Knowledge Constitutive Interests and the World Wide Web: Can the Internet Be an Emancipatory Medium?

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Abstract: The Internet has great potential as a medium for social change in international relations by providing a forum where ideas can be explored, transmitted, and archived in real time. In order to answer the question, “can the internet become an emancipatory medium?” two bodies of literature must be evaluated: Habermas’ work on cognitive interests, discourse, and communicative action, and the metatheoretical approach to international relations called constructivism. By evaluating these two literatures, one can examine the potential of the Internet both as a “medium for emancipation,” a tool used to liberate people oppressed by political or economic structures, and as an “emancipatory medium,” a forum by which those structures can be critically examined in our construction of social reality. This study examines the possibilities and barriers for the Internet, yields guidelines for evaluating web site content, and presents conclusions about the potential and reality of the Internet.

Introduction

The Internet has great potential as a medium for social change in international relations. It provides a forum where ideas can be explored, transmitted, and archived in real time. People and groups can publish their ideas and make known their struggles without the editorial filters of traditional publications. The Internet makes such publications available to millions of viewers at a minimal cost. E-mail and web sites can also be used to rally and organize activists. The Internet’s communications technologies make discourse possible that builds consensus and thus speeds the process of reconstructing international relations and our society at large. Yet, the Internet may not be the panacea for social change and reconstruction that many would hope. The digital divide prohibits access to Internet technology based on class and income. The Internet’s reliance on centralized servers and communications networks permits those with political power to intercept messages for surveillance and to censor information. Authorship of web sites can sometime be obscure, concealed, or fabricated, making it difficult to evaluate the intent and validity of claims made on the sites.

Can the Internet be an emancipatory medium in international relations? Addressing this question first requires a theoretical and conceptual definition of emancipation in relation to international relations. This definition is found in two bodies of related literature – Jürgen Habermas’ work on cognitive interests, discourse, and communicative action, and the metatheoretical approach to international relations that has come to be known as constructivism. Framing the discussion in light of these two literatures allows for examining the potential of the Internet both as a medium for emancipation and as an emancipatory medium. To be a medium
for emancipation is to be a tool for liberating peoples oppressed by political or economic power structures. To be an emancipatory medium is to provide a forum by which those structures can be critically examined and altered in our construction of social reality. The semantic difference in these two goals belies their obvious connection. One liberates people while the other liberates theory and practice. To succeed at one without the other is, ultimately, to fail at both.

This study introduces paths to answering its question. It proceeds by first examining the conceptual definitions of emancipation and emancipatory interests in the work of Habermas and his critics and the recent literature on social constructivism. Next, the study examines the possibilities for and barriers against emancipatory interests on the Internet. It is hoped that this examination will yield some guidelines for evaluating web site content within the framework of the question. The guidelines for content will be applied to some web sites and some conclusions will be drawn about the potential and reality of the Internet as an emancipatory and constructivist medium.

**Habermas, Constructivism, and Emancipatory Interests**

It is true that there is no unified school of social constructivism in the study and practice of international relations. Yet, the approaches to constructivism that lead down from Onuf’s defining work share at least one common tenet – that language matters – for it is in words that international relations is defined (constructed) and played out. Müller goes so far as to call it an “undeniable fact that international politics consists predominantly of actions that take the form of language.” A number of authors, including Onuf, have turned to the work of Jürgen Habermas to find theoretical foundations for the connection between language and social construction in his theory of communicative action. Communicative action is derived from discourse between agents that is “oriented towards achieving, sustaining, and reviewing consensus – and indeed a consensus that rests on the intersubjective recognition of criticisable validity claims.” In Habermas, constructivist theory finds an ally that locates action as a means for building consensus and thus reifying an intersubjective socially constructed world.

In addition to the theory of communicative action, three other theories of communication by Habermas add to the understanding of emancipation and emancipatory interests and the Internet. The three theories are his taxonomy of cognitive interests expressed in *Knowledge and Human Interests*, the concept of the public sphere, and his approach to discourse ethics.

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Habermas defines emancipatory interests in relation to a taxonomy of knowledge constitutive interests, also referred to as cognitive interests. David Held states that Habermas’ approach to knowledge is “historically rooted and interest bound.” Habermas defines human interests in terms of the need to produce for material existence and the need to communicate with others. This translates into two types of cognitive interests – interests related to controlling the environment (both physical and social) and interests related to developing common meaning of phenomena. The first of these he calls technical cognitive interests and he claims that it is the underlying interest of the empirical-analytical sciences. The empirical sciences use information to secure and expand control over feedback monitored action. That is, “technical control over objectified processes.”

Habermas calls the second type of cognitive interest practical cognitive interest. He claims that this is the underlying interest of the historical-hermeneutic sciences. “The historical-hermeneutic sciences gain knowledge by meaning, not observation.” They disclose reality “…subject to a constitutive interest in the preservation and expansion of the intersubjectivity of possible action-orienting mutual understanding. The understanding of meaning is directed in its very structure toward the attainment of possible consensus among actors in the framework of a self-understanding derived from tradition.”

There are biases that distort communication and knowledge bound up with the cognitive interests of both of these approaches to knowledge. The technical cognitive interests of the empirical sciences distort communication and knowledge because of their need to standardize method as a way to validate claims. Habermas claims that “in the empirical-analytic sciences the frame of reference that prejudges the meaning of possible statements established rules both for the construction of theories and for their critical testing” and that “…facts relevant to the empirical sciences are first constituted through an a priori organization of our experience in the behavioral system of instrumental action.” Thus the requirements of the scientific method itself (falsifiable hypotheses, replicability, etc.) and the means for validation, such as the arbitrary alpha level of .05 in statistical inference, while necessary for the creation and transmission of technical information, bias the knowledge generated from the information. Knowledge gained from practical cognitive interests carry biases as well. These are derived from the parsimony that meaningful communication requires. Habermas claims that “…the rules of hermeneutics determine the possible meaning of the validity of statements of the cultural sciences.” Later, he states

“It appears as though the interpreter transposes himself into the horizon of the world of language from which a text derives its meaning. But here too, the facts are first constituted in relation to the standards that establish them. Just as the positivist self understanding does not take into account explicitly the connection

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10 Ibid.
14 Ibid.
between measurement operations and feedback control, so it eliminates from consideration the interpreter’s pre-understanding. Hermeneutic knowledge is always mediated through this pre-understanding."\(^{15}\)

Because of the direct connection to human history through the need to control the environment for production and the need to communicate, most forms of knowledge are based in either technical cognitive interests or practical cognitive interests.

Habermas speaks of another cognitive interest that is, as Held points out, derived from the human capacity to be “self-reflective and self-determining, to act rationally.”\(^{16}\) Emancipatory cognitive interest “releases the subject from dependence on hypostatized powers.”\(^{17}\)

Hypostatized refers the condition of hypostasis which is defined by *The American College Dictionary* (1966) as “a. that which stands under and supports; b. the underlying or essential part of anything as distinguished from attributes; substance, or essential principle.” Thus to be released from dependence on hypostatized power is to lay bare the “thing in itself,” to borrow a phrase from Kant. According to Habermas, emancipatory interests are the cognitive interests of the critically oriented sciences.\(^{18}\) Knowledge pursued by the critically oriented sciences attempts to “achieve human autonomy and self understanding by bringing to consciousness previously unapprehended determinants of the human species ‘self-formative process.’”\(^{19}\) That is, knowledge derived from emancipatory cognitive interests is the knowledge that is needed to recognize historically constructed behavior and, ultimately, to restructure it to abolish oppression and exploitation and achieve freedom.

Habermas’ concept of the public sphere is an idealized communication forum where all citizens have equal access and where a semblance of public opinion of public consensus is formed through discourse. The public sphere “mediates between the public and the state.”\(^{20}\) Habermas traces the history of the public sphere as public discussions about the political power that “grew out of a specific phase of bourgeois society.” In this history, he illustrates that the public sphere first grew out of the coffee houses and salons of the late 18\(^{\text{th}}\) and early 19\(^{\text{th}}\) century where the new bourgeoisie tried to find consensus to promote policies affecting their interests derived from a growing capitalist economy to arcane absolutist monarchies. Habermas documents how the idealized public sphere of the 18\(^{\text{th}}\) century Parisian salon and the town meeting of 19\(^{\text{th}}\) century New England gave way to a mediated public sphere first captured in the print medium of newspapers and later in the electronic medium of radio and television. In the age of public relations, the public sphere must now be “arduously constructed case by case, a public sphere which earlier grew out of the social structure.”\(^{21}\) The public sphere contributes to the possibility of emancipation by providing the forum in which public discourse can critically evaluate claims and examine alternative social constructions.

From the previous discussion, emancipation is obtained through autonomy of the agent. For the public sphere to be an effective medium for emancipation, first it must be free from interference of prior power commitments that prohibit free expression of ideas and second it must have rules of operation that encourage and permit the kind of discourse that will lead to

\(^{15}\) Ibid.  
\(^{16}\) Held, p. 255.  
\(^{17}\) Habermas (1971), p. 311.  
critical examination of ideas and public consensus. Evaluation of the first of these two criteria involves careful examination of the sponsorship and intent of the forum itself. Such an evaluation is relatively easy in the transparent world of the town meeting but is more difficult in the mediated environment of the Internet. Habermas himself sets forth guidelines for the evaluation of the second of these criteria for an emancipatory public sphere in his discussion of discourse ethics.

In the discourse ethics, Habermas sets forth the conditions for communication that can lead to democracy, freedom, and emancipation. Discourse in the public sphere, properly done, can lead to emancipation. The discourse ethics centers around the idea of an ideal speech situation. For such a situation to emerge in a public sphere, its participants must adhere to the following set of rules:

1. Every subject with the competence to speak and act is allowed to take part in a discourse.
2a. Everyone is allowed to question any assertion whatever.
2b. Everyone is allowed to introduce any assertion whatever into the discourse.
2c. Everyone is allowed to express his attitudes, desires and needs.
3. No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (1) and (2).

The ideal speech situation emphasizes the autonomy of the participating agent. The agent is autonomous in relation to other agents engaged in the discourse while at the same time the agent is autonomous of the other power commitments that derive from the political or economic setting of the discourse. The agent is not independent, however, of the exegesis of the discourse itself. Each participating agent must acknowledge the autonomy of the other agents, especially in relation to claims of validity. Perzynski notes three criteria for validity claims attributed to Habermas:

- All of those affected by a norm must agree that they accept its consequences and side effects. All must understand that the norm may bring constraints and that any constraint satisfies all interests.
- The conditions for the practical discourse out of which universally valid norms may emerge include the participation and acceptance of all who are affected by such norms, as such norms meet their interests.
- Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.

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23 At The time this paper was written, a copy of *Moral Consciousness and Communicative Action* was not available to its author. Therefore I am relegated to using others’ characterizations of Habermas’ words with hopes and expectations that they are correct.

It is this communally accepted intent of the public sphere that sets the conditions for ideal speech. For Habermas, the emancipatory interests of knowledge and emancipation of individuals from social, economic, and political forces of oppression are inextricably linked. He refines this idea in his theory of communicative competence\(^\text{25}\) in which he claims that all speech is an attempt to achieve consensus through discourse\(^\text{26}\) – an attempt that is often doomed to failure. Its failure provides a measure of the degree to which it embodies so called distorted communication. Held captures Habermas’ connection between consensus and emancipation as follows:

“The process of emancipation, then, entails the transcendence of such systems of distorted communication. This process, in turn, requires engaging in critical reflection and criticism. It is only through reflection that domination, in its many forms, can be unmasked.”\(^\text{27}\)

In summary, then Habermas believes the public sphere has the potential to be emancipatory because it is capable of discourse that leads to communicative action, but only if it is free of prior power commitments (political, economic, social, or personal); its discourse is conducted by implicit rules that permit equal and free access for all its participants; and its participants explicitly recognize the communal intent of finding consensus. Thus, if the Internet is to be an emancipatory medium, it must first be sustainable as a public sphere. It must also permit equal and free access for all persons concerned and it must not be constrained or regulated by political economic, or social forces. Finally, those who engage in online discourse must explicitly recognize the intent of coming to general consensus. The next section of this study will examine the Internet at large in relation to these criteria and identify barriers to their being achieved.

**Emancipatory Interests and the Internet**

Much has been written, online and off, about the possibility of the Internet becoming the new public sphere. One of the most influential of these articles is by Mark Poster. Poster notes that much of the discussion about the impact of the Internet has centered on the transformative effect of its technology. This discussion has focused on access, technological determinism, encryption, commodification of information, and intellectual property.\(^\text{28}\) He claims that few approaches to the impact of the Internet address the question of cultural identity formation. For example the commodification of information “translates the act of shopping into an electronic form” but more important is how it “institutes new social functions.”\(^\text{29}\) The question concerning the effect of costless reproduction of communication of information is the wrong question. The Internet imposes a “dematerialization of communication and in many of its aspects a transformation of the subject position of the individual who engages within it.” The Internet “installs a new regime of relations between humans and matter…reconfiguring the relation of the

\(^{26}\) Held, p. 256.
\(^{27}\) Ibid.
technology to culture and thereby undermining the standpoint from which, in the past, a discourse developed...about the effects of technology.”

He proceeds to use a somewhat dubious analogy to make his point by claiming that “…the Internet is more like a social space than a thing; its effects are more like those of Germany than those of hammers. The effect of Germany upon the people within it is to make them Germans...As long as we understand the Internet as a hammer we will fail to discern the way it is like Germany.”

Rather than focusing on the instrumentality of networked communication, Poster asks whether there are new forms of relations occurring within the Internet “which suggest new forms of power configurations between communicating individuals?” He then frames the question in terms of the possibility of the Internet becoming a new public sphere and asks

“If there is a public sphere on the Internet, who populates it and how? In particular one must ask what kinds of beings exchange information in this public sphere? Since there occurs no face-to-face communication, only electronic flickers on a screen, what kind of community can there be in this space? What kind of disembodied politics are inscribed so evanescently in cyberspace?”

Poster characterizes Habermas’ concept of the public sphere as a “homogenous space of embodied subjects in symmetrical relations pursuing consensus through the critique of arguments and the presentation of validity claims” and then contends that it is systematically denied in electronic communication.

One of the barriers to the Internet becoming a public sphere that Poster identifies exists in the creation of an individual identity on the Internet. He claims that, “On the Internet, individuals construction their identities in relation to ongoing dialogues, not as acts of pure consciousness.”

The benefit of this fluid definition of the self is that it permits people to step out of identities imposed by sensory cues such as visual identification by race or gender or auditory identification by inflection or accent. There are problems, however, with this self identification. First, it is transitory. Poster gives the example of a man who entered an Internet discussion as a woman to experience the intimacy he had observed in conversations between women. While the man may have learned something about such intimacy, the women were exploited and hurt upon discovery of the man’s identity. Another problem with self identification is that it is not based in true historical and cultural experience. The man’s communications in the previous example could only be based on what the thought a woman’s interaction might be – not based on the cultural and social history that a woman would bring to the discourse. Such fabricated identities distort communication and can hardly be the basis for Habermas’ ideal speech situation.

Other barriers to ideal speech on the Internet derive from the atomized access that decentralized communication permits. The typical mode of Internet access involves the person

30 Poster, p. 205.
31 Ibid.
32 Poster, p. 206.
33 Ibid.
34 Poster, p. 209.
35 Poster, p. 212.
sitting alone at a computer interacting only through the keyboard and the monitor. Joseph Lockard notes that “…the netsurfer rides alone, solitary even amid electronic crowds.”

“Instead of real communities, cyber consumers sit in front of the Apple World opening screen that pictures a cluster of cartoon buildings which represent community functions (click on post office for e-mail, a store for online shopping, a pillarated library for electronic encyclopedias, etc.). Cyberspace software commonly imitates ‘community’ in order to further a nonexistent verisimilitude. What the software addresses is desire for community rather than the difficult-to-achieve, sweated-over reality of community.”

Lockard further condemns cybercommunity as “an element in the ideological superstructure over the material base of cyberspace (computers, software, labor costs,) an element that facilitates technological acceptance, integration, familiarity, and consumption.” If this characterization is correct, then the public sphere of cyberspace is not free of prior power commitments – especially those that derive from an attempt to instantiate a sense of online community for the purpose of furthering commercial interests of the market place.

A significant question that must be addressed in the examination of the Internet as a tool for emancipation is whether or not communication behavior is affected differently by computer mediated communication than face-to-face communication. That behavior is different in this medium is not disputed. For example, a recent study of online commerce shows that cognitive barriers to unregulated buying are directly attacked by the nature of cyber commerce, increasing the problem of compulsive shopping. Lincoln Dahlberg identifies a number of additional factors of computer mediated communication that create barriers to development of an emancipatory public sphere on the Internet. Among these barriers are a dearth of reflexivity in computer mediated discourse, a lack of respect for the views of others, and domination of discourse by certain individuals and groups. Another study indicated that cooperation in computer mediated communication is less stable than cooperation that emerges in face-to-face communication.

Some differences in computer mediated communication behavior may enhance the ability of the Internet to establish ideal speech. Sirkka Jarvenpaa and Dorothy Leidner found that trust develops more quickly in computer mediated communication but that it also tends to be more

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37 Lockard, p. 224.
38 Ibid.
fragile and temporal.\textsuperscript{42} Other studies have shown that computer mediated communication can help people overcome shyness.\textsuperscript{43}

The digital divide presents one of the most significant barriers to the Internet becoming an emancipatory medium. Equal and free access to the discourse is clearly one of the most important criteria for the public sphere—although it must be noted that Habermas’ own examples of the 18\textsuperscript{th} century salons and coffee houses were hardly all inclusive. While access to the Internet is growing significantly, it is still a medium affected by class, income, and wealth. Barriers to access go beyond the ability of individuals to remedy. Until world wide satellite access becomes a reality, access to the Internet still requires substantial local network and server hardware. Figure 1 shows the growth in the estimated number of people who have access to the Internet world wide from 1995 through 2001.

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\textit{Figure 1: Number of People World Wide with Access to the Internet from 1995-2001. Compiled from data from NUA Internet Surveys at http://www.nua.com/surveys/how_many_online/world.html.}

While it is clear that the number of people with access to the Internet is growing, two other facts about figure 1 are important to note. First, the total number of people with access in May 2002, the most recent date, point is 580.78 million, which is only an estimated 9.75\% of the world’s population. Second, the Internet grew rapidly in its early years, but the rate of growth has been falling off since December 2000. This is probably due to an increasing saturation of the market in the developed world and the lack of capitalization of the Internet in the less developed world.

This digital divide that is emphasized when the rates of access are compared across continents. It is estimated that in January 2002, approximately 164.16 million people in the United States had access to the Internet. That is approximately 58.5\% of the population. This

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compares with 26.28% in France and 1.61% in Kenya in approximately the same time frame (Data are taken from the NUA Surveys web site at http://www.nua.com/surveys/how_many_online/). The Internet is a long way from providing the universal free and equal access that is required of ideal speech in the public sphere.

This divide of access also affects content of the Internet. English is still the language of the web, further limiting access and empowering American-centric and Euro-centric content. As Joseph Lockard puts it, “In the chaos of globality, an American identity imprints itself on the Internet by default of any other seriously contending ideology.”

From the above discussion, the chance for ideal speech in a public sphere of the Internet seems bleak. Possibly the pessimistic outlook is due to the youth of the Internet. While e-mail and USENET date back to the 1960’s and 1970’s, the Internet we know today did not come into existence until the creation of the world wide web by CERN in 1991 and the first graphic browser (Mosaic) in 1993. The medium is only 10 years old and it is growing and changing rapidly. While Mark Poster provided a thorough critique of the use of the Internet as a public sphere, he also admitted to its potential.

“The magic of the Internet is that it is a technology that puts cultural acts, symbolizations in all forms, in the hands of all participants; it radically decentralizes the positions of speech, publishing, film-making radio and television broadcasting, in short the apparatuses of cultural reproduction.”

Case Studies of Internet Emancipation from an Unrepresentative Sample of Two

The discussion so far has focused mostly on the interactive aspects of the Internet such as e-mail, list-serves, discussion groups, USENET groups, or MUD’s. The emancipatory potential of the Internet is also found in the one-way communications of the World Wide Web. To be emancipatory, in Habermas’ context, in addition to contributing information to the discourse of the public sphere, web sites must derive from emancipatory cognitive interests.

There are examples of web sites that approach the requirements for emancipatory interests. One such site is the home site of the Independent Media Centers (http://www.indymedia.org/). The Independent Media Center (IMC) is a collection of web-based grass-roots news groups that operate their own web sites and interconnect to each other through the Internet. IMC started by covering IMF/World Bank anti-capitalist protests (specifically the “Battle in Seattle” in 1999). IMC covers protests and demonstrations from inside – that is, from the perspective of those organizing and participating. Each IMC is an autonomous group that organizes its own structure and mission. The indymedia.org group that sits at the center of the organization does not try to direct the organization. It merely manages the communication and provides a central web page for communications. Global decision making is explicitly democratic and decentralized. The site operates an open publishing newswire to which anyone can submit a story. Editors do clean up the stories and perform some filtering to avoid

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44 Lockard, p. 228.
46 Poster, p. 211.
47 MUD stands for Multiple User Dimension and is a multi-user programming environment in which users meet and interact in a fabricated social setting. Its origins come from online role playing games but variations on MUD’s are now being used in education, business, and other endeavors.
duplication. Instructions for creating and uploading digital image, audio, or video files are included on the web site. Articles in many different languages are accepted.

The Independent Media Center meets many of Habermas’ criteria for emancipatory interests. Access is open to those who have the technology to use it. While there is little interaction directly, the information on IMC forms a part of a larger body of information that underlies public discourse on politics, economics, and society. The decision making within the IMC is distinctly democratic and attempts to empower participants equally. The IMC is no more inhibited by prior power commitments than any other Internet site. Finally, due largely to the types of people who participate, the content of the material on the Independent Media Center newswire explores power commitments that form the hypostatized forces of social interaction thus providing a critique that could reduce their influence.

Geocities.com is not your typical emancipatory web site. In fact, many critical theorists might be hard pressed to accept that any commercially sponsored web site has the potential for emancipatory content. One must remember, however, that the coffee houses and salons of Habermas’ early public sphere did not give the coffee away. There were prices to be paid to use the facility. What gives Geocities its potential emancipatory content is its approach to easy access to the World Wide Web. Geocities (www.geocities.com) is a service provided by Yahoo, one of the Internet’s largest commercial sites. Geocities offers free web sites to anyone who wants one. Perhaps “free” is the wrong adjective since they come replete with advertising. For $4.95 per month, a user can get an ad-free web site. Prices and services go up from there. Much of the content is commercial or personal in nature. Some of the content is clearly political and some of the content embodies emancipatory cognitive interests. For example, a subject search of Geocities sites for anarchism returned 539 sites. A search on the keywords “feminist politics” returned 8 member pages and 939 web sites, one self-proclaimed to be a site for “teenage anarcho-feminists” – complete with bomb making recipes.

Conclusions

It is unclear how much either Indymedia.com or the political content of Geocities.com add to the emancipatory discourse of the public sphere. Both sites have exclusionary qualities, if for no other reason than it takes a computer to access them. Neither site provides two-way communication that is necessary for discourse. The unregulated content of Geocities succumbs to the criticisms of computer mediated discourse raised by Dahlberg. Yet, both sites provide some hope for the nascent emergence of a public sphere in the Internet. Both sites provide free access of a sort and both sites encourage unregulated participation.

The Internet does not yet yield the ideal speech situation that a truly emancipatory public sphere would. There are many barriers to such a situation – some of which may be insurmountable with the current technology and organization of the Internet. Nevertheless, the medium is young and by decentralizing communication and as Geocities does, the Internet may yet develop its emancipatory potential.
Is International Law Compatible with Peace in a War-Torn Society? Trials and Tribulations in Bosnia

Linda S. Bishai

Abstract: The role of law in an international system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interest of maintaining a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order are mutual outcomes. However, in certain circumstances, as seen in Bosnia-Herzegovina, law is used to create political justice, putting it in conflict with the order provided by the system and society of states. This article examines the contrast between the application of order in an attempt to settle disputes amidst social chaos, and the application of justice in an attempt to locate and punish individual perpetrators of universal crimes. The International Tribunal for the Former Yugoslavia was created in response to demands for justice in the face of horrific crimes in Bosnia. However, the US-sponsored Dayton Peace Agreement represented an exercise in dispute settlement focusing on the establishment of order regardless of the possible criminal histories of the negotiating parties. These two attempts to solve Bosnia’s problems contradicted one another, vividly illustrating the inadequacy that comes from pursuing order and justice in mutual exclusivity.

Introduction

The international system is widely perceived as one which is based on the relationship between interdependent yet equally sovereign states. The role of law in this system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interests of a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order in this sense, are mutual outcomes of one another.

In certain cases, however, a conflict arises which forces law and order into a hostile rather than cooperative relationship. These are cases involving a conception of law as justice, based on individual human rights. In the words of International Relations Theorist, Hedley Bull: “there is …an inherent tension between the order provided by the system of society and states, and the various aspirations for justice that arise in the world politics”.\(^1\) The violent conflict in Bosnia-Herzegovina is such a case. The attempt by the international community to stop the fighting and create order was accompanied by an attempt to deal with the universal outcry at the crimes against humanity which were being committed in the region. This article will examine the contrast between the application of conceptions of order in an attempt to settle disputes amidst social chaos, and the application of conceptions of justice in an attempt to locate and punish individual perpetrators of universal crimes.

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The International Tribunal for the Former Yugoslavia was created in 1993, by the UN Security Council, when there was no end in sight to the violence and hostilities. It was widely considered to be merely a symbolic gesture in response to international horror at the nature of the hostilities occurring in the region, yet the project has gathered momentum and now stands poised as the litmus test of the will of the world community to give effect to the declarations of the need to punish crimes against humanity. Meanwhile, the US-sponsored Dayton Peace Agreement represented an exercise in the dispute settlement which focused on the establishment of order regardless of the “justice” of the compromise and irrespective of the possibly criminal histories of the negotiating parties. Because of the methods and compromises use in the Dayton negotiations, the aims and activities of the Tribunal caused problems of contradiction for the Implementation Force. Likewise, the final settlement, without limiting the goals of the Tribunal, provided a compromise which allowed the imperative of justice in prosecuting war crimes to be paid mere lip service. These two attempts to solve Bosnia’s problems vividly illustrate the often stark choice between justice and order in the international system.

The Need for Justice

From 1991 onwards, the media world focused constant attention on the viciousness of the Yugoslav conflicts. Shocking photos of death camps and rape victims, coupled with the arrogant and defiant statements of Serb and Croatian nationalist leaders, gave the international public a sense of helplessness. Even when the U.N. declared safe-havens and sent in troops, the continued bombardment of Sarajevo and the relentlessly building number of civilian deaths caused a sense of outrage which could no longer be neglected outside of the region. The sense of “human justice” had been so deeply violated that the Security Council, pursuant to its powers under Article VII of the Charter, created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Tribunal). Although individual persons have previously been prosecuted for such crimes, under the 1945 London Agreement which established the jurisdiction for the Nuremburg Tribunals, the creation of an international civilian court under the auspices of the U.N. is something quite new.

The creation of the Tribunal alone has opened up a floodgate of legal activity amongst human rights lawyers and activists – from those who advocate a permanent international criminal tribunal, to those who strive to see the standards developed in various humanitarian law conventions plainly applied, to women’s rights groups who demanded (and got) recognition of rape as a crime against humanity. The Tribunal “is being most closely watched as a test of whether the international community can apply the network of laws that it has been building since World War II to punish those who commit atrocities during wartime, either between nations or within the boundaries of a single country”. The consensus among international observers is that if this Tribunal can be seen to establish a legitimate process for the prosecution of the humanitarian crimes, then the entire international system will benefit from an enriched sense of moral justice and legal order, and the path to the permanent International Criminal Court will be made considerably smoother. If, however, the Tribunal fails, then the chance for a legal

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2 Hedley Bull’s term for justice in the moral sense.
3 American Bar Association Journal vol. 82 (April 1996), 53.
means of redressing such crimes will be proven a chimera, and the international system will be confirmed in its inability to enforce its own humanitarian standards.

Under the terms of its Statutes, the Tribunal is competent to prosecute Grave Breaches of the Geneva Conventions of 1949 (Art. 2), Violations of the Laws or Customs of War (Art. 3.), Crimes of Genocide (Art. 4) and Crimes Against Humanity (Art. 5). One of the first questions that Tribunal had to face was a challenge to its own jurisdiction in the case of Dusko Tadic. Jurisdiction was attacked on the basis of three arguments:

[F]irst, that the Tribunal has not been validly established, because the United Nations Security Council lacked the power to do so; second, that the primary [F]urisdiction of the Tribunal’s jurisdiction over that of national courts...was unlawful; and third, that the Tribunal lacked subject matter jurisdiction, because the articles of the Statute named in the indictment (Articles 2, 3, and 5) are applicable only to international armed conflicts, and the alleged crimes, if proven, were committed in an internal armed conflict. 4

The challenges were rejected both by the trial and the appeals chambers of the Tribunal, but not without carefully reasoned opinions. It is evidence of the seriousness with which the Tribunal sees its task that the judges did not deal with the issues peremptorily by holding that they were not justiciable because of the Tribunal’s origin as a creation of the Security Council. Instead, the approach followed was one which maintained the right of an accused person to challenge the validity of the procedure being used against him. “For a criminal tribunal in particular, it is reassuring to know that it finds inherent to the exercise of its judicial function the jurisdiction to examine the legality of its establishment.” 5

Even though the Tribunal was created in response to demands to justice in the face of horrific crimes, there was a common understanding amongst the judges of the need for procedural justice as well as human justice. Otherwise, the breach of justice would be confirmed rather than expiated. The Tribunal must continue to walk a delicate tightrope between protecting the rights of the accused (procedural justice), and protecting the rights of the of the victims as well as providing both a condemnation of and a deterrent to such crimes (human justice). In this struggle, the Tribunal has had to continually update and fine-tune its rules of procedure, which are based on an amalgam of various national systems. Among the difficulties has been an interpretation of Rule 75, which gives a judge the competence to “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.” 6 This rule, similar to one in Article 22 of the Statue, have led a trial chamber of the Tribunal to interpret the protection of witness identity to include withholding names of victims and witnesses indefinitely from the accused and defense counsel. This interpretation has been maintained through several versions of the rules of evidence and procedure, and has led one prominent legal analyst to comment:

From a legal policy point of view, it seems obvious that the Tribunal’s priority should be to do justice to Tadic and at the same time maintain its credibility...[T]hat is most nearly consistent with international law as reflected in the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights.

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5 Aldrich, 65.
6 ABA Journal, 58.
It seems to me that axiomatic that the Tribunal should presume that the Security Council in establishing the Tribunal intended that its Statute should be interpreted in a way that is consistent with international law. With the eyes of the entire international community watching its every move, the Tribunal cannot afford a misstep. If it does not produce justice credibly and continuously for each of the accused defendants, it will not have produced justice at all.

Although the Tribunal was created eight years ago, it got off to a hopelessly slow start. Three years after its creation, it had only begun one trial due to the difficulty of gaining custody of indicted suspects. When the peace talks were beginning in Dayton in November 1995, members of the Tribunal staff feared that their ability to continue the business of prosecution would be hampered further. In a bid to keep its mission in the forefront of the Dayton proceedings, the Tribunal’s Prosecutor issued second indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic. Deputy Prosecutor, Graham Blewitt, admits that they were hoping that “[t]he indictments would send a strong reminder to negotiators that there were major criminals who had to be dealt with. We wanted to make it harder for them to do away with the tribunal.”

The peace process, which focused on the cessation of hostilities, posed a definite risk to the justice process, which focused on individual accountability regardless of political (and negotiating) clout. The implications of taking the mission of the Tribunal seriously are that all individuals who have been indicted, no matter how powerful or politically crucial, be taken into custody to be politically impossible – but, international lawyers urged, such a principled stance would be justice to a region in desperate need of it.

These aspects of the Tribunal’s mission have become more and more visible in the last five years, and the continued partisanship of the three parties to the Bosnian conflict, in the face of the Dayton mandate for cooperation, have given new credibility to the idea that order cannot be imposed without a widespread trust that justice has been done. The Tribunal now has a respectable 42 proceedings currently underway, not including the most recent and visible public relations victory of gaining custody over the infamous former president of Yugoslavia, Slobodan Milosevic. Thus, in a short span, the court has gone from a shaky half-hearted gesture by the international community to the glittering feature topic of evening news across the globe.

The Need for Order

The voluntary handover of Milosevic by the government of Yugoslavia has recalled international attention to the unheeded indictments of the Bosnian Serb leaders, Karadzic and Mladic. Fears of widespread rioting and disorder by the Bosnian Serb population if their arrests were attempted now seem overrated, and many international figures (including Dayton architect, Richard Holbrooke) are now calling for these two accused war criminals to share Milosevic’s fate. How did they manage to evade international justice for so many years? Again, the contradictory goals of justice and order go far in explaining a strange discrepancy. During the course of the summer of 1995, events in the Balkan conflict began to unfold in ways which made negotiation a possibility rather than a pipe dream. The fall of the UN “safe areas” gave momentum to U.S. and European attempts to bring about a settlement. Additionally, the Bosnian Serbs suffered from Croat and federation attacks and the authority for forces on the ground

8 ABA Journal, 61.
changed from the UN to NATO. This combination of events led to a situation in which, while still having broadly different expectations and goals, all parties could agree that stopping the fighting was a desirable achievement. Still, it is unlikely the parties could have met without the forceful invitation and participation of the United States. Playing the role of host and mediator, the U.S. put its diplomatic prestige at risk. Having practically guaranteed to help enforce any agreement with some of its own troops, U.S. negotiators were not going to lightly give up the unique opportunity to be the architects of peace.

The tactics used at Dayton to make an agreement more likely ranged from seclusion, to high-tech computer map simulations, to sleep deprivation. Assistant Secretary of State, Richard Holbrooke, presented the parties with a long draft treaty and then proceeded to steer them through all the necessary alterations and compromises, badgering them past any entrenched difficulties. His methods were so relentless that the victims of his particular brand of persuasion coined the term “getting Holbrooked” to describe it. In fact, Holbrooke may have developed a whole new method of dispute settlement – coercive conciliation. Questionable as they were, the methods got results. But at what expense? U.S. officials were not under any illusions about the lack of commitment to a unified Bosnian state. One official described the different goals of the three leaders as completely contradictory, including the fear of Milosevic “that after a so-called decent interval he’ll try to absorb all of Bosnia. He may try for an Anschluss.” Even with these grave doubts about the value of the parties’ promises, the teams of negotiators in Dayton struggled at achieve an agreement.

Although a deal was finally signed, the chaotic mess of Bosnia has yet to develop into a stable peaceful state. The compromises were many and difficult and have continued to haunt the peace. The Bosnians have up effective control over the entire region that would come to be known as Republika Srpska and had to settle for an extremely weak central government structure. The Bosnian Serbs gave up eastern Slavonia and the idea of a divided Sarajevo, and the Croats gave up various parts of territory conquered from the Serbs. Although the agreement contains strong language about human rights standards and laws, provisions are only made for reporting and monitoring, not enforcing. Political will to make the bifurcated state structure work remains lacking. One of the major problems in guaranteeing the validity of the parties’ agreement was the lack of a permissible Bosnian Serb representative, since the leader at the time, Karadzic, was a suspect indicted by the Tribunal in the Hague. Although he was denied a presence at Dayton and in the subsequent Bosnian state, his influence and methods continue to be felt. Slobodan Milosevic served as an official representative for the Bosnian Serbs at Dayton, but there is reason to doubt that they felt their interests were preserved. One of the Bosnian Serbs who served in the small delegation accompanying Milosevic declared “[t]he agreement that has been reached does not satisfy even a minimum of our interests.” Not only does a statement like this distract from the likelihood of the terms of the agreement being honestly pursued, but it casts doubt upon the credibility of the method of negotiation. Again the requirements of justice and order seemed at loggerheads. A better order could have been achieved by giving voice to the chosen representative of one of the parties rather than his proxy. Yet, the demands of justice required that no indicted person be involved in any internationally sponsored process since that

\[9\] *Time Magazine* vol. 146, no. 19 (November 6, 1995).


\[12\] *TIME DAILY* 11/22/95 [found at http://pathfinder.com].

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would undermine the chances of bringing him to justice in the future. In fact, it is precisely this point – in reverse – that has led some to criticize the trial of Milosevic in the Hague, on the theory that peaceful negotiations with criminally inclined leaders will become impossible in future conflicts.

The side effect of all the compromises involved in the agreement is that difficulties with implementation have been plaguing the UN and SFOR since the beginning. Originally, the Bosnian President, Alija Izetbegovic, refused to negotiate until promises were made to extradite the indicted leaders, Karadzic and Mladic. This demand was softened to the point where Article IX of the General Framework Agreement (GFA) merely states the “obligation of all parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.” This has meant that Bosnia’s first six years as an independent republic have been marred by perceptions that those guilty of war crimes may escape the rule of law with impunity. Additionally, Article IX of the Constitution of Bosnia and Hercegovina (Annex 4 of the GFA), categorically states that “No person who is serving a sentence imposed by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Hercegovina.” Although Karadzic resigned his post as Bosnian Serb President, subsequent Serb leaders who emerged to fill the void were seen as operating under his influence. This situation has been slow to change – due in part to an active partisan media campaign by all three parties to the conflict operating within Bosnia that has perpetuated the agenda of hard-line nationalists and separatists.

The ironic tragedy of the Dayton peace is that the cease-fire it upheld undoubtedly preserved lives, yet, by hastily seizing the moment, the negotiators created a rickety peace and an exceptionally weak central government, which has been picked at and thwarted from its very beginning. Peace and order are of undoubtedly great moral and political value. But if order is perceived to have been established in a careless or overly compromised way, it will not be observed. All three parties to the Bosnia conflict have been guilty of tailoring the peace to their own needs rather than attempting to rebuild and cooperate. Just after the Paris signing of the Dayton agreement, Croatia released a man indicted by the Hague Tribunal who had been in a local jail on an unrelated charge. A journalist covering the area stated bleakly that “[n]o one should be optimistic that there will be sufficient justice to convince the various populations in Bosnia that the wicked have been punished.” Even the ethnic “cleansing” continued after the agreement: a group of elderly Muslims were driven out of Banja Luka, and towns were returned to the respective entities in looted and burnt out condition. The sense lingers that the peace in Bosnia relies primarily on the presence of foreign soldier and not on local institutions. Although the conflict is no longer hot, the stability of the peace undoubtedly depends on the willingness of foreign leaders to remain involved. This is hardly a successful outcome for the Dayton negotiators.

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16 TIME DAILY 12/08/95 [found at http://pathfinder.com]
The text of the agreement describes an orderly state which allows each entity to form associations with its affiliated neighboring state, a state in which much attention is paid to human rights and freedoms, and which incorporates all of the humanitarian conventions already present in international law. And yet, there is no specified mechanism for identifying and capturing war criminals. The dirty work is left up to the piteously understaffed Tribunal in the Hague – which depends upon the will of the local police for obtaining custody over the accused. Even for IFOR troops, which include the best-trained and staffed military forces in the world, regard the arrest of war criminals as something of a nuisance. NATO commanders have “balked at doing anything to either seek out war crimes suspects or to safeguard sites of reported crimes, including mass burials sites that were discovered” claiming that those activities would be “mission creep” and would “jeopardize the safety of their troops.”

Although the troops have pledged to arrest the accused criminals they come into contact with in the course of their duties, these duties have proven to be remarkably without incident in terms of local confrontations. There is a widespread feeling of cynicism regarding the task of the troops in Bosnia, since many of the people indicated by the Tribunal are within their easy reach. Recently there has been increased pressure on NATO to make the effort to arrest and transport the indictees in Bosnia. The situation reflects a sea of change in perception of the legitimacy of the Tribunal vis a vis the Dayton Accord. Today, out of 67 persons indicted by the Tribunal, the Court has custody or contact with 42 persons (3 have been provisionally released) there are 24 accused currently at large. The Court’s recently acquired custody over Milosevic has simply driven the starkness of the contrast home. Despite Milosevic’s personal remarks to the Court that it was not a legal body and he did not recognize it, the Court entered a plea of “Not Guilty” on his behalf, and he will be extended all of the protections elucidated in the Tribunal’s statute. A former head of state is being prosecuted before and international tribunal – and yet order in Yugoslavia has not come to an end.

Just as the Tribunal in the Hague is founded upon the necessity of an apparent political impossibility, the Dayton Agreement rests upon a cornerstone which seems to require the silencing of the claims of justice. The peace envisaged at Dayton requires the sanctioning of the results of the war. The spoils of force and ethnic cleansing have been endorsed for the sake of order. Theoretically, the two institutional solutions to the Bosnian problem cancel each other out. But the Tribunal and the Peace Agreement need each other to work – each is based upon principles that shore up the foundations of the other. Prosecuting individuals who relied on criminal terror to achieve political aims is a necessary part of healing a country torn up by nationalist hatred, but merely writing the rules does not create the society envisioned by them. Political settlement that addresses the concerns of all the groups comprising the society is necessary for law and prosecution of criminals to be seen as legitimate. On the other hand, establishing an orderly society by force without attempting to address concerns for justice regarding past events is counter-productive. The specter of recent unpunished crimes, especially those of a widespread, organized political nature, will obstruct the worth of civic trust so necessary for long-term order.

Conclusion

The most powerful indictments being issued in Bosnia are those of civilian residents who suffered more from the denial of their humanity than from the bullets and shells:
[T]he world has only shown us that nothing is sacred when it comes to promoting its own order at the expense of ordinary people reduced to being miserable, hungry and cold. After Dayton, all the actors with bloody parts in the play have kept their roles. The winners are criminals and thieves, demagogues and warmongers, the ideologues of totalitarianism, of one nation and one state, controlled by one party. The defeated are those who believed people find happiness in justice and diversity. Between such sides, there can only be control but never peace.\(^{18}\)

What the Bosnian conflict starkly reveals is the utter impossibility of pursuing order and justice in mutual exclusivity. The need for the creation of a Tribunal that could fairly pursue justice in a war-torn wreck of a country was profound and imperative. Yet to create the Tribunal without any kind of orderly control over the raging chaos of Bosnia was to condemn it to play a role of symbolic gestures and inconvenient snooping regarding the powers-brokered peace process. In contrast, the Dayton peace was almost perceived as an end in itself. If a document was signed, any kind of document, then there would be peace – and the conference would be deemed a success. But this goal-oriented approach applied sterile problem-solving techniques to an intensely psychological situation, without regard for the need of these peoples to heal, and the necessity of justice for that social healing. One fears that Bosnia may no longer be susceptible to a reconciliation of order and justice, but perhaps the lesson may still be learned.

Although he favored a conservative and somewhat instrumental approach to international relations, even Hedley Bull recognized that Order and Justice can not exist in isolation. They must be regarded as complementary, and mutually reinforcing:

Any regime that provides order in world politics will need to appease demands for just change, at least to some degree, if it is to endure; and thus an enlightened pursuit of the goal of order will take into account also of the demand for justice. Likewise the demand for just change will need to take account of the goal of order; for it is only if the changes that are effected can be incorporated in some regime that provides order, that they can be made secure.\(^{19}\)

The future of international law and dispute settlement, then, lies in pursuing as far as possible the idea the idea of “enlightened order”. For settlement will never be complete without an accompanying sense of human justice done, and justice will be reduced to empty symbols in the absence of accompanying security and order.

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\(^{18}\) Zlatko Dizdarevic, “City Divided, City Defeated” *Time Magazine* vol. 146, no. 24 (December 11, 1995).

\(^{19}\) Bull, 95.