CHAPTER 4

Focal Points and Salient Solutions

Jonas Brown and I. William Zartman

In his groundbreaking book *The Strategy of Conflict*, Nobel Prize-winning economist Thomas Schelling (1960: 67) noted "the remarkable frequency with which long negotiations over complicated quantitative formulas or ad hoc shares in some costs or benefits converge ultimately on something as crudely simple as equal shares, shares proportionate to some common magnitude (gross national product, population, foreign-exchange deficit, and so forth), or shares agreed on in some previous but logically irrelevant negotiation." This observation that even complex negotiations tend toward certain simple, conspicuous solutions—termed by Schelling "focal points"—suggests that negotiators stand to benefit from a thorough understanding of Schelling's insight. Therefore, the purpose of this chapter is to outline Schelling's loose argument and examine ways in which negotiators might tighten and usefully apply focal points and the related concept of focal principles to their craft. Two primary practical applications of focal

J. Brown (✉)
Middle East Institute, Washington, DC, USA

I. W. Zartman
School of Advanced International Studies (SAIS),
Johns Hopkins University, Washington, DC, USA
e-mail: zartman@jhu.edu

R. Schuessler and J.-W. van der Rijt (eds.), *Focal Points in Negotiation*,
https://doi.org/10.1007/978-3-030-27901-1_4

points are highlighted in this chapter: (1) their role in framing and reframing the issue(s) for the construction form of negotiation; and (2) their role in facilitating concession and compensation, the other forms of negotiation. The utility of focal points in streamlining multi-party, multi-issue negotiations is also examined.

There seems much consistency in the spirit and little in the letter of a definition of focal (salient) points, as Schuessler's chapter shows. In an attempt to simplify and so add to the confusion, the core element in recognizing a focal point is as "something that sticks out alone." Why it sticks out can vary widely and is partially dependent on the context. However certain characteristics combine to make it so. First, it is *unique*—there is only one.[1] It can be unique because it existed before, as a precedent or simply as status quo. That said, there may be other points "less focal" that compete with the one that stands out most. Second it is *simplified*. It can be rounded figure, where there is nothing after the decimal point and no details before. Or it can be mountains or rivers that clearly divide the topography. Third is its moral force of *fairness*, in that it does not heavily favor one side and provides an "envy-free" outcome, an embodiment of justice defined as equality (Schelling 1960: 73). Fourth is its *optimal* quality: it cannot be improved on, in its own terms.[2] As a result of these characteristics, focal points are primarily of use in the detailed phase of negotiations, when decisions are stalemated, capitulation would be face-losing, and some kind of neutral point is needed to close agreement. These characteristics reinforce each other, although as shall be seen they also may open as well as close further ambiguities and complexities. Related to focal points is the looser concept of focal principles. Unlike focal points, focal principles have a substantive meaning; like focal point they stand out because of their integrity and clarity. They tend to be simply few-word phrases that capture a guiding idea in the search for solutions. As such, they generally characterize the formula phase of negotiations and often embody the formula itself. In contrast to focal points, we use the terms salience and salient points for conspicuous outcomes that are not unique (except when commenting on Schelling). Hence, there can be several competing salient points in the same context.

[1] What happens when there is two or more will be discussed below.

[2] Schelling also suggests public opinion as a defining characteristic, but that sounds rather imprecise. If public opinion plays a role, it is in recognizing the four characteristics mentioned, here and by Schelling.

1 Schelling's *The Strategy of Conflict*: Focal Points

1.1 Focal Points in Tacit Coordination

Schelling sought to explain why, in games with multiple Nash equilibria, players tend to coordinate on certain solutions. He argued that "anything in a game's environment or history that focuses the players' attention on one equilibrium may lead them to expect it, and so rationally to play it. This *focal-point effect* opens the door for cultural and environmental factors to influence rational behavior" (Myerson 2009: 1111). "People *can* often concert their intentions or expectations with others if each knows that the other is trying to do the same. Most situations … provide some clue for coordinating behavior, some focal point for each person's expectation of what the other expects him to expect to be expected to do…. A prime characteristic of most of these 'solutions' to the problems, that is, of … focal points, is some kind of prominence or conspicuousness" (Schelling 1960: 57).

Schelling begins his explanation of focal points by explaining tacit coordination, which occurs when parties with a common interest cannot communicate directly, yet each knows the other is trying to coordinate. The phenomenon is illustrated using games, tested by Schelling in informal experiments, in which two parties attempt to arrive at the same answer without communicating. In a particularly famous example, two parties must choose a time and place to meet in New York City. In Schelling's informal experiments, without any discussion, a majority of respondents successfully made plans to meet up at Grand Central Station at noon. Other pairs were given a map with many territorial lines and a number of nondescript buildings but only one river and only one bridge; most chose to meet at the bridge. Between "heads" or "tails", most coordinated on "heads". Asked to divide up $100 into two piles in exactly the same way as their partner, most coordinated on the solution of dividing the money 50/50.

Focal points—or points of salience—are selected through a combination of imagination and logic. The choice of focal points, Schelling (1960: 58) writes, "depends on the time and place and who the people are". For example, given a problem that involves geometry, two laypeople may select a different focal point than would two specialists in mathematics due to the difference in the shared body of knowledge. "Uniqueness" is also a key

feature of focal points. On a map with many bridges but only one house (the opposite of the example above), the house becomes the focal point.

In tacit bargaining, communication is similarly limited or nonexistent, but the parties have divergent interests: "The problem is to develop a modus vivendi when one or both parties either cannot or will not negotiate explicitly or when neither would trust the other with respect to any agreement explicitly reached" (Schelling 1960: 53). Schelling is especially interested in the role of tacit bargaining as the means by which warring parties agree to limited war. For example, he seeks to explain how—without negotiations or overt communication—all sides in World War II reached a tacit agreement not to use poisonous gas on the battlefield. In tacit bargaining, an agreement is preferable to the status quo for both parties; however, the only possibility for an agreement is at the focal point, which is more beneficial to one party than the other: "The conflict gets reconciled—or perhaps we should say ignored—as a by-product of the dominant need for coordination" (Schelling 1960: 59). Schelling (1960: 60) conducted informal tacit bargaining experiments and found that "on the whole, the outcome suggests the same conclusion that was reached in the purely cooperative games".

The simplest of the bargaining games altered the "heads" and "tails" problem slightly to award Party A $3 and Party B $2 if both coordinated on "heads," while awarding Party B $3 and Party A $2 if both coordinated on "tails." 68% of the pairs—much greater than the predicted random result of 50%—coordinated on "heads" even though it was a sub-optimal result from Party B's perspective. Schelling (1960: 60) explains this outcome as follows: "[A]mong all the available options, some particular one usually seems to be the focal point for coordinated choice, and the party to whom it is a relatively unfavorable choice quite often takes it simply because he knows that the other will expect him to. The choices that cannot coordinate expectations are not really "available" without communication. The odd characteristic of all these games is that neither rival can gain by outsmarting the other. Each loses unless he does exactly what the other expects him to do …. The need for agreement overrules the potential disagreement, and each must concert with the other or lose altogether."

1.2 Focal Points and Explicit Bargaining

Schelling proceeds to argue that focal points retain their power even in cases of explicit bargaining, in which they are important "for their power to

crystallize agreement" (Schelling 1960: 68). Some aspect of the tacit coordination achieved in the above experiments persists in explicit bargaining because focal points provide a way for the parties to coordinate "intuitively perceived mutual expectations" (Schelling 1960: 71). If one examines carefully the influence exerted by concepts such as public opinion, precedence or moral standards in bargaining situations, Schelling argues, one is likely to find that this influence is largely due to the role these concepts play as focal points: It is difficult if not impossible to say what solution is objectively fair, but because certain solutions offer themselves as fair according to popularly perceived social norms—for example, the common solution to "split the difference"—they possess salience (Schelling 1960: 73). As Dixit (2006: 222) writes, "[F]ocal points can help the parties avoid the mutually bad outcome of no agreement. That may be why 50:50 division is observed so often … and similar conventions apparently override explicit rational calculation to determine the outcomes of many social interactions."

A key point here is that a focal point possesses its own persuasiveness and thus imparts bargaining power to the party who stands to benefit most from a solution based on it: "The 'obvious' place to compromise frequently seems to win by some kind of default, as though there is simply no rationale for settling anywhere else" (Schelling 1960: 69). Effective analysis of negotiations, Schelling argues, requires that one remain attuned to "the 'communication' that is inherent in the bargaining solutions, the signals that the participants read in the inanimate details of the case. And it means that tacit and explicit bargaining are not thoroughly separate concepts but that the various gradations from tacit bargaining up through types of incompleteness or faulty or limited communication to full communication all show some dependence on the need to coordinate expectations. Hence all show some degree of dependence of the participants themselves on their common inability to keep their eyes off certain outcomes (Schelling 1960: 73).

2 Focal and Salient Points in Diplomacy

2.1 Numerical Focal and Salient Points

The most "mindless" use of focal points is to enable an agreement between two positions, each of which has some justification, by picking some midpoint between them and thereby losing any intrinsic justification. The only

reason for focality is that it breaks deadlock by being neither one position nor the other. Frequently such compromises are split-the-difference, halfway in between; at other times, they are some other round number, especially if halfway would yield a cumbersome fraction. Split-the-difference concession convergence usually occurs on numerical issues. While such issues are the epitome of detail bargaining, they are often the numerical translation of opposing formulas that have not been decided on the level of principles and so are left for resolution in their detailed expression.

A double use of salient points was found in the final 1996 bargaining over on-site inspections authorization in the Comprehensive Test Ban Treaty (CTBT) negotiations, the US held firm to a an obvious salient point–simple majority vote of 26 of the Council's member states to authorize an inspection, the minimum and therefore easiest to obtain, as an expression of its preference for an intrusive formula, while China held equally firm to another salient point: two-thirds (34 member states), identifying it as a make-or-break issue over a protective formula. Seeking to get a positive outcome to the negotiations, China finally budged and proposed three-fifths (31); finally, the difference splitting figure of "at least 30" was adopted (art. IVD46) (Johnson 2009: 135, 170). There was no general principle to justify this compromise provision but it stood out clearly as the winning focus. When the 1987 Montreal Protocol on CFCs was amended in 1990 to include compensation for developing countries, the cost was apportioned "according to the UN assessment scale," the obvious focal point as in many other UN-related cost allocations (Barrett 1999). In the haste of nailing down the final agreement to end the Vietnam War after the Christmas bombing of Hanoi in 1972 and the presidential inauguration in 1973, a number of details were settled by splitting the difference (Zartman 1976: 391–392).

2.2 Geometric and Natural Boundaries

Geodesic and natural boundaries as solutions to territorial disputes represent straightforward examples of salient solutions requiring little explanation. The division of Korea at the 38th parallel following World War II, roughly splitting the peninsula in two, is perhaps the most famous border ever determined by a parallel, but there exist many others. Unfamiliar with the territory they were dividing in Africa, the colonial powers relied

on parallels and meridians as they drew up the borders of Africa; "44 percent of [African borders] are straight lines that either correspond to an astrologic measurement or are parallel to some other set of lines" (Herbst 1989: 674–675). "A large proportion of … geometrical boundaries in a region is a strong indication of absentee boundary-making on the basis of inadequate maps." (Jones 1971: 108). However, most of the geodesic boundaries cut across sparsely inhabited areas with little defining topography, so straight lines were an apt solution; the longest are in the Sahara. The Anglo-American Convention of 1818 drew the western section of the American-Canadian border along the 49th parallel, quite the opposite case. The 49th parallel replaces "54.40 or fight", a line less salient because it is not a round number and—for other reasons—it only applied to the Pacific Northwest. The simplest case is when neither side is associated with either salient point. After the Korean War, an invisible line on the ground made visible by artificial fortification along the 38th parallel in 1945 was replaced by a battle line established by the force of arms. Germany was divided alone the Oder and Neisse rivers.

Mountains and rivers, "the walls and moats of history," offer an alternative salient solution to territorial disputes (Zartman 1965a: 155). Rivers account for about a quarter of the boundaries in North and West Africa (Zartman 1965b: 157). Jones (1971: 108) writes: "There are numerous reasons why rivers have been adopted as boundaries. They are conspicuous on maps of poorly explored countries, while other features, even major mountain systems, may be missing." Interpreted figuratively, this comment is an apt characterization of all salient solutions: They are the lines that present themselves on otherwise blank maps: They stand out. Following the first Indochina War, the Vietnamese Demilitarized Zone was widely referred to as the 17th parallel but in practice followed the Ben Hai River. The 17th parallel was not visible on the ground but the Han River was: it was "more salient," thus reinforcing the original notion.

A group of Ukrainians were arguing about what to do with the eastern part of the country. After deciding the two populations could not live together, they turned to defining the border. "Let Kiev remain there in the west; it's not a problem in principle," said one. "No, all the way to Kiev," said another. "Fine, along the Dniepr [just east of Kiev]; left bank is theirs, right bank [with Kiev] is ours." With that agreement on a salient point, that incidentally put lots of non-Russian Ukraine in the east, they turned to the means. "Either a sea of blood and corpses, or a referendum; there is no third way." A salient point that beat content with its focality, and a

hopefully clear choice between two salient solutions solved the problem for the group (Chivers and Sneider 2014). In a similar situation in Libya, "An Islamist-dominated Congress will find it extremely difficult to reach a negotiated settlement with Jathran given his renowned animosity to the Muslim Brotherhood. Jathran's rebels have vowed to hold the Red Wadi, in what some see as a de factor partition of Libya" (Stephen 2014).

Sometimes the focal or salient point is not a natural occurrence but something emerging from history. Like the new battle-line replacing the 38th parallel in Korea, a line where opposing sides met their stalemate consecrated by a ceasefire takes on its own salience. In Kashmir, the Line of Control stands as a potential compromise between two competing total claims (Zartman 2005: 54).

2.3 Precedents and Salience

In their analysis of multi-party negotiations of international environmental regimes Young and Osherenko (1993: 14) emphasize the role that precedent can play in coalescing agreement among numerous parties. "The emergence of salient solutions or focal points that have the power to shape expectations increases the probability of success in institutional bargaining. Success is often linked to the ability of those formulating proposals to draft simple formulas that are intuitively appealing or to borrow formulas or approaches from prior cases with which negotiators may already be familiar." An example of this dynamic was the multi-party North Pacific Sealing Convention of 1911, which relied heavily on the precedent set by two recently signed bilateral (US–UK and US–Canada) agreements in organizing a sustainable sealing regime that would last into the 1980s: In exchange for cessation of pelagic sealing, Canada, a pelagic sealing state with no rookeries, had been compensated with a portion of the land-based harvest of the rookery-owning state. The application of this principle to the other major actors (Japan and Russia) in the closing stages of the 1911 negotiations helped to assure the commitment of all five actors (including Canada). The series of previous bilateral agreements provided the actors with both experience and confidence that aided in the successful conclusion of the 1911 agreement (Mirovitskaya et al. 1993: 43).

When a party finds the salient solution highlighted by precedent constraining, it may seek opportunities to discredit the precedent by drawing attention to an alternative salient solution. The Ecuador-Peru border conflict, in which Ecuador sought recognition of its sovereign access to the

Amazon River, is one such example. In 1942, both parties had signed the Rio Protocol, which formally demarcated 95% of the border according to the Status Quo Line of 1936 at a loss to Ecuador of about 5000 square miles (Simmons 1999: 10). Sections of the border that remained in dispute were to be allocated based on arbitration. However, on the basis of aerial photography taken in 1946, Ecuador asserted that the Rio Protocol had underestimated the size of the Cenapa River watershed (contributing to the loss of land for Ecuador) and in 1960 announced that the Rio Protocol was null and void. In this case, Ecuador attempted to turn aside precedent by drawing attention to the salience of a natural feature. In addition, Simmons writes, Ecuador sought to link its case to alternative precedents that would support its rejection of the Protocol and the associated arbitration process: "Following its rejection of the arbitral award and the protocol, Ecuador made a conscious effort over time to link its position to analogous cases of arbitral rejection in the region: the Argentine position on the 1977 Beagle Channel arbitrations and the Venezuelan position on the 1899 Essequibo decision regarding Guyana, for example" (Simmons 1999: 11).

3 Problems with Focal Points

A problem with a focal point is *weak focality* or salience (Crawford et al. 2008). It may not be as focal as all that. Rivers and mountains exhibit varying degrees of prominence and clarity. They may be small or unclear. French boundary-makers separating Mauritania from Soudan (Mali) seized upon a river as a natural line and were told its name was *wadou,* which they did not realize was the generic name for an intermittent river and therefore was the name of many gullies in the area (Zartman 1963). The Sudan-Egypt border, a geodesic line across the desert (and the Nile) amended to take traditional tribal areas in its eastern end, leaps from mountain top to mountain top in small straightline segments.

Or for all its focality, a focal point might contain some unfocalizing ambiguities. Rivers, for example, are dynamic entities that change seasonally and take altered courses year to year. Wide rivers may contain islands; which side do the islands belong to? In the United States, "river boundaries have caused more friction between states … than have mountain boundaries or geometrical lines" (Jones 1971: 109). Even as a salient solution to a territorial dispute, a river boundary therefore often requires secondary negotiations on the precise location of the boundary within or along the river. As the following diagram (Fig. 1) shows (Jones 1971: 111), a river contains

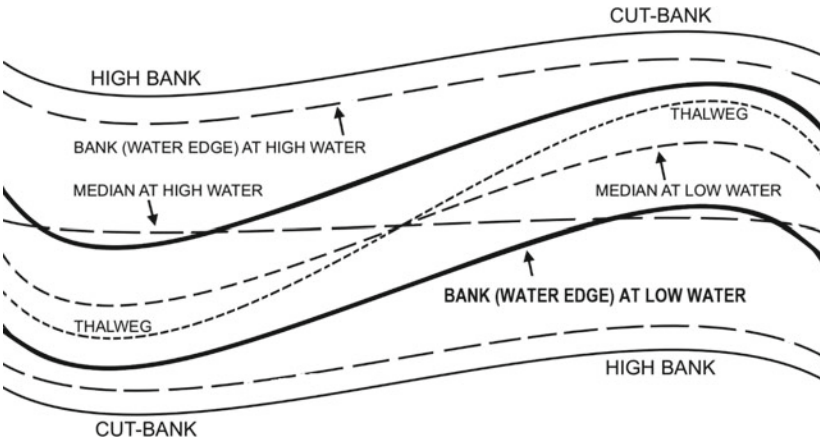

Fig. 1 Different salient solutions within a river

within it a whole new set of potential salient solutions, from the median point at high or low water to the bank edge to the thalweg. Liberian President Tubman eagerly accepted the Ivory Coast proposal that the boundary between them run along the right bank of the Cavally River, only to discover that banks are identified looking down stream and he had given over the river to his neighbor (Zartman 1963). Jones proceeds to criticize the use of river boundaries as a kind of lazy cartographic shorthand that is likely to lead to further disputes and ought to be the last resort of boundary-makers. Thus a focal point may not necessarily be a clear or lasting solution; it may not so much finalize negotiations as provide a new basis for negotiations, which may require a new salient solution. Still, the river often stands out as unique, even if not clear in detail. There is no more salient boundary for the US and Mexico than the Rio Grande, at least until the Gadsden Purchase.

Similarly, there may be several points of equal salience. There may be several rivers or mountain crests, or rivers may vie with mountains for the greater saliency. Rivers and geodesic lines competed for authority in conflicting claims among early American colonies or states before and after Independence. And multiplicity is not only found in geography. The face-off between the National Party (NP) and the African National Congress (ANC) over an important point in the negotiation of a pre-constitution agreement came when the NP, afraid of the ANC's ability to rally votes,

insisted on a 75% vote, against the ANC's proposal of 66%, two round figures. The NP moved down to 70%, which the ANC still refused, until the ANC and NP lead mediators met in the men's room and, in a moment of relief, the NP spokesman said, "Sixty-six percent," to his fellow negotiator's surprise (Zartman 1995: 162; Sisk 1995: 210). The German cry after the Franco-Prussian war was "Rheinfluss nicht Rheingrenze" ("Rhine river [valley], not Rhine border"). When the straight-line boundaries of southeast Algiers and of southwest Egypt ran into a mountain in the desert, they climbed them, then went ahead on their straight-line ways.

A particular problem arises out of the repeated use of a salient solution as a guide to process. If split-the-difference is offered as a final solution, as is usually considered to be the case, it cuts all further bargaining. But if split-the-difference is taken dynamically, its finality falls before its own principle (Cross 1978: 21). One party can offer a split-the-difference solution, but the second can then offer to split the difference between that offer and his original position, moving in his favor from the .50 point to the .75 point. Such was the risk that Morocco ran in proposing autonomy as a compromise between its original demand of total integration and the Polisario's demand for independence. Later, a well-meaning commentator offered a proposal that split the difference between autonomy and independence by suggesting joint sovereignty (Roussellier 2013).

4 Focal Principles

Focal points stand out "because it's there" to be perceived, but they may also stick out because they represent a principle. Split-the-difference or 50% embody an inherent notion of fairness seen as equality; mountain crests and river are obvious as boundaries in themselves but also represent a natural separation of populations. Focal principles are not always expressed in lines or numbers but more often as short substantive statements containing an idea. However, unlike the points, principles are usually only salient (Scott 1967: 173; Zartman 2005) for their succinct expression of substance and are neither unique nor accidental; they stand out *because* they encapsulate a principle. Indeed, it is often because the principle wears out in application that a point is evoked. As such, salient points tend to useful in the detail phase of negotiation and salient principles in the formula stage, and are often expressions of the formula itself. "Territory for security" is a salient principle; so is "national self-determination," "polluter pays," "net cost,' and even "equity" or "equality."

For all their focalizing effect, salient principles are not unequivocal. To take "equality" as an example: there are many interpretations of equality. It can refer to equal (or parity) distribution in which all parties have an equal share, or equal access to or chances at a share, but also to inequality (or proportionality) in which outcomes are allocated in order to equalize by some criterion, generally either by equity (or merit), or by compensation (or need) in which they who have least get the most in order to attain equality (Zartman et al. 1996). But also, inequalities can be equalized by compensation with other items. Further, equality merely passes the decision on to the referent question: "equal or equalizing based on what?" For example, in arms control negotiations, the US and the Soviet Union agreed easily on the principle of equality but struggled to agree on whether the principle of equality should be applied to missile quantities, missile types, defense sites, or other referents (Zartman 2008). The question that loomed over the SALT negotiations was how the principle of equality should be applied to asymmetric force structures (Zartman 2008: 77). In the SALT II negotiations, justice was located in the equalization of aggregate numbers of different types of armaments. The effort to maintain equality with unequal force structures led to attempts to find a new formula based on compensatory (unequal) justice, but the power of the equality notion worked to limit the notion of inequality.

The negotiations to restrict emissions that harm the ozone layer, which resulted in the Montreal Protocol of 1987 and the London Revisions of 1990, demonstrate the range of salient points that can emerge as potentially just solutions (Zartman 2008: 73). The issue could be framed as one of equal individual rights, with each person allocated a certain legal amount of ozone-harming emissions. Another option would be equality of states, whereby all countries, whatever their current level of industrialization, would reduce their emissions by the same amount. Alternatively, countries could be asked to reduce emissions by an equal percentage of their current output. The final agreement on the ozone then called for a fixed percentage cut in CFCs for industrialized countries, a ten-year moratorium on compliance combined with financial and technical aid for developing countries, and an ultimate ban on all CFC production by a target year. It was a negotiated compromise between inequality principles of equity for industrialized countries and compensation for developing countries, working to an equality principle for all.

5 Problems with Focal Principles

Focal points are precise and brook no argument, although it has been seen that they sometimes open up to further ambiguity. Focal principles, on the other hand, are the subject of interpretation even if their authority is fully admitted. Their focalizing effect is to pass on the debate to questions of application and interpretation. But their use also raises other problems. Many intractable conflicts feature *two salient solutions*, each supported by a focal principle. The result is a Prisoner's Dilemma, in which both parties choose noncooperation over cooperation despite the costs, posing a coordination problem where both positions represent a focal principle and each side wants its solution in its entirety. To make matters worse, the parties may adopt polarized identities that reflect this zero-sum dynamic. Two examples of competing focal solutions are the Nagorno-Karabakh and Kashmir conflicts (Zartman 2005: 53–54). In Nagorno-Karabakh, Armenia and the Karabakh Armenians view self-determination as the focal principle while Azerbaijan finds the focal solution in territorial integrity. Mediated attempts to locate a new salient solution characterized by political autonomy and Armenian withdrawal have been unsuccessful because the disputed territory "necessarily falls on one side or the other of the 'crest of sovereignty,' whatever the softening effects of a new status might be: there is no in between" (Hopmann and Zartman 2013: 3). Opposing parties seek to locate opposing precedents to suit their causes. In the Nagorno-Karabakh conflict, Armenia and the Karabakh Armenians cite the legal precedent for the "self-determination of peoples" (highlighting the specific recent precedent of Kosovo) while Azerbaijan emphasizes the legal precedent for the "territorial integrity of states," both of these conflicting precedents drawn from the Helsinki Final Act. Similarly, Kashmir belongs in India by the choice of its local ruler but in Pakistan by the religion of its inhabitants; the "line of control," as noted, provide a "split the difference" with only a salient principle to support it, even though it has provided a de facto solution for seventy years.

Another problem can arise when a *single focal solution is exhausted or delegitimized* by previous misuse or failure. When a focal principle has been found to guide a peace process and the ensuing single focal solution breaks down, the people tend to feel betrayed, convinced that the other party is simply incapable of making peace; instead of trying the apply the principle again under improved circumstances, it is rejected completely Examples include Jonas Savimbi's rejection of elections as a means to settle the conflict

in Angola after he lost the previous elections in 1992, the decay of the Oslo process and its two-state solution for Palestine, and the failure of federation as a salient solution in Sudan after the federation failed in 1978 and finally in 1984. The Israel-Palestine case raises the important question of how to rehabilitate a failed salient solution in the absence of reasonable alternative solutions (Makovsky 2013).

6 Using Focality in Negotiation

As shown, difficulties can arise in the use of focal and salient points and principles in the search for a diplomatic solution. Although it is always challenging to translate concept into practice in any instance, salience is often the starting point and the conclusion of a process of creativity. A number of strategies present themselves.

In a situation of competing salient principles, the challenge is difficult when the two parties are stuck in a stalemate, but not impossible. Three options can be considered: (1) to establish the greater salience, (2) to combine the multiple salient solutions into a single compromise solution, or (3) to reframe the problem by altering perceptions of the existing alternatives. The first removes the problem—definitional and political. The other two are customary challenges to negotiation in the absence of a new salient principle. In Aceh, "self-government" proved more salient than either independence or integration; in the Western Sahara, it is still possible that autonomy provide a principled alternative to the same both options.

Although a court ruling differs from negotiation (and often follows failed negotiations), the parties' arguments and the court's decision-making process demonstrated how negotiation, as a joint decision-making process, often requires choosing between—or integrating—competing salient solutions. The difference is that in negotiation the parties come together, whereas in a court case a third party arrives at the integration by itself. One case in particular, the ICJ's June 1985 demarcation of the border between Libya and Malta, clearly indicated this dynamic. First, the court explicitly stated that potential salient solutions stemming from precedent and status quo arguments would not be acceptable: "The Court observes that no decisive role is played in the present case by considerations derived from the *history of the dispute,* or from legislative and exploratory activities in relation to the continental shelf" (ICJ 1985). The court then acknowledged the parties' "irreconcilable" salient points. Malta sought an agreement that would divide the sea between the Libyan and Maltese coasts equally, while

Libya sought a division based on the physical geography of the sea floor, citing a natural "rift zone" in the continental shelf as the appropriate border. While agreeing on the importance of an "equitable" solution, Libya argued against the principle of equality, in part by noting its much larger coastline (192 miles long compared with 24-mile Maltese coast). Citing yet another potential salient solution, Libya argued that the division of the sea between the two nations should reflect the proportional difference in length of coastline. The court's final decision was largely based on the latter argument, and the boundary was drawn closer to Malta than Libya.

This case shows how geographic features (continental shelf and coastline) interact with other salient solutions based on the concepts of precedence, status quo, equality, and proportionality to frame the issues that are under negotiation. To reach its final decision, the ICJ first had to decide between two salient definitions of the continental shelf: whether it was defined mathematically as a specific distance from shore and could therefore be divided or whether it was defined by its physical dimensions and was therefore indivisible. After selecting the former definition, the court then chose a basis (proportionality) for dividing the shelf between the two nations.

6.1 Framing and Reframing: Defining the Conflict

Effective use of focal or salient points and principles shifts the locus to the negotiation phase where the parties are engaged in identifying the problem. The search for an outcome depends on how the problem is formulated and on what analogies or precedents the definition of the bargaining issue calls to mind, elements generally associated with the first phase of negotiation—diagnosis (Schelling's 1960: 69; Zartman 1963). In other words, one key to achieving success as a negotiator is to frame the problem in such a way that an appropriate salient principle for a solution is agreeable to both parties and defines to each party's preferred outcome. Framing and reframing are the means by which the parties meet the challenge of successful construction of a new solution, and the framing process itself often provides an answer to the problem of reaching the newly formulated solution (Kahnemann and Tversky 1982; Stein 2019).

The two-way relationship between focal or salient principles and framing—principles suggest frames and frames suggest principles—implies that they can be used together to serve negotiators in two different ways: (1) Framing can be viewed as a campaign of persuasion designed to draw

attention to a predetermined, potential principle that is favored by the negotiator; and (2) (often from a mediator's perspective) framing can be a more indeterminate act that creates space for a collaborative reconceptualization of competitive principles. In either case, it is vital that the negotiator remain aware of how parties are framing the negotiation, how these frames imply certain focal principles, and how the negotiation might be reframed to expose new mutually agreeable outcomes. This awareness is particularly important in the pre-negotiation (diagnosis) and formulation phases.

The first situation, in which parties frame the conflict to highlight their preferred salient principles, is so commonly encountered in both positional and integrative bargaining that it needs little elaboration. The maritime border dispute between Libya and Malta mentioned above represents one particularly clear case. As the smaller state, Malta viewed its optimal outcome as an *equal* division of the continental shelf along the median line between the two countries (the 50/50 solution). Libya, in contrast, argued that an *equitable* solution entitled it to the majority of the continental shelf based on two possible rationales: (1) the natural rift in the continental shelf just south of Malta and (2) the far greater length of its coastline. Both parties employed a combination of legal precedent and political rhetoric to frame the conflict such that its favored solution became the "conspicuous" solution. The failure of negotiations necessitated the court case, which ultimately dismissed "natural prolongation" yet awarded Libya a greater share of the shelf based on proportionality. The mediator can reinforce the new frame and demonstrate its potential to reinvigorate the negotiations by setting a new constellation of (in this case, economically oriented) salient points on the table to replace those (in this case, sovereignty-oriented) salient points that have been exhausted.

The important interaction between reframing and salient principles was also demonstrated in negotiations between Canada, Denmark/Greenland, Norway, the Soviet Union and the United States aimed at establishing a new conservation regime to address the declining population of polar bears. After five years of scientific coordination and drafting and two years of political preparations, the final negotiations were in danger of stalling due to the conflicting jurisdictional concerns of the five countries (Fikkan et al. 1993: 110). The principle question was how to define national jurisdiction in a way that would match all five parties' national interests and also regulate polar bear populations that regularly crossed international boundaries (both over land and at sea on circulating ice flows).

The five drafts assumed that the subject was the prohibition of polar bear hunting in international waters, with regulation within national jurisdictions left to the states. This distinction required a definition of the boundary between national and international waters, a distinction that had become controversial in the early 1970s in the preparations for the UN Conference on the Law of the Sea. Any definition among the five ice states on the polar bear matter might constitute risky precedents affecting larger interests in the broader UNCLOS negotiations. Furthermore, the five states sought different levels of legal protection for the polar bears and different terms of exemption for native hunters (Fikkan et al. 1993: 120–121). The Soviet Union loosened this legal knot by reframing the issue in simple "status quo" terms: In all areas currently inhabited by polar bears, hunting would be banned, with exception for traditional hunters in all places where traditional hunting had existed in the past. The proposal resorted to historical precedent to cut through interminable debate on legalistic criteria (Fikkan et al. 1993: 132). The issue had initially been framed in legalistic terms that raised further jurisdictional issues and provided no simple solution now found consensus in a single clear focal principle.

6.2 Making and Coordinating Concessions: Breaking Stalemates over Ambiguous Expectations

Tacit and explicit bargaining often lead to similar results because even in explicit bargaining, the parties are tacitly coordinating their expectations. Negotiations tend to arrive at a zone of possible agreement (ZOPA) within which each party would rather make a concession than fail to reach agreement at all but would also seek to move the other to a more favorable point (Schelling 1960: 70). When both parties are willing to concede something in order reach an agreement, the result is an impasse that stems from the sheer multitude of possible outcomes and from competing efforts within the range. "The final outcome must be a point from which neither expects the other to retreat; yet the main ingredient of this expectation is what one thinks the other expects the first to expect, and so on. Somehow, out of this fluid and indeterminate situation that seemingly provides no logical reason for anybody to expect anything except what he expects to be expected to expect, a decision is reached. These infinitely reflexive expectations must somehow converge on a single point" (Schelling 1960: 70).

In this common bargaining situation, both focal points and focal principles have a role. A focal point has the power to facilitate agreement on

the details of a deal. A focal point, with its "intrinsic magnetism," may permit one party to take a strong stand in a particular bargaining position, providing a reason to stand firm at a point along the continuum of qualitatively undifferentiable positions that contain no inherent rationale. "The rationale may not be strong at the arbitrary 'focal point', but at least it can defend itself with the argument 'If not here, where?'" (Schelling 1960: 70). In other words, focal points facilitate concessions. A focal point provides a "groove" where a party can dig in its heels (Schelling 1960: 70). Because focal points possess their own inherent stability, a party can concede to a focal point—for example, from 55 to 50%—without signaling that it is willing to concede further. A concession to 49%, on the other hand, suggests that the concessions may continue; a commander can retreat to a river without opening himself to further retreat.

The function of focal and even salient points in facilitating concessions is apparent in the case of negotiations on wealth sharing between Khartoum and the Sudan People's Liberation Movement/Army (SPLM/A). The rebels initially demanded that the southern administration receive 60% of oil revenues from oil producing wells in the south, while Khartoum demanded 90% (Paris AFP 2002). In the 2004 agreement on wealth sharing signed in Naivasha, Kenya, 50% of revenues were allocated to each party (UN Mission in Sudan 2004), giving both parties—which both sought a deal amidst ambiguous expectations—a place to "dig their heels in." In another case, the unusual focal point of 49–51 governing the division of territory in Bosnia between the Serbs and the Bosnian-Croat Federation expressed the balance of forces—almost even if not quite equal. "At one point [Swedish negotiator Carl] Bildt ran into [Serb president Slobodan] Milosevic…and found him 'desperate'. 'Give me anything,' he said, 'rocks, swamps, hills—anything, as long as it gets us to 49-51'" (Holbrooke 1998: 302).

In other situations, more than simply a valueless point may be required to escape from the morass of the ZOPA; a substantive reason or arguments may be required to provide a point of agreement from which the parties can craft their solution. Such need for a focal principle need not occur only in the formula phase but also in the concluding phase where parties still have no guideline for establishing details. It is a not infrequent situation where the parties agree that they want to agree but have no common indication as to where. In the negotiations on the North American Free Trade Agreement (NAFTA), the automotive sector was a subject of intense haggling because of different interests of the three parties. "By May 1992, the

detail phase has already begun," but after eleven months of the parties were still searching for a criterion on which to base the details. After debating several criteria, the notion of "net cost" was finally accepted at the end of the month as a focal principle, and the parties could turn to consider the threshold for the rules of origin. Canada was willing to go higher than the 50% figure contained in the earlier US-Canada Free Trade Agreement but not more than 60%; the US asked for 65%. "The Canadians could not be seen as capitulating to the Americans [after having already gone up 10 per cent], so a 65 per cent level was out of the question. We ended up with 62.5 per cent" (Roberts 2000: 192, 203, 204). A focal principle had set the stage for a focal point; both were necessary for agreement. In dealing with the pharmaceutical issue, the presence of a package for full patent protection announced at the end of 1991 by GATT director general Arthur Dunkel provided a focal principle about which to build consensus. "The detail phase, which began in the spring of 1992, and 'legal scrubbing', benefitted from the fact that the negotiators were using the Dunkel Text" (Roberts 2000: 242).

6.3 Salience and Facilitating Concessions in Multi-Issue Bargaining

Salient points and principles have a particular role in facilitating convergence of expectations in multi-party talks. "The influence of salience lies in its capacity to facilitate the convergence of expectations in international bargaining involving numerous parties operating under a consensus rule" (Young and Osherenko 1993: 14–15). For an exploration of this question, the Law of the Sea negotiations provide a useful case study. A brief examination suggests that in multi-party, multi-issue talks salient points are applied both as framing devices and facilitators of concessions. First, the parties highlight certain salient points in an attempt to frame the issue according to their own interests. Then the parties use salient points to facilitate concessions that will permit a convergence of their positions. These concessions permit a gradual whittling down of the number of competing salient points. Since these negotiations address a broad range of issues, the parties are likely to collectively arrive at multiple salient points, which are eventually packaged together in a single deal.

The UN Conference on the Law of the Sea (UNCLOS) used salient principles and points in an attempt to reach agreement on national maritime boundaries, among other issues. In the seventeenth century, Grotius

asserted that states were entitled to jurisdiction over waters that could be policed from land, while the remainder of the sea was to be left free according to natural law. This concept evolved into the Netherlands' cannon shot rule, which stated that no leader "could challenge further into the sea than he can command with a cannon." (Sanger 1987: 12). The law was interpreted differently by different nations, with the US and Great Britain eventually claiming a territorial sea three miles wide, France a territorial sea six miles wide, and Russia a territorial sea twelve miles wide (Sanger 1987: 13). When (mainly European) states met at the Hague Codification Conference of 1930 to attempt to formalize the law, maritime powers such as Great Britain pushed for a permanent, universal 3-mile limit to territorial waters, despite the existence of modern weaponry with a range well beyond 3 miles. "The cannon shot justification of the cannon shot salient point was stretched to breaking by Louisiana and Texas in 1938 and 1941 laws claiming 27 miles into the Gulf of Mexico on the grounds that artillery could fire that distance" (Sanger 1987: 22).

As a maritime power, Great Britain sought a modern law based on Grotius's natural law of freedom of the seas; therefore, its negotiators sought to highlight the age-old 3-mile territorial sea as historical precedent. However, other parties were not easily dissuaded from their own goals, and the negotiations that proceeded sporadically for the rest of the twentieth century were in no small part a contest to frame the negotiation by selecting certain precedents over others. By the time of the Hague conference, countries were claiming jurisdiction over territorial seas of varying breadth for different reasons: "for national security …, for control over fisheries, for customs purposes, and for more general civil and criminal jurisdiction" (Sanger 1987: 13).

After failing to reach an agreement at the Hague, negotiations over territorial waters resumed in 1958 at the First UN Conference on the Law of the SEA (UNCLOS-1) (Sanger 1987: 14). Following the Hague meeting, a new precedent had been set by the United States in the Truman Proclamations of 1945, which claimed "'jurisdiction and control' over the natural resources of its continental shelf and also claimed the right to establish fishing conservation zones in parts of the high seas adjacent to its coast" (Sanger 1987: 14). As a natural feature, the continental shelf represented a new salient point that meshed with the American interest in highlighting the continuity between the coastal sea and the continental land mass, with the goal of maximizing its access to natural resources. Because the

continental shelf is irregular, the US later defined the shelf in fixed numerical terms: the 200-meter depth line, which reached as far as 250 miles from shore. Although arbitrary, the 200-meter depth line quickly became a standard shorthand for the continental shelf and, therefore, a new focal point.

Another debate arose when Latin American nations sought "sover eignty" over the continental shelf whereas West Germany sought to award nations "rights" over the continental shelf. Using the "split the difference" focal point to facilitate mutual concessions, they invented a new, vague term halfway between their positions: "sovereign rights." This is an apt example of a focal point that does not provide a final solution but instead a blurry accommodation destined to become a new starting place for further negotiations.

In 1945, the US had favored expansive jurisdiction because it had been primarily concerned with fisheries and oil extraction. By 1958, it was preoccupied with Cold War security concerns and alarmed that Latin American countries were claiming vast territorial seas based on an American precedent. Reframing the issue as one of the "freedom of the seas," the US now sought the smallest possible definition of territorial waters—a three-mile belt—so Polaris submarines could freely patrol the Mediterranean. However, in the 1956 Suez Crisis the Arab states had closed the Straits of Tiran to Israel by claiming a twelve-mile territorial sea, and these same states now formed a coalition with the USSR and East European states that refused to consider any agreement limiting territorial waters to under six miles (Sanger 1987: 16). The twelve-mile definition aligned with the Arab states' security concerns and with the Russian precedent.

After the failure at UNCLOS-1, Iceland unilaterally claimed a restricted fishing zone extending twelve miles from its shores, and four Middle Eastern states unilaterally claimed 12-mile territorial seas (Sanger 1987: 17). Therefore, by UNCLOS-2 in 1960, the 3-mile precedent no longer represented a viable focal point. The American and Canadian "6-6" proposal now represented the narrowest remaining option for the territorial sea. Latin American countries agreed with the proposal on the condition that they would be able to extend the restricted fishing zone beyond twelve miles. However, the USSR/Eastern Europe/Arab state coalition held firm, and the agreement failed to achieve a two-thirds majority by one vote.

At UNCLOS-3 in 1974, The Single Negotiating Text was used in an attempt to find consensus, and special interest groups formed, each group framing the negotiation to match its preferred salient point (Sanger 1987:

31–33). Coastal States were "territorialists" seeking to offset the influence of the maritime powers and claim a territorial sea 200 miles wide. The Margineers, a much smaller group, claimed a potentially larger territorial sea that extended to the limits of the "natural prolongation" of the land territory. An Environmental group highlighted the damage to beaches caused by marine pollution. With nothing to gain from a wide territorial sea or restricted economic zone, the Land Locked and Geographically Disadvantaged States sought to maintain the freedom of the seas to the greatest possible extent. The Gang of Five—the United States, the Soviet Union, Britain, France and Japan—met "to plan tactics on their common concerns, particularly freedom of navigation and freedom of scientific research" (Sanger 1987: 32).

Eventually, the majority of parties reached agreement on a twelve-mile "contiguous zone" in which countries could restrict international fishing, but they could not agree on how much of this belt would be a territorial sea. The US and Canada offered a compromise to the USSR and the Arab States, in place of a 12-mile territorial sea proposing territorial waters to six miles (the French precedent), followed by a six-mile fishery zone. No agreement on territorial seas or restricted fishery zones could be finalized at UNCLOS-1.

In these multi-party, multi-issue talks, the parties attempted to draw attention to preferred salient points by framing/reframing the negotiations in a manner that emphasized their own central interests. Salient points gradually came to serve as centers of gravity around which coalitions formed, and the eventual agreement on a Law of the Sea—the final details of which are beyond the scope of this paper—was reached through a complex process of prioritizing, trading, locating compromises between, and packaging these competing salient points. In addition to facilitating the formation of interest groups, which simplified the process by minimizing the number of parties, salient points streamlined the negotiations by narrowing the number of potential solutions.

In many conflicts, one uniquely focal solution emerges and exerts a pull on the parties. In such cases, the challenge—whether the parties are negotiating alone or under the guidance of a mediator—is to find a way to meet at the focal point (Zartman 2005: 53). In some cases, as in the case of Korean unification, there may be "no way to get there" in the short term due to the parties' attachment to the status quo (Zartman 2005: 54).

7 Conclusion

Focal and salient points are, of course, but one of many factors that together shape the result of a given negotiation process. Nonetheless, negotiators clearly stand to benefit from developing an awareness of the influence that salience exerts on the negotiating process. In the formula phase, focal or salient principles of substantive content are important for constructively framing the conflict and potential solution; when negotiations reach an impasse, unique, simple fair points have great authority in cutting through otherwise disoriented debate. Especially in cases where the parties possess relatively equal bargaining power, the bargaining power inherent in salient points can be accessed to facilitate concessions. Salient points can also make multi-party, multi-issue bargaining more manageable by facilitating coalition-building and narrowing the number of solutions under consideration. Unique focality, however, is an elusive element: some points are more focal than others; some saliencies need merely open further negotiations on their specific application, whereas others establish a new frame or formula from which to proceed in new, creative directions.

References

Barrett, S. "International Cooperation for Sale" (Mimeo London Business School, 1999).

Chivers, C. J. and Sneider, N. "Behind the Masks in Ukraine". *New York Times* 4 May A15, https://www.nytimes.com/2014/05/04/world/europe/behind-the-masks-in-ukraine-many-faces-of-rebellion.html (2014).

Crawford, V. P., Gneezy, U. and Rottenstreich, Y. "The Power of Focal Points Is Limited: Even Minute Payoff Asymmetry May Yield Large Coordination Failures". *American Economic Review* IIC 4 (2008): 1443–1458.

Cross, J. "Negotiation as a Learning Process". In *The Negotiation Process*, edited by I. W. Zartman, 29–54 (Beverly Hills, CA: Sage, 1978).

Dixit, A. "Thomas Schelling's Contributions to Game Theory". *Scandinavian Journal of Economics* CVIII 2 (2006): 213–229.

Fikkan, A., Osherenko, G. & Arikainen, A. "Polar Bears: The Importance of Simplicity." In *Polar Politics: Creating International Environmental Regimes*, edited by O. R. Young and G. Osherenko, 96–151 (Ithaca: Cornell University Press, 1993).

Herbst, J. "The Creation and Maintenance of National Boundaries in Africa". *International Organization* XXXIII 4 (1989): 673–692.

Holbrooke, R. *To End a War* (New York: Random House, 1998).

Hopmann, P. T. and Zartman, I. W. eds. *Negotiating Karabagh, Conflict Management Program* (SAIS-The Johns Hopkins University, 2013).
ICJ. "Libya-Malta Maritime Border Case". *International Court of Justice* (June) (1985).
Johnson, R. *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing* (Geneva: UNIDIR, 2009).
Jones, S. *Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissioners* (New York: Johnson Reprint Corporation, 1971).
Kahneman, D. and Tversky, A. *Judgement Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982).
Makovsky, D. "A Threshold Test for Both Sides if Peace Has a Chance". *New York Times* March 27 (2013).
Mirovitskaya, N., Clark, M. and Purver, R. "North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict." In *Polar Politics: Creating International Environmental Regimes*, edited by O. R. Young and G. Osherenko, 22–55 (Ithaca: Cornell University Press, 1993).
Myerson, R. "Learning from Schelling's Strategy of Conflict." *Journal of Economic Literature* IIIL 4 (2009): 1109–1125.
"Rebel Official Says Peace Talks Deadlocked on Wealth, Power-sharing". *AFP* 17 November, http://search.ebscohost.com/login.aspx?direct=true&db=awn&AN=AFR-2002-1117-011&site=ehost-live&scope=site (2002).
Roberts, M. *Negotiating NAFTA* (Toronto: University of Toronto Press, 2000).
Roussellier, J. "Morocco's Two-Track Approach to the Western Sahara Conflict". *Carnegie Endowment for International Peace, Sada Analysis*, September 24 (2013).
Sanger, C. *Ordering the Oceans: The Making of the Law of the Sea* (Toronto: University of Toronto Press, 1987).
Schelling, T. *The Strategy of Conflict* (Cambridge, MA: Harvard University of Press, 1960).
Scott, A. *The Functioning of the International Political System* (New York: The Macmillan Company, 1967).
Simmons, B. *Territorial Disputes and Their Resolution: The Case of Ecuador and Peru* (United States Institute of Peace: Peaceworks No. 27, 1999).
Sisk, T. *Democratization in South Africa* (Princeton: Princeton University Press, 1995).
Stein, G. J. "Facing Impediments; Prospecting." In *How Negotiations End: Negotiating Behavior in the Endgame*, edited by I. W. Zartman (Cambridge University Press, 2019).
Stephen, C. "Partition of Libya looms". *The Observer* 16 March, www.theguardian.com/world/2014/mar/16/Libya-partition-looms-fight-oil-tanker (2014).
United Nations Mission in Sudan "The Protocol on Wealth Sharing." May, http://unmis.unmissions.org/Default.aspx?tabid=515 (2004).

Young, O. R. and Osherenko, G. "The Formation of International Regimes: Hypotheses and Cases". In *Polar Politics: Creating International Environmental Regimes*, edited by O. R. Young and G. Osherenko, 1–20 (Ithaca: Cornell University Press, 1993).

Zartman, I. W. "A Disputed Frontier is Settled". *Africa Report* VIII 8 (August) (1963): 13–14.

Zartman, I. W. "Negotiating the South African Conflict". In *Elusive Peace: Negotiating an End to Civil Wars*, edited by I. W. Zartman, 147–174 (Washington, DC: Brookings, 1965a).

Zartman, I. W. "The Politics of Boundaries in North and West Africa". *The Journal of Modern African Studies* III 2 (1965b): 155–173.

Zartman, I. W. "Reality, Image and Detail: The Paris Negotitions 1969–1973". In *The 50%Solution*, edited by I. W. Zartman, (Garden City: Anchor Doubleday, 1976).

Zartman, I. W. "Negotiations in SouthAfrica". In *Elusive Peace: Negotiating an End to Civil Wars (Brookings)*, edited by I. W. Zartman, (Brookings, 1995).

Zartman, I. W., et al. "Negotiation as a Search for Justice". *International Negotition* I 1 (January) (1996): 79–98.

Zartman, I. W. "Analyzing Intractability". In *Grasping the Nettle: Analyzing Cases of Intractable Conflict*, edited by C. A. Crocker, F. O. Hampson and P. Aall, 47–64 (Washington, DC: United States Institute of Peace Press, 2005).

Zartman, I. W. *Negotiation and Conflict Management: Essays on Theory and Practice* (New York: Routledge, 2008).