Justice, Fairness and Negotiation: Theory and Reality

Cecilia Albin

University of Cambridge

Can international negotiation contribute to justice and fairness? [1] Can such values be reconciled with the very nature of negotiation, as a decision-making process accepted and used by parties only as long as it promises to benefit them as much or more than any other alternatives available to them?

Most of us would agree that our interpersonal relations are subject to moral evaluation and some moral constraints. We know from experience that concepts of justice and fairness play an influential role in the dynamics and outcomes of many negotiations which we conduct with other individuals. Such notions have an impact on the positions and expectations brought to the negotiation table, the exchange of concessions and evaluation of alternative solutions in the bargaining process, and the ultimate satisfaction with and stability of the negotiated outcome. To avoid constant confrontations and stalemates, and to foster good relations for future dealings, we must also normally consider what could be regarded as a fair bargain and moderate any inclination simply to maximize our own gains al the expense of the other side. The social-psychological literature confirms, based on laboratory experiments, that principles of justice and fairness serve these functions in interpersonal negotiations (Deutsch, 1973 ; Bartos, 1974 ; Lind & Tyler, 1988 ; Benton & Druckman, 1973).[2]

Justice and fairness in international negotiations is, by contrast, a relatively new and debated subject in scholarly research. Some analysts remain skeptical that international bargaining does (or should) take account of such concerns: They sometimes raise larger, seemingly insoluble questions and cause parties to become entrenched in deeply confrontational positions, and thus become serious obstacles to 'effective' bargaining. Indeed, vicious cycles of violence and reprisals in many regions of the world remind us that ideas about justice may lead to war as much as peace (see Welch, 1993). Much systematic work on empirical cases remains to be done, particularly to illuminate the circumstances under which concepts of justice and fairness do play a role and how this role is

affected by other factors such as power asymmetry, culture and the nature of the disputed resources. We cannot, of course, simply assume that social-psychological research findings apply to conflict and negotiations among states, or that justice and fairness influence all international negotiations. Such negotiations differ considerably from those conducted within one country and between private individuals.

The predominant notion from the time of Plate to the present has been that the bounds of justice coincide with state boundaries and that justice is not an issue in relations between or across states. That is, principles of distributive justice apply to the contemporary members of a single group or society with common norms and opportunities for mutually beneficial cooperation, and more specifically to the distribution of the cooperative gains among those members (Rawls, 1971). Given the absence at the international level of one community of states united by cooperative ventures or enforceable norms, governments are often seen as complying with international demands only when this serves their own particular interests and goals (Nardin, 1983).

Do states genuinely allow considerations of justice and morality to constrain their actions, including in negotiations? A number of international negotiations lend empirical support to the positive answers given to these questions in works on political theory and political philosophy (Barry, 1989b; 1989a; Frost, 1986; Morgenthau, 1971).[3] International negotiators often do formulate their positions and legitimize agreements based on principles of justice or fairness, for reasons that may overlap rather than conflict with self-or national interests. The fact that such values also have tactical worth, which parties seek to exploit in negotiations, underlines the genuine significance generally attached to them. It is on the subject of *the circumstances* under which justice and fairness have a place in international negotiations that scholarly research diverges the most.

A widespread assessment traceable back to Plato's *Republic* is that power equality enhances concerns about justice and that extreme power inequalities exclude any role for such norms. The perceived reasons for this, however, vary. The acceptance of principles of justice is often viewed as a necessary compromise between egoistic, self-serving parties who are too equal to pursue their interests without regard for the other or to do injustice without suffering unacceptable costs. Thus adherence to moral constraints depends on the existence of a balance of forces (Gauthier, 1986; Rawls, 1971): "We care for morality, not for its own sake, but because we lack the strength to dominate our fellows or the self-sufficiency to avoid interaction with them. The person who could secure her ends either independently of others or by subordinating them would never agree to the constraints of morality. She would be irrational-mad"

(Gauthier, 1986 :307). Another perspective is that concern about justice is not purely egoistic in a narrow sense, but driven by a desire to justify one's actions on impartial grounds which others cannot reasonably reject and which can elicit voluntary agreement and cooperation. Such a desire, and a habit of considering the legitimate interests of others, are more likely to be cultivated in largely equal parties owing to their experience of interdependence and their need to secure the collaboration of others (Barry, 1989a).

It is a consensus view that power equality facilitates the negotiation of just and fair agreements, and that such agreements are more likely to be implemented and durable. They create a state of equilibrium in which every party feels that it received its 'fair share' and that likewise the other parties got neither more nor less than that. Some of the sharpest differences concern whether approximate power symmetry is *requiren* for just and fair bargaining and whether or what kinds of inequalities, notoriously pervasive in international affairs, may legitimately be reflected in agreements which are to be taken as just. At one end of the spectrum, Rawls's argument (Rawls, 1971, 1958) that principles of justice are only those selected and agreed upon by parties who are ignorant of their own identity, position, and interests is exactly meant to purge the bargaining process of *all* inequalities—in individual qualities and skills as much as in power and strategic advantages. Discussion and negotiation remain essential in the choice of these principles. However, behind such a 'veil of ignorance' negotiation clearly takes a form radically different from any common practice and appears particularly inapplicable to real international encounters, which would fail to meet Rawlsian criteria of a fair selection situation.[4] At the other end of the spectrum, self–interested bargaining with the use of power and tactical advantages is seen as an activity which can produce perfectly just and fair agreements (Nash, 1950 ; Zartman, 1995).[5]

This paper begins by articulating several, partly conflicting propositions which arise from the literature on justice and fairness in the process and outcome of international negotiations. The applicability of these propositions is then examined in two cases of very different kind : one of regional environmental negotiations (the European acid rain negotiations conducted since the mid–1970s within the UN Economic Commission for Europe) and one of bilateral autonomy negotiations (the Israel–PLO interim talks conducted from 1993 until 1996 under the Oslo Declaration of Principles). It will be argued that in both these cases, issues of justice and fairness have been central and unavoidable and all propositions contribute important insights. However, each paradigm by itself takes too narrow of a view and notably fails to specify the conditions under which justice and fairness play the roles it describes.

Four sets of propositions

• *The dynamics and outcome of international negotiations reflect the distribution of bargaining power between parties; justice lies in the compliance with negotiated agreements.*

This is a classic paradigm according to which a party's negotiating behavior, such as readiness to make concessions and accept a particular deal, is based on a calculation of its relative strength vis-à-vis the other side. In a situation of power asymmetry, the stronger side tends to behave exploitatively and make the greater gains in rough proportion to its power advantage, while the weaker parry has to concede the most. Parties thus bargain to secure all they can acquire given their power, rather than their "just" or "fair" share which may be more or less. The resulting agreement will largely reflect relative bargaining strength rather than any impartial criteria, particularly in cases of power asymmetry.[6] "Power" is sometimes defined independently of particular situations in terms of structural, such as military and economic, resources.[7] More commonly a wider range of resources and abilities, including the skillful use of tactics, are taken into account which can effectively move the other side in a desired direction in negotiations (Rubin & Brown, 1975; Swingle, 1970; Zartman, 1983). A key element of bargaining power is certainly the value of a party's best alternative to a negotiated agreement, or 'BATNA' (Fisher & Ury, 1981). The higher that value the less dependent the party is on reaching an agreement and the more it can afford to concede little, take risks and "wail out" the other side. A in this sense stronger party cannot be so abusive as to remove all incentives to negotiate, but may appease a weaker party simply by offering some advantage over a continued state of conflict on unequal terms.

The exploitation of power advantages and the constant striving to maximize self-interest do not imply that international negotiations are considered inevitably amoral or unprincipled. Firstly, the classic Realist view holds that the selfishness of states is grounded in and justified by a moral responsibility of national leaders to the security and well-being of their own populations. Even if state action is subject to certain universal moral principles, no leader can be required to adhere to such principles (or help another leader fulfill her duties) if this would compromise on his primary moral obligations toward his own people (Morgenthau, 1971, 1948). Secondly, even the staunchest Realist would maintain that voluntary conclusion of an agreement creates an obligation to honor it. Justice is achieved when parties comply with terms to which they have agreed freely and rationally.

The intellectual roots of this minimalist view of justice are found foremost in the moral theory of Thomas Hobbes.[8] In the Hobbesian 'state of nature', men as

selfish competitors for scarce resources share an interest in agreeing to constrain their behavior, to avoid mutually destructive conflict. Until such an agreement on mutual constraints has been reached, men are effectively at war and have no obligations : They possess unlimited 'natural rights' and liberties to do whatever they can to preserve and please themselves, including at the expense of the lives and property of others. The concept of natural rights, and Hobbes's argument that there are no independent criteria of justice or fairness, mean that ethical considerations are inapplicable to processes of negotiations and to the terms of any agreement. Until an agreement is concluded, there are no constraints on what a party may do or take to better its own situation other than the limits of its own strength. However, an agreement automatically creates obligations of compliance, for supposedly free parties have themselves chosen to conclude it and to constrain their actions accordingly, in the expectation of mutual benefit. Moreover, it is not only morally binding but also "rational" (self-serving) to implement an agreement concluded for mutual advantage.[9] This assumes that all or most parties honor their commitments under it, so that its 'raison d'être' and benefits are not eroded.[10]

In sum, this first paradigm holds that negotiated agreements are legitimate and valid by virtue of having been agreed and that justice lies in adhering to them whatever the terms. There can never be conflict between justice and power (or self-interest) for negotiated agreements will reflect the balance of power, and justice as much as rationality require that they be honored. Undoubtedly this approach has some explanatory power : Prevailing power relations influence many international negotiations. The question is whether we can, and whether parties generally do, possess such a limited notion of justice in negotiation. The idea that only the post-agreement phase of implementation is subject to moral judgment, while processes of bargaining and the content of agreements fall outside the domain of ethics, is incompatible with most scholarly and popular views of the meaning of justice. Parties to international or other agreements will rarely separate the duly to comply from the *terms* of what has been agreed or the *process* by which it was agreed : If either is seen as illegitimate or unfair, there is a considerable risk of non-compliance (including as a result of domestic political pressures) both in the immediate and long terms. Particularly in situations of considerable power asymmetry, this paradigm does not coincide with broadly accepted or intuitive notions of justice (Barry, 1989a). These would rather, as we shall see, insist on some *constraints* on the exercise of power and the rentless pursuit of self-interest : A stronger party could not simply in the name of justice more or less impose its will, especially if it initially acquired its powerful bargaining position by taking advantage of the now weaker side (Shue,

1992 ; Gauthier, 1986).[11]

• *Negotiations are guided and facilitated by shared notions of justice and/or fairness.*

Another paradigm holds that negotiators are driven not only by divisive interests in maximizing individual gains, but also by a coordinating desire to reach a just or fair solution (Bartos, 1974). The concession–convergence model has been particularly influential. It views negotiation as a progression of moves, consisting of exchanges of concessions based on opening positions. The exchanges are usually governed by a notion of *procedural* fairness—namely, the principle of reciprocity (mutual responsiveness to the other's concessions)[12]—and a notion of outcome fairness defined as a compromise agreement at some point between the initial positions. These notions, presumably shared by parties, serve as functional referents which guide and facilitate the negotiations : They help parties coordinate expectations and concessions, avoid constant confrontations and stalemates, and forge durable and timely agreements which can be justified to important constituencies in ambiguous situations of multiple alternatives (Lax & Sebenius, 1986 ; Schelling, 1960). The shared notion of outcome fairness is frequently described as a "focal point" or "salient solution" which emerges as obvious and relevant, above other possible options, because of precedent, custom, analogy, prevailing norms or other factors. A common salient solution is split–the–difference, for it requires parties to make equal concessions on their initial positions.

The concession–convergence model certainly captures the dynamics of some international negotiations ; for example, over territorial boundary disputes and arms control (Druckman & Harris, 1990 ; Jensen, 1963). In the Strategic Arms Limitation Talks (SALT) and other US–Soviet arms control negotiations during the Cold War, equal ceilings or freezes and equal percentage reductions based on existing (unequal) weapon arsenals were usually endorsed. However, justice and fairness can play such a coordinating and facilitating role only under certain conditions. Most essential is approximate equality, a condition widely known to foster effective negotiation and mutually satisfactory agreements (Rubin & Brown, 1975). It is when parties perceive themselves as largely equal—for example, in dependency on or gains to be had from a negotiated agreement—that they tend to hold similar or compatible notions of justice and fairness, and realize the need to search for a balanced solution. They acquire the motivation to practice procedural equality through reciprocal concessions to arrive at such a solution (Zartman, 1991), for their equality implies that attempts to forge some other type of agreement may cause costly delays and even fail.

The assumptions of power equality, compatible ethical notions and a shared commitment to negotiate on basis of them, explain the inapplicability of this paradigm to a large number of international negotiations. To the extent that the negotiating behavior of parties is influenced by notions of justice or fairness, a complicating reality is that these are often sharply opposing as a result of differences in cultural norms, resources, historical experience, responsibility for the problems under consideration and so forth. Such conflicting concepts inevitably become part of the dispute itself and cannot guide or facilitate any negotiation ; in fact, they may lead to intransigence and deadlock (Albin, 1995a). If there is power asymmetry, the stronger side may not recognize any need to consider alternative perspectives on a just and fair solution or to compromise on its own principles. These are only some of the difficulties which the Israel–PLO interim talks, further discussed below, illustrate all too well.

• *Cancepts of justice and fairness, often conflicting, are part of the bargaining itself and must be balanced and reconciled in a negotiated agreement.*

More recently negotiation has become viewed as an exercise in which opposing principles of justice and fairness (or interpretations of them) are, and indeed must be, reconciled in an agreement. The task of determining what norms should underlie an agreement becomes a central part of the bargaining itself. The initial concepts of fair concessions and just or fair solutions held by the parties are modified and combined in the process of exploring options, and somehow balanced in any agreed outcome. This results from the presumed refusal of parties to forgo their own principles. In addition, they may acknowledge that norms other than their own are valid and important. In many contexts a range of criteria must be utilized to weigh all pertinent factors, and to produce an outcome which is fair to each individual party and just in a wider sense (Albin, 1995a ; Young & Wolf, 1992 ; Young, 1994). It has even been argued that no deal can be negotiated or implemented unless parties first accept a formula for a solution which incorporates an agreed notion of justice (Zartman, 1995 ; Zartman et al., 1996). This notion may involve a single criterion, or a compromise or combination of different principles.

Justice and fairness clearly play this role in many international, including environmental, negotiations in which the parties embrace opposing ethical principles. However, once again it applies poorly to sharply asymmetrical negotiations. In these, the more powerful party may not have much to gain from considering a 'just' or 'fair' solution and the weaker party may have no choice but to accept what it is offered. If conflicting notions of justice are to form a serious part of the bargaining and are to be reconciled in the outcome, all palties

must have the strength to uphold their respective principles and reject any unbalanced solution.

• *What is a just and fair outcome? Internal (contextual) vs. external and impartial criteria.*

How do we assess if a negotiated outcome is just and fair? What characterizes such an outcome? A fourth set of propositions arising from the research literature address these questions. They differ on the criteria used, including the extent to which an agreement may legitimately reflect any power inequalities.

Internal (contextual) criteria. Many paradigms, including game-theoretical, have relied on this type of criterion. Stressed is often the absence of one overarching standard or universal values by which to judge an agreement (Zartman, 1995, 1983 : 38-41). So are the "rational" or self-interested grounds for negotiating, and the non-agreement point (the value of each party's BATNA) as the basis for determining the nature of a just and lair agreement. A widespread notion is that the mere fact that something has been negotiated and agreed is a strong indication that it is just and fair. Negotiation is a form of joint decision-making which takes place when every party to a problem prefers an agreed solution. Even the weakest party is supposedly empowered to veto an outcome which it views as unfair or unfavorable, and to break off the talks (Zartman, 1991). So just agreements are based on principles which parties themselves have, by their own will, agreed to honor. These must be mutually beneficial, since parties strive to maximize their own gains : There is no place for justice or rationality outside the context of reciprocity and mutually beneficial cooperation ; for example, for purely redistributive arrangements or for agreements with a party unable to contribute to the cooperative gains (Gauthier, 1986). In the broadest notion *any* outcome is taken to be just by virtue of having been negotiated and agreed, with no constraints imposed on standards or methods used. For if it has been agreed rationally, it must also leave every party better off than in a stale of non-cooperation. All parties only have to benefit in this sense from a 'just' outcome, and it can therefore normally cover a wide range of options (Barry, 1989a).[13]

However, specific criteria internal to the bargaining process are more commonly endorsed. One group of criteria, while too precise to be perfectly applicable in practice, is based on the premise that parties should gain (or lose) to about the same extent from a negotiated agreement. The principle of 'equal excess' allocates to each party resources corresponding to the value of its best alternative to a negotiated agreement plus half of the remaining resources.

Another norm holds that a just solution should give parties the value of their respective non-agreement points, and then divide the remaining benefits from cooperation in proportion to the worth of their contributions (Gauthier, 1986). The norm of 'equal sacrifices' holds that parties should accept burdens or make other concessions proportionally to their resources and ability to do so (Pruitt, 1981). 'Equal shares' divides resources in equal amounts irrespective of variations in claims, needs or other considerations, while the principle of 'splitting the difference' does so in reference to the stated positions of parties. In Nash's famous concept, a fair solution is one which yields to each party one-half of the maximum gains it can rationally expect to receive (Nash, 1950).

On rare occasions these contextual approaches restrict the conditions under which negotiation can result in just agreements, including the types of leverage and other advantages which may be used in formulating them.[14] The initial bargaining positions, the starting point for negotiations, and any power leverage or inequalities utilized in bargaining may in these cases only reflect a party's own legitimate endowments and efforts to better itself, without taking advantage of another. Strategic advantages or strong BATNAs resulting from resources acquired through activities which worsened the bargaining position or overall situation of another party may not be exploited or define a party's stake in negotiations (Gauthier, 1986 ; Shue, 1992). Any such past injustices and illegitimate acquisitions must be corrected or compensated before bargaining can result in just, and indeed rational and stable, agreements.[15] Unlike the case in most game-theoretical approaches (see Braithwaite, 1955 ; Nash, 1950), the use of threats and coercion to bolster the non-agreement point or bargaining positions is rejected : They redistribute benefits irrespective of contributions or desert all the expense of the threatened party when successful, and undermine cooperation in the long term.

External and impartial criteria. The reliance on ethical criteria which are entirely impartial and external to particular situations and interests is almost as rare in the literature as it is in everyday practice of negotiation, owing to its very nature. An important exception is Rawls's notions of justice and fairness, as discussed above. Most paradigms emphasizing impartial and external standards view these as complementing rather than replacing internal and contextual norms. One common proposition is that just outcomes will tend to be based on well-recognized, external principles of distributive justice whose general content is independent of particular bargaining situations. These include norms such as equality, equity (proportionality), need and compensatory justice which certainly underlie many international agreements (Young, 1995 ; Albin, 1995b). The task of negotiation is to produce agreement on what principles may be

judged applicable and how they may be interpreted and applied fairly under the circumstances.

Rather than focusing on external criteria, an 'impartial' approach would delineate general requirements which a negotiation process and outcome must fulfill in order to be taken to be just and fair. It is probably impossible to create (or even identify the meaning of) parity in bargaining power in most international encounters. However, this approach stresses that there can be no place for justice and fairness in negotiations which take place in a coercive or otherwise manipulative context. Agreements which are held in place by force, or which a more powerful or favored party would not accept if it was in the situation of the other (weaker) party, are thus unjust. Just principles and just agreements are only those which elicit *voluntary* agreement without the use of threats or rewards (Barry, 1989a; Rawls, 1971). They can be defended on impartial grounds. They may reflect some power inequalities as well as mutual benefit, but take account of all interests and do not simply reflect the prevailing balance of forces. They cannot be reasonably rejected by an outside observer or by any party to the conflict which examines the situation beyond its own narrow self-interests. Thus the principal measure of justice or fairness here is not the content of particular distributive norms, the contributions of the parties to the cooperative gains, or the value of their best alternative to a negotiated agreement.[16] Rather, it is the parties' voluntary acceptance of the norms, and their general acceptability from any viewpoint, which make them just. Clearly processes and outcomes of negotiations which are just in this sense can materialize only when all the parties, by necessity or choice, are prepared to abandon some partiality and consider a balanced solution.

The case of European acid rain negotiations

Acid rain—acid deposition formed in the atmosphere primarily from sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions—is, like many other environmental hazards, transboundary. Scientific understanding has deepened dramatically about the sources of such emissions (notably coal and oil fired power stations and smelters, and motor vehicle exhausts), their transport across national boundaries, and extensive damage to freshwater, agricultural crops, fish populations, forests, ecosystems, and historical and cultural monuments. In the last two decades multilateral negotiation and cooperation have become essential in the attempts to eliminate harmful emission levels in Europe.

The acid rain problem lends itself particularly well to empirical examination of the role played by justice and fairness in international negotiations. Firstly, there is now a rich record of the nature of the problem and the negotiations

conducted within the UN Economic Commission for Europe since the mid-1970s to tackle it.[17] Secondly, the acid rain problem involves indisputable core questions of distributive justice and fairness similar to those at the heart of many other regional and global environmental negotiations. These questions arise from differences in contributions to the problem between heavy polluters (e. g., Poland, Germany, the UK) and countries which are predominantly importers of the pollution (e. g., Sweden, Finland, Norway) ; in sensitivity to the problem (given variations in ecosystems, proximity to polluting sources, and so forth) and gains to be derived from regulatory agreements ; and in economic, technological, and political ability to accept and implement control measures. Under many current schemes for further acid rain emission reductions in Europe based on economic and environmental efficiency criteria, some of the poorest countries with the least resources are required to invest in the most costly abatement technologies and measures, to the benefit of richer countries with lower emission reduction costs (Klaassen, Amann & Schöpp, 1992). Without a negotiated agreement redistributing some of the benefits and burdens involved, such strategies are unlikely to elicit the necessary political support.

Negotiations over transboundary air pollution controls in Europe first got underway in the mid-1970s, driven by Sweden which had proved that foreign sources of SO_2 emissions were primarily responsible for the acidification of its lakes. The 1979 Convention on Long Range Transboundary Air Pollution (LRTAP), signed by 32 states and the European Community (EC) within the UN Economic Commission for Europe (UNECE), established vague obligations to limit and, "as far as possible," gradually reduce and prevent transboundary air pollution. The LRTAP Convention, together with EC environmental legislation, have provided the main frameworks for subsequent negotiations over specific controls and reductions in SO_2 and NO_x emissions. These include the 1985 Helsinki Protocol, the 1988 Sofia Protocol, and the 1988 EC Large Combustion Plant (LCP) Directive. Some of the reviewed propositions provide powerful explanations of the role played by justice and fairness in the lengthy negotiations which resulted in these agreements.

• *Negotiations are guided and facilitated by shared notions of justice and/or fairness.*

A joint acceptance and reliance on the principle of equality facilitated getting acid rain talks underway. This shared notion served as a 'focal point' coordinating expectations and guiding the emission reductions undertaken by European countries. Equality came to mean equal shares of rewards and burdens for all parties regardless of differences in resources, contributions to the

problem or other particular circumstances. The application of the principle has been reflected in plans for ceilings on, and freezes and equal percentage reductions in, current SO_2 and NO_x emission levels with fixed time frames. Calls for such agreements based on equality were first made, unsuccessfully, in the mid 1970s by net importers of acid rain—notably Sweden, Finland, Norway, and Canada. In March 1984, however, a group of nine West European states and Canada formed the "30 Percent Club." They committed themselves to unilateral cuts of at least 30% in their 1980 levels of SO_2 emissions over a ten-year period. The Club set a just—and, in the eyes of many, also fair—standard for undertaking and evaluating abatement efforts, in the sense that all countries would reduce their individual emission levels by an identical percentage. Its formation was a symbolically significant act which created political pressures on other countries to follow suit. Six months later, another eight West and East European countries had joined the Club.

The 30 Percent Club set the stage for the talks leading to the 1985 Helsinki Protocol on the Reduction of SO_2 emissions. It was signed by 21 states—including several heavy polluters such as West Germany, the Soviet Union, Italy, and France which previously had vetoed proposals for specific emission controls. In these negotiations across-the-board 30% cuts in SO_2 emissions (by 1993 based on 1980 emission levels) emerged again as the acceptable formula to most participating countries among the many divergent positions advanced.[18] A major hurdle in the talks was the argument of the United Stales and Great Britain that an earlier base year be selected so as to credit them for emission reductions prior to 1980, thus requiring insignificant or no further reductions of them. Most participating countries viewed these pre-1980 reductions as insufficient and rejected the demand. The final Protocol was not signed by three major exporters of acid rain : the United States, Great Britain, and Poland (for its lack of abatement technology). Yet at a later EEC environmental meeting Great Britain suggested the same idea of a uniform 30% reduction in SO_2 emissions by 1993 (Regens and Rycroft, 1988). Agreements driven by the equality norm have contributed to a net 15% decline in overall emissions in Europe since 1980. Many countries reached the 30% target of the Helsinki Protocol before the 1993 deadline.

There are important advantages which explain the frequent reliance on variations on the equality principle in European acid rain, as well as other international, negotiations. These include intrinsic appeal, simplicity, and explicitness. Firstly, it converges with common, intuitive ideas about "intrinsic" or " impartial" justice ("all countries should be treated the same") and about the proper basis for concession-making if pair agreements are to result. Secondly,

the equality principle is relatively unambiguous in both concept and application. It has thus helped European countries to coordinate expectations and accelerate concession-making in a situation of deeply opposing positions on acceptable measures.

However, a closer examination reveals that the principle (as interpreted and applied) establishes justice and fairness only in a very restricted sense. It does not account for, and even less seeks to rectify, inequalities in the particular situations of parties. National emission levels of a particular year are taken at face value as the only relevant information and as the just starting points on basis of which "equal concessions" are then exchanged. Through the formula of the 30 Percent Club, for example, countries are apportioned equal shares of the emission reduction costs, expressed in percentage reductions of their individual polluting outputs. But as national emission levels are in fact unequal, reduction requirements in absolute terms differ. Wide divergences in economic-technological resources and in responsibility for and vulnerability to the acid rain problem further contribute to the actual inequality of the distribution of collective burdens and gains. Basing emission controls on the equality principle is also relatively inefficient in environmental terms. The same requirements are imposed on all countries irrespective of the sensitivity of their ecosystems and their pollution levels. In sum, the insufficiency of this approach from the viewpoints of fairness, environmental effectiveness and economic efficiency has caused it to lose support.

• *Concepts of justice and fairness, often conflicting, are part of the bargaining itself and must be balanced and reconciled in a negotiated agreement.*

Divergent norms of justice and fairness have been at the core of European acid rain negotiations in recent years, and have had to be balanced and combined in complex agreements on further emission reductions. A prime concern has been to take better account of the varied conditions of countries by including norms of equity (proportionality); for example, ability to pay for abatement measures as reflected in national income, willingness to pay as indicated by costs of national plans for emission reductions, contribution to the acid rain problem in terms of current and/or past national emission levels, and susceptibility to ecological damage from acid rain as measured by "critical loads".[19]

The difficult negotiations preceding the adoption of the 1988 Sofia Protocol on the Control of NO_x Emissions are illustrative in this respect. They evolved extensively around conflicting positions on fair and acceptable abatement strategies, which in turn caused impasses and prevented agreement on specific reductions. On the one hand a group of five countries—Austria, the Netherlands,

Sweden, Switzerland, and West Germany—insisted on a uniform 30% reduction in NO_x emissions by 1994.

On the other, the United States demanded credit or some exemption corresponding to its emission reductions prior to the suggested reference year of 1985 (Fraenkel, 1989). The final document, signed by 25 states, reflected a combination of norms. The equality principle underlied the call for a freeze in NO_x emissions by the end of 1994, using as the baseline the year 1987 or any previous year, thus leaving room for crediting pre-1987 emission reductions. In case a country selected a year prior to 1987, its average annual NO_x emissions in the period from 1987 to 1996 must not exceed its 1987 emission levels.[20] Twelve parties to the Protocol committed themselves to unilateral 30% reductions in their NO_x emissions. Also endorsed was the criterion of "critical loads", entailing differentiated percentage reductions in relation to the vulnerability of each country's ecosystem (s) to acid deposition. In subsequent discussions within the ECE, two additional criteria were adopted as the basis for negotiating new protocols on SO_2 and NO_x reductions : the relative costs of reducing emissions in different countries ; and the relative contribution of a given country's emissions to acid deposition in other countries, or "source-receptor relationships."[21] Together, these three criteria tend to impose greater percentage reductions on heavily polluting states, save stales with excessive pollution control costs from undertaking extensive reductions, and reward control and reduction measures undertaken previously.

Another illustrative example is the arduous negotiations resulting in the European Community's Large Combustion Plant (LCP) Directive of 1988. The eventual success of these talks is largely explained by the adoption of a mix of norms reconciling the opposing British and German positions which had dominated the negotiations. The initial drafts of the Directive were modeled on German legislation, and called for emission limits based on best-available technology only (Haig, 1989). Such limits won the support of environmentally activist countries for removing the unfair conditions of competition and unfair allocation of emission reduction costs resulting from their own higher and costly levels of environmental protection (Boehmer-Christiansen and Skea, 1991). However, the formal EC Commission proposal of 1983 over which negotiations began called for equal percentage reductions by all member states. It stipulated a 60% reduction in SO_2 emissions, and a 40% reduction in emissions from NO_x and particulate matter, from large combustion plants by 1995 based on emission levels in 1980. The United Kingdom, supported by less industrialized states, found this proposal one-sided and unfair : It was viewed as failing to take account of the high costs of compliance for countries with a dependency on the

coal industry or otherwise high emissions, emission reductions achieved in the 1970's, and cuts in emissions from smaller plants. The ensuing stalemate was partly overcome by a Dutch proposal that countries undertake different percentage reductions based on an elaborate set of criteria. The Directive as finally adopted ruled that all new power plants must be fitted with the best available abatement technology. NO_x emissions were to be reduced first by 20% and then by 40% no later than 1993 and 1998 respectively, with adaptations made for individual states as needed. The UK was to reduce its SO emissions in two stages, to reach the 60% target by 2003. A number of exceptions cut the costs of agreement for less industrialized member countries and the UK. For example, the emission limits could be renegotiated or surpassed for a transitional period in cases of excessive costs of control technologies, technological problems with plants, difficulties with the use of indigenous or essential sources of fuel, and unforeseen and substantial changes in the supply of certain fuels or energy demand.[22]

The preceding discussion has already pointed to how *a combination of internal, external and impartial criteria* has been used in the last few years to forge agreements. The need for such formulas is obvious, if further SO_2 and NO_x emission reductions in Europe are to be at once environmentally effective and sufficient, economically efficient, and fair in the distribution of gains and burdens. A wider range of factors must be considered than a single type of criteria can possibly capture. Recent proposals for achieving greater emission reductions through "cost–sharing" thus combine external principles (proportionality, compensatory justice) with internal criteria (notably the idea that countries should gain to about the same extent from regulatory agreements, despite their disparate resources and contributions to the acid rain problem).[23] It has also demonstrated that in this case, the 'Hobbesian' notion of *justice as rooted solely in compliance with power–based agreements* is inapplicable. European acid rain negotiations have certainly reflected prevailing power relations to some extent, but ethical considerations have also shaped their course and outcome. Moreover, the parties appear never to have regarded the duty to comply as separate from the terms of the agreements or from the process by which they were reached.

In sum, negotiations over acid rain (and many other environmental problems) involve central and unavoidable issues of justice and fairness. An important condition underpinning this reality is the interdependence stemming from the transboundary nature of the problem and the absence of sharp power asymmetry in important respects. National emission reduction plans cannot separately attain targets which are sufficient environmentally on a regional

scale or for several (victim) countries. If coordinated multilaterally abatement strategies can also be implemented at much lower cost for Europe as a whole and for several individual states. It is an area in which conventional sources of power and coercive measures often prove to be of little use in inducing compliance from "weaker" (economically less developed) countries. These countries often exercise veto power since their non-cooperation—as heavy polluters or potential polluters, for example—threatens to render any agreement ineffective. At the same time they have much interest in using negotiation to secure, among other benefits, new financial and technical resources in exchange for undertaking abatement measures. Thus virtually all parties to the European acid rain negotiations are required or motivated to consider seriously each others' perspectives on fair and acceptable options, and to accept reasonably balanced agreements.

The Israel-PLO interim negotiations

Force and the predominance of power have determined much of the course of the Arab-Israeli conflict to date. Throughout the history of the Middle East peace process, the international community and the parties themselves have also stressed the need to negotiate a permanent solution based on justice and mutual consent. The last three years of arduous negotiations between Israel and the Palestine Liberation Organization (PLO) within the framework of the Oslo Declaration of Principles, signed by Yizhak Rabin and Yassir Arafat on the White House lawn in September 1993, is no exception. The text of the Oslo Accords and the subsequent interim agreements, and statements by Israeli and the PLO officials alike, assert the importance of several principles of justice and fairness, including those endorsed in United Nations Security Council 242 and various General Assembly Resolutions. Former Israeli Prime Minister Shimon Peres, a key architect and driving force behind the Oslo Accords, has emphasized that only a solution which does justice to all parties, and avoids rectifying one side's wrongs at the expense of the other side's rights, can be durable (Peres, 1993). At the same time Jewish and Muslim extremists, responsible for the assassination of Yizhak Rabin and the recent surge in suicide bombings inside Israel, respectively, have proved their determination to derail the peace process, convinced that negotiation and compromise cannot serve the cause of justice.

The Oslo Declaration of Principles, based on the secret Israel-PLO agreements worked out in Norway, established a staged approach and a timetable for reaching a permanent settlement. Firstly, negotiations would result in Israeli military withdrawal from Jericho and the Gaza Strip, the transfer of power to a nominated Palestinian National Authority, and the beginning of a

five-year period of interim Palestinian self-government under this Authority. Secondly, a Palestinian Council would be elected and early "empowerment" achieved for the Palestinians in the rest of the West Bank, through self-government in five spheres. Thirdly, negotiations on a permanent solution—including to the issues of Jerusalem, Jewish settlements, refugees and final borders—would begin by April 1996 but have been delayed. The negotiations leading to the signing of the Gaza-Jericho Agreement in May 1994 achieved the first objective. The signing of the Taba Agreement (Oslo II) in September 1995 set the stage for a partial implementation of the second goal : Palestinians gained full control over six main West Bank towns and administrative responsibility for almost the entire Palestinian West Bank population, and a Palestinian Council was elected in January 1996.[24]

Have the Israel-PLO interim talks merely been dictated by the sharp power asymmetry between the two sides, and confirmed references to principles of justice and fairness as empty commitments for public consumption ? Have these negotiations been devoid of any moral content and largely witnessed the weak capitulating to the demands and interests of the strong, as some analysts argue (Said, 1995 ; Usher, 1995 ; Ashrawi, 1995)? If the terms of the Oslo Accords and the interim agreements reflect the existing imbalance of bargaining power, does this mean that they are unjust ? As the reviewed literature suggests, the answer is far from obvious: It depends on what measuring rods and particular conceptions of justice are applied.

The interim talks raised both narrow (contextual) and broad (external) issues of justice and fairness. The narrower ones concerned fair and reasonable interpretation and application of the principles set out in the Oslo Declaration serving as the framework for the talks. They naturally influenced the course of the negotiations considerably, and help to explain both the deadlocks and the eventual outcome. And they became prominent owing to the vagueness or silence of the Declaration on several core questions, some of which inevitably arose in the interim talks while formally deferred to the final status negotiations. While the Declaration holds that the interim arrangements may not prejudice the outcome of the permanent status negotiations, the parties knew that exactly the opposite would be true for what was agreed in some instances (including on water, discussed below). The broader ones involved principles of international law and distributive justice, which were incorporated into the texts of the Oslo and interim agreements. As endorsed by the Palestinians these principles led to a questioning of the legitimacy of the Oslo peace process itself, but barely influenced the actual course or outcome of the interim talks.

• *The dynamics and outcome of international negotiations reflect the distribution of bargaining power between parties; justice lies in the compliance with negotiated agreements.*

In the interim talks over the implementation of the Oslo Declaration, which endorsed de facto Israeli control over the West Bank and Gaza as the starting point for negotiations, Israel conceded considerably on a few issues. The declared right of Palestinian Jerusalemites to "participate in the election process" became a right not only to vote but also to stand as candidates (if they had a second address outside the city). The original Palestinian demands regarding the size and powers of the elected Palestinian Council were largely met.[25] Despite Israel's earlier objections the Taba Agreement accorded Palestinian villages in the Jerusalem area the same status as other West Bank villages in placing them under Palestinian civil rule, and thus may have tarnished Israeli plans for a 'Greater Jerusalem' (Albin, 1997). On the whole, however, the asymmetry in bargaining power between Israel and the PLO became apparent. A most contested issue was Israel's conservative understanding of the nature of its military redeployment required under the Declaration. Apart from the withdrawal from Gaza, the Jericho area and several other population centers in the West Bank which was undertaken, Article XIII, para. 3 of the Declaration called for "[f]urther redeployments to specified locations...commensurate with the assumption of responsibility for public order and internal security by the Palestinian police force...".[26] It also held that the interim period should preserve the integrity of the West Bank and Gaza as a single territorial unit. In fact, the areas from which Israeli forces redeployed and over which the Palestinians gained full control in the Taba Agreement are scattered and constitute only 4 % of the land of the West Bank. As for Hebron Israel enforced the view that it be exempted from the principle of Israeli redeployment outside Palestinian population centers, owing to the small number of Israeli settlers who live in the heart of the town.

Among the numerous questions covered in the Israel–PLO interim talks, the negotiations over water are particularly indicative of their treatment of justice and fairness issues. Since 1967, owing to its own limited supplies, Israel has taken maximum advantage of its control over the natural water supply in the West Bank. Over–pumping from Israeli wells, including newly created ones, combined with restrictions on pumping from Palestinian wells and on the drilling of new Palestinian wells, have led to a steady decline in the volume of usable water available to the Palestinians (over one million) in favor of Jewish settlers in the West Bank (about 100,000 people) and the Israeli population as a whole. Currently Palestinians receive about 110 million cubic meters (mcm) or

less than 20% of the West Bank water supply, while Israel draws about 490 mcm and has a three to four times greater per capita consumption. The severe shortage forces Palestinians to buy additional water from Israelis al a high price (much higher than that given to Israelis), continues to hamper the development and productivity of Palestinian agriculture and the Palestinian economy in favor of Israel, and thus contributes to unfair competition and unfair trade relations.[27]

The importance of cooperative and sustainable management of water resources (irrespective of their territorial location) to Middle Fast peace and security is indisputable. The Oslo Declaration of Principles called for an Israeli–Palestinian committee to work out arrangements for "...cooperation in the management of water resources in the West Bank and Gaza Strip and...the equitable utilization of joint water resources" in and beyond the interim period.[28] Water became a central issue in the negotiations leading up to the 1995 Taba Agreement. It was agreed that a joint committee be established to manage the water resources in these territories and thus protect "the interests of both parties."[29] The most difficult part of the talks concerned water allocation. In early September 1995 Shimon Peres, then Israel's Foreign Minister, made some decisive concessions. Following media exposure of the grossly unequal water distribution between the 120,000 Palestinians and 400 Jewish settlers living in Hebron, Peres agreed to allocate an additional 2,000 cm daily to the former. Overall he undertook to increase the annual water allocation to Palestinians by 28 mcm. Furthermore Israel expressed an intention to ensure long–term growth in the availability of water resources for Palestinians, specifying that it would have to come from new supplies developed with international assistance rather than from a reallocation of existing supplies reserved for Israeli consumers.[30]

It may thus appear as if the talks on water were influenced by concepts of justice and fairness, at least on the surface. However, as in other phases of the Israel–PLO interim talks, the existing situation was through the framework of the Oslo Declaration endorsed as a legitimate starting point for negotiations and the exchange of concessions. Therefore the interim agreements on water and many other issues barely took account of or compensated for past events and activities which contributed to the predominance of Israeli power. Among these are Israeli practices in the territories occupied since 1967 which are illegal according to international law and prevailing international opinion, such as the exploitation of water and other natural resources and Jewish settlement on confiscated land at the detriment of the indigenous Palestinian population (Quigley, 1995). The Palestinians stressed the applicability of legal principles under the Hague and other conventions to matters such as their own water rights (Al Musa, 1996). In the Taba negotiations Israel consented to joint

management and "equitable distribution" of water resources located in the occupied territories only, at a low cost to itself. Palestinians agreed to share these resources once taken from them and from Jordan by force, even after the end of the Israeli occupation, not because of a change in their notion of justice but because of the need to improve their current status of having no say at all.

Key Israeli participants do not consider the interim talks unprincipled or amoral. Their notions which pervaded the negotiations are reminiscent of some of the discussed Hobbesian and Realist arguments about justice. The Oslo Declaration of Principles is considered legitimate by virtue of having been agreed by Palestinians and Israelis acting in their own interest. Moreover, the principles reflect a situation which was largely brought about by Israel acting in self-defense against Arab armed aggression, and it should be maintained until Israeli security requirements can be guaranteed by other means (Hirsch et al., 1995 : 15-16 ; O'Brien, 1991). The Oslo principles thus provided a rightful framework for the interim talks. The genuine issues of justice and fairness arising in the talks concerned matters of applying and adhering properly to the letter and intent of the Oslo Declaration (Singer, 1996). They did not and could not in Israel's view concern matters on which no definite commitments were made in the Oslo Declaration, such as the questions of continued Jewish settlement in the occupied territories and Israeli exploitation of West Bank water resources. An influential Israeli participant throughout the interim talks, the lawyer Joel Singer, maintains that they were unique and that there are no clear international legal norms by which they could be judged ; moreover, interpretations of international law are politically biased.[31] To recall a Realist notion of morality the behavior of Yizhak Rabin and his team (which drew heavily on the military), and the initial decision to negotiate with the PLO, were certainly driven by a sense of national duty and concern about Israel's national security interests (Slater, 1993 ; Makovsky, 1996).

• *What is a just and fair outcome ? Internal (contextual) vs. external and impartial criteria.*

Israel thus held (and promoted) largely internal and contextual notions of justice and fairness in the interim talks, defined within the existing Israel-PLO power relations. Israeli negotiators stress how much the Palestinians have already gained from the Oslo peace process.[32] Whether the Oslo Declaration of Principles and the bargaining positions of the parties were a legitimate starting point from which just and fair outcomes could result is debatable. If the only criteria are mutual agreement and mutual gains (over a state of non-cooperation), objections are unlikely. However, if conditions are placed on the

structure and process of negotiations which can be taken to be legitimate, the Israel–PLO interim talks may not fulfill them.

It is impossible to determine with precision and objectivity the extent to which the talks violated particular conditions endorsed in the literature (e. g., Gauthier, 1986 ; Shue, 1992). Part of the Israel PLO power inequality has certainly resulted from Israeli activities and resource acquisitions which made the Palestinians weak, vulnerable and dependent. It is far more difficult to determine exactly which activities if any were necessary under the circumstances (for example, to avoid a deterioration of the Israeli security and economic situation), which of the captured resources had a legitimate owner in the first place, and of what any compensation would consist. The continuation of Israeli settlement and land confiscations in the territories contributed an element of threat and coercion to the talks, thus transgressing the discussed impartial criteria : These activities constantly increased the costs of non–agreement to the Palestinians and limited their actual ability to counter Israeli proposals (Khalidi, 1996). Unless they accepted certain terms and did so soon, Palestinians risked being even worse off than they were before negotiations started while Israel would have further fortified its position.[33] However, if negotiation can correct past injustices and prohibit the use of threats only as far as it still affords *all* parties net benefits from an agreement (and if pragmatism is essential to any meaningful notion of justice), the interim talks appear far more legitimate.

Palestinians have criticized the Oslo Accords and the interim talks on impartial grounds. They hold that the continuation of Israeli settlement in the occupied territories not only violated international law and the spirit of the Oslo principles, but also prejudiced future bargaining over the final status of these lands and constantly pressurized them to give in to Israeli demands. A freeze on settlement activity would have been a requirement for fair negotiations. For both genuine and tactical reasons, Palestinians have also emphasized principles external to the mandate of the interim talks in presenting their claims (Sayigh, 1996). Virtually all Palestinians agree that their historical presence and land holdings in Mandatory Palestine, and the usurpation of their national rights through Israel's territorial expansion by military conquest and enforced occupation, are such that a genuinely just solution requires a return to the pre–1948 situation and the creation of a binational state. All major PLO factions agreed to compromise on justice in this sense when they endorsed the 1988 Algiers Declaration of Palestinian Independence and a two–state solution (Khalidi, 1996). Similarly, most Palestinians have accepted UN Resolution 242 and the existence of Israel in the hope that this could restore at least some of

their national rights—including an independent Palestinian state in the occupied territories, removal of Israeli settlements, and a right of return for Palestinian refugees.

Even if a return to the pre–1948 and even the pre–1967 state of affairs is no longer realistic, Palestinians argue they should minimally be used as references for assessing their losses over time and the extent to which current Palestinian negotiating positions already incorporate large concessions to Israel (Said, 1995). The interim talks may have improved their conditions in the 1990s, but using these as some neutral starting point in negotiations is viewed as unjust historically and legally and as an unfair exploitation of Palestinian weaknesses. Thus there is a consensus among Palestinians that the Oslo peace process cannot result in a just or fair settlement (and many doubt that it can even produce a minimally acceptable solution). The differences of opinion concern whether it is preferable to be "pragmatic" and retrieve some losses, however small, through that process rather than keep to their principles and risk losing even more.

These external criteria of justice and fairness are essential in explaining the unprecedented splits within the Palestinian community which the Oslo Accords and the interim agreements have created, and hence some fragility inherent in these achievements. However, they do not explain well the negotiating behavior of the Palestinians who participated in the interim talks. The question of what a just and fair solution would require did not guide their crucial moves. Despite frequent tactical and rhetorical references to legal and ethical principles, the Palestinian negotiators were ultimately driven by pragmatic considerations of what they realistically could achieve given their weakness (Sayigh, 1996; Singer, 1996; Khalidi, 1996). They remained acutely aware of the need to make large concessions to move the Israelis. Insisting on their criteria of justice, or on a fairer interpretation of some of the Oslo principles, would have been likely to result in further losses and even greater injustice. Palestinian disadvantages included not only a constantly deteriorating BATNA, and (related to this) the deferral to the permanent status talks of the issues most significant to them and Israeli control over the resources being negotiated. Poor coordination, consultation and bargaining strategies among Palestinian negotiators, fragile support within their own community and the financial crisis of the PLO, and their lack of a powerful patron to offset the largely unconditional US support of Israel's approach to the peace process, were other significant factors (Sayigh, 1996; Makovsky, 1996).

The Israel–PLO interim negotiations is a thus case in which there were *no shared notions of justice or fairness to guide the discussions*. Ethical issues were both underlying currents and central questions in these, but were defined very

differently by the parties. *These conflicting concepts of justice and fairness were not part of the decisive bargaining, or balanced and reconciled in the agreements.* The outcome came to reflect Israeli principles and interests extensively and, at least according to much of the international community and the Palestinians, past and present injustices inflicted upon their people. It is precarious to attempt to measure the extent to which the interim agreements merely mirrored the asymmetries between the two sides. Israelis and Palestinians—and Israelis and Palestinians among themselves—came to interpret and evaluate the same concessions differently, and their actual significance will not become clearer until the permanent status talks are well underway.[34] The baseline (time period) in reference to which the gains, losses and concessions of each party should be assessed is also questionable.

Concluding comments

In the international negotiations here discussed, there was a definite place for justice and fairness given the nature of the questions covered. But justice and fairness have played very divergent roles in European acid rain negotiations and the Israel–PLO interim talks. Among the numerous differences between the two cases, the sharp power asymmetry in the latter case provides a major explanation. In the former instance the notions of justice and fairness of all parties have been at the heart of the negotiation process, and have overlapped with mutual interest and mutual gains in arriving at effective agreements. In the latter Israel's interests and principles have dominated the negotiation process and the agreements : The Palestinians have been too weak to infuse their notions of justice and fairness into the crucial bargaining, and in part also unwilling given that an implementation of them would remove all incentives for Israel (and the United States) to take part. Contrary to much of the theoretical literature, both cases suggest that a single or precise measure of a just and fair outcome is rarely used in international negotiations. The parties to the European acid rain negotiations and the Middle East interim talks have relied on a combination of internal, external and impartial criteria in forging, judging and accepting or opposing agreements. To the extent the actual notions of parties practicing negotiation provide important information about the meaning of justice, the use of internal criteria alone appears particularly unsatisfactory in a situation of power asymmetry. In such a context negotiation cannot be assumed to produce just or fair outcomes in any meaningful sense unless certain requirements are fulfilled (or justice and fairness are simply defined in terms of the prevailing balance of forces). The positions and BATNAs of the parties, accepted at face value as the referents against which the fairness of particular

concessions and bargains is assessed, are likely to reflect relative strength rather than differences in entitlements to or need for the disputed resources. And the actual veto power of a weaker party may be insufficient to secure a principled or balanced settlement. Similarly, as the Israel–PLO case demonstrates, a situation of sharp power inequality may leave little motivation for a solely impartial approach. Finally, the exclusive use of external standards may conflict with the basic requirement that successful negotiation be mutually beneficial.

For those concerned with gaining a better understanding of justice and fairness in international negotiations, propositions from the theoretical literature contribute useful suggestions and general insights (descriptive and prescriptive). The vast majority are too demanding to examine empirically with any precision or certainty. In addition, while undoubtedly relevant to some cases they either claim universal applicability or fail to specify the conditions under which justice and fairness play the proposed roles. Further study of practice is essential if we are going to improve our knowledge of two central issues: when and how ethical values actually affect international bargaining, and how that effect could be strengthened without removing the element of mutual gains as the engine running negotiations. To the latter question, the widespread phenomenon of asymmetrical negotiations in the international arena poses particular challenges.

NOTES

1 There are no exact or generally accepted definitions distinguishing 'justice' from 'fairness' (see, for example, Barry, 1965, and Rawls, 1971). It is nevertheless useful to think of these concepts as existing at the macro–and the micro–levels, respectively. Justice here refers to *distributive justice*; to general standards for allocating collective benefits and burdens among the members of a community (local, national or international). Such standards typically exist independently of any particular allocation problem, bur their exact meaning and application in specific contexts are often ambiguous. Notions of *fairness* are individual judgments of what is reasonable under the circumstances, often in reference to how some principle of justice regarded as pertinent should be understood. Parties naturally tend to view and refer to their own notions of fairness as "justice"—as criteria reflecting some higher ethics going beyond partisan perceptions and interests, and situational factors. An outcome may of course be just in being in accordance with a general distributive principle, but unfair in how the principle has been applied; or fair to a group of parties at the micro–level but unjust in a wider (e. g., international) sense.

2 An overview of this literature can be found in Albin (1992).

3 This literature maintains persuasively that typical 'Realist' arguments about the inapplicability of morality and justice to state conduct and inter–state relations do not hold. These arguments

point to the different rules of conduct and notions of morality among states (the absence of a shared moral purpose and of agreed ethical criteria) ; the absence of a supranational authority capable of enforcing or ensuring compliance with norms ; and states' inevitable tendency to serve their own interests and define moral obligations narrowly in terms of duties to their respective peoples. Barry (1989b) notes that such arguments are based on real conditions in international affairs which exist also in interpersonal and intersocietal relations, without for that matter eroding the actual role which morality plays in those relations, and that widely accepted international norms (moral and legal) are indeed generally observed in the international arena. States usually adhere to norms because doing so rarely interferes with the pursuit of their own ends. Rather, it tends to serve their interests in an age of international interdependence.

4 These criteria effectively remove differences in interests and power from negotiations. Unlike many negotiation scholars, game theorists in particular, Rawls argues : "We cannot take various contingencies as known and individual preferences as given and expect to elucidate the concept of justice (or fairness) by theories of bargaining" (Rawls, 1971, pp. 134–135). The need for a 'veil of ignorance' arises from the assumption that parties are driven by a narrow interest to maximize their own gains.

5 Equality in power is strictly speaking rare and difficult to calculate, and has even been termed "a myth" (Barry, 1965). As discussed, it is defined differently across different conceptions of justice. A minimalist view would hold that each party must lack the capacity to achieve its interests by unilateral means at acceptable costs, and have more to gain from cooperating and accepting some moral constraints than remaining in a Hobbesian 'state of nature' (Gauthier, 1986). A maximalist view would require perfect equality. For example, it is difficult to envision that the principles of justice which in Rawls's argument (Rawls, 1971) are chosen behind a 'veil of ignorance' would be selected or adhered to under different conditions. In the international arena, the inequality of states often means that cooperation must be on unequal terms to benefit and attract the interest of well–endowed states. A middle position holds that moderate power inequalities must not exclude a role for justice and fairness and may be reflected to some extent in negotiated agreements (Barry, 1989a). In this study power equality refers broadly to a situation in which each parry feels that there is sufficient equality to secure a 'fair share' of the disputed resources.

6 Some approaches define justice and fairness contextually within a given power relationship, as further discussed below.

7 These approaches recognize poorly that effective power in negotiation is often issue–or area specific. Thus they cannot explain how a structurally weak party can gain more or even "win" over a stronger parry, as has happened in many international negotiations. Zartman (1983 : 120–121) suggests, based on a number of cases, that the greater the structural imbalance between parries, the more likely it is that nonstructural elements will determine the outcome. These elements may include a firm commitment to certain values and goals, organizational unity, and tactics such as persuasive references to moral principles.

8 See Thomas Hobbes, *Leviathan,* edited by R. Tuck (Cambridge University Press, 1991).

9 Any gains to be had from 'cheating' (benefiting unfairly from the compliance by others) will be undermined by the long-term consequences of being excluded from future cooperative ventures. According to Hobbes, however, humans are unable to internalize this logic and to abandon voluntarily the short-term maximization of self-interest. Hence the need for a sovereign ruler to formulate moral codes, and enforce agreements on mutual constraints which leave all parties better off than in a stale of non-cooperation.

10 "Common-sense" morality upholds an obligation to adhere to norms only if and as long as enough people do so to keep the norms effective in serving their goals, while "utilitarianism" supports a greater obligation to comply as long as this benefits the purposes of the norms at all (Barry, 1989b). Hobbes held that compliance with an agreement is morally binding and rational only as long as the sovereign can ensure that *all* contracting parties in fact comply with it.

11 Shue (1992, p. 385) expresses a similar view in discussing the meaning or justice between developed and developing countries, particularly in negotiations over global environmental agreements : "*Justice is about ,not squeezing people for everything one can get out of them, especially when they are already much worse off than oneself... a willingness to choose to... accept only agreements that are fair to others as well as to oneself. Justice prevents negotiations from being the kind of rational bargaining that maximizes self-interest no matter what the consequences are for others. There are some bargains too favourable for a just person to accept. Justice means sometimes granting what the other party is in no position to insist upon.*"

12 Each party will thus make concessions based on the other's tendency to concede, rather than on calculations of relative power as in the 'Hobbesian' paradigm. Different interpretations and applications of the reciprocity norm include *equal concessions*, whereby comparable concessions are exchanged in reference to initial positions (Bartos, 1974); *equal sacrifices*, whereby concessions are made so that patties will surfer equally in their respective eyes (Kelley, Beckerman & Fisher, 1967); and *tit-for-tat* whereby a party matches the other's move in substance and scope, responding to toughness/softness with the same toughness/softness (Pruitt, 1981). In the case of *responsiveness to trend* each party makes concessions based on its evaluation of a series of moves by the other side (Snyder & Diesing, 1977), whereas with *comparative responsiveness* each party acts based on a comparison of its own and the other's tendencies to concede. The latter corresponds best to several actual cases of international negotiation (Druckman & Harris, 1990).

13 This approach overlaps considerably with the 'Hobbesian' view discussed earlier, but we will recall that the latter regards ethical values as inapplicable to the terms of a negotiated agreement.

14 Note that any proposed restrictions ultimately depend on the particular conception of justice which is adopted. Those discussed here are derived from the notion that justice only concerns the distribution of gains from mutually beneficial cooperation. By contrast Rawls considers all differences in power and strategic advantage as illegitimate influences on negotiation, which may (re-) distribute justly also the benefits from endowments originally held and resources acquired legitimately by parties.

15 Gauthier (1986) suggests certain circumstances under which 'past injustices' as here defined

may legitimately be reflected in agreements. Firstly, one party may exploit another party's resources if this is absolutely necessary to avoid *worsening* his own situation, or if adequate compensation is provided. Secondly, *mutual gains* from negotiation is viewed a practical necessity which ultimately must *override all other considerations whenever they are conflicting.* Thus, 'past injustices' should be corrected only as far as it is consistent with affording *all* parties net benefits from an agreement compared to a situation of non-agreement (Gauthier, 1986 : 229). For the confiscation of resources to be considered unjust in the first place the deprived party must be the legitimate owner of them (having acquired them through his own labor), and must have been using (or intended to use) them and have been affected negatively by them being taken away.

16 In his notion of 'impartial' justice, Barry (1989a) forcefully rejects the idea that the value of non-agreement points (BATNAs) should play any role in determining the nature of just distributions.

17 See, for example, Fraenkel (1989), Schneider (1992), Alcamo, Shaw and Hordijk (1990), Boehmer-Christiansen and Skea (1991), Chossudovsky (1988), and Carroll (1988). The discussion here draws partly on Albin (1995a).

18 "Positions and Strategies of the Different Contracting Parties to the Convention on Long-Range Transboundary Air Pollution Concerning the Reduction of Sulphur Emissions or their Transboundary Fluxes," August 6, 1985. Document ECE/EB. AIR/7.

19 The last-mentioned standard refers to deposition levels for sulfur and nitrogen above which significant harmful effects on specified sensitive elements of the environment (including forests, freshwater and fish) do not occur according to present knowledge. See "Economic Principles for Allocating the Costs of Reducing Sulphur Emissions in Europe." Report submitted by the delegation of the Netherlands to the Group of Economic Experts on Air Pollution, Executive Body for the Convention on Long-range Transboundary Air Pollution, UN Economic Commission for Europe, for the 5th Session, Geneva, 26-28 June 1989. EB. AIR/GE. 2/R. 26, 19 May 1989 ; and "Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes (November 1, 1988)," article I, para. 7 (reprinted in *Register of International Treaties and Other Agreements in the Field of the Environment*, 1991).

20 "Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes (November 1, 1988)." (Reprinted in *Register of International Treaties and Other Agreements in the Field of the Environment*, 1991.)

21 "The Critical Load Concept and the Role of Best Available Technology and Other Approaches." Report of the Working Group on Abatement Strategies, September 1991. Economic Commission for Europe EB. AIR/WG. 5/R. 24/Rev. 1.

22 "Council directive on the limitation of certain pollutants into the air from large combustion plants." Commission of the European Communities (December 7, 1988), 88/609/EEC. Brussels : *Official Journal of the European Communities*, L336.

23 These cost-sharing schemes involve redistribution of financial and technological resources

from richer to poorer polluting countries. They seek to make additional reductions in SO_2 and NO_x emissions, particularly in Eastern Europe, both fairer and more realistic. One such scheme suggests that GDP, GDP per capita, and national abatement costs determine contributions to and receipts from an 'Acidification Fund' (Sliggers and Klaassen, 1992). France, Germany, and the UK, among others, would through the Fund compensate for some of the high costs of emission reductions in countries such as Poland, Ukraine, and Romania. The latter would cover the remaining "reasonable" costs themselves in proportion to their GDP per capita. The plan would presumably motivate polluting countries to participate, but it might elicit support only from those major financial contributors which stood to gain on a national scale from emissions reductions being undertaken abroad, such as the Scandinavian countries. In another proposal the distributive criterion is by contrast relative gains from participation in a European cost-sharing fund, and every member therefore stands to gain (Bergman, Cesar, and Klaassen, 1992). The losses or gains of all member slates from further emission reductions are estimated, and they would receive money from the Fund or contribute to it accordingly.

24 "Declaration of Principles on Interim Self-Government Arrangements" (Israeli Ministry of Foreign Affairs, 1993); *Middle East International*, 6 October 1995, pp. 2-5; Boutwell & Mendelsohn (1995).

25 As far back as in the Washington Peace Talks (1991-1993), Israel insisted on the election of a small 12-member Palestinian 'administrative council' with limited municipal functions which would not come anywhere close to a Palestinian parliament. Elections eventually took place for a large, 88-member and far more empowered Palestinian council with both legislative and executive powers, which al present includes seven Jerusalemites.

26 "Declaration of Principles on Interim Self-Government Arrangements" (Israeli Ministry of Foreign Affairs, 1993), p. 26. The major Israeli argument was that the Palestinian police force had failed to assume such responsibility adequately.

27 *Middle East International*, 8 September 1995, p. 6; Boutwell & Mendelsohn (1995); Sayigh (1996).

28 "Declaration of Principles on Interim Self-Government Arrangements" (Israeli Ministry of Foreign Affairs, 1993), p. 31.

29 " Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip-September 28, 1995" (Information Division, Israeli Ministry of Foreign Affairs, Jerusalem, November 1995).

30 *Middle East Monitor*, Vol. 5, No. 10, October 1995, p. 2. The fact that Israel's interpretations and terms largely prevailed on the redeployment issue and caused extensive Palestinian resentment may explain its greater flexibility on the water issue, as well as on the questions of the Palestinian Council and East Jerusalemites in the elections (Sayigh, 1996; Khalidi, 1996).

31 Singer recognizes that a permanent solution to the water issue should take account of some common principles for the equitable distribution of water resources, such as proportionality and need. He stresses that such a solution can be worked out and such principles can be considered only in the final status talks once population sizes, the ultimate fate of the territories and borders are better known (Singer, 1996). However, while the Oslo Declaration states that the interim agreements may not prejudice the outcome of the final status talks, they will in

practice be influential and constrain the range of likely solutions to a number of questions.

32 Singer (1996) argues that the outcome of the interim talks do not simply reflect the distribution of gross power between the two sides. Indeed, a lesson to be learnt from this case is supposedly that the weak can turn their feebleness into strength by arguing, as Arafat did on several occasions, that further concessions or costs would be fatal to their survival.

33 This would frequently be defined as a bargaining situation involving unfair threats and coercion (e. g., Barry, 1965 : 86). In order for coercive tactics to have a place in fair bargaining, it is often argued that both parties must be in a position to use them and must recognize them as part of the game (see Lax & Sebenius, 1986).

34 For example, the concessions to East Jerusalemites in the interim talks can be viewed as a mere continuation of Israel's old strategies to appease them through limited political rights which do not undermine its sovereignty over the city. By contrast, some Israelis regard the concessions as a dangerous tampering with the status quo and even as the prelude to the establishment of a Palestinian capital in Jerusalem. Palestinians themselves have taken many opportunities to assert their political presence and national claims to the city, partly through institution-building.

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