51-49 ratio. American negotiators approach Izetbegovic for agreement, but no movement.

Christopher puts pressure on Izetbegovic: "It is truly unbelievable the Bosnian position is irrational. A great agreement is within their grasp and they don't seem able to accept it"

American negotiators decide to give ultimatum, absolute closedown by midnight. Milosevic extremely concerned over closedown of talks: "You are the United States, you can't let the Bosnians push you around this way." (Holbrooke 1998: 306)

Izetbegovic offers final 1% on condition that receives Brcko. American negotiators refuse as ultimatum in place, and no new conditions accepted. Milosevic offers compromise, arbitration for Brcko after one year. Izetbegovic relents and agreement signed.

## **APPENDIX IV - PARTIES TO THE OSLO BACK CHANNEL**

### **Israel**

Dr Yair Hirschfeld (Haifa University)

Dr Ron Pundak ( of Hebrew University's Truman Institute)

Uri Savir (Director General Israeli Foreign Ministry)

Joel Singer (Legal Advisor to Negotiations)

### **Palestinians**

Abu Alaa (Director General of the Economics Department PLO)

Maher el-Kurd (member of Yasser Arafat's office)

Hassan Asfour (assistant to Mahmoud Abbas )

### **Norwegian Negotiation Team**

Rod Terje Larson (Director FAFO-Forskningssiftelsen for Studier av Arbeidsliv, Fagbevegelse og Offentlig Politikk)

Mona Juul (member of Stltenberg's personal staff, Holst's Bureau Chief wife of Rod Terje Larson)

Jan Egeland (Director General of Norwegian Foreign Ministry)

Thorvold Stoltenberg (Foreign Minister, until April 1993)

### **Lead Negotiator**

Johan Joergen Holst (Norwegian Foreign Minister)



## **APPENDIX V – OVERVIEW OF OSLO BACK CHANNEL**

### **Round 1: January 20-23**

The first round was held in Sarpsborg. It began by way of lecture by Marian Heiberg, wife Norwegian Cabinet Minister Holst. The Norwegians adopted a conference framework, being uncertain over status of the ban on PLO contact by Israel. Yossi Beilin, Deputy Foreign Minister approved the discussions.

### **Round 2: February 11-14**

Drafting process begun on a Declaration of Principles (Denoted DOP) for an interim period of Palestinian self-rule.

### **Round 3: March 20-21**

Drafting process concluded for a DOP, and a six page document entitled Sarpsborg 111 agreed upon. Norwegians pass copy on to American officials.

### **Round 4: April 29-May 2**

Round four begins after Israeli pre-condition that Washington talk's resume. Hirschfeld introduces a framework for further negotiations to move the negotiations forward after commenting how the negotiations began without an agenda. He suggests that negotiations should begin on final status talks and how the PLO is to appear on the scene.

Hirschfeld proposes a programme for the following six weeks: first two weeks draft DOP to be discussed in Israel; following two weeks draft DOP to be presented to Americans; final two weeks Americans to present document in Washington as compromise solution to be negotiated for another two weeks (attempt at involving Americans, never acted on).

### **Round 5: 8-9 May**

Hirschfeld states that negotiating teams had received official authorisation by Israel but emphasised that this did not mean that the delegation had received legal status. Hirschfeld emphasised that the talks supported Washington talks and were not a substitute. It was emphasised that Rabin still preferred the Washington talks.

### **Round 6: 21-23 May**

In early May Abu Alaa informed Larson that the Oslo talks would end unless Israel up-graded negotiations to include official representation. He stated that his position was of “ministerial rank” (Makovsky 1996).

On May 13 it was agreed between Peres and Rabin to up-grade the talks to an official level. Consequently Joel Singer, Director General of the Foreign Ministry sent by Peres to assist in negotiations.

Talks began on 21 between Abu Alaa and Savir. Savir recommends to Israel that talks should continue and that Israel should recognise the PLO.

### **Round 7: 13-15 June**

Joel Singer, an Israeli lawyer working for a law firm in Washington D.C law firm and confidante of Rabin introduced to assist Singer. Sarpsborg document revised.

### **Round 8: 25-27 June**

First formal document produced by the Israeli delegation

### **Round 9: 4-6 July (held in Gressheim)**

Drafted reply by Palestinians. During these negotiations several drafts were completed on FAFO stationary. Gressheim draft supersedes Sarpsborg III draft of DOP.

### **Round 10: 10-12 July (Held at Halvorsbole Hotel outside Oslo)**

First direct involvement by Arafat. Letter by Arafat handed out by Abu Alaa, which according to the Israelis provided a timely and positive contribution. (Peres 1995 295) Palestinians returned with 26 revisions of Gressheim draft, Savir said unacceptable, Palestinians stated revision no different to what Israel had done when talks became official. Rabin authorises Savir to mention recognition in passing and then off the record specific terms on 25-26 meeting.

### **Round 11: 25-26 July (Halversbole Hotel)**

Palestinians insist on almost all of the 26 revisions, Israelis refuse to discuss revisions. Abu Alaa announces that he was resigning from talks. In private meeting with Abu Alaa, Savir provides seven pre-conditions for mutual recognition. but needed package deal seven points and eight for eight concessions.

### **Round 12: 13-15 August**

Recognition formally placed on negotiating table. Stale-mate ends by offer of recognition and PLO concerns that Israeli intended to focus on negotiations with Syria (for which Israeli officials reinforced by releasing public statements about prospects for negotiations) PLO agrees to four out of the five issues and accept concessions surrounding this.

### **Round 13: 20 August (final meeting)**

Israelis, Palestinians, and Norwegians initial the DOP at secret ceremony in Norway.

**(Source: Makovsky 1996: Mahmoud Abbas 1995)**

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