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DEMOCRATIZING THE MEDIA

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DEMOCRATIZING THE MEDIA[*]

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Abstract

In the international realm, very specific norms and standards have developed with respect to the media. Specifically, the media should be independent, should act with professionalism, and should reflect a plurality of viewpoints on salient issues. Government authorities should respect media independence and refrain from censoring or regulating editorial content. This paper argues that, in transitional societies where democratic institutions have not yet been firmly established, strict adherence to those norms in the process of democratization reform may impede, rather than facilitate, the ultimate development of successful democracy. The lens of media reform efforts undertaken in post-conflict Bosnia and Kosovo shows that, under certain circumstances, departure from established liberal democratic norms might permit a more efficient, effective reform process. Reform efforts undertaken in Bosnia and Kosovo failed to account for hurdles to the democratization of the media environment posed by characteristics of the post-conflict society in those locations. Moreover, steps that might have been taken to minimize the impediments to reform were overlooked. The paper then considers how the lessons gleaned from experiences in Bosnian and Kosovar media reform may prove useful in determining how to approach other media democratization efforts in other transitional societies, such as Iraq.

<div align="center">CONTENTS</div>

DEMOCRATIZING THE MEDIA

Introduction

The concept of intervention in the internal affairs of a sovereign state is a controversial one, and it is a project the international community is loath to take on. But once a decision to intervene has been made, the controversy is usually at an end. In most instances, the goals of such an intervention are clear: bring a halt to violence and humanitarian violations, preserve peace, and facilitate the (re)building and (re)establishment of a liberal democratic political system.[1] In other words, once the United Nations (UN) Security Council or other intergovernmental organization has decided to deploy a peacekeeping mission or a peace agreement is brokered among warring parties, the high-profile political negotiations and rhetoric usually die down.

The nearly universally accepted goals of peace and democratization are presumed to provide guidance to those tasked with designing and implementing the nuts and bolts of the UN mission. Because the ultimate goal is a democratic society, the norms, principles, and standards that govern democratic institutions should form the basis of the agenda for those responsible for bringing about democracy. After all, if the territory or nation is expected to follow in the footsteps of the western liberal democracies, the accepted norms that apply in those states must be instilled and respected in the transitional state.

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[1] This paper takes no position on the question whether it is appropriate for the international community to intervene within the territory of sovereign nations or to engage in nation-building projects. Nor does it grapple with the question whether democracy and democratization is the proper path for every nation-state. It simply recognizes that current policy dictates democratization projects in areas subject to international intervention and considers ways in which these projects may be more successfully with respect to democratization of the media environment. While it is true that there should perhaps be some limits that constrain the scope or extend of administrative and legislative powers exercised by international intervention forces, *see e.g.*, Kristen Boon, *Legislative Reform in Post-Conflict Zones: Justification Post Bellum the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L. J. 285 (2005), the goal of these interventions is nearly always to establish a democratic political system.

Within established democracies, norms and standards have developed for the treatment of all of societal institutions. High government officials must be chosen through elections with universal adult suffrage. The institution with lawmaking powers should be separate from the one with the power to enforce the law. Legal disputes should be decided by a neutral and impartial adjudicator. And so on. Some of these fundamental principles are enshrined in international treaties, national constitutions, or domestic law that is binding on all actors. Others are simply norms that have developed organically over time and which are commonly accepted as necessary in a democratic society.

One institution for which universally accepted – though not legally binding – norms have developed is the media. A crucial player in both the exercise and the facilitation of the right to freedom of expression,[2] the media is viewed by intergovernmental organizations, non-governmental organizations (NGOs), and various agencies of international and domestic governance as fundamental to the exercise of all other rights in a democratic society. As a result, very specific norms and standards have developed surrounding the media.[3] There are expectations regarding the media itself – that it should be independent, that it should act with professionalism, that it should reflect a plurality of viewpoints on salient issues. But there are also standards according to which other societal institutions, including governments, should treat media entities – that they should respect media independence by refraining from imposing regulations, that journalists should have access to relevant information, and so on.

When international administrators were dispatched to both Bosnia and Kosovo in the 1990s to assist in post-conflict transitions in those places following civil wars, these principles

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[2] Unlike the non-binding secondary norms that govern treatment of the media, the right to freedom of expression is a fundamental human right enshrined in multiple human rights instruments. *See infra* notes 8-11 and accompanying text**.**

[3] *See infra* Part IA.

guided the administrators' reform goals. In both places, the local media had a history of being aligned with or controlled by political factions and of contributing to the existing divisions and hostilities between various segments of society through inflammatory, ethnically-biased reporting.[4] Because of the media's destabilizing tendency in these places, international administrators in both locations very quickly determined that media reform was an integral element of democratic institution-building. So they set out to transform the Bosnian and Kosovar media sector into an independent, professional, and pluralist one.

What their experience shows is that, while generally accepted international norms and standards may define the desired result of media democratization,[5] those same principles may not provide sufficient guidance for determining the means by which that result can be achieved. The assumption that the norms that function so well in established, stable democracies also should provide the standards to be applied in transitional societies fails to recognize that democratization is not democracy.[6] And in circumstances of democratization, the institutions of government and civil society do not yet operate according to the principles that govern these institutions in democratic societies. Indeed, if they did, no democratization would be necessary. And when the conditions in a democratizing society differ from those in established democracies in ways that render the relevant accepted standards and norms ineffective, strict adherence to those norms will impede, rather than facilitate, the ultimate development of successful democracy.

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[4] *See infra* Part II.A.

[5] Throughout this paper, the concept of media democratization refers to the process of reforming or transforming the relevant media sector into one which exhibits the hallmarks of what is considered the ideal media in a democratic society – independence, professionalism, and pluralism.

[6] *See* JAMES PUTZEL & JOOST VAN DER ZWAN, WHY TEMPLATES FOR MEDIA DEVELOPMENT DO NOT WORK IN CRISIS STATES 17 (2006) ("The default template for media assistance assumes the existence of a functioning state and government."), *available at* http://eprints.lse.ac.uk/837/01/MEDIA.REPORT.pdf.

Using the lens of the media reform efforts undertaken in Bosnia and Kosovo, this paper will explore the idea that, under certain circumstances, departure from established liberal democratic norms might permit a more efficient, effective reform process. It will consider which characteristics of Bosnia's and Kosovo's post-conflict societies created hurdles to democratization of the media environment, how the reform efforts failed to account for those hurdles, and what steps might have been taken to minimize the impediments to reform. It also will discuss how the lessons from Bosnia and Kosovo might guide reformers' thinking about which type of policies might best be deployed in what is currently the most high-profile democratization process underway – Iraq.

A caveat is now in order. One of the most important conclusions advanced in this paper is that the context in which any transition to democracy takes place is highly salient. Any plan for reform will need to account for the historical, religious, political, ethnic, geographical, etc. foibles that are specific to the country or territory in question. This being the case, the lessons learned from any one nation's experience do not necessarily apply to that of any other. In other words, the generalizability of this paper's analysis, which is based on the experience of early reform efforts in Bosnia and Kosovo, may be limited. Nonetheless, the very process of approaching media reform suggested by this paper, namely examining the context in which the reform will be implemented, considering how that context differs from that of established democracies, and then adjusting the norms by which the reformers are bound in order to account for those differences, can only help in making the ultimate reform plan a more effective one.

The paper proceeds in three parts. Part I.A. sets out the established norms surrounding the media accepted in liberal democracies and to which, according to many actors involved in media reform in the Balkans, the international reformers should have adhered. Part I.B. then

discusses possible justifications for departing from those norms, many of which were present in both Bosnia and Kosovo. Part II goes on to describe the context in which media reform was undertaken in both Bosnia and Kosovo and then discusses those reform efforts, the bases for opposition to them that arose, and suggestions for more effective reform. Part III considers the situation in Iraq in light of the lessons that may be drawn from the Bosnia and Kosovo experiences. The paper then briefly concludes.

I. Democracy & Democratization

In post-conflict situations where the international community intervenes, its ultimate goal is to (re)establish in the formerly conflict-torn territory or country a liberal democracy in the Western European/North American model.[7] All institution-building and reform efforts are simply instrumental means aimed at achieving this goal. The media component of these reform efforts are a result of the sentiment that both the right to free expression and a vibrant free press

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[7] Evidence of the international community's endorsement and promotion of democracy as the preferred form of governance comes from many sources. International human rights treaties, for example, establish the right to self-determination and self-governance as fundamental human rights. *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 21(3), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("[T]he will of the people shall be the basis of the authority of government.") (hereinafter "Universal Declaration"); International Covenant on Civil and Political Rights, art. 1, 25, *opened for signature* Dec. 16 1966, 1966 U.S.T. 521, 999 U.N.T.S. 172 (hereinafter "ICCPR"). The work of multiple UN agencies also encourages and facilitates the promotion and development of democratic governance. Commission on Human Rights, Resolution 1999/57, Promotion of the Right to Democracy, UN Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999); Commission on Human Rights, Resolution 2000/47, Promoting and Consolidating Democracy, UN Doc. E/CN.4/RES/2000/47 (Apr. 25, 2000); Commission on Human Rights, Resolution 2001/36, Strengthening of Popular Participation, Equity, Social Justice and Non-discrimination as Essential Foundations of Democracy, UN Doc. E/CN.4/2003/L.47 (Apr. 23, 2001); United Nations Democracy Fund, Situating the UN Democracy Fund in the Global Arena ("[D]emocracy lies at the heart of the UN's normative value system and underpins what the organization does at an operational level. Indeed, most departments, funds, programmes and agencies proceed explicitly from this foundation, especially since a human-rights-based approach to development programming has become the norm."), http://www.un.org/democracyfund/XSituatingDemocracy.htm; *see also* Edward Newman & Roland Rich, *Has the UN Found the Right Formula for Promoting Democracy?*, UPDATE.UNU.EDU, Mar.-Apr. 2004 ("The ideal of democratic governance underpins much of the contemporary work of the UN.") , http://update.unu.edu/archive/issue36_17.htm. Moreover, the mandates of international peacekeeping efforts in post-conflict societies from East Timor to Cambodia to Kosovo all include a provision for democratization or the organization and conduct of elections. *E.g.*, United Nations Department of Peacekeeping Operations, East Timor, UNMISET Mandate, http://www.un.org/Depts/dpko/missions/unmiset/mandate.html; United Nations Department of Peacekeeping Operations, Cambodia, UNTAC Mandate http://www.un.org/Depts/dpko/dpko/co_mission/untacmandate.html; OSCE, OSCE Mission in Kosovo, Mandate, http://www.osce.org/kosovo/13197.html.

are considered integral elements of liberal democracies.[8] While the entitlements to free

expression, to seek out information, and to hold opinions are important in their own right,[9] "the

full enjoyment of [free expression] is the most potent force to achieve individual freedoms,

strengthen democracy, and pre-empt repression, conflict, war and genocide."[10] It is only through

the exercise of free expression rights that the necessary civil society can develop and that the

citizenry can become fully informed on issues relevant to self-governance. And it is only the

preservation of the right to seek information that will ensure transparent, accountable

government action, thus strengthening the democratic nature of government institutions. Absent

information regarding, for example, rights-infringing government behavior, democratic voters

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[8] *E.g.,* Press Release, United Nations Democracy Fund, Secretary-General Sees Free Press and Essential Feature of Democracy (Apr. 23, 2007) ("Free press discharges the vital work of informing and educating the voting public without fear, harassment or censorship."); Organization for Security and Cooperation in Europe, OSCE Mission in Kosovo, Media Standards, http://www.osce.org/kosovo/13419.html ("A free and responsible media is an integral component of any democratic society."),

[9] These rights are enshrined in all of the major human rights treaties. Universal Declaration, *supra* note 7 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); ICCPR, *supra* note 7, at art. 19(2), *opened for signature* Dec. 16 1966, 1966 U.S.T. 521, 999 U.N.T.S. 172 ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.") (hereinafter "European Convention"); American Convention on Human Rights, art. 13(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice") (hereinafter "American Convention"); American Declaration of the Rights and Duties of Man, art. IV, O.A.S. Res. XXX (1948) ("Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.") (hereinafter "American Declaration"); African Charter on Human and Peoples' Rights, art. 9(1) & (2), June 27, 1981, 1520 U.N.T.S. 217 ("Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.") (hereinafter "Banjul Charter").

[10] ARTICLE 19, Our Work Overview, http://www.article19.org/work/index.html; *see also* Council of Europe, Committee of Ministers, Declaration on Freedom of Expression and Information ¶ 1, 4 (Apr. 29, 1982); Council of Europe, Committee of Ministers, Declaration on Freedom of Political Debate in the Media, pmbl. 872d mtg. (Feb. 12, 2004); Council of Europe, Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism, pmbl. 917th mtg. (Mar. 2, 2005); Declaration of Principles of Freedom of Expression, Inter-Am. Comm'n. H.R., 108th sess., pmbl. (2000); Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) (1986)*;* Reyes v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/11.118, doc 70 rev. 2, at 222 (2003); Declaration of Principles on Freedom of Expression in Africa, Afr. Comm'n on Hum. & Peoples' Rts., 32d Sess. (2002).

cannot demand a change in policy or vote the rights-infringers out of power. Only a citizenry that is both aware of infringements on rights and free to voice opposition to those infringements will be able to influence its government's actions and policies, thus forcing it to be rights-respecting. Information therefore enables both participation and empowerment. The existence of norms ensuring the free flow of information is thus an "essential foundation"[11] of democratic society, a necessary precondition for liberal democracy to flourish.

Because these norms surrounding the free flow of information, which lead to the more specific norms regarding the press set forth below, are considered so fundamental to a stable, successful democracy, any process of democratization will include an effort to embed them into the society in transition. After setting out the specific standards that have developed for a democratic free press, this part will discuss the concept of democratization, especially in the context of post-conflict, deeply divided societies. It does not dispute that the ultimate goal of democratization must and should remain the implementation of democratic norms and institutions across society, including in the media sector. It will argue, however, that in the process of bringing these norms and institutions into existence, it is not always necessary to adhere strictly to the norms themselves. In fact, there are certain circumstances in which strict adherence to the principles surrounding the media that have developed in established democracies will impede the evolution of the media sector into one that, someday, will be able to operate according to those norms. In those circumstances, media reform efforts must be free to depart from accepted liberal norms for the media in order to create an environment where those very norms might eventually take hold.

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[11] *E.g.*, Lingens v. Austria, 103 Eur. Ct. H.R. ¶ 41 (ser. A) (1986).

A. Democratic Media Norms

The free flow of information, which is so essential to effective self-governance, is greatly facilitated by the existence of an effective free press. To be an effective facilitator of information flow, the press must play several specific roles and exhibit several specific characteristics. Because they are seen as so integral to successful and healthy democracy, these desirable roles and characteristics have evolved into a set of baseline norms regarding the media, which apply to actors both within and outside the media industry itself, and to which members of democratic societies are expected to adhere. It is these principles that provide the goals to which international media reformers in Bosnia and Kosovo aspired. They also explain why those reformers undertook some reform efforts that were doomed to failure[12] and why such strident opposition arose to other reform efforts that were sorely needed.[13]

While the free press is extolled as an essential element of liberal democracy, a direct contributor to democratic strength as well as a vehicle for the democratic benefits flowing from the free flow of information in other contexts, the term "free press" is rarely defined. Instead, it is assumed that the traits of such an institution are understood and agreed upon. In fact, however, transnational treatment of the press indicates that the concept of "free press" has a very specific meaning. The ways that the media is expected to use its free flow of information rights and to facilitate the exercise of others' rights to the free flow of information are not indeterminate. It is true that the information-flow regime must be flexible enough to allow the media to operate. But to ensure that the media operate in the manner that is envisioned for it, that operation must be constrained by limiting principles. In other words, the "free press" as a theoretical concept is not a core principle of democracy integral to the effective exercise of the fundamental right to the

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[12] *See infra* Part II.B.1.

[13] *See infra* Part II.B.2.

free flow of information; the free press is only those things if it functions in a very specifically

defined fashion. So while "free press" usually goes undefined in discussions of its place in the

democracy-building and free flow of information regime, there is, in fact, a definition implicit in

the international community's conception of the ways that the ideal media is expected to

perform.[14]

First and foremost, the press must play the role of watchdog, scrutinizing government

action and ensuring that the public has information regarding political issues and other topics of

public interest. Ensuring that the press can be a government watchdog increases transparency of

government actions, thus contributing to government accountability and discouraging

corruption.[15] "The media has a corrective function by bringing to the public's attention

corruption and inequitable practices."[16] This pervasive watchdog vision of the media is evident

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[14] The OSCE's policy regarding media standards is a rare explicit statement of the media's role in democratic society:

> A free and responsible media is an integral component of any democratic society. It ensures that the public is provided with unbiased and balanced information and is able to make informed decisions and form opinions on issues of crucial importance to Kosovo. A functioning democracy is characterized not only by free exchange of opinion and information between individual citizens, but also by free, independent and pluralistic mass media. In short, information received through professional and independent media fosters and encourages public engagement in political and economic life.

Organization for Security and Cooperation in Europe Mission in Kosovo, Media Standards, http://www.osce.org/kosovo/13419.html.

[15] *E.g.*, Council of Europe, Committee of Ministers, Declaration on Freedom of Political Debate in the Media (Feb. 12, 2004) (noting that the media is important in order to "exercise public scrutiny over public and political affairs, as well as for ensuring accountability and transparency of political bodies and public authorities."); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report on Civil and Political Rights Including the Question of Freedom of Expression*, Annex I, *delivered to the Commission on Human Rights*, U.N. Doc E/CN.4/2000/63 (Apr. 5, 2000) (joint statement by the UN Special Rapporteur on Freedom of Opinion & Expression, the Representative on Freedom of the Media of the OSCE, and the OAS Special Rapporteur on Freedom of Expression) (hereinafter "2000 Report of the Special Rapporteur"); United Nations Educational, Scientific, and Cultural Organization, Capacity Building, http://portal.unesco.org/ci/en/ev.php-URL_ID=19487&URL_DO=DO_TOPIC&URL_SECTION=201.html (capacity-building projects pay special attention to issues of governance with the aim of improving information delivery, encouraging citizen participation, and making government more accountable, transparent, and effective) (hereinafter "UNESCO, Capacity Building"); *see also* Declaration of Principles of Freedom of Expression, Inter-Am. Comm'n. H.R., 108th Sess., pmbl. (2000) (recognizing the benefits of increased transparency and accountability of government actions as a result of free flow of information).

[16] 2000 Report of the Special Rapporteur, *supra* note 15, at Annex I.

everywhere from the jurisprudence of the European Court of Human Rights,[17] to the World

Bank's focus on accountability, transparency, and anti-corruption,[18] to the work of NGOs such

as Freedom House, which annually measures press freedom around the world.[19]

In addition to its watchdog function, the press also must create a space for public

debate.[20] In facilitating this public debate, a free press enables the operation of the marketplace

of ideas, ensuring that multiple viewpoints on issues of public concern are represented. If the

media ably performs this public debate function, the result is a well-informed citizenry that is

capable of participation and self-governance. The press itself, as well as other institutions, sees

this not just as an ability to disseminate information about matters of public interest; rather, it is a

responsibility. The public has a right to receive this information, and it is the responsibility of

the media to provide it.[21] But the effect of media's creation of this public sphere is broader than

simply the dissemination of information to a passive public that then goes to the polls and votes

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[17] That tribunal noted that if the confidentiality of reporters' sources was not protected, "the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected." Goodwin v. United Kingdom, App. No. 17488/90, 22 Eur. H.R. Rep. 123, 143 (1996).

[18] Press Release, World Bank, Free and Independent Media Empower the Poor and Spur Development,

(Nov. 20, 2002) ("Free and independent media can expose corruption in government and the corporate sector, provide a voice for the people/citizens to be heard, and help build public consensus to bring about change.") (hereinafter "World Bank Press Release"). As the Bank points out, journalists can not only offer disclosures about government activity but also provoke debate about solutions to address the problems that they have uncovered. *Id.*; WORLD BANK, STRENGTHENING BANK GROUP ENGAGEMENT ON GOVERNANCE AND ANTICORRUPTION ii (2006); WORLD BANK, MEDIA, GOVERNANCE, AND DEVELOPMENT, AN EMPIRICAL PERSPECTIVE THAT CHALLENGES CONVENTION (May 3, 2006) (hereinafter "WORLD BANK, MEDIA, GOVERNANCE & DEVELOPMENT").

[19] Freedom House's measures rely, in part, on whether journalists are free to criticize the state, whether they are given access to government information, whether the government interferes with the content of the news and information emanating from media outlets, and whether there is government-imposed or self-censorship. Freedom House, 2006 Freedom of the Press Methodology, http://www.freedomhouse.org/template.cfm?page=350&ana_page=102&year=2006.

[20] *E.g.*, Council of Europe, Committee of Ministers, Declaration on Freedom of Political Debate in the Media (Feb. 12, 2004); Organization for Security and Cooperation in Europe Mission in Kosovo, Media Standards, http://www.osce.org/kosovo/13419.html.

[21] *E.g.*, REPORTERS WITHOUT BORDERS & UNESCO, PRACTICAL GUIDE FOR JOURNALISTS 14 (2002) ("All rights and duties of a journalist originate from this right of the public to be informed on events an opinions.") (reproducing the Declaration of the Rights and Duties of Journalists, known as the Munich Charter) (hereinafter "PRACTICAL GUIDE FOR JOURNALISTS"); Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) (1992) (stating that it is incumbent on the press to impart information and ideas on matters of public interest).

on the basis of the opinions formed through reading media accounts of the events of the day. A successful free press encourages participation from the public at large, fostering a robust civil society capable of carrying on the debate inspired initially by the media, creating a true marketplace of ideas where all points of view are represented.

This public debate role also contains within it a notion that multiple and varied viewpoints on public issues will be represented in the press. This means not only that leaders will be permitted to "to reflect and comment on the preoccupations of public opinion,"[22] but that all elements of society will be permitted to participate in the debate. In fact, ideally, the press itself will be as varied as the opinions and points of view of the public it serves because "the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels generally enhances pluralism and democracy."[23]

Finally, the media's use of its right to free expression to facilitate public debate should promote tolerance and understanding among different elements of society.[24] This role of the media is especially crucial in conflict and post-conflict situations,[25] where the institutions of civil

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[22] *E.g.*, Castells v. Spain, 236 Eur. Ct. H. R. (ser. A) (1992).

[23] *E.g.*, Council of Europe, Committee of Ministers Recommendation No. R (99)1 on Measures to Promote Media Pluralism (Jan. 19, 1999); *see also* UNESCO, Capacity Building, *supra* note 15.

[24] *E.g.*, Declaration of Principles of Freedom of Expression, Inter-Am. Comm'n. H.R., 108th sess. (2000) ("[T]he right to freedom of expression is essential for the development of knowledge and understanding among peoples."); COUNCIL OF EUROPE STEERING COMMITTEE ON THE MEDIA AND NEW COMMUNICATIONS, REPLY TO THE COMMITTEE OF MINISTERS ON THE ALIGNMENT OF LAWS ON DEFAMATION WITH THE RELEVANT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 4 (2007) ("[W]ithout open public debate there can be no pluralism, tolerance and broadmindedness which, in turn, are a precondition for the existence of a democratic society.").

[25] *E.g.*, Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism, 917th mtg. (Mar. 2, 2005) ("[T]he free and unhindered dissemination of information and ideas is one of the most effective mans of promoting understanding and tolerance, which can help prevent or combat terrorism."); United Nations Educational, Scientific, and Cultural Organization, Freedom of Expression, http://portal.unesco.org/ci/en/ev.php-URL_ID=2493&URL_DO=DO_TOPIC&URL_SECTION=201.html ("For several years now, UNESCO has been supporting independent media in conflict and post-conflict situations to enable them to gather and disseminate non-partisan information.") (hereinafter "UNESCO, Freedom of Expression").

society are important elements for reconciliation and for fair and effective democratic elections.[26]

In order for the media to fulfill these roles, there are certain characteristics that an ideal press should have, or standards by which it should operate. The most universally endorsed and fundamental of these ideal characteristics is that the media should be free and independent. Advocates for free expression and a media able to exercise that freedom effectively understand that to be a successful watchdog and to determine the relevant topics of public debate, the press must be able to pursue its own agenda. This means that no individual, group, or government entity should be able to influence which stories journalists choose to pursue or what information and analysis those stories contain.[27] Only a media free to investigate and report on the subjects of its own choosing can provide the citizenry in a participatory democracy with the information it needs to hold its government accountable and to engage fully and effectively in debates on matters of public interest. The principle of independence leads to certain principles governing the media environment which are necessary to ensure that the media is free to act independently. The first is a categorical rejection of government regulation of or control over media content, and an insistence that any regulation of the media sector must be through self-regulation from within the profession itself. Also widely endorsed are the protection of confidential sources, the

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[26] *E.g.*, UNESCO, Freedom of Expression, *supra* note 25 ("Freedom of the press, pluralism and independence of the media, development of community newspapers and radio stations are crucial to the re-establishment of social bonds and to the reconciliation process.").

[27] Examples of the international community's endorsement of independence as a defining characteristic of the free press are legion. *See, e.g.*, 2000 Report of the Special Rapporteur, *supra* note 15; Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1998/40 (January 28, 1998); Declaration of Principles of Freedom of Expression, Inter-Am. Comm'n. H.R., 108th sess., principle 13 (2000); Council of Europe, Committee of Ministers, Declaration on Freedom of Expression and Information (Apr. 29, 1982); World Bank Press Release, *supra* note 18 ("Free and independent media can expose corruption in government . . . provide a voice for the people/citizens to be heard, and help build public consensus to bring about change."); World Press Freedom Committee, Charter for a Free Press, principles 1 & 2, http://www.wpfc.org/Fundamentals.html (hereinafter "WPFC Charter"); PRACTICAL GUIDE FOR JOURNALISTS, *supra* note 20, at 15.

physical protection of journalists, the prevention of the abuse of defamation claims to harass

reporters and editors, and liberal access to information policies.

Closely related to the idea of independence is the principle of media professionalism.

While media independence requires governments and other powerful actors to refrain from

attempting to influence media content, professionalism is a set of standards to which members of

the media themselves must be held. These standards are embodied in the ethical codes of the

profession, which require that journalists' work is carried out in the public interest and that

editorial decisions are not influenced by improper motivations. In fact, journalists' professional

codes maintain that because the rights and duties of journalists originate from the right of the

public to be informed, journalists' primary obligation is to the public.[28] This obligation exceeds

any other responsibility, especially to the journalist's employer or to government authorities.

Thus journalists' view of their role in democratic society is consistent with the role conceived for

them by others: as a conduit of unbiased information about issues of public concern, ensuring

that the citizenry is able to form rational opinions and policy preferences. Media professionalism

includes the duties to respect the truth, to report facts accurately and even-handedly; to refrain

from using unfair methods to obtain information; to respect privacy; to avoid engaging in

plagiarism, slander, libel, unfounded accusations, or propaganda; and to ignore efforts of others

intended to affect the content of news.[29]

Finally, the press should be pluralistic, meaning that it should be representative of

multiple sectors of society and should provide culturally diverse content such that it reflects all

views on major societal issues. This pluralism has structural elements, meaning that there should

be multiple independent and autonomous media outlets, as well as a content element, meaning

[28] PRACTICAL GUIDE FOR JOURNALISTS, *supra* note 20, at 14; Statements of Leslie Gelb, Journalists Covering Conflict: Norms of Conflict, Proceedings of a Conference on Preventing Deadly Conflict (Apr. 28, 1999).

[29] PRACTICAL GUIDE FOR JOURNALISTS, *supra* note 20, at 14.

that those media outlets should provide diverse content and viewpoints. A pluralist media is the best means of ensuring a well-informed citizenry that is fully prepared to participate in governance because it is the most likely to disseminate the entire spectrum of views and ideas about any particular issue. As an institution able to convey information from varied viewpoints to all members of society, a pluralist media is also seen as a means of fostering tolerance and understanding across divisions within a particular society. The drive for media pluralism thus stems from the determination that it is both a prerequisite for and a major factor in successful democratization, especially in a pluralist society.

These norms are not binding law. They are simply the standards and expectations that are reflected repeatedly and consistently in the pronouncements, policies, and agendas of intergovernmental organizations, NGOs, and national domestic governments devoted to liberal democratic principles. As such, they have become informal aspirational guidelines for an ideal media sector. And despite their non-binding nature, they are fiercely guarded; any action that conflicts with them is guaranteed to provoke strong criticism.[30]

B. The Process of Democratization

In a democracy, an ideal media – one able to carry out its functions in facilitating the effective exercise of free expression – must be free and independent, able to resist external pressures that might affect editorial decisions, committed to an ethical code that insists on placing the public interest ahead of any political agenda, and pluralist. These ideals are important, and they are effective in situations where their application is justified. They are not,

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[30] "[T]his liberal agenda has tended to drive media policy. An open media is seen as a 'good thing,' and has been promoted even in somewhat extreme circumstances." Tim Allen & Nicole Stremlau, Media Policy, Peace and State Reconstruction, LSE Crisis States Research Centre, Discussion paper #8, 2005, at 2, 3 ("When it comes to war zones, the 'received wisdom' seems to be that the best way to counter divisive speech is to allow for more speech . . . rather than to impose restrictions.").

however, universally applicable. In fact, there are some contexts which provide compelling reasons to depart from them in significant ways.

When it comes to addressing the role of accepted media norms, the lion's share of the post hoc analysis of the media reform efforts undertaken in Bosnia and Kosovo focuses on the wrong question. These analyses, almost without exception, ask whether the media regulation schemes implemented by international reformers were consistent with international human rights and free expression standards.[31]   This paper argues for a substantial reframing of the question. Rather than wondering whether international reformers acted within the confines of the media norms that apply to established democracies, we should be asking how the specific facts and circumstances encountered in these democratization contexts might justify modifying, suspending, or possibly even discarding – on a temporary basis – strict adherence to the widely accepted norms outlined above.

To accept that this question is the relevant one, we first must understand that democracy and democratization are not one and the same. This proposition is not new or radical. In fact, the well-established field of democratization studies takes it entirely for granted,[32] and with good reason. After all, by definition, in any place where a transition to democracy is taking place, full-fledged democracy does not yet exist. The norms that have developed in the context of established democracies rely for their success on many of the characteristics of democratic

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[31] Peter Krug & Monroe E. Price, *A Module for Media Intervention: Content Regulation in Post-Conflict Zones in* FORGING PEACE, INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE 148, 148 (Monroe E. Price & Mark Thompson eds., 2002); Julie Mertus & Mark Thompson, *The Learning Curve: Media Development in Kosovo in* FORGING PEACE, INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE 259, 280 (Monroe E. Price & Mark Thompson eds., 2002).

[32] E.g., LAURENCE WHITEHEAD, DEMOCRATIZATION THEORY AND EXPERIENCE 7-35 (2002) (attempting first to define what is meant by democracy, the end goal of democratization, and then what is meant by democratization, the process by which a political entity moves toward democratic governance).

society – stable rule of law, a society-wide political identity, political contestation through non-violent means, and so on.[33]

Because democracy does not yet exist in places undergoing democratization, and therefore the democratic characteristics presupposed by established standards do not necessarily yet exist, we should not assume that the norms guiding the understanding and treatment of institutions in democracies should apply.[34]

Within this field of study, there is some contestation over how best to define the word "democratization." One point of view sees democratization as the transition from political monopoly to political competition, and democratization processes are simply those institutional changes that successfully lead to the desired outcome – political competition.[35] The shortcoming of this view is that it does not fully capture the complexity and nuance of most contemporary democratizations; to encompass the entire field of study a more expansive definition is necessary.[36] An alternative view, and the one which this paper adopts, is that "democratization is best understood as a complex, long-term, dynamic and open-ended process."[37] It is a process that is unpredictable, in that neither participants nor experts will be able to anticipate how it will proceed, how long it will take, who will be the winners or losers, and which pre-transition conditions will significantly affect how it unfolds. On this view, the democratization process is not complete simply because elections have been held. Instead, it continues until a more broad-based transformation of society as a whole has taken place, and it is complete only when a

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[33] *See* Allen & Stremlau, *supra* note 30, at 4 ("[T]he starting point here is the benefits of the media at 'optimal performance' – i.e. in rich democracies. . . proponents of free expression are deeply reluctant to concede situations where restricting the media may be appropriate except in the most blatant or dire of circumstances.").

[34] It should be noted that, while this statement may well hold true for the treatment of many institutions of democratic society, the assertions and analysis of this paper are intended to apply only to the media.

[35] WHITEHEAD, *supra* note 32, at 27-29.

[36] *Id*. at 28.

[37] *Id*. at 27.

culture of public debate and civil disputation has replaced the pre-transition means of settling political questions.

This view of democratization as an unpredictable, long-term, dynamic process has some important implications. First, there can be no formula or set of actions that, when taken, will ensure successful democratization wherever they are competently implemented. Instead, the context in which the transition is taking place is enormously important. Democratization tactics must be tailored to the historical, political, economic, military and other relevant factors that exist on the ground. "Institutional design for new democracies needs to be seen as an exercise in social construction and persuasion, rather than in terms of the importation of internationally approved and standardized 'right' answers. . . ."[38] Second, the process will take place in stages. In the early phases of a transition, reformers will have to focus their efforts on certain types of reforms – such as putting an end to violent conflict – which ultimately will become less crucial at later stages. And similarly, measures that would be inappropriate or doomed to failure in the early going might become both more feasible and more desirable over time as the process unfolds.

In democratization contexts, partial deviation from strict adherence to democratic norms might be justified based on certain conditions that often prevail in transitional societies. Indeed, some of these conditions render such deviations not only justified but necessary for successful transition. The first is the existence of deep social cleavages along ethnic, regional, religious, linguistic, or racial lines, especially when these cleavages have been the basis for violent conflict.[39] In these deeply divided societies, large segments of the society are susceptible to co-option and control by non-democratic networks or power bases held over from the pre-transition

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[38] *Id*. at 112.

[39] *See id*. at 76-77 (pointing out that deep divisions can form obstacles to the development of healthy civil society).

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regime. Moreover, the uncertainties accompanying major political transitions often can reinforce group identities and loyalties, and therefore exacerbate conflicts between groups. As a result, divided societies present significant barriers to the development of a national consciousness as well as increased risk of inter-societal tensions and even violence. These characteristics pose challenges to successful democratic governance which are absent in established democracies and which must be overcome by reform efforts during the transitional period.

Not only are transitional societies often deeply divided, they also often have recently emerged from conflict. This post-conflict state of affairs is relevant to democratization in several ways. First of all, especially when post-conflict societies are also deeply divided, the pre-existing divisions or lingering disputes unresolved by the recently ended conflict often remain just below the surface. Renewed violence and the breakdown of peace agreements or truces may be sparked by events that, in a firmly established democracy, would pose no threat to the peace. Moreover, post-conflict societies often exhibit nascent and fragile commitment to the rule of law and institutions meant to support the rule of law. Inexperienced, untrustworthy, or overwhelmed police forces, courts, and government agencies cannot be relied upon to inspire the confidence among the citizenry that is necessary for stability. The heightened tensions and constant risk of renewed violence present in post-conflict transitions must be taken into account in crafting any transitional process meant to lead to peaceful coexistence and meaningful reconciliation.

Finally, transitional societies lack the entrenched tradition of democratic norms and commitment to resolving political disputes through civil, public debate that prevails in stable democracies.[40] This dearth of democratic tradition often includes the absence of a tradition of free and independent media. Instead of operating as part of a robust civil society where the

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[40] *See id*. at 76 (discussing lack of experience with democracy as a problem of developing a useful civil society)

actors are independent of inappropriate influence and committed to acting within the legal rules,[41] the media in societies emerging from authoritarian or other non-democratic rule often have a tradition of being tools of propaganda and mouthpieces for particular political agendas. Because the media in such places never has developed a sense of its role as an instrument of the public interest, committed to independence, accuracy, and even-handedness, reforms designed to create such a media will have to instill in journalists an entirely new ethic. Such a fundamental shift in ethos is never easily accomplished.

Each of these characteristics also has concrete effects on the media environment. In such circumstances, the typical, liberal marketplace of ideas hypothesis—the idea that the cure for inaccurate, offensive, or simply unconvincing speech is more speech, rather than regulation— simply may not hold true. Because of the deep divisions, more speech may result in heightened tensions. And when such tensions are heightened in a post-conflict circumstance, the risk of renewed violence therefore may be raised, rather than eased by a proliferation of media output. Similarly, the marketplace of ideas relies on a plural media, one where a point/counterpoint discussion can take place and where opposing viewpoints engage in civil debate. But in a divided society, where each sector listens only to one or a few dominant voices that share the perspective of a majority of that sector's citizenry, and where contrary viewpoints have no outlet for expression or are subjected to intimidation, the usual justification for avoiding any content regulation may not bear out.

A society governed by accepted democratic norms and principles is the ultimate goal. And in an ideal world, at the end of the long and complex process that is democratization such a society will emerge. As the foregoing discussion has shown, however, transitional societies

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[41] *See id*. at 73 (setting out a working definition of civil society).

differ from established democracies in important ways, ways that affect the way we should think about designing media democratization policies. And so while democratic norms remain an important touchstone, recognizing these differences may at times indicate that the best ways of accomplishing the ultimate goal is through means of democratization that depart from principles proscribed by democratic norms.

II. The Cases of Bosnia & Kosovo

This part first will describe the political contexts in Bosnia and Kosovo that are relevant to the project of media reform undertaken there. It then will discuss those reform efforts, pointing out the ways in which the transitional nature of the circumstances impeded their success, explaining how established democratic media norms were invoked to undermine measures that were actually necessary, and suggesting ways that such impediments might have been avoided or minimized.

A. Political Context

The efforts by intergovernmental agencies and organizations attempted to facilitate a transition to democracy in Bosnia following its civil war and in Kosovo after the war between the Serbian central government and the province of Kosovo's Albanian population present two cases which allow us to consider some of the difficult questions posed by democratization in the field of media reform. Both of these post-conflict situations involved deeply divided societies where renewed violence among ethnic groups remained a very real threat. And in both places, the media historically had been used by political factions as a propaganda tool to highlight and exacerbate the tensions that ultimately led to war. In short, they both exhibited characteristics which not only justified departure from the standards at work in established democracies, but which also ensured that any successful media reform effort would have to do so. This part sets

out the relevant political circumstances and media sector characteristics with which the

international regulators were faced when they began their democratization missions in Bosnia

and Kosovo.

1. Bosnia

When Bosnia emerged from civil war with the signing of the General Framework

Agreement for Peace in Bosnia And Herzegovina (Dayton Accords or Accords)[42] in 1995, the

organized violence stopped, but the ethnic divisions and tensions that had fueled the war

remained. The Accords created a nation divided along ethnic lines into two semiautonomous

entities, the Bosniac-Croat Federation – a federation of territories controlled by the Bosnian

Muslims and Croats respectively – and the Serbian Republic, populated largely by Bosnian

Serbs.[43] Politically, very few issues were to be decided at the national level; instead power

devolved largely to the entity or local level.[44] Despite this decentralized power structure and its

concomitant ethnic divisions and tensions, the organizations and administrators charged with

implementing the Dayton Accords aimed to facilitate the development of a unified, multi-ethnic

Bosnian national identity.[45]

Bosnia's geographic and ethnic divisions were reflected in its public sphere, where both

political parties and media outlets tended to align themselves with particular ethnicities. The

federated structure of post-war Bosnia and the power-sharing devices employed in that structure

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[42] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1996) (hereinafter "Dayton Accords").

[43] GARY T DEMPSEY & ROGER W. FONTAINE, FOOL'S ERRANDS 86 (2001); Dayton Accords, *supra* note 42.

[44] Shelley Inglis, *Re/Constructing Right(s): The Dayton Peace Agreement, International Civil Society Development, and Gender in Postwar Bosnia-Herzegovina,* 30 COLUM. HUM. RTS. L. REV. 65, 78-79 (1998); Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COM. 145, 145 (1996).

[45] DEMPSEY & FONTAINE, *supra* note 43, at 85; Monroe E. Price, *Restructuring the Media in Post-Conflict Societies: Four Perspectives*, 2 CARDOZO ONLINE J. CONFL. RESOL. 1, 6 (2001).

ensured that political leaders within each ethnic community would have a great deal of power.[46]

Consequently, the leaders of these ethnic communities had a great deal to gain by consolidating

power within their respective ethnic enclaves and to resist efforts to create a unified Bosnian

identity that might spread power among ethnic groups. Their strategy for doing so was to

continue to view political issues through ethnic lenses and to continue to support the nationalist,

separatist position that they had advocated during the war.[47] By contrast, the international

community charged with overseeing the implementation of the Dayton framework was intent on

forging a unified Bosnia, a project that required the breakdown of old power structures and the

empowerment of a new generation of leaders who did not share the war-time leaders'

ethnocentric agendas.

A significant factor contributing to the divided nature of post-war Bosnia was the nature

of its media, and in particular its broadcast media. Both before and during the war, the seeds of

the post-conflict media shortcomings were apparent, as the media – like the rest of the country –

were divided along national or ethnic lines.[48] This division remained as Bosnia moved into its

post-conflict transitional phase. Each ethnic group had a corresponding broadcast network.

These networks, Serb Radio and Television (SRT), Croatian Radio and Television (HRT), and

Bosnia-Herzegovina Radio and Television (RTBiH), were broadcast in the territory where a

particular ethnic group was concentrated and served as the major source of information within

that area.[49] This dynamic resulted in the creation of essentially three audiences, with no national

networks reaching the entirety of the Bosnian population. The networks tended to be aligned

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[46] *See* Inglis, *supra* note 44, at 84; Morrison, *supra* note 44, at 145.

[47] Price, *supra* note 45, at 6.

[48] *Id*. at 5; MARK THOMPSON, SLOVENIA, CROATIA, BOSNIA AND HERZEGOVINA, MACEDONIA (FYROM) AND KOSOVO INTERNATIONAL ASSISTANCE TO MEDIA 32 (2000).

[49] THOMPSON, *supra* note 48, at 36.

with local politicians.[50] Sometimes this meant that the political parties themselves controlled the

networks; sometimes it meant that journalists and editors were intimidated, through harassment,

physical assaults, or threats, into broadcasting only reports of which those local leaders

approved.[51] Rather than engaging in independent, unbiased reporting, these networks not only

supported the leader in power but also showed a penchant for polemical, nationalist statements

that demonized rival ethnic groups.[52] Thus the post-war media remained both politically aligned

with entrenched ethnic leaders and prone to venomous, ethnically-biased, often inaccurate or

unsupported reports.

It was into this post-conflict morass that the international community waded, attempting

to ensure the implementation of the terms of the Dayton Accords.[53] Dayton itself contained no

specific provisions for media reform.[54] It did, however, provide that the Organization for

Security and Cooperation in Europe (OSCE) would organize elections,[55] and OSCE officials

knew that, absent reform of the existing media situation, voters would receive information only

from the partisan, nationalistic, divisive programming that existed in the immediate aftermath of

the war. With this type of program as the dominant source of information, the likelihood of

realizing the goal of the development of a unified Bosnian national identity was slim. In such an

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[50] Price, *supra* note 45, at 6.

[51] *Id*. at 6; THOMPSON, *supra* note 48, at 36.

[52] THOMPSON, *supra* note 48, at 41.

[53] In addition to the local political leaders in Bosnia, several international entities were put in place to ensure the
implementation of Dayton's provisions. A NATO-led multinational Implementation Force (IFOR), later know as
the Stabilization Force (SFOR), was responsible for the military aspects of the implementation. THOMPSON, *supra*
note 48, at 34. The civilian aspects of the Dayton Accords were to be overseen by the Office of the High
Representative (OHR) an *ad hoc* international institution created by the London Peace Implementation Conference
and approved by the United Nations Security Council. Dayton Accords, *supra* note 42, at annex 10, art. 1; S.C. Res.
1031, U.N. SCOR, 50th Sess., 3607th mtg., P 15, U.N. Doc. S/RES/1031 (1995). And the UN Mission in Bosnia-
Herzegovina (UNMIBH) was designed to help establish rule of law, including reform of the police and the judicial
system. S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., P 15, U.N. Doc. S/RES/1031 (1995).

[54] THOMPSON, *supra* note 48, at 33.

[55] Price, *supra* note 45, at 6; Dayton Accords, *supra* note 42, at annex 3; THOMPSON, *supra* note 48, at 34.

environment, it was apparent that any election simply would result in the same nationalist leaders that led the country to war being voted into office.[56] Such a result would entrench the existing ethnic divisions, endangering the long-term implementation of Dayton and jeopardizing the international community's goal of a unified Bosnia. Thus OSCE and the Office of the High Representative for the Implementation of the Peace Agreement (OHR), the office charged with overseeing the civilian aspects of implementing the Dayton framework, made media reform a significant element of both election preparations and the implementation of Dayton more broadly.

OSCE and OHR's reform efforts almost universally failed to recognize the implications of the context in which they were implemented. The reforms were aimed at transforming the Bosnian media sector into one that conformed to the model developed in western democracies outlined above. Specifically, some reforms focused on making the local media pluralist, both in the sense of ensuring that it reached all segments of Bosnian society and also that its content presented varied points of view on salient issues. The hope was that such information would send unifying, mediating messages aimed at conflict resolution to the Bosnian population as a whole. Other reforms were targeted at the way that journalists do their jobs, trying to shape the Bosnian media into the western image of a free press, independent from political or other improper influence and conforming to standards of professional conduct with respect to characteristics such as accuracy and evenhandedness. But none of them sufficiently accounted for the effects of Bosnia's continued ethnic divisions. Nor did they consider the extent of the difficulties posed by the lack of a tradition or history of independent journalism.

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[56] Price, *supra* note 45, at 7.

2. Kosovo

When NATO's 1999 bombing campaign brought an end to the war between Serbia and the province of Kosovo's Albanian population, the political and media environment had many similarities with the post-conflict scenario in Bosnia. For example, despite the formal end of hostilities, the political situation and the public sphere in Kosovo remained highly polarized. In fact, the threat of renewed large-scale violence in Kosovo was even more pronounced than it was in Bosnia. In contrast to Bosnia, where the parties signed a peace treaty (albeit under some duress) concluding hostilities and agreeing to a framework for peace going forward, the conflict in Kosovo ended with a UN resolution,[57] leaving the final status of Kosovo undetermined and a UN mission in charge of a territory full of Albanians and Serbs still intent on seeking revenge for the perceived wrongs done to them prior to and during the war. Inter-ethnic harassment, intimidation, and violence continued after the war's end, and attacks on members of the Serb community, an ethnic minority within Kosovo, in retaliation for past Serbian oppression of Kosovar Albanians were not uncommon.[58] Polarization was not limited to the relationship between Kosovar Albanians and Serbs. Rival Kosovar Albanian political parties were also vying for a piece of the post-conflict pie, though these intra-ethnic struggles tended to play out in peaceful, though polemical, fashion.[59]

Also as in Bosnia, the media traditionally had not been a neutral or conciliatory force. Albanian-Serbian tensions had built up over many years prior to the initial outbreak of

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[57] S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

[58] DEMPSEY & FONTAINE, *supra* note 43, at 92-94. The situation was so tense that much of the Serbian population who had lived in Kosovo prior to the war had fled the province; for the most part, the Albanian population was not sorry to see them go. *Id.* at 135-36.

[59] The most powerful was the Kosovo Liberation Army (KLA), which had spearheaded the war for independence against the Serbs, led by Hasham Thaci. Thaci had a strong rival, however, in Ibrahim Rugova, leader of the self-proclaimed Republic of Kosovo since 1992. *Id.* at 141; THOMPSON, *supra* note 48, at 62.

violence.[60] As tensions intensified, the Serbian regime had become more aggressive in interfering with Kosovo's independent media outlets as a means of asserting control over the formerly semiautonomous territory. For example, in 1990, Radio Television Pristina (RTP), Kosovo's Albanian-language broadcast entity, was taken over by the Serbian regime and transformed into a Serbian-language service.[61] Albanian-language newspapers were generally permitted to continue to operate, but always under threat of harassment or closure.[62] And the Albanian-language newspapers that did exist tended to align themselves with one of the Albanian political factions extant in the province and served to inflame tensions, exaggerating both the scope of Serb abuses and the strength of pro-independence forces.[63]

Post-conflict Kosovo was a province with neither functional media nor functional government. During the war, the media outlets within Kosovo either had shut down entirely or removed their operations to a neighboring territory. Between Serbian leader Slobodan Milosevic's crackdowns and the NATO bombing campaign, any indigenous, Albanian-language media that had existed prior to the war had been wiped out.[64] When international forces moved into Kosovo after the NATO bombing ended, they found a province with no functional media, with most residents getting information from Albanian newspapers and Albanian television via satellite. The media scene quickly became crowded, however, and mere months after the bombing ended, multiple daily newspapers, magazines, and radio stations had begun broadcasting and publishing; the television landscape remained barren.[65]

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[60] Price, *supra* note 45, at 27.

[61] Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INTL L. 179, 191 (2001).

[62] THOMPSON, *supra* note 48, at 61.

[63] Price, *supra* note 45, at 28-30.

[64] *Id.* at 27-30; THOMPSON, *supra* note 48, at 62.

[65] THOMPSON, *supra* note 48, at 62-63.

Politically, Kosovo was essentially made into a protectorate, and the United Nations was vested with the authority to administer the region through the United Nations Interim Administration Mission in Kosovo (UNMIK), led by the Special Representative of the Secretary General (SRSG).[66] Unlike Bosnia, where local politicians retained authority to govern, UNMIK was the only governmental authority in Kosovo until such time as elections could be held. UNMIK's mandate called upon it to, inter alia, "perform basic civilian administrative functions[,] . . . promote the establishment of substantial autonomy and self-government[, and] promote human rights,"[67] while military and security issues would be governed by the NATO-led Kosovo Force (KFOR).[68] While the international community intended to restore Kosovo to the semiautonomous status it had enjoyed up until the early 1990s, it expressly avoided taking a position with respect to Kosovo's final status – whether, as the Albanian population wanted, it eventually would become an independent entity or whether Serbia would retain control over it in some form.[69] Despite the uncertainty of Kosovo's final status, local political leaders retained significant influence in anticipation of UN-run elections, which would allow some power to devolve back to local government.

Like the Dayton Accords that guided the administration of Bosnia's post-conflict era, UNMIK's mandate failed to include a specific media reform policy.[70] But OSCE, again charged with democratization and institution-building,[71] considered media reform in Kosovo to be an

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[66] Price, *supra* note 45, at 26; THOMPSON, *supra* note 48, at 62.

[67] S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999); S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., P 15, U.N. Doc. S/RES/1031 (1995).

[68] THOMPSON, *supra* note 48, at 62.

[69] DEMPSEY & FONTAINE, *supra* note 43, at 125-26.

[70] S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999); United Nations, UNMIK at a Glance, http://www.unmikonline.org/intro.htm; THOMPSON, *supra* note 48, at 63.

[71] United Nations, UNMIK at a Glance, http://www.unmikonline.org/intro.htm.

integral element of its institution-building program.[72] And again, international reformers

embarked on a plan based on the premise that "[i]n Kosovo, like in [Bosnia-Herzegovina], a

professional and independent public service broadcasting service [will] play a vital role in

promoting reconciliation, peace, law and order and the establishment of a democratic civil

society."[73] And again, the implementation of reforms overlooked the political and media-related

realities that should have influenced the design of reform efforts.

B. Media Reforms

In an attempt to foster the liberal democratic norms of independence, professionalism and

pluralism discussed above, and to remake the Bosnian and Kosovar media landscapes in the

image of western free press, international administrators embarked on a variety of media reform

efforts. These efforts met with varying degrees of support within the international community at

large, among influential media entities and organizations, and with local actors on the ground.

Some of the reforms were destined to fail, some were necessary though controversial, and still

others should have been more central to the overall media reform strategy. In the end, the

international community's failure to take into account the forces that would affect the

effectiveness of their actions and to recognize that a departure from liberal democratic norms

regarding the media was, in some instances, crucial for bringing about media transition rendered

the efforts much less successful than they could have been.

1. Establishing National Networks

One element of media reform that was undertaken in both Bosnia and Kosovo was the

attempt to establish a nationwide (or province-wide, in the case of Kosovo) broadcast network

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[72] Organization for Security and Cooperation in Europe, 237th Plenary Meeting, Agenda item 2, Decision No. 305, 1 (July 1, 1999), http://www.osce.org/documents/pc/1999/07/2577_en.pdf.

[73] Laurent Pech, *Is Dayton Falling? Reforming Media in Bosnia and Herzegovina*, 4 INT'L J. COMM. L. & POL'Y 1, 2 (1999).

that would be a source of reliable, unbiased information from a variety of sources – both local

and international – and that would be available throughout the relevant geographic area.[74] The

impetus behind this reform effort was a desire to establish a pluralist media source – one that

would broadcast multiple points of view – to combat the nationalistic, ethnocentric, or politically

biased information characteristic of the established broadcast networks. By developing a

nationwide source of reliable, unbiased information to the Bosnian populace, the international

community hoped to combat the divisive, sectarian influences of the ethnically affiliated SRT,

HRT, and RTBiH and to encourage the development of national, non-ethnic based, democratic

public opinion. While Kosovo was not burdened with a pre-existing chokehold on the broadcast

media by ethnic or political influences, the idea of politically-affiliated media outlets was

nonetheless integral to Kosovo's media community. And, as in Bosnia, an impartial, province-

wide broadcast network was envisioned as a tool for overcoming the agenda-specific nature of

Kosovo's reporting, which reflected broader societal divisions deeply entrenched in the minds of

both Albanians and Serbs.[75] By providing pluralist information sources, reformers hoped to

engender a civil society that encompassed the whole of the population and to ensure that the

citizenry would have a forum for full and fair debate, free from improper political or ethnic

influences.

Unfortunately, these efforts failed to recognize that the entrenched local political interests

resulting from the divisions within Bosnian and Kosovar society had both the desire and the

ability to place insurmountable obstacles in the way of these reforms unless international

reformers were willing to utilize aggressive management and oversight tactics. While

autonomous, locally controlled national networks might be a valuable development at a later

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[74] Price, *supra* note 45, at 7-8; THOMPSON, *supra* note 48, at 28.

[75] *See* Ana Bardhi, *Is the Press Turning into a Judge?* AIM PRISTINA, June 9, 2000,
http://archiv.medienhilfe.ch/News/Archiv/2000/AIM_KOS0616.htm.

stage in the transition process, any attempt to establish them in the immediate post-conflict phase requires a level of regulatory control that reformers were loathe to employ.

Recall that media pluralism, in the ideal model discussed above, incorporates both pluralism of media content – the idea that media sources should present varying views on the issues they cover – and pluralism of media outlets – the idea that there should be many sources of information in the media market. The norm favoring pluralist media in general, and favoring the presentation of varied perspectives from each individual media entity in particular, is intended both to ensure the fullness of public debate on issues and to promote tolerance and understanding among various groups within society. The international reformers' plan to establish nationwide networks was an attempt to ensure this pluralism of content. By creating a media outlet that was unbiased and impartial, which would cover issues from all angles without filtering it first through the lens of any particular point of view, such networks would present varying views on relevant issues. This aspect of media pluralism, however, presupposes a society with a unified self-image. Different members of that society or different ethnic, socioeconomic, religious, or political elements might hold different views on what is best for that society and what policies should be implemented. But each of those factions considers itself part of the larger society; the relevant political entity is the entire nation. In other words, even though (as a general rule) Democrats might favor greater funding for entitlement programs while Republicans prefer lower taxes and less overall spending on such programs, all of these actors consider themselves Americans, and they advocate for their position by appealing to the whole of the American public. It is this shared understanding of belonging to the same national entity, despite philosophical or political differences, that allows the expression of and tolerance for

multiple viewpoints. In other words, nationwide media pluralism presupposes a nationwide political consciousness.

This sense of commonality was, at best, an aspirational one in the deeply-divided societies present in both Bosnia and Kosovo at the time of the events described above. In Bosnia especially, and in Kosovo to some degree as well, the very political structures that had been established recognized a sharply divided, self-consciously non-pluralistic society. The Dayton Accords explicitly divided Bosnia into three ethnic enclaves, and the very existence of Kosovo as a semi-autonomous province is premised on the right to self-determination of ethnic Albanians living in Serbia. While the UN and OSCE's stated goal in Bosnia was to forge a Bosnia-wide national consciousness, that goal seems at odds with the political settlement to which the parties on the ground agreed. Because Dayton created a dual-entity structure based on ethnicity and largely governed at the local level, local political leaders recognized that they had nothing to gain by the development media networks touting a unified Bosnia. Indeed, for local politicians, such networks were nothing but a threat to the existing power-structures under which they thrived and prospered. So while the international community's long-term goal was for a unified, pluralist Bosnia, any policy implemented on the assumption that local actors shared that vision was woefully incongruent with the prevailing political conditions and therefore unlikely to succeed.

The situation in Kosovo was slightly more hopeful. Because there was no functional broadcast entity in existence when the UN took over governance of Kosovo, UNMIK and OSCE's reform efforts did not have to overcome the influence of the sort of nationalist, biased networks with which they were faced in Bosnia. However, as in other Balkan power struggles, the media in Kosovo had been used by both Albanians and Serbs as means of waging their

conflict since the early 1990s. And the very existence of Kosovo as a semi-autonomous province, premised on the right to self-determination of ethnic Albanians living in Serbia, embeds this ethnic conflict in the political reality on the ground.

In failing to recognize that the necessary element of a shared sense community required for a successful nationwide media was absent, the international reformers overlooked crucial aspects of the context in which they were working, both in Bosnia and in Kosovo, which undermined their efforts to import western media pluralism into those territories. Specifically, they did not take into account the extent to which the extant societal divisions incentivized local leaders and power-brokers to undermine international efforts towards media pluralism. Without appreciating the strength and pervasiveness of the resistance they were likely to face, the reformers failed to incorporate into their project sufficient international oversight. As a result, the countervailing forces at work were powerful enough to render their efforts at creating pluralist media outlets – at least in the short-term – futile.

The first attempt at a establishing a nationwide broadcasting network in Bosnia, known as the Open Broadcast Network (OBN),[76] made the mistake of relying on the cooperation of pre-existing local television stations. Seen as more efficient than creating a new network from the ground up, OBN planned to connect existing independent local stations into a nationwide network and provide training and equipment to those local stations.[77] The OHR spearheaded and administered the project, while financial support came directly from a broad array of enthusiastic donors such as the United States Information Agency, several European Union member states,

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[76] Price, *supra* note 45, at 8.

[77] There were initially two different potential models for the network. The OHR wanted to build a new network with journalists covering all sides of relevant issue and with staff and officers brought from outside the country. *Id.* at 8. All of the donors, however, wanted to provide training to existing independent stations and build an affiliate network to connect them, fearing that an entirely new entity created by the OHR would be seen as imposed on Bosnia by foreigners and therefore would lack credibility. *Id.*

and George Soros' Open Society Institute.[78] In the radio realm, a similar attempt to create a

nationwide, pluralist broadcast entity was the Free Elections Radio Network (FERN), a joint

project of OSCE and the Swiss government. Both networks were meant to provide objective and

timely information on the initial post-war elections to all peoples in all areas of Bosnia[79] and

intended to use and develop local journalists.[80]

Entrenched political interests strongly opposed OBN and FERN's development and

actively worked to subvert their success by exerting their own influence in defiance of the

international reformers' agenda. As for OBN, not one station in the Serbian entity agreed to be

part of the network, and only a few in the Bosniac-Croat federation were willing to do so.[81]

When OBN went on the air just a few days before the 1996 elections, only one-third of the

Bosnian population could see it, and there was no coverage in the Serbian Republic, the region

most in need of a media outlet with a moderate, impartial point of view.[82] As a result, OBN was

spectacularly unsuccessful in transforming the Bosnian media into a forum for accurate, pluralist,

non-partisan debate.   And after the 1996 elections, the Bosnian national government tried to

undermine OBN's future success by accusing OHR of impermissibly granting OBN a broadcast

license without coordinating with Bosnia's authorities and thus interfering with existing

frequencies.[83] Unable to sustain itself financially, OBN declared bankruptcy and shut down in

1999.[84]

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[78] *Id.*

[79] *Id.* at 7.

[80] THOMPSON, *supra* note 48, at 38.

[81] Price, *supra* note 45, at 8.

[82] *Id.*

[83] Price, *supra* note 45, at 9.

[84] L. Kendall Palmer, The Power-Sharing Process: Media Reforms in Bosnia-Herzegovina 12 (Feb. 9, 2001)
(unpublished paper presented at the Kokkalis Graduate Student Workshop, Harvard University).

Similarly, local authorities obstructed FERN's ability to proceed. For example, Bosnian Serbs claimed they couldn't install the transmitters for FERN because the roads leading to the mountains where they needed to be placed were mined.[85] Due to tactics such as this, FERN went on the air just two months before the 1996 election and reached only 40% of the territory of Bosnia, none of which was in the Serbian entity.[86] Neither OBN nor FERN was able to threaten the dominance of the politically and ethnically aligned media whose influence over the elections they were meant to mitigate.[87]

In Kosovo, reformers only temporarily avoided the mistakes that they made in Bosnia. Again avoiding the creations of a province-wide, pluralist, impartial network from nothing, UNMIK and OSCE took over RTP from the Serbian regime and re-launched it as Radio Television Kosovo (RTK).[88] When RTK first was launched, UNMIK and OSCE put in place international managers who, in turn, hired journalists mostly from the Albanian émigré community, rather than re-hire the Kosovar Albanians who had worked for RTP prior to the Serbian takeover.[89] Not surprisingly, this hiring decision created resentment among former employees,[90] but it was not without purpose. According to some observers, the group of former employees that were excluded from becoming involved with RTK from the beginning were affiliated with the KLA and planned to use their positions at RTK to advance the KLA agenda.[91] As a result of the international control over editorial and content decisions, RTK provided

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[85] Price, *supra* note 45, at 7.

[86] *Id*. at 7, 8.

[87] THOMPSON, *supra* note 48, at 38.

[88] Price, *supra* note 45, at 31.

[89] *Id*. at 36.

[90] *Id*.; Amalou Florence, *L'ONU Impose sa Propre Télévision au Kosovo*, LE MONDE, Sept. 9, 1999.

[91] THOMPSON, *supra* note 48, at 67.

relatively even-handed and accurate reporting of events within and around Kosovo for its first two years of existence.

Vesting initial editorial control in non-Kosovars and excluding politically motivated employees from taking part in RTK succeeded only briefly in preventing RTK from becoming politicized. Over the course of RTK's first two years, responsibility for RTK management and editorial decisions gradually devolved from international administrators to local journalists. As this move progressed, the broadcast content became more one-sided, anti-Serb, anti-UN, and anti-KFOR.[92] The Serbian-language aspects of the network were eliminated when a Kosovar Albanian journalist took over management.[93] And as RTK became more and more a wholly local entity, there were accusations that it favored one local politician over another.[94] Though such allegations could not be proved (the tapes of the broadcasts in question mysteriously disappeared before they could be reviewed), there is evidence that local factions were jostling for control of the network and the power that its information-dissemination capability conferred. Thus OSCE's aim of establishing a pluralist, multi-ethnic entity failed to outlast the international control over the network.[95]

UNMIK and OSCE's belief that they could establish a pluralist province-wide network and remove their heavy regulatory hand so quickly without allowing RTK to fall prey to the factional battles so evident in Kosovo's print media,[96] especially considering those organizations' prior experience in Bosnia, appears naïve. Kosovo's different ethnic groups and political factions had long seen their influence over information flow as a tool with which to

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[92] *Id.* at 68-69; Shira Loewenberg, United Nations Media Strategy, Recommendations for Improvement in Peacekeeping Operations, Case Study: UN Interim Administration Mission in Kosovo 20 (2006).

[93] Thompson, *supra* note 48, at 71.

[94] *Id.* at 69.

[95] *Id.* at 71.

[96] *See infra* Part II.B.2.

35

further their political agendas. The mere creation of a network that would reach all of Kosovo's residents, without significant regulation, management, or intervention by neutral actors, could not hope to remove this tactic from local politicians' tool chests.

Recognizing the significant impediments to the ability to forge broad-based, national democratic consciousness in the immediate post-conflict phase of democratization in deeply divided societies leads to several suggestions for approaching the goals of pluralism – full and fair debate and the development of a tolerant, productive civil society. Recall that democratization is a long-term, dynamic process, and that it may have several phases.[97] Reform efforts or regulations that are appropriate at a given point in time may not be effective or desirable at another. Similarly, departure from democratic norms may be more easily justified when a transitional society has made relatively little progress towards the ultimate goal of a stable democratic state.

An initial lesson is that the preliminary success with RTK in Kosovo indicates that an aggressive agenda of editorial control and international oversight has the potential to establish the type of nationwide network that the international community had in mind for Bosnia and Kosovo.[98] It is also apparent that relinquishing this control too early risks sacrificing any progress that has been made. Thus if an attempt at creating a pluralist network is undertaken in the initial phases of democratization in a deeply divided society, international or neutral management of some form must stay in place until the divisions that render locally controlled pluralist networks unlikely have abated. This suggestion flies in the face of the liberal media independence principles that preclude government regulation or editorial management and that

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[97] *See supra* Part I.B.

[98] PUTZEL & VAN DER ZWAN, *supra* note 6, at 6 ("In situations where national cohesion and consensus is lacking, state or public involvement in the media can, as part of the equation, actually be a constructive force for the social, economic, and political reconstruction and development of a country.").

insist on media self-regulation. But in deeply divided societies, impediments to pluralism and nationwide debates are deeply entrenched within the local political power struggles. When local political actors have nothing to gain and everything to lose from permitting the media sector to transition from one controlled by political agendas to one that operates according to western standards of professionalism, they are unlikely to acquiesce in or support reformers' attempts to facilitate this transition by living up to the democratic expectations for government actors to respect media independence. "[T]heorists of power-sharing have recognized that in societies with severe ethnic divides, democratic institutions need to go far beyond standard democratic procedures to ensure adequate ethnic representation and minimize conflict between ethnic groups. If such steps are needed in governance in divided societies, they may also be necessary in other institutions."[99] In other words, if the various sectors of society are unwilling to form a wholly integrated political unit, it is unlikely that efforts to forge a wholly integrated media sector will succeed absent significant intervention. While such ethnically-focused arrangements may or may not be appropriate in the design of formal political institutions such as the presidency or the legislature, the argument for them is particularly compelling in the context of institutions, such as the media, whose makeup, even in an established democracy, is not traditionally selected by the electorate. Until there is some sense among local actors that their own interests will be served by buying into a national identity that includes former enemies and rivals, any insistence on media self-regulation as a limiting principle will preclude the existence of nationwide, pluralist media sources.

So the first lesson is that, in the immediate post-conflict phase of transition where societal divisions still heavily influence political agendas, the creation of a nationwide, pluralist media

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[99] Palmer, *supra* note 84, at 3.

can only be embarked upon through a rejection of the democratic non-regulation principle. If such an entity hopes to escape sectarian political influence, it must be aggressively managed by a neutral regulator or administrator. This is, of course, only an option in situations where, like Bosnia and Kosovo, there is an international presence that can act independently of any local political agenda.

But the only options available to reformers who hope to facilitate the emergence of a pluralist media are not either to create an internationally controlled network or to simply stand by passively and wait for a unified national consciousness to emerge; instead, they might take a multi-phased approach. In the initial post-conflict period, they can take steps to encourage the development of a national consciousness and the break-down of the power structures that impede its development. Once these obstacles to the creation of pluralist national media outlets have been reduced or eliminated, the second phase of reform can focus on the media outlets themselves.

The first phase can be implemented in two ways. The first is through an alternative media reform focus. In situations such as Bosnia and Kosovo, rather than expecting any one information source to serve the entirety of the population, who live in different geographical areas and who speak different languages, initial reform efforts should focus instead on ensuring that the information sources that the various populations do rely on are providing accurate and unbiased information and that there are multiple media sources available within each community. In other words, focus on intra-ethnic or intra-factional pluralism so that, within each segment of society, there are a variety of voices and that those voices present a variety of perspectives. It is unlikely, for example, that all Bosnian Muslims hold the same views on every issue. So while it might be unrealistic to expect Bosnian Muslims and Bosnian Serbs to turn to

the same media sources for information, different Bosnian Muslims could be presented with different types of information sources. Within this theoretical pluralistic Bosnian Muslim media sector, a variety of voices might emerge, some more moderate, some more nationalistic. And this variety of voices might contribute to civic debate and ideological tolerance in the same way that the UN and OSCE hoped that a nationwide broadcaster would. Perhaps eventually this intra-ethnic or intra-factional pluralism might result in some voices in favor of the international community's ultimate political goal of a unified society. And if that goal gains support among moderate forces within each ethnic community, over time unified media sources will emerge as a national consciousness emerges. At the proper time, if that time comes, the international community can then move to the next phase and attempt to facilitate the emergence of those sources. But to expect unified media to precede a sense of unified national identity is unrealistic. The international community cannot force a national identity on a group of people who do not already possess that identity or even aspire to develop it.

A parallel path to eventual pluralism focuses on the broader political context rather than focusing narrowly on the media sector. If the major impediments to pluralism come from those political entities who have the most to lose from minimizing existing societal divisions, political defeat or marginalization of those entities will tend to reduce those impediments. As the old power structures and alliances break down over time – due to changed conditions on the ground, international efforts on the political front, pressures from allies or intergovernmental organizations, the natural aging of charismatic leaders, etc. – the old ways of thinking about the structure of society will evolve as well. And if the democratization process continues effectively, a single national consciousness eventually will come to be more powerful than the old, sectarian ones. At such a point pluralism in media, like pluralism in society more broadly,

39

becomes possible. Recognizing their impact on media pluralism, media reformers should actively engage with the reform attempts going on in other societal institutions in an effort to coordinate in pursuit of pluralism within society at large.

2. *Imposing Regulatory Frameworks*

The other major reform initiative undertaken in both Bosnia and Kosovo shows stark contrasts with the attempts to create nation- or province-wide broadcast networks. This was the attempt to establish and enforce a comprehensive regulatory system for the media, which included both the development and enforcement of professional codes of conduct requiring accuracy and fairness in reporting and the prohibition of hate speech and incitement.[100] Unlike the pluralist network initiatives, these proposed regulatory schemes met with significant opposition not only from local actors but also from international media organizations and powerful media entities. Also unlike the networks discussed above, media regulation plans would have significantly enhanced media reform efforts in the early stages of both Bosnia's and Kosovo's transition process. But instead of aggressively forging ahead with these plans in the early stages of reform, the international authorities repeatedly balked in the face of objections based on the norms developed for established democracies with entrenched respect for the rule of law and a sincere commitment to a free press by all relevant actors, failing to recognize that the circumstance with which they were faced justified a departure from those norms. Ultimately, these regulatory schemes were imposed, but only after significant delays. As a result, reformers lost the valuable opportunity to affect significantly the role of the media sector in the immediate wake of the recently ended conflicts, especially with respect to the highly problematic use of hate

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[100] These comprehensive schemes also included non-controversial elements that governed, for example, the assignment of broadcast frequencies. These aspects of the plans are not relevant to the focus of this paper, which is on the provisions that directly affected editorial decisions, through restrictions on certain media content and regulations regarding how media professionals conducted themselves in the course of their jobs.

speech.[101] Moreover, not only should the international regulators have insisted at the outset on carrying out their proposed regulatory schemes, they also should have acted much more aggressively to promulgate, encourage, or insist upon on legal provisions that would have created an environment with the necessary preconditions for journalistic professionalism.

There were several factors at work in both Bosnia and Kosovo that should have alerted regulators that they would have to modify or disregard some of the standard norms applied to media sectors in established democracies when it came to general media regulation measures. As discussed above, the generally accepted norms of media governance dictate that the media must be both independent and professional. The desire for independent media, which must resist allowing improper influences to affect editorial decisions, leads to a strict presumption against regulation of the press by government actors who could use those regulations to censor or influence media content. Instead, the government's role is often limited to technical areas such as management and assignment of broadcast frequencies, leaving the media to regulate its own members activities and the content of their reporting, with the expectation that this self-regulation will include a mechanism that ensures professionalism among members of the media. For adherence to these norms to make sense, the media must be both able and willing to resist improper editorial influence and to self-regulate.

The very reason that media reform efforts were necessary in Bosnia and Kosovo was that these ideals – an independent media that resists improper influence and a culture of professionalism that ensures accurate, even-handed reporting – had never taken hold there. In fact, contrary to what some detractors claimed,[102] the media sectors in Bosnia and Kosovo had

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[101] For the purposes of this paper, any speech that constitutes incitement to prejudice, discrimination, or hatred of a group or individual on the basis of ethnicity, race, religions, or political views constitutes hate speech.

[102] Steven Erlanger, *NATO Peacekeepers Plan a system of Controls for the News Median in Kosovo*, N.Y. TIMES, Aug. 16, 1999 at A8; THOMPSON, *supra* note 48, at 64.

never exhibited the characteristics of independence or professionalism and thus were in no

position to police themselves. One need simply look at the type of reporting that dominated the

airwaves and the newspaper stands to recognize that the limiting principles embodied in the press

codes proposed by international reformers had yet to find a home in the professional dictates of

the journalists to which they were meant to apply. An example: In the summer of 2000, the

Kosovo daily *Dit*a accused a UN translator of taking part in war crimes as part of a Serb

paramilitary group. The article, which published the employee's name, address, and photograph,

amounted to a call for revenge against this individual who was, in fact, abducted and found

stabbed to death no more than two weeks after the publication of the article.[103] In the aftermath

of these events, *Dita*'s publisher was unapologetic, explaining that UN's failed criminal justice

efforts in Kosovo forced his actions and pledging to continue to act in the same manner going

forward.[104] If the journalism community is not able to impose the necessary standards on itself,

then perhaps, as an initial step, those standards must be imposed on them by an outside entity.

Through these externally imposed standards, international reformers can attempt to instill the

sense of responsibility and loyalty to the public interest that seems to be lacking in the hopes that

the principles contained therein will eventually be accepted, internalized, and then followed

voluntarily.

In addition to a dearth of media professionalism among Bosnia and Kosovo's media,

there was an alarming lack of independence. In Bosnia, the distribution of propaganda was a

major contributor to the war and remained a source of post-war ethnic tension and divisiveness

in Bosnian communities.[105] And, as discussed above, Bosnian broadcast networks clung to their

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[103] Llazar Semini, *UN To Stamp Out Vigilante Journalism*, IWPR Balkan Crisis Report, No. 146, June 6, 2000.
[104] *Id*.
[105] Price, *supra* note 45, at 12.

42

ethnocentric worldviews and tended to advance only ideas consistent with their nationalistic

affiliations. In contrast to Bosnia where the broadcast media reigned, Kosovo's print media was

local the source of most news and information,[106] but it was equally troubled. Most print

periodicals were nationalistic, tending to print incendiary and inaccurate reports, often of a

nature that would put the subjects of those reports in danger. Echoing the pre-war era

tendencies, many newspapers that emerged in post-conflict Kosovo were aligned with political

parties.[107] These publications used their pages to further a political agenda, often labeling the

few independent editors and journalists that did exist as Serb collaborators.[108] In short, the

media in both places engaged in biased reporting, which often took the form of attacks on rival

political or ethnic groups, and that in the course of the conflicts that played out in these places,

the media had played an active role in instigating violence, in enflaming ethnic tensions, in using

stereotypes and unfounded accusations to further a particular political agenda, in drawing

attention to and highlighting the ethnic divisions extant in the country or territory in question.

This type of reporting was the result of influence exerted in a variety of ways by local political

leaders, resulting in media content intended to advance specific agendas rather than to provide

accurate information. This propagandization of the media sector meant that, rather than working

as a force for reconciliation, peace, and understanding – as it often does in established

democracies by serving as a conduit of information between rival points of view – these media

often served to undermine the international community's attempts to facilitate a transition to a

stable, peaceful, democratic society.

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[106] Many Kosovar Albanians got broadcast networks from outside the province via satellite, especially from Albania, but those networks were not subject to UNMIK or OSCE's reform efforts. Price, *supra* note 45, at 37; INTERNATIONAL CRISIS GROUP, ELECTIONS IN KOSOVO: MOVING TOWARD DEMOCRACY? (2000).

[107] Price, *supra* note 45, at 33-35.

[108] *Id.*

The principle of non-regulation is intended to prevent skewing media content through political control and to allow the media to conduct their own affairs according to the internal ethics of responsible journalism. Moreover, it is largely meant to curb attempts to censor criticism of the government or of public officials. But in Bosnia and Kosovo, non-regulation meant ensuring that existing political control of the media would continue, that local leaders could silence criticism at will, and that local journalists' would not be held to the professional standards that govern journalists in stable democracies. Non-regulation is intended to ensure that all points of view are able to be freely expressed, and that expression of one point of view may be countered by those who disagree with it. When the airwaves and newspaper columns are full of only one point of view, or of hate speech targeting a particular population unable to present its own perspective (because of its minority status or lack of political power or socioeconomic conditions or lack of sympathetic media outlet), some steps must be taken to ensure that the information that is disseminated is accurate and that expression that is not aligned with the predominant power is permitted to be heard.

The international regulators in Bosnia and Kosovo recognized the need to put in place some limitations on and guidelines for the media, and in an effort to do so, they crafted comprehensive regulatory schemes. An examination of the implementation of these schemes, however, reveals an unfortunate pattern. The UN, OSCE, and UNMIK officials repeatedly determined that regulatory measures were necessary to overcome the destabilizing tendencies born of the local media's partisan agendas and to promote an evolution towards a professional, independent media. And they repeatedly designed plans aimed at achieving those goals. But each attempt to implement such a plan fell prey to hesitancy on the part of the international reformers actually to intervene in the editorial decision of local media outlets. This hesitancy

arose sometimes from the regulators' own sensibilities regarding media freedom, but more often

it was the result of pressure from international media organizations or powerful media entities,

whose opposition was motivated not by the desire to serve the best interests of Bosnian or

Kosovar media reform, but instead by their commitment to the principle of non-regulation of the

media in any form.

In Bosnia, Dayton's implementers twice determined that comprehensive media regulation

was essential for effective media reform. First, in an effort to ensure a fully informed electorate

for the September 1996 elections, OSCE issued rules for the media to follow: All media were

expected to provide true and accurate information, to refrain from broadcasting incendiary

programming, and to carry OSCE and international election-related statements and

advertisements. The three party-controlled networks also were expected to allow equal

advertising time to opposition parties.[109] The OSCE failed to enforce these regulations

systematically, however, thus rendering them largely ineffective.[110] The lack of progress prior to

the 1996 elections prompted the Steering Board of the Peace Implementation Council, the

international body charged with implementing the Dayton Accords,[111] to conclude that more

aggressive efforts to encourage independent, professional, and pluralist media were needed.[112]

Recognizing that the local pro-status quo media were a threat to the peace and democratization

process in Bosnia and that initial efforts at reform had failed,[113] the resulting so-called Sintra

Declaration gave OHR significantly more power, including the right to "curtail or suspend any

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[109] Price, *supra* note 45, at 7.

[110] One commentator describes OSCE's early regulatory efforts in Bosnia as "spineless." THOMPSON, *supra* note 48, at 37; Mark Thompson & Dan De Luce, *Escalating to Success? The Media Intervention in Bosnia and Herzegovina in* FORGING PEACE, INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE 201, 207 (Monroe E. Price & Mark Thompson eds., 2002).

[111] Office of the High Representative, The Peace Implementation Council and its Steering Board, http://www.ohr.int/pic/default.asp?content_id=38563.

[112] Price, *supra* note 45, at 10.

[113] THOMPSON, *supra* note 48, at 38-39.

media network or programme whose output is in persistent and blatant contravention of either the spirit or letter of [Dayton]."[114] The OHR used its enhanced powers to create a comprehensive media law framework to address irresponsible, unprofessional reporting.[115] The Independent Media Commission (IMC), created in 1998,[116] had the power to license broadcasters, to develop codes of practice for broadcast media, and to impose sanctions for violations of those codes.[117] It also was involved in drafting a Press Code for print media, but it was not empowered to impose sanctions for violations of that code, instead relying on the print media for self-regulation.[118]

Despite the Steering Board and OHR's conclusions that aggressive media regulation was the most promising means of increasing the professionalism and independence of Bosnia's media sector, internationally media organizations and other groups devoted to preserving the principles of free speech found the IMC, its codes of conduct, and other efforts by the international authorities in Bosnia to regulate media scandalous. While these international and western journalists' organizations agreed that a free, independent, professional media is the ultimate goal,[119] they do not accept that the means of achieving this goal sometimes might need to depart from those norms.[120] According to this view, it is the very regulation that the international

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[114] Office of the High Representative, Political Declaration from Ministerial Meeting of the Steering Board of Peace Implementation Council, U.N. SCOR, 52d Sess., Annex, U.N. Doc. S/1997/434 (1997); *see also* Price, *supra* note 45, at 10; Richard Caplan, *International Authority and State Building: The Case of Bosnia and Herzegovina*, 10 GLOBAL GOVERNANCE 53, 56-57 (2004).

[115] Price, *supra* note 45, at 11.

[116] *Id*. at 12; THOMPSON, *supra* note 48, at 40.

[117] Price, *supra* note 45, at 12; THOMPSON, *supra* note 48, at 40.

[118] Pech, *supra* note 73, at 15; INTERNATIONAL PRESS INSTITUTE, WORLD PRESS FREEDOM REVIEW, BOSNIA AND HERZEGOVINA (2001),
http://www.freemedia.at/cms/ipi/freedom_detail.html?country=/KW0001/KW0003/KW0052/&year=2001.

[119] *E.g.*, WPFC Charter, *supra* note 27 ("A free press means a free people. To this end . . . [i]ndependent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.").

[120] *E.g.*, WPFC Charter, *supra* note 27, at principle 1 ("[G]overnment authorities . . . must not interfere with the content of print or broadcast news. . . .").

community justifies as a means toward an independent media that prevents such a media from existing. Thus they saw the OSCE regulatory system as a threat to freedom of speech in Bosnia, and feared that, in a place with no historical tradition of free media, it set a dangerous precedent for authoritarian control over media content.[121] Conceding the good intentions of the architects of the scheme, these groups nonetheless considered any legal body with jurisdiction over journalists to raise free speech concerns.[122] In the words of the World Press Freedom Committee (WPFC), an organization committed to the promotion of the free press, "in countries lacking the foundations of democracy – including free and fair popular elections, a free and independent news media and independent courts – mechanisms such as press laws, media councils, and ethics codes have been used routinely as tools of restriction on the free flow of information and news."[123]

Despite the lessons learned in Bosnia and the power of UNMIK, as territorial administrator in Kosovo, to impose necessary regulations, regulatory efforts in Kosovo produced a similar pattern: a perceived need for regulation, outspoken opposition to proposed regulatory plans, and subsequent retrenchment by international authorities. The UN's mission in Kosovo began around the same time that the OHR in Bosnia had abandoned case-by-case oversight over broadcasters in favor of the comprehensive regulatory scheme led by the IMC.[124] UN officials felt that the failure to take an aggressive stance with the Bosnian media early in the post-conflict era had allowed that media to undermine Dayton's implementation. Determined to avoid such a mistake in Kosovo, UNMIK and OSCE intended to regulate the media there rigorously from the

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[121] THOMPSON, *supra* note 48, at 41.

[122] Philip Shenon, *Allies Creating Press-Control Agency in Bosnia*, N.Y. TIMES, Apr. 24, 1998 at A8; Stephen Schwartz, *Europe Should Leave the Balkan Media Alone*, WALL STREET JOURNAL (EUROPE), Aug. 27, 1999, at 6.

[123] THOMPSON, *supra* note 48, at 48 (quoting Press Release, World Press Freedom Committee, World Press Freedom Committee Concerned About "Protection" Measures in BiH (Feb. 11, 2000), http://www.ifex.org/fr/content/view/full/9577/).

[124] *See supra* 115-118 and accompanying text.

outset.[125] This position was supported by members of the local media dedicated to successful

reform, who recognized that "limited government regulation of media content in Kosovo [was]

justified in the immediate post-conflict period and while the region's media is becoming re-

established"[126] and as necessary means of avoiding the potentially bloody consequences of hate

speech.[127] And because UNMIK was the government in Kosovo, it had much greater leeway to

act than OHR ever did in Bosnia.

The initial instinct of the Kosovo reformers was a good one. At the outset of its

involvement in Kosovo, OSCE announced a comprehensive regulatory plan similar to the one

established by the OHR in Bosnia and led by the IMC.[128] The regulatory regime would have the

power to censor material judged dangerous or incendiary, and to penalize, fine, or shut down

media outlets that violated internationally established reporting standards.[129] It also would write

and administer a Broadcasting Code of Practice and a Press Code for print journalists.[130] These

measures, like those in Bosnia, were modeled on Western European and North American ideals

of media conduct and were described as means to "bring people up to Western standards . . .

until they can operate on their own" while "preventing the abuse of the media . . . so it can't be

used to urge people to go out in the streets and create riots."[131]

The international media community's response, based on the highly contested and largely

inaccurate premise that pre-war media in Kosovo had been professional and independent,[132] was

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[125] Price, *supra* note 45, at 27; THOMPSON, *supra* note 48, at 63.

[126] DEMPSEY & FONTAINE, *supra* note 43, at 127.

[127] Press Release, Committee to Protect Journalists, Civility by Decree: Why Many Kosovo Journalists Want Censorship (Sept. 23, 1999), http://www.ifex.org/index.php/en/content/view/full/8625.

[128] Price, *supra* note 45, at 31.

[129] *Id.*

[130] *Id.*

[131] Erlanger, *supra* note 102.

[132] *Id.*; THOMPSON, *supra* note 48, at 64.

swift and almost universally opposed to OSCE's proposed plan. The WPFC, the *New York Times*, the *Wall Street Journal*, and the International Federation of Journalists all denounced OSCE's plan as infringing on press freedom and setting a dangerous precedent for long-term censorship.[133] In response to the strident and well-publicized opposition to OSCE's initial proposed regulatory scheme, UNMIK limited OSCE's mandate, removing its ability to impose binding sanctions on media outlets that violated the established codes of practice.[134] Instead, OSCE had the power only to "encourage journalists to voluntarily establish an ethical code."[135] In the face of these toothless measures, the Kosovar Albanian media continued its business as usual, becoming more and more incendiary as time went on.[136]

This now-familiar dance repeated itself time and again in Kosovo. Continued biased and inaccurate reporting, sometimes even leading to violence, would prompt OSCE or the SRSG to consider imposing a press code,[137] to promulgate anti-hate speech regulations,[138] to temporarily shut down an offending publication,[139] and finally to impose a comprehensive regulatory scheme remarkably similar to the one contemplated at the outset of OSCE's mission in Kosovo.[140] And in response to each proposal or regulatory action, a hue and cry was raised that UNMIK and

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[133] Price, *supra* note 45, at 32; THOMPSON, *supra* note 48, at 64; Erlanger, *supra* note 102; Editorial, *Kosovo's Incipient Media Ministry*, N.Y. TIMES, Aug. 30, 1999, at A18; Schwartz, *supra* note 122.

[134] Price, *supra* note 45, at 31-32; THOMPSON, *supra* note 48, at 64.

[135] Price, *supra* note 45, at 33.

[136] An example is an article published in the daily *Bota Sot*, which stated that a Human Rights Watch official who issued a report condemning Albanian revenge attacks against Kosovo's Serbs was a homosexual. In Kosovo's homophobic culture, such an allegation can render an individual vulnerable to harassment or attacks. Price, *supra* note 45, at 32-35.

[137] THOMPSON, *supra* note 48, at 65.

[138] In response to increased use of hate speech, in early 2000, the SRSG promulgated a regulation prohibiting incitement to national, racial, religious, or ethnic hatred, discord or intolerance. LOEWENBERG, *supra* note 92, at 18 (2006); Price, *supra* note 45, at 34.

[139] Semini, *supra* note 103; DEMPSEY & FONTAINE, *supra* note 43, at 127.

[140] The plan included binding codes of conduct and the possibility of robust sanctions. The conduct codes prohibited unnecessarily inflaming public opinion or inciting ethnic or religious hatred, crime or death, injury, damage to property, or other violence, as well as primarily or exclusively promoting the interests of one political party. It also included provisions calling for accuracy, fairness, impartiality, and civility. INTERNATIONAL CRISIS GROUP, *supra* note 106.

OSCE were imposing a censorship regime in Kosovo, that they were interfering with the free press and free speech, and that the only acceptable means of press regulation was self-regulation by the industry itself. Often these objections came from international free press organizations like the WPFC, or from powerful media entities such as the *New York Times* or the *Wall Street Journal*.[141] Sometimes they came from within the local Kosovar journalism community.[142] But sometimes they also came, albeit more quietly, from officials within OSCE itself who had qualms about imposing a heavy regulatory hand on media content.[143]

The vocal opposition to government or international regulation of the media was not unprincipled or insincere; it simply failed to see the entire picture. The objecting organizations and entities were invoking accepted norms of the free press: the prohibition on government interference with media content and the insistence that the press itself should be the entity to regulate its members. What this paper fundamentally argues, however, is that accepted norms – which are highly valuable or even necessary in established democracies – do not necessary supply the best guidance for crafting democratization or transitional regimes. The international media organizations that resisted the UN, SRSG, OHR, and OSCE's attempts to regulate the media in Bosnia and Kosovo failed to consider whether the circumstances in those places raised a different set of considerations, one that might justify broadening the scope of permissible regulation beyond what might be acceptable in America, Britain, or France.

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[141] *Id*.; Stephen Schwartz, *Europe Should Leave the Balkan Media Alone*, WALL ST. J. (EUROPE), Aug. 27, 1999, at 6; Peter Van Agtmael, *Dita in the Dock Again*, IWPR's Balkan Crisis Report, No. 154, July 10, 2000 (describing ARTICLE 19's objection to the regulations based on fear that other governments will follow the UN's example).

[142] Semini, *supra* note 103.

[143] In response to the SRSG's 1999 proposal to impose a press code on the print media, officials within OSCE insisted on adherence to the principle that, when it comes to the press, only self regulation is permissible. THOMPSON, *supra* note 48, at 65. Similarly, when SRSG temporarily shut down the daily paper *Dita* for a report in which it published the name, address, work schedule, and photograph of a UN translator along with accusations that he had taken part in war crimes as a member of a Serb paramilitary group, OSCE privately argued that a more hands-off approach, such as calling for a retraction or apology, would have been appropriate. The translator was abducted and stabbed to death two weeks after this publication. Semini, *supra* note 103.

The opposition of organizations such as the WPFC and the *New York Times* was based on two premises, both stemming from the dictates of the liberal democratic media principles outlined above. The first was a knee-jerk reaction to any form of government regulation of the media regardless of the context in which it occurred or the evils it was designed to remedy. This reaction was justified by the fear that regulations in the Balkans would set dangerous precedent for government regulation of the media elsewhere, where it might be applied abusively, that the regulatory measures would embolden repressive governments elsewhere to censor the media in their countries and point to the international community's actions in the Balkans as justification for those repressive measures.[144] In other words, the historical proposition that "in countries lacking the foundations of democracy – including free and fair popular elections, a free and independent news media and independent courts – mechanisms such as press laws, media councils, and ethics codes have been used routinely as tools of restriction on the free flow of information and news" [145] is what drove these organizations. Their opposition was not based on specific objections to the way that the regulations would affect Bosnia and Kosovo and did not propose alternative means of effecting change in those locales. Nor did the objectors take into account the specific conditions that prevailed in Bosnia and Kosovo when opposing regulatory plans.[146] And they never directly addressed the possibility that the proposed measures were not necessary to remedy the media situation in those places or that they would not have salutary effects there.

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[144] INTERNATIONAL CRISIS GROUP, *supra* note 106; Van Agtmael, *supra* note 141.

[145] THOMPSON, *supra* note 48, at 48 (quoting Press Release, World Press Freedom Committee, World Press Freedom Committee Concerned About "Protection" Measures in BiH (Feb. 11, 2000), http://www.ifex.org/fr/content/view/full/9577/).

[146] *See* PUTZEL & VAN DER ZWAN, *supra* note 6, at 6 (noting that, at times, political concerns and beliefs of external (Western) entities take propority over the realities present on the ground in transitional societies); *See* Allen & Stremlau, *supra* note 30, at 10 (recognizing an " 'international legal absolutism'" adopted by many Western NGOs, such that "[s] pecific historic or political considerations, that might be required to address the particular local realities of countries in complex transitions, are subordinated to the 'global justice agenda.'") .

In a place where, as the WPFC itself pointed out,[147] there is no history, tradition, or culture of independent, professional media, it is not realistic to expect the profession to self-regulate according to those standards. In order to change media behavior, there must therefore be some form of intervention from outside the media industry.[148] And because the media's behavior created a destabilizing force in the democratization process, that behavior had to be changed. The insistence by the WPFC, the *New York Times*, the *Wall Street Journal*, and some local media entities that any press codes or broadcast codes should not be enforced by any authority outside the media ignored the ways in which the lack of a culture of media professionalism rendered the norm of self-regulation only ineffectual. After all, it was not the existence of the codes themselves that was deemed problematic.[149] Instead, based on the principle that the media must be relied upon to self-regulate according to codes of conduct to preserve its independence, it was the effort of OSCE and the UN to take control over the monitoring and enforcement of the codes to which many members of the media community objected. This usual objection that only the media should be allowed to impose such regulations on itself was asserted along with the claim that robust professional organizations of journalists would be able to achieve the same goals as the regulatory scheme.[150] Again, these principles, which are powerful weapons against improper external influence of the press in places where the

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[147] Press Release, World Press Freedom Committee, World Press Freedom Committee Concerned About "Protection" Measures in BiH (Feb. 11, 2000), http://www.ifex.org/fr/content/view/full/9577/).

[148] *See* Allen & Stremlau, *supra* note 30, at 2 *("In the aftermath of social upheaval, the crucial short-term issue is not how to promote freedom of speech but rather how controls on expressing dissent should be exercised.")*.

[149] INTERNATIONAL CRISIS GROUP, *supra* note 106; Schwartz, *supra* note 141. The contents of the proposed codes, with the one exception already noted, were unobjectionable. After all, they were modeled on established practices in Western European and North American democracies, and meant to reinforce all of the norms that the objecting organizations themselves held out as crucial to a free press. Their provisions included guidelines on accuracy and balance and on reporting provocative statements, rules and standards requiring that the media shall not broadcast any material which incites ethnic or religious hatred, and a requirement to observe general community standards of decency and civility. They also promoted respect for the principles of freedom of information and an obligation to protect confidential sources. Price, *supra* note 45, at 13; THOMPSON, *supra* note 48, at 40; Pech, *supra* note 73, at 14.

[150] INTERNATIONAL CRISIS GROUP, *supra* note 106; Schwartz, *supra* note 141.

principles of media professionalism are firmly entrenched, are simply inapplicable in contexts where fundamental elements of a free press – the idea that the media operates in the public interest, that it is bound to produce fair, accurate, balanced, agenda-free reporting for the purposes of informing the populace regarding issues that are relevant to them – have never taken hold.

The other basis for objecting to proposed regulation of the media in Bosnia and Kosovo was an aversion to regulation stemming from the pluralist public debate function of the media. Accepting this function of the press leads to the argument that, even in the cases of the most offensive or potentially harmful expression, the remedy is not regulation prohibiting that expression; rather, it is more expression,[151] thus allowing counterarguments to win the day. Like the principle of non-regulation, this concept is inapplicable in some transitional situations. It relies on the idea that any ideas that are expressed can be countered by contrary ideas, and that through this process of debate the best, most convincing ideas will win out. But in a situation where there are one or a few dominant voices, and where contrary viewpoints have no outlet for expression, it is hard to support this perspective. Here, too, the particular circumstances in Bosnia – where each ethnic group had access to just one media outlet that espoused only one point of view – and in Kosovo – where independent or contrary voices were rare and often subjected to intimidation or harassment – do not seem to support the usual justification for avoiding any content regulation.

That the strident objections to the imposition of what appeared to be an authoritarian regulatory scheme resonated not only with western media organizations but also with the regulators themselves shows the force that accepted media norms can exert. It is also what

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[151] C. Edwin Baker, Genocide, Press Freedom, and the Case of Hassan Ngeze, Public Law and Legal Theory Research Paper Series, Research Paper No. 46, Jan. 31, 2003 at 8-9.

makes it all the more important that, in crafting reform plans, reformers consider the purpose of those norms and the assumptions on which they rest. When these assumptions, such as the idea that the media is able to self-regulate, do not hold true, any reform efforts must adjust their baseline principles accordingly. In both Bosnia and Kosovo, reformers allowed their inherent aversion to forceful regulation of media practices and content to prevent them from aggressively curtailing the detrimental effects of a partisan, unprofessional media sector until years into the reform process. Not only did this hesitation allow harm to come to specific individuals, such as the Serbian translator killed as a result of *Dita*'s content, but it also significantly delayed meaningful media reform.

The imposition of general regulation and professional codes was an important part of media democratization not just because Bosnia and Kosovo lacked a tradition of an independent and professional press, but also because of the particular threat posed by hate speech. As discussed above,[152] democratization tactics must be tailored to the specific context of the place in which they are implemented. Context is important, and there is no "one size fits all" means of effecting a successful democratic transition. There is perhaps no other area where the differences between life in Sarajevo or Pristina and life in New York or London are more relevant than in the discussion of regulating hate speech and incitement. The situations in Bosnia and Kosovo – deeply divided societies, recent violent conflict, local political actors' tendency to control media outlets as tools to advance a particular political agenda, and (especially in Kosovo) the very real threat that incendiary reporting could lead to renewed violence – differ from those extant in stable, established democracies in ways that render blind adherence to the norms developed in that context inappropriate. Many of the regulations and press code provisions

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[152] *See supra* Part I.B.

proposed or implemented by the UN, OSCE, OHR, and SRSG were aimed at stamping out the

phenomenon of accusatory, biased, stereotype-based reporting[153] that a posed real threat to long

term peace and stability. The blanket assertions by the WPFC and the *New York Times* that any

media regulation scheme was a precursor to censorship and authoritarian abuse ignored several

facts regarding hate speech and its consequences in Bosnia and Kosovo. In the first place,

regulating expressive content that constitutes hate speech is an accepted media regulation in most

established liberal democracies. Moreover, characteristics of transitional societies often will

justify even those regulatory measures that would not be accepted in stable democracies.

Even among western liberal democracies, there is no consensus that hate speech

regulations constitute a violation of free expression or media norms. Indeed, hate speech is

regulated in many places that are considered to have a vibrant, fully functional free press,[154] and

such regulations are considered fully compatible with international human rights

requirements.[155] Many of the provisions of the press codes to which the WPFC and *New York

Times*' were so opposed were aimed at eliminating the stereo-type-based, accusatory reporting

that is often described as hate speech. Given the widespread acceptance of hate speech

regulation, this opposition rests on one of two bases. First, the true objection may not have been

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[153] All of the proposed press codes on both Bosnia and Kosovo included provisions prohibiting the incitement of ethnic or religious hatred and calling for civility. Pech, *supra* note 73, at 14. In Kosovo, the tenor of reporting in early 2000 prompted the SRSG to promulgate a specific regulation prohibiting incitement to national, racial, religious, or ethnic hatred, discord or intolerance. Price, *supra* note 45, at 34.

[154] Many states around the world, including Canada and most European states have laws against hate speech. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 801 (1996) (Austria, Belgium, France, Germany, Israel, Italy, Sweden, and Switzerland); Note, Joshua Wallenstein, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 STAN. L. REV. 351, 369 (2001) (Germany); Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 147 (2004) (Denmark).

[155] The International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination both prohibit hate speech , which they define as incitement to discrimination or hatred. ICCPR, *supra* note 7, at art. 1, 25; International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195. The European Convention for the Protection of Human Rights and Fundamental Freedoms permits (but does not require) member states to outlaw hate speech. European Convention, *supra* note 9, at art. 10(1).

to the hate speech provisions themselves, but rather to the broader regulatory scheme of which they were a part. Alternatively, it is possible that these organizations' views simply reflect an American, First Amendment-based theory of expression, where the restriction of hate speech is not permitted unless it is either intended as a threat[156] or rises to the level of incitement,[157] as opposed what is often considered the European model, which accepts wider regulation of expression that constitutes hate speech.

Neither explanation justifies these organizations' position. Before objecting to the overall regulatory scheme as a whole, they should have examined it to see whether it was, in fact, objectionable in all respects. Given the nature of reporting that the anti-hate speech provisions were meant to prevent, the specific conditions on the ground in Bosnia and Kosovo cried out for such provisions. Even a cursory investigation into the context in which the regulations were being implemented would have made that clear. Instead of simply reacting to the words "media regulation" without inquiring into what that truly meant and what it hoped to accomplish, the international free press advocates could have developed more nuanced arguments against those portions of the proposed regulatory scheme that actually violated accepted norms. Similarly, blind adherence to the extremely speech-protective American model, which has been rejected in all other jurisdictions, ignores the seriousness of the harm that hate speech can cause in post-conflict societies generally and in Bosnia and Kosovo in particular.

Even if prevailing norms in established democracies precluded hate speech regulation (or if all of the speech targeted by the regulations in Bosnia and Kosovo did not qualify as hate speech according to the definition used in established, stable democracies), the situations addressed Bosnia and Kosovo would call for a departure from the non-intervention norm during

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[156] Virginia v. Black, 538 U.S. 343 (2003).

[157] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

the immediate post-conflict, transitional phase. Even in the European and Inter-American

context it is acknowledged that, in situations of conflict or tension, the actions of members of the

media are especially important. Because the media risks contributing to tensions if it violates

professional standards and engages in the dissemination of propaganda; racial or ethnic

stereotypes; or otherwise spreads messages of intolerance, authorities managing post-conflict

situations must be particularly cognizant of these risks and act accordingly.[158] Moreover, it is

uncontested that in the specific contexts of Bosnia and Kosovo, the unprofessional nature of the

media had contributed to tensions leading up to and during wartime, and continued to contribute

to such tensions in the post-conflict stage. The destabilizing nature of hate speech in a

transitional phase generally, and in Bosnia and Kosovo in particular, means that reducing or

eliminating such reporting is an essential step toward long-term reconciliation and peace.

Because the societies in question are post-conflict, deeply divided, and in transition,

which means that they are susceptible to the tensions media hate speech could inflame and that

such inflammation risks derailing the transitional process that has only just begun, regulatory

authorities should be permitted to subject an even broader swath of expression to regulatory

measures than might be permitted in an established democracy. In the US, where the rule of law

is well-established and where citizens largely trust the government and the judicial system to

protect and vindicate their rights, only speech that is likely to cause imminent lawless action

(thereby constituting incitement under US law)[159] is considered a threat justifying the limitation

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[158] *See* Sener v. Turkey, 2000 Eur. Ct. H.R. 377 ("Particular caution is called for when consideration is being given
to the publication of views which contain incitement to violence against the State lest the media become a vehicle
for the dissemination of hate speech and the promotion of violence."); Council of Europe, Committee of Ministers,
Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism,
917th mtg. (Mar. 2, 2005); Jo M. Pasqualucci, *Criminal Defamation and the Evolution of the Doctrine of Freedom
of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights*, 39
VAND. J. TRANSNAT'L L. 379, 432 (2006) (quoting Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No.
ICTR-99-52-T, Judgment and Sentence, ¶ 945 (Dec. 3, 2003)).

[159] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

free speech rights. But in a place like Bosnia or Kosovo, where the ethnic tensions that recently led to war continue to bubble just beneath the surface, and where the institutions of government are either nascent or unreliable, a threat might be posed by words that, in the US, might appear innocuous.[160] So a broadcast or an article whose contents perhaps should not be prohibited or punished somewhere in Western Europe actually might need to be regulated or restricted in a post-conflict or transitional society. The entire point of a transitional regime is to begin a long-term process that ultimately will lead to democracy. Thus, not only should incitement and hate speech be regulable, but so should any expression that serves to undermine or promises to derail the democratization process.   In other words, the goal should be to prevent reporting that creates the real threat of violence – whether imminent or otherwise – or destabilization of the transition process. For example, several of Kosovo's newspapers consistently inveighed against all Serbs as criminals and routinely portrayed UMNIK and KFOR as being in league with the Serbs against the Albanians.[161] While these types of reports may not have invited imminent lawless action, and may not even have qualified as hate speech, depending on their particular content, they were certainly likely to undermine progress toward reconciliation, perpetuate existing tensions and prejudices, and serve as obstacles to a successful transition.

This is not to say that the means of regulation and enforcement of hate speech provisions of any regulatory scheme need not be carefully crafted and thoughtfully designed. After all, the possibility of chilling legitimate reporting and the risk of abuse that motivate the WPFC and *New*

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[160] Many observers now argue that, in the case of the Rwandan genocide, "the conflict was intensified by greater press freedom. Rapid liberalization of the media was part of the Arusha peace accords. It immediately spawned numerous news media outlets, largely dominated by opposition voices. Highly inaccurate and overtly biased editorials became prevalent. . . . The Hutu elite, already feeling threatened by the potential loss of power they were to face, did not take these developments lightly. One reaction were the radio broadcasts of the government's Milles Collines [radio station, whose broadcasts significantly contributed to the genocide]. . . . In retrospect, most now agree that it would have been appropriate to clamp down on the hate speech of Milles Collines." *See* Allen & Stremlau, *supra* note 30, at 6-7.

[161] THOMPSON, *supra* note 48, at 66.

York Times's response to such regulations are not inconsequential concerns. Any regulatory

scheme that purports to affect content and editorial decision must be as minimal as is possible

while still preventing the type of reporting that is likely to result in violence or destabilization.

At the same time, it must be highly sensitive to the context in which it is implemented,

recognizing that a statement that would be highly unlikely to provoke a violent response in

America may nonetheless pose a real threat to the peace in Kosovo, or in any location where the

enmities that once led to violent conflict remain alive.

Starting at the most extreme end of the spectrum, some forms of expression call for

criminal prosecution. Even in the jurisdictions that are most protective of free expression rights

and that interpret such rights broadly, a government authority may regulate, and even criminally

punish, expression that constitutes incitement to lawlessness or violence.[162] And the

international community also has authorized criminal prosecution of incitement to genocide. In

fact, in *The Prosecutor v. Nahimana et al.,* a case that became known as "The Media Trial,"

three members of the Rwandan media were convicted in the International Criminal Tribunal for

Rwanda (ICTR) for genocide, incitement to genocide, and crimes against humanity in the form

of persecution "on political grounds of an ethnic character" for their use of radio stations and

newspapers in the furtherance of the 1994 Rwandan genocide.[163]

Similar criminal sanctions would have been appropriate for some media actions in

Kosovo. In tactics reminiscent of the Rwandan media during the 1994 genocide, some Kosovar

media outlets published names of Serbs believed to have committed war crimes, along with their

addresses and places of employment.[164] An incident already referred to above is illustrative of

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[162] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[163] Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1071 (Dec. 3, 2003).

[164] Price, *supra* note 45, at 35.

the problem. Recall the publication by *Dita* of the name, address, and photograph of the alleged

Serb collaborator that resulted in his death.[165] The SRSG's response was to shut down *Dita* for

eight days and to draft an emergency law prohibiting the print media from engaging in acts that

would endanger life, safety, or security through vigilante violence.[166] *Dita's* publisher was

unapologetic, blaming the UN's failed criminal justice efforts in Kosovo and pledging to

continue to publish the names of Serbs believed to be involved in anti-Albanian activities,[167] and

the Kosovo Journalists' Association[168] denounced the closure of *Dita* as endangering press

freedom.[169] These objections illustrate the self-serving fashion in which some local journalists

invoked international norms in an attempt to continue their irresponsible and destructive tactics.

Despite their claims that preventing such reporting is an impingement on their free speech rights,

however, *Dita's* actions clearly fall within the scope of what is recognized as illegal incitement,

punishable by criminal sanctions. Much of the media content that the UN and OSCE sought to

prohibit in Bosnia and Kosovo could have been proscribed through criminalization of incitement.

In the United States, this is where we draw the line. Either a particular statement

qualifies for criminal prosecution because it is incitement, or it may not be censored at all. But

there is room, as Professor Samuel Issacharoff points out, for some middle ground when the

circumstances call for it.[170] As noted above, there is no consensus that hate speech regulations

constitute a violation of free expression or media norms and it is freely regulated in many

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[165] *See supra* notes 103-104 and accompanying text.

[166] Semini, *supra* note 103; DEMPSEY & FONTAINE, *supra* note 43, at 127.

[167] Semini, *supra* note 103.

[168] OSCE helped Kosovar journalists form a professional association with a board of directors and an ethical code. When informed of violations, however, they fail to act decisively, and papers affiliated with political parties, usually the worst offenders, are not part of the association and therefore not subject to its code of conduct. Price, *supra* note 45, at 35.

[169] Semini, *supra* note 103.

[170] Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1417-18, 1422 (2007).

western democratic societies.[171]   Making available measures such as required retractions or

corrections, public apologies, civil fines, or publicly administered reprimands to offending

journalists and editors would give administrators a means to regulate harmful reporting while

having a more limited impact on expression.

Clearly and narrowly defining exactly what would constitute a violation of any particular

hate speech regulation would also be an important way of limiting the detrimental or chilling

effects on expression that the imposition of hate speech regulations might have. The Media Trial

in the ICTR again illustrates the point. While those convictions were hailed almost universally

as just,[172] several concerns about the tribunal's reasoning have been raised by journalists,

international lawyers, and international media organizations with respect both to the arguably

expansive definition of incitement to genocide[173] and the tribunal's conclusion that the use of

hate speech could constitute the crime against humanity of persecution.[174] These commentators

point out that by expanding the definition of incitement to genocide and by allowing the use of

hate speech to qualify as persecution rising to the level of a crime against humanity, the ICTR

had made the category of what action constituted criminal behavior significantly more malleable.

As a result, they argue, the ICTR decision can be (and has been) used as an excuse by repressive

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[171] *See supra* notes 154-155 and accompanying text.

[172] *E.g.*, Joel Simon, *Of Hate and Genocide in Africa, Exploiting the Past*, COL. JOURNALISM REV., Jan/Feb 2006 at 9 (Joel Simon is the deputy director of the Committee to Protect Journalists (CPJ)); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT'L L. REV. 557, 558-59 (2005); Catharine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze,* 98 AM. J. INT'L L. 326, 330 (2004).

[173] Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT'L L. REV. 557, 560-75 (2005) (hereinafter Orentlicher, *Crucible*); Diane F. Orentlicher, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.*, 13 HUM. RTS. BR. 1, 1-2 (2005).

[174] Orentlicher, *Crucible*, *supra* note 173, at 576-89; Diane F. Orentlicher, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.*, 13 HUM. RTS. BR. 1, 2-4 (2005); Brief for Open Society Justice Initiative as Amicus Curiae at 26-34, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-A (2003). All of these commentators seem to agree that the judgment is ambiguous on this point, and they urge the Appeals Chamber to clarify that incitement to genocide requires more than simply engaging in hate speech. *Id.*

governments to impose restrictions on the press in their countries.[175] In order to avoid setting a precedent for authoritarian abuse and chilling legitimate journalistic speech, any regulation, criminal or civil, must make plain what it permits, what it restricts, and what penalties may be incurred. Regulators should ensure that only incitement may be criminally punished, and that other restrictions or punishments are imposed only as needed to keep the democratization process alive.

The determination of exactly which media reports should be subjected to such civil penalties or enforcement measures is a difficult question to answer. In the end, it must be a process that places great weight on the context in which the media is reporting. As the trial chamber of the ICTR astutely noted in The Media Case, determining what qualifies as incitement requires a highly contextual inquiry.[176] Nuances of language, ethnic stereotypes, sources of historical tensions, and many other considerations go into determining what effect the presentation of a particular idea or set of facts will have. The same holds true for determining what speech will result in violence or destabilization of the democratization process. Because of the centrality of understanding the context in which a particular regulation is administered, the administrator or administrative body in charge of implementing such regulation must combine expertise in media regulation with local expertise. A regulatory scheme that is sensitive both to these contextual nuances and to the threats to free expression that excessive regulation poses will be able to strike the right balance for the specific circumstances in which they are working.

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[175] Simon, *supra* note 172 (between 2002 and 2006, CPJ documented nearly fifty cases of the misuse of hate-speech laws by repressive African governments); Brief for Open Society Justice Initiative as Amicus Curiae at 4-9, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-A (2003).

[176] Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 1004-06 (Dec. 3, 2003).

3. *Missed Opportunities*

International media reformers in Bosnia and Kosovo lost valuable opportunities when they allowed objections to media regulation to interfere with their efforts. They also ceded significant reform opportunities by failing to address more comprehensively the conditions that affected the media environment as a whole. Any comprehensive media scheme, in addition to the imposition of press codes and guidelines regarding content, must include a component aimed at this broader media environment. As discussed above, one of the elements most taken for granted in established democracies is stability. This includes respect for the rule of law and broad acceptance, among political actors both within and without the government, the citizenry, civil society at large and among the media specifically, of all of the accepted liberal democratic norms. This includes the norms surrounding the role of the free press. But in transitional societies where the culture of democracy has not yet developed or is under attack from certain sectors, some effort must be made to protect the preconditions that are necessary for the press to act independently and responsibly. Media and free press watchdogs of all stripes acknowledge that the legal, political, and economic environment must permit journalists access to relevant information and refrain from exerting or permitting others to exert pressure – such as overt censorship, intimidation, defamation punishments, or physical threats – that might chill journalists' speech and effect their editorial decisions.[177] Without the guarantee of things such as limitations on defamation penalties, robust physical protection of journalists, liberal access to information laws, and protection of source confidentiality, even the most well-meaning journalist will struggle to satisfy the requirements of professionalism.

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[177] Freedom House, Freedom of the Press Questionnaire A5 ("Is freedom of information legislation in place and are journalists able to make use of it?"); Freedom House, Freedom of the Press, Survey Methodology. http://www.freedomhouse.org/uploads/fop/2007/fopmethod2007.pdf; Reporters Without Borders, Worldwide Press Freedom Index, Questionnaire, http://www.rsf.org/article.php3?id_article=19390; WORLD BANK, MEDIA, GOVERNANCE & DEVELOPMENT, *supra* note 18.

In crafting their media regulatory priorities, officials in Bosnia and Kosovo seemed to have overlooked the fact that the media's ability to conform to accepted international standards of independence and professionalism is highly contingent on the actions of other powerful actors, especially governmental or political powers. When those actors do not honor the norms surrounding media independence, it is impossible for the media to function according to accepted professional standards. A reporter committed to producing fair, accurate, even-handed stories about government activity cannot hope to do so if the government that is the subject of her reporting refuses to respect the accepted norms of liberal access to information. Similarly, governments that do not enshrine reporter confidentiality in their laws reduce the likelihood that sources will be willing to share relevant information with reporters. And perhaps most importantly, journalists whose physical safety is threatened when their reporting does not conform to the desires of local power brokers are highly unlikely to be able to act according to accepted standards of professionalism and independence.

Despite the fact that forces against media independence and professionalism were at work from outside the media, the international community's media reform plans for Bosnia and Kosovo imposed expectations on actors within the media that seemed to presume that the environment in which they were working conformed to accepted norms. One area where non-media actors' failure to respect principles required for true media independence rendered professional reporting quite difficult was the media influence exerted by local politicians. Their insistence on either exercising outright control of media outlets, as was largely the case with the three major television networks in post-conflict Bosnia,[178] or exerting pressure through intimidation or harassment mean that even reporters committed to producing unbiased content

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[178] *See supra* notes 48-52 and accompanying text.

will be unable to do so. When local political actors have nothing to gain and everything to lose from permitting the media sector to transition from one controlled by political agendas to one that operates according to western standards of professionalism, they are unlikely to acquiesce in or support reformers' attempts to facilitate this transition by living up to the expectations for government actors to respect media independence. And when these forces use the tools at their disposal to prevent the development of independent journalism, there is very little a journalist can do to stop them.

The local journalists themselves often contributed to the problem. Local journalists' enthusiasm for international reform efforts depended on their status in the existing system. Politically affiliated or controlled media entities both supported the opposition to international regulation and worked to undermine the independence of specific media outlets. Perhaps most illustrative is the experience at RTK in Kosovo. After successfully resisting initial efforts by KLA supporters to take over control of the network, the international community succeeded in starting up and running this province-wide, independent public broadcasting network for close to two years. Despite this initial and relatively sustained success, when Kosovars took over control of RTK, it reverted to the same type of media outlet as the others that dominated Kosovo's Albanian-language landscape. In contrast, media entities in both Bosnia and Kosovo committed to independence welcomed proposed regulatory oversight as the only means of guaranteeing their freedom to engage in independent reporting.[179] For example, while most local media condemned the 2000 hate speech regulation as an infringement on their free speech rights, two independent dailies in Kosovo that often found their reporting targeted by the types of speech that the regulation was meant to curb supported the measure.[180] It is therefore clear that the

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[179] Shenon, *supra* note 122.

[180] Price, *supra* note 45, at 34.

extent to which any particular actor honored the right of journalists to engage in independent, professional reporting was dependent upon whether they had anything to gain from such reporting. In other words, independence itself became a tool of the political agenda.

The obvious effect of external influences on the media and the difficulties faced by media entities attempting to remain independent of the political fray illustrate the need for aggressive measures aimed at creating a media environment that exhibits the necessary preconditions for independent, professional journalism. It is true that reformers made some efforts in this direction. In Bosnia, OHR and the rest of the international community implemented some measures intended to combat concerns about threats and other pressures being brought to bear on journalists, thus helping to preserve the media's independence and cut down on the ability of powerful actors to influence its content.[181] For example, politically motivated defamation suits had become an effective tactic of preventing journalists from pursuing unfavorable reports about local government leaders.[182] In response, OHR, in conjunction with OSCE and the IMC, launched a program to protect journalistic inquiry and free speech. Measures included a "Decision on freedom of information and decriminalization of libel and defamation," which called on the entities to create civil remedies for defamation, libel, and slander in accordance with European Convention standards and to enact freedom of information laws, as well as the formation of a Press Council designed to implement the code of conduct adopted in 1999 and the development of a set of guidelines for the police on the treatment of journalists.[183] As mentioned above, the call to enact these legislative provisions was ignored by both entities.

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[181] THOMPSON, *supra* note 48, at 48; Pech, *supra* note 73, at 16.

[182] THOMPSON, *supra* note 48, at 48.

[183] THOMPSON, *supra* note 48, at 47-48. Ironically, even the small steps that regulators took to improve the broader media environment often provoked ire from the international media community. For example, it was in response to threats to journalists, including a near-fatal bomb attack against an investigative journalist in the Serbian entity of Bosnia, *id.* at 48, that the OHR, OSCE, and IMC launched their "programme intended to protect journalistic inquiry

Ultimately, a reform policy with that focuses on requiring media content to live up to professional standards when the problem is not only the media's lack of professionalism but also the pressure brought to bear on the media by other actors seems guaranteed to be futile. There is no code of conduct or regulation that is going to eliminate the influences that originate outside the media itself. This is not to say that professionalization of the media is not both worthwhile and necessary. But complimentary efforts must also be undertaken to ensure that those professionalization efforts can be successful. When journalists are in danger simply for doing their jobs, media reform must include ensuring that a process is in place for investigating and punishing instances of threats, assaults or intimidation of journalists. Rules providing liberal access to government information must be promulgated and enforced. Measures ensuring source confidentiality must be implemented. Ties between local political leaders and the media outlets that they control must be severed. And, if possible, the threat that an independent media poses to these local political leaders must be minimized so that their resistance to its development is also minimized. Until the trappings of independence – physical safety, source confidentiality, respect for liberal access rules, etc. – exist, truly professional reporting is unlikely to be possible on an industry-wide basis.

In the end, it is important to note that all of the reforms discussed in this part are intimately intertwined with one another. The expectations set forth in the conduct codes –

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and free speech," which included the drafting of guidelines for the police on the treatment of journalists. *Id.* And in Kosovo, it was the vitriolic attacks against independent media outlets and their editors that appeared in the editorial pages of the politically-aligned newspapers, which were tantamount to death threats, s*ee supra* notes 103-104 and accompanying text, that ultimately led to the SRSG's promulgation of the hate speech law in an attempt to diffuse some of the tensions. *See supra* note 138 and accompanying text. But these attempts to improve the media environment, because they included regulatory elements, constituted impermissible government interference with free expression to many outside observers. This reaction illustrates the lack of nuance present in the opposition to regulation evidenced by the WPFC and its allies who, under other circumstances, are champions of defamation law reform and physical protection. INTERNATIONAL PRESS INSTITUTE, WORLD PRESS FREEDOM REVIEW (2006); REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX (2006); FREEDOM HOUSE, FREEDOM OF THE PRESS: A GLOBAL SURVEY OF MEDIA INDEPENDENCE (2006); WPFC Charter, *supra* note 27, at principle 10.

accuracy, lack of bias or political agenda, etc. – will overlap significantly with the regulations

regarding incitement or hate speech, and the measures taken to ensure media independence

discussed will aid in allowing journalists to meet those expectations. Reporting that relies on

ethnic stereotypes or characterizes one ethnic group as criminals[184] will be both contrary to

codes of ethical conduct and potentially incitement or hate speech. And reporting that is

influenced by harassment or intimidation will continue to advance political agendas. Thus each

of these elements must be seen simply as one part of a wider regulatory effort, which ideally

addresses each of these concerns simultaneously and which may be discontinued in later phases

of the democratization process as progress is made.

4. Structural and Procedural Safeguards

Any international intervention to maintain or restore peace and security is already a

second- or third-best solution. It means that the domestic actors have failed to find a way to lead

their own society through its transitional phase. But the international community is unlikely to

intervene absent pressing need. Given that the consequences of failing to intervene are often

more violence, prolonged conflict, or ongoing serious human rights violations, international

intervention sometimes becomes the lesser of the evils. That was the calculation that the

international community made with respect to Bosnia and Kosovo. And though no international

reform strategy will succeed in avoiding all of the risks and imperfections inherent in such an

undertaking, there are means through which the dangers posed by the media regulation aspect of

international intervention can be minimized.

First, any regulations should be required to comport with the requirements set out in the

international human rights treaties – that any restrictions placed on free expression are provided

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[184] *See* THOMPSON, *supra* note 48, at 66 (quoting a radio broadcast that implied that all Serbs are criminals).

for by law[185] and are no more restrictive than necessary.[186] This means that, as discussed above in the context of hate speech regulation, any press regulation and the potential sanctions for violation or non-compliance should be clearly and publicly spelled out prior to its enforcement. Consider an example. Recall that, in response to *Dita*'s publication of the name and address of an alleged Serb collaborator that resulted in his death, the SRSG shut down production of *Dita* for eight days.[187] Not only was the sanction itself based solely on the arbitrary determination of the SRSG, but it was meted out based on the accusation that *Dita*'s actions "violated the letter and spirit of Security Council resolution 1244," the resolution that established UNMIK's mandate.[188] Such a vague basis for regulatory action can hardly satisfy the "prohibited by law" requirement. Local reaction to the SRSG's response was uniformly negative, even by independent media outlets who normally opposed the type of reporting in papers like *Dita*. In fact, the independent daily *Koha Ditore* published a report in support of *Dita*, arguing that it was not the only paper to publish lists of suspected war criminals.[189] This objection seemed more based on the discretionary nature of the SRSG's ability to sanction media outlets than on any sense of solidarity with *Dita*'s message.[190] The regulators' response, even to conduct as outrageous as *Dita*'s, cannot be arbitrary. The regulated entities or industry must feel confident that regulatory decisions and the determination of sanctions are made according to a reasonable, predictable, and generally applicable rule of law.

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[185] ICCPR, *supra* note 7 ("provided by law"); European Convention, *supra* note 9 ("prescribed by law"); American Convention, *supra* note 9 ("expressly established by law"); Banjul Charter, *supra* note 9 ("within the law"); *see also* Amit Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT'L & COMP. L. 339, 358 (1994).

[186] European Convention, *supra* note 9, at art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 221; Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111; Pasqualucci, *supra* note 158, at 393.

[187] *See supra* note 166 and accompanying text.

[188] Krug & Price, *supra* note 31, at 161.

[189] Semini, *supra* note 103.

[190] INTERNATIONAL CRISIS GROUP, *supra* note 106 (noting that *Koha Ditore*'s headline read "*Dita* is closed by decree, not through normal procedure").

Similarly, whatever regulations or policies are adopted must be enforced consistently according to their own terms, without regard to the political preferences of the regulators themselves, either individually or as representatives of a national government or intergovernmental body. There were several occasions where this principle was not followed in Bosnia and Kosovo, thus vindicating the fears of the media watchdog groups that were so opposed to any form of regulation that such regulation would be used as a political tool. Inconsistent and selective enforcement of regulatory directives indicates that the international control over media content was not always administered in a neutral manner. Instead, governmental or quasi-governmental power was sometimes brought to bear with a particular political agenda in mind.

Illustrative examples took place in the context of efforts to reform Bosnia's broadcast landscape. In the summer of 1997 with elections on the horizon for the fall, the Serbian network, SRT, split into two factions, with the production center in Pale loyal to Radovan Karadzic, the other, in Banja Luka, favoring Biljana Plavsic.[191] The international community, which was firmly in favor of Plavsic's candidacy, responded to a series of inflammatory broadcasts that were highly critical both of political candidates sympathetic to the goals of the international community and of the international authorities themselves by having the international peacekeeping forces (SFOR) seize several of SRT-Pale's key transmitters, in effect bolstering Plavsic's political strength.[192]

When similar political considerations advised against intervention, however, those considerations seemed to win the day. Erotel was the broadcast entity that illegally relayed the Croatian state television, HTV, throughout Bosnia via HRT. The broadcasts were typical of

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[191] Thompson & De Luce, *supra* note 110, at 208.
[192] Price, *supra* note 45, at 11-12 ; Thompson & De Luce, *supra* note 110, at 208-12.

Bosnian broadcasts at the time, often using inflammatory language and criticizing SFOR and other international organizations as enemies of the Croat people.[193] Despite exhibiting similar characteristics as the SRT broadcasts that had prompted SFOR's intervention in 1997, no action was taken to prevent Erotel's broadcasts, in part to protect the electoral chances of opposition parties in Croatia.[194]

There were indications that interference with broadcasts and publications were more likely when such interference would further the UN or the American political agenda in Kosovo as well. For example, there were instances where media outlets that criticized KFOR or the UN, describing them as occupying forces, were shut down or punished.[195] When a newspaper is punished for publishing criticisms of the government – and in the case of Kosovo, the UN was the only government that existed – the free press concerns raised by the international media groups are most salient. So long as the international regulators can be seen as impartial actors, always pursuing the goals media reform and enforcing rules and regulations even-handedly, it is more resistant to accusations of media censorship. But when those regulations are applied selectively or with a particular agenda in mind, the larger reform effort is likely to be compromised. The selective enforcement of restrictions so as to aid favored political factions merely serves to vindicate the objections posed by international watchdog groups, undermine the local population's trust in the regulators, and set a poor example of the type of rule of law the local government is expected to respect as the reform process goes forward.

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[193] Thompson & De Luce, *supra* note 110, at 215.

[194] The failure to act was due to opposition by American diplomats. The OHR and OSCE both urged action, but the US diplomats in Sarajevo and Zagreb insisted on waiting until after the Croatian elections. Thompson & De Luce, *supra* note 110, at 217-18; THOMPSON, *supra* note 48, at 47.

[195] August 1999 NATO forces shut down *Çlirimi*, an Albanian-language newspaper for publishing an editorial critical of KFOR, arrested the publisher, and confiscated the issues. DEMPSEY & FONTAINE, *supra* note 43, at 127. UN shut down Radio S in Kosovska Mitrovica because it referred to UN and NATO as occupying forces and encouraged Serbs to boycott upcoming elections. *Id*. at 128.

The risk of importing political agendas into regulatory implementation points to a third structural safeguard that should be part of any media regulation plan. The person, persons, or regulatory body who will administer any given regulatory scheme must have certain qualities. First, they should not be beholden to the equivalent of state government authorities, whether those are UN administrators or local political leaders. Media restrictions are anathema in established democracies not because, in the abstract, such regulations can never serve a useful purpose. Instead, it is the very real risk that any regulatory power over media content can be manipulated by those wielding the levers of power to entrench their own interests, and to undermine political opposition. Indeed, authoritarian regimes regularly use such power to crush dissent and to ensure their own continued domination. The risk posed by these inherently dangerous powers is most acute when the holders of power have self interests that may incentivize misuse of regulatory authority. Conversely, the more removed from the local political struggles the media regulators are, the smaller the temptation to use their regulatory power improperly. The regulators and any members of an appeals body should be independent operators whose sole concern is media reform, who are not bound to any other aspect of the UN or OSCE or NATO mandate, and who are not affiliated with any particular local faction. Second, these individuals ideally would have both expertise in media issues and significant local expertise as well. As discussed above, the question whether a particular instance of expression should qualify for regulation or sanctions will be hugely dependent on the context provided by the local language, history, and culture. Media reformers who are unfamiliar with these factors will be less effective in identifying and rooting out the truly problematic media content.

Next, setting out a range of possible government action – from criminal prosecution at one extreme to requiring the publication of a correction at the other – is, in itself, a form of

structural safeguard. The existence of many possible responses means that regulators can tailor the speech-restrictiveness of their response to the severity regulatory violations. Moreover, just as the regulations for hate speech must clearly set out with respect to substantive content what is permitted and what is forbidden,[196] the rules must be written so as to detail which types of violations are eligible for which sanctions. Then, regulators would not have the power to respond in draconian fashion to less problematic violations and their leeway to administer discretionary, possibly selective enforcement would be curtailed.

When considering procedural and structural safeguards, it is also important to recall a point made at the outset of this paper: the democratization process is long-term, encompassing many phases, and measures that are considered appropriate during one phase may not be suitable during another. With this in mind, no regulatory system put in place by the international community should be considered permanent. In fact, such a system should be considered one of the initial reforms that is implemented and should be phased out as soon as possible. The media likely will gradually transition as the other institutions of government and civil society do the same. The process therefore should be constantly and closely monitored so that when, at any point, a particular regulation or restriction that has been imposed on the media is no longer necessary, it can be discontinued. Initially, for example, perhaps relatively heavy-handed intervention is required to ensure the safety of independent journalists. But as the police force and legal system becomes able to ensure the physical protection of journalists, media reformers may turn their attention away from that area. Similarly, as journalists become accustomed to the codes of conduct to which they are expected to adhere and as the public becomes accustomed to the superior information sources that professional media provide, less regulation might be

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[196] *See supra* 172-175 and accompanying text.

necessary. At that point, international authorities might turn over the monitoring and

enforcement of codes of professional conduct to local professional organizations, taking those

responsibilities out of the hands of regulatory authorities. This sort of multi-phased transitional

process will result in the very minimal amount of regulation that is perceived as necessary at any

given time.

The temporary nature of transitional reform policies provides another safeguard as well.

The regulating entity is not a local government authority that can stay in power indefinitely and

use its control over the media to consolidate its power. Instead, any regulatory authority will be

place only as long as necessary to accomplish its mandate. Given the financial and political

constraints on long-term nation-building projects, international reformers have every incentive to

accomplish their goals as soon as possible, effect the necessary changes in the media sector, and

then relinquish authority over that media. In any event, the vast majority of the regulatory

measures contemplated in this paper should be discontinued when a local government takes over

full control of governance. The concerns voiced by the international media organizations

become much more salient when local political actors take over. While the international

community's goals are to restore or create conditions for a successful liberal democracy, local

politicians want to gain and maintain power. Therefore, while any government intervention into

media content raises some concerns, international authorities' intervention in areas where they

have temporary control are less problematic because they have less of an incentive to use that

power for selfish ends.[197] To avoid this type of abuse, any media regulation scheme that goes

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[197] Of course, like any governmental entity, the UN or OSCE or any other international authority has incentives to
hide its own failings or exaggerate its successes, and we have seen cases that imply politically motivated selective
enforcement of regulations. The international authorities must resist these temptations. An independent media
commissioner and an impartial appeals process for any sanctions imposed would help ensure that such actions are
prevented, or at least severely limited.

beyond internationally accepted norms should be dismantled before full authority is restored to local actors.

Finally, as with any use of coercive power by a government authority, there must be an opportunity for independent review of regulatory decisions. The systems ultimately implemented in both Bosnia and Kosovo provided for appellate review of sanctioning decisions.[198] And the experience in Kosovo showed that such review could be implemented effectively when the Media Appeals Board there overturned the media Commissioner's imposition of a fine because it "had not satisfied the procedural guarantees required by . . . the applicable law in Kosovo," and referred the case back to the Commissioner for re-evaluation.[199] As noted above, the members of any review board must be politically and financially independent both from national and international authorities, and from those regulators making the initial sanctioning decisions.

III. Implications for Iraq

Any contemporary discussion of democratization immediately raises the specter of Iraq. And indeed, the study of democratization in Bosnia and Kosovo is little more than an interesting historical anecdote if it cannot offer insight that might prove useful in other contexts. So while Iraq differs considerably from the Balkans in the details of its historical, political, cultural, religious, and media experience, perhaps some of the lessons to be drawn from the efforts to democratize Bosnia and Kosovo's media can suggest approaches to help overcome the challenges that media reform efforts in Iraq face. This part will consider the nascent media reform efforts in Iraq in light of the factors that seemed to present hurdles to the development of an ideal free press in Bosnia and Kosovo. Based on those factors, it then offer some critiques of

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[198] Krug & Price, *supra* note 31, at 151.

[199] Mertus & Thompson, *supra* note 31, at 274.

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the media reforms the already have been implemented in Iraq, as well as some recommendations for how to move forward most effectively there. Again, given that each democratization process is historically contingent and highly dependent on contextual circumstances that will vary from place to place, no definitive formula may be developed. The hope is, however, that pointing out relevant considerations will provide some useful guidance.

At first glance, Iraq seems to share many of the problematic elements present in Bosnia and Kosovo, the type of elements that both justified and necessitated a departure from liberal democratic norms in the means of media reform. As the post-war rebuilding phase has made abundantly clear, Iraq is a deeply divided society. And while the current conflict did not break out because of these divisions, any national Iraqi consciousness that existed under Saddam Hussein's regime has been eroded by the ongoing sectarian violence that emerged in the wake of the US-led overthrow of the Ba'athist government. The current focus of international efforts is to break down the salience of these divisions and re-establish a reconciled, national identity under a centralized unity government. But unless and until that happens, one of Iraq's defining characteristics is its divisions. And regardless of whether the unity government succeeds in crafting a political compromise to end the current violence, those divisions and the harms that have been carried out as a result of them in the past several years likely will remain a prominent feature of Iraqi civil society. And while the Iraqi media does not have a history of exacerbating divisions within Iraqi society, it has begun to contribute to or, at the very least, to reflect increasingly these emerging and deepening societal schisms.[200]

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[200] In the relatively free aftermath of Saddam's fall, a slew of new publications emerged, especially in Baghdad. Most of them, however, are affiliated with, financed, and controlled by either political parties or religious groups. Their editorial content reflects the agendas of these groups. Anthony Borden, Institute for War and Peace Reporting, *Chaos in the Iraqi Media*, ICR No. 23, June 20, 2003; ARAB PRESS FREEDOM WATCH, FINAL REPORT OF FACT FINDING MISSION TO IRAQ 21-22 (2003).

The ever-present threat of violence in Iraq is so pervasive that it hardly bears mentioning here. Bosnia and Kosovo were emerging from civil war when their media reform schemes were implemented. And while the possibility of renewal of the recent violence still bubbled just beneath the surface, susceptible to triggering by an irresponsible or agenda-driven media, that threat did not rise to the same level that Iraqis tolerate on a daily basis. In some ways, perhaps it does not even make sense to discuss Iraq as a post-conflict nation. Some would say that it is in the process of post-conflict democratization. But others could argue that, while the US-led war to overthrow Saddam Hussein may have ended, Iraq now is entangled in a complex civil war being fought along the current societal fault lines. But whatever the diagnosis of the current state of affairs, media reform—though certainly not a priority—already is underway. And that such reform should strive to help ensure that the media serve as a force for peace, rather than a force that encourages or exacerbates inter-sectarian tensions. Unfortunately, the ethno-sectarian divisions that receive so much attention in Iraq are increasingly reflected in both the broadcast and print media. In the words of one commentator, "[r]ather than a media sphere, Iraq has ethno-sectarian media 'sphericules' that have the potential to further the gap between Iraq's communities, developing identities along ethno-sectarian lines and weakening any kind of national belonging."[201] Media reform efforts thus need to focus on preventing the Iraqi media from becoming, like the media did in so many Balkan nations, yet another force contributing to the ongoing war and strife and violence.

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[201] Ibrahim Al-Marashi, The Dynamics of Iraq's Media, *in* Toward an Understanding of Media Policy and Media Systems in Iraq: A Foreword & Two Reports Center for Global Communication Studies Occasional Paper #1 75-90 (2007).

With respect to its history of an independent and professional media, such a thing has rarely been permitted to flourish in the Arab-speaking world, and Iraq is no different.[202] and recent years have exhibited the worst record of media freedom. Even before the Ba'ath party took over governance of Iraq, leftist and nationalist sentiment among journalists in Iraq had led to significant government interference with the press and very little opposition to that interference, even from journalists.[203] The ascendancy of the Ba'ath party and, in particular the regime of Saddam Hussein, led to intensified control of the media to the point where any vestige of press freedom was replaced with a media that was effectively a mouthpiece of the regime and a tool for the dissemination of Ba'athist ideology.[204] Effective media reform thus requires more than simply regime change and the enactment of formal rules requiring adherence to principles of journalistic professionalism. It requires both government officials and journalists to change their old patterns of behavior and to learn entirely new skill set.

At the same time, there are some promising aspects of the Iraqi media sector's legacy. For one, while the media has certainly been used as a propaganda tool, historically is has no contributed to and inflamed conflict in Iraq in the way that it has in Balkan countries. So while it was certainly been abused, censored, and restricted, prior to the fall of Saddam it was not an independent source of tension. Finally, there are vestiges of an Iraqi journalists' professional association which can be built upon as the foundation for a professional, self-regulating Iraqi

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[202] PUTZEL & VAN DER ZWAN, *supra* note 6, at 9. In the Arab-speaking world regimes have tended to control all media, so any media development or reform strategy must focus on establishing media independence. *Id.*

[203] ARAB PRESS FREEDOM WATCH, *supra* note 200, at 16.

[204] *Id.* at 16-17; Monroe Price, Foreword *in* Toward an Understanding of Media Policy and Media Systems in Iraq: A Foreword & Two Reports Center for Global Communication Studies Occasional Paper #1 6 (2007); Monroe Price & Douglas Griffin, Policy Recommendations Concerning Broadcasting in Iraq *in* Toward an Understanding of Media Policy and Media Systems in Iraq: A Foreword & Two Reports Center for Global Communication Studies Occasional Paper #1 19 (2007).

media.[205] In other words, while the history of the Iraqi media does not reflect the liberal, democratic model of an independent free press, nor does it conform to the example of Bosnia and Kosovo, where the media was an additional instrument of conflict.

So societal circumstances in Iraq mirror, in some senses, the challenges to media reform encountered in both Bosnia and Kosovo. The media's role in contributing to violence is less significant, and the threat of renewed or continued inter-sectarian violence is more significant. But in the end the same barriers to reform—deep societal divisions, significant risk of violence, a dearth of embedded culture of professional journalism—are extant. Despite these warning signs, media reform efforts embarked upon in Iraq exhibit only incremental improvements over their Bosnian and Kosovar counterparts. Unfortunately, many of the same shortcomings have arisen once again.

First, there is the now-familiar effort to create a nation-wide, pluralist media source, the Iraqi Media Network (IMN). This effort included not only reshaping the Iraq State Television channel into satellite broadcaster Al-Iraqiyya, but also two ground-based channels, two radio stations, and a newspaper.[206] IMN was envisioned as a media entity that would provide a variety of types of multi-lingual programming variety of types of programming, including entertainment and educational content. This programming mandate was designed, *inter alia*, to foster and encourage the development of a pluralist civil society and the rule of law.[207] Despite millions of dollars of investment in the project,[208] IMN still fails to live up to its mission. It first was seen as a mouthpiece for the CPA, then it established itself as a channel free of American editorial

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[205] ARAB PRESS FREEDOM WATCH, *supra* note 200, at 28-30.

[206] Price & Griffen, *supra* note 204, at 25.

[207] *Id.*

[208] Price, *supra* note 204, at 8.

influence, and finally came to reflect the agenda of the Iraqi government, emphasizing unity along with an alleged Shi'a-Kurdish bias.[209]

The short history of IMN is similar to that of Kosovo's RTK. Recall that the United Nations re-launched the former state television entity RTP, which had been a mouthpiece for Milosevic's views, as RTK, which was intended to be a national pluralist broadcast entity in Kosovo. It spent the first two years of its existence battling the perception that it was a propaganda tool of the United Nations, KFOR, and the United States. When editorial control was relinquished to Kosovars, however, the network fell prey to political pressures, much like the rest of the media had, engendering claims of bias and pursuit of a partisan agenda through RTK's airwaves.[210] IMN seems to have suffered the same fate. In a nation lacking a deep-seated journalistic culture of independence where competing factions are vying for political power, editorial choices are unlikely to reflect the independence and other hallmarks of professionalism required by liberal free press models. Iraq's brief post-war public broadcast experience thus far simply reinforces the lessons that Kosovo and RTK taught.

The competing pressures with respect to content regulation and government intervention in the media sector that were present in both Bosnia and Kosovo also have been in evidence in Iraq. On the one hand, U.S. policy in the immediate post-Saddam era reflected an optimism for freedom of the press. It therefore permitted, and even encouraged, the emergence of a rash of new publications.[211] In fact, the meteoric increase in the number of media outlets, as well as inroads into the Iraqi airwaves by regional satellite networks (Al-Alam from Iran and Al-

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[209] Al-Marashi, *supra* note 201, at 75-76; *see also* Price & Griffin, *supra* note 204, at 50 (noting that IMN still fails to exhibit truly balanced reporting).

[210] *See supra* notes 88-105 and accompanying text.

[211] Brian Whitaker, *Getting a Bad Press*, Guardian Unlimited, June 23, 2003; Borden, *supra* note 200.

Jazeerza) led to a sort of media chaos.[212] This hands-off approach reflected the typical U.S.

approach to media, reflected in the positions of the WPFC and the *New York Times*, which

prohibits any government intervention in the media sector in the name of liberalism.

On the other hand, those in charge in Iraq—at first the American authorities and later the

Iraqis themselves—recognized the need to exert some control over the proliferating Iraqi media

and to react aggressively to inaccurate or inflammatory reporting.[213] Early efforts to that end led

to Coalition Order 14, under which Ambassador Paul Bremer had the sole authority to close

media organizations.[214] Any media outlet shut down under this order could appeal the decision

only to Bremer himself.[215] Order 14, whose proclaimed purpose was to enhance stability and

prevent the inflammation of tensions through irresponsible journalism, was used to close or ban

media outlets temporarily, and to detain editors or managers.[216] But the perception, no doubt

resulting in part from the anemic process permitted to the accused media under Order 14 and in

part due to the presumption against government intervention discussed at length above, was that

the order was being used to suppress speech unnecessarily.[217] Order 14's inability to deal

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[212] Price, *supra* note 204, at 7-8.

[213] Allen & Stremlau, *supra* note 30, at 1, 5; Price, *supra* note 204, at 11.

[214] Coalition Provisional Authority Order 14, Prohibited Media Activity (June 10, 2003), *available at* http://www.cpa-iraq.org/regulations/20030610_CPAORD_14_Prohibited_Media_Activity.pdf. Order 14 prohibited, *inter alia*, media activities aimed at inciting violence, civil disorder, rioting, or action against Coalition forces or the Coalition Provisional Authority (CPA). *Id.*

[215] Brian Katulis, *Liberated and Occupied Iraq: New Beginnings and Challenges for Press Freedom*, Freedom House, 2004 Freedom of the Press Essays, *available at* http://www.freedomhouse.org/printer_friendly.cfm?page=131&year=2004&essay=12; Price, *supra* note 204, at 9 n.14.

[216] Katulis, *supra* note 215; Price, *supra* note 204, at 9 n.14. For example, "in July 2003, when U.S. troops and Iraqi police raided the Baghdad offices of the Al-Mustaqila newspaper and detained the newspaper's manager, Abdul Sattar Shalan. CPA officials said that Al-Mustaqila had published an article proclaiming the killing of spies who cooperate with the United States to be a religious duty." *Id.* Order 14 was also invoked by "U.S. and interim Iraqi governing council officials as justification for temporary bans and restrictions on coverage by the Arab satellite television channels Al-Jazeera and Al-Arabiya." *Id.*

[217] *E.g.*, Whitaker, *supra* note 211.

effectively with the challenges posed by Iraq's post-war media sphere prompted authorities to design a more comprehensive media policy.[218]

After much political wrangling, Order 65 emerged to impose some sense of order on the post-war media scene.[219] This order represented a giant leap forward from the relatively arbitrary Order 14. Order 65 established the Communications and Media Commission of Iraq (CMC) to enact rules, regulations and codes applicable to the media, as well as the procedural framework for the enforcement of those rules.[220] The regulatory framework that Order 65 purports to fashion has many laudable qualities: Commissioners are chosen for their political independence and professional expertise; the CMC is both administratively and financially independent of the government; it sets out clear rules, regulations and codes of practice; it provides guidance regarding accuracy and balance in reporting; it prohibits incitement to violence; it sets forth the sanctions the CMC can impose and requires that they be proportionate to the offense committed.[221]

It is, however, far from perfect. Some of its elements are simply ill-conceived. First, it calls for the press code of ethics to be implemented through a system of self-regulation.[222] As we have seen before, in a situation where the history of media professionalism is not engrained, where professional associations are nascent, where, in short, the culture of a liberal free press in

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[218] Price *supra* note 204, at 9.

[219] Coalition Provisional Authority Order 65, Iraqi Communications and Media Commission (March 20, 2004), *available at* http://www.cpa-iraq.org/regulations/20040320_CPAORD65.pdf [hereinafer Order 65]; Price & Griffen, *supra* note 204, at 19. A parallel order governing public service broadcasting was promulgated at the same time. *See* Coalition Provisional Authority Order 66, Iraq Public Service Broadcasting (Mar. 20, 2004), *available at* http://www.cpa-iraq.org/regulations/20040320_CPAORD66.pdf. Both Order 65 & Order 66 were a result of a long-term effort to devise an effective approach to media reform in Iraq. A June 2003 conference in Athens aimed to provide a post-conflict media policy framework. The conference brought together regional and international experts and officials (few Iraqis were able to participate, largely for security reasons). Price *supra* note 204, at 5. Out of this conference came a plan that, after much negotiation with relevant political actors and administrative entities within Iraq, formed the basis for Order 65 & Order 66. *Id.* at 10.

[220] Price & Griffen, *supra* note 204, at 20.

[221] Order 65, *supra* note 219; Price & Griffen, *supra* note 204, at 19-21.

[222] Price & Griffen, *supra* note 204, at 20.

the Western European image has yet to take root, self-regulation is likely to result in no regulation at all. In addition, the Broadcasting Code of Practice (which is enforceable by the CMC), leaves ambiguous too many of its provisions – incitement, for example, must be more clearly defined.[223] And the CMC procedures do not live up to the due process ideals necessary to protect media defendants from unwarranted restrictions on their expression.[224] Perhaps more problematic than these conceptual elements of the CMC framework are the problems that the CMC has faced in practice. As of May 2007, the CMC had not received or initiated any complaints under the mandatory Codes of Practice, and its rules and correspondence are routinely flouted by domestic and international broadcasters alike.[225] Some journalists have never even heard of the CMC; others complain that it simply looks the other way in the face of violations.[226]

The implementation of Order 65 early in the post-war era represents a significant improvement over what took place in Bosnia and Kosovo. Rather than hesitating to assert regulatory over the media and bowing to pressure from outside groups largely ignorant of the specific circumstances involved, media reform was placed on the agenda right away. A concerted effort that included local and international input attempted to craft a regulatory framework both to encourage press freedom and to prevent the media from contributing to instability.[227] It is a good start. And despite some imperfections, it sets in place many of the necessary tools. One can hope both that the CMC's implementation efforts will improve over

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[223] *Id*. at 45.

[224] *Id*. at 47.

[225] *Id*. at 24.

[226] Al-Marashi, *supra* note 201, at 92.

[227] *See supra* note 219 and accompanying text.

time as its capacity slowly ramps up to speed and that the permanent law media law, still yet to be enacted as of this writing, addresses some of the substantive failings of Order 65.

Unfortunately, there may not be time to wait patiently for improvement. Few of the new media entities formed in the post-war era exhibit the type of media professionalism and independence considered the hallmark of an ideal free press. Instead, with a few significant exceptions, these publications contain false news and misinformation, follow a partisan editorial bent, and use hyperbole and incitement rather than facts to convey their message.[228] In fact, the media is dominated by outlets controlled by ethno-sectarian or political factions,[229] who see media as it was seen under Saddam: as a tactical tool to be used to support the group that sponsors it.[230]

The most disturbing aspect of the current media environment—and the one that makes effective intervention all the more urgent—is that it seems to be deteriorating over time. Media that emerged in the immediate aftermath of the war used the ethno-centric labels in the context of calling for unity among the different groups.[231] Over time, however, they have become increasingly divisive, reflecting the similar trend in local politics, and setting the groundwork for conflict.[232] Political parties running on non-sectarian platforms do not have enough followers to be able to field a network, so that perspective is not part of the broadcast or print media

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[228] ARAB PRESS FREEDOM WATCH, supra note 200, at 22-23.

[229] Price & Griffen, *supra* note 204, at 17-18; Al-Marashi, *supra* note 201, at 69.

[230] Price & Griffen, *supra* note 204, at 17. Shi'a networks tend to emphasize Shi'a victimization by Sunni militants, and a pro-government unity agenda. Al-Marashi, *supra* note 201, at 77. Sunni networks, on the other hand, reflect fear of a federated Iraq where they become marginalized into a landlocked rump state and focus on Sunni victimization by Shi'a militias who have infiltrated the government or security forces. *Id*. at 78. Kurdish media is essentially a mouthpiece for the two dominant Kurdish political organizations, emphasizes progress in the North, the ability of local political leaders to provide security, support for Kurdish members of the government, support for a federated Iraq, and fear of Sunni Arab militants. *Id*. at 79. Some media outlets are aligned with the insurgents and openly call for violence. One of these was closed down under an Anti-Terrorism law, but it continues to broadcast from clandestine (and likely mobile) locations. *Id*. at 80-81.

[231] Al-Marashi, *supra* note 201, at 68.

[232] *Id*. at 68-70.

picture.[233] While there are some independent channels operating to further participation by civil

society, providing outlets for civic expression, criticism of the government, and giving a voice to

the people's concerns,[234] they face nearly insurmountable challenges. For example, they lack the

financial support that their politically- and ethnically-aligned counterparts enjoy.[235] Moreover,

their access to information is often restricted to prevent reporting undesirable stories, and their

employees are subject to blackmail, death threats, and physical violence.[236] In short, the media

is becoming increasingly balkanized, increasingly aligned with religious or sectarian agendas,

increasingly likely to contribute to violent conflict rather than provide a forum for reconciliation

and compromise.

Given this disturbing trend, more assertive intervention by the CMC could potentially

halt or slow the backsliding into sectarianism currently evidenced in the media. Aggressive

enforcement of regulations regarding fair and balanced reporting and against hate speech

incitement might prevent the media from becoming yet another destabilizing force in Iraq.

Reformers in Iraq also must be more mindful of the safeguards that make press regulation

less troubling. The first of these is the assurance that media regulations will not be enforced

selectively in order to further the regulators' political agenda. This has been especially salient

with respect to the use of Order 14. An example is the case of *Al Hawza*, a popular Shiite

newspaper. Ambassador Bremer ordered the paper closed for allegedly inciting violence against

coalition troops in the form of publishing inaccurate anti-American rumors. The closure was

controversial, seen by many as a self-serving American imposition of censorship.[237] But when

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[233] *Id*. at 88.

[234] *Id*. at 85; Price & Griffen, *supra* note 204, at 17; *see also* Whitaker, *supra* note 211; ARAB PRESS FREEDOM WATCH, *supra* note 200, at 21.

[235] Al-Marashi, *supra* note 201, at 74.

[236] Price & Griffen, *supra* note 204, at 18.

[237] *See* Allen & Stremlau, *supra* note 30, at 1.

Iraq's interim prime minister, Iyad Allawi, ordered the paper reopened, that, too, was regarded as a political move – an effort to curry favor with radical elements of Iraq's citizenry.[238] Another troubling aspect of the use of Order 14 is the fact that, even after the promulgation of Order 65, Order 14 continued to be invoked to close media outlets.[239] Thus, despite the creation of a comprehensive regulatory framework, the relatively arbitrary use of Order 14 would continue.

The indictment of Order 14 as a political censorship tool rests in large part on its glaring procedural failings: It fails to define incitement, it does not provide equitable enforcement procedures or adequate due process protections, it permits imprisonment as a sanction,[240] and appeals of its penalties are decided by the same authority that initially imposed the sanction.[241] Each of these troubling aspects of Order 14 remains relevant, because Order 100 gave the order to enforce Order 14 to the Iraqi authorities following the handover of power.[242]

Nor does Order 65 contain all of the procedural safeguards necessary to limit abuse and censorship. As mentioned above, the procedures established for handling complaints are not ideal. They fail to provide clear evidentiary rules, to identify the standard of proof that will be used, or indicate whether there is a right to call witnesses or to legal assistance.[243] In addition, while the Order 65 framework provides for an appeals process, the appointments to the appeals board have never been made.[244] These complaints are perhaps premature, given that the CMC has yet to initiate any proceedings. But if it is to step in and address the increasingly hostile,

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[238] *Id.*

[239] Price, *supra* note 204, at 11.

[240] Price, *supra* note 204, at 28.

[241] *See supra* note 214 and accompanying text.

[242] Price, *supra* note 204, at 28; Coalition Provisional Authority Order 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority (June 28, 2004), *available at* http://www.cpa-iraq.org/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdf.

[243] Price, *supra* note 204, at 47.

[244] Price & Griffen, *supra* note 204, at 36-37.

sectarian tone in the Iraqi media, it must be prepared to do so in a way that is unimpeachable. And in order to do that, it must insist on the procedural safeguards necessary to fend of allegations of unnecessary censorship or arbitrary decisions.

The final issue Iraq raises with respect to safeguards against unwarranted media intervention is a complex one in this context. Recall in the discussion of Bosnia and Kosovo the importance of placing the tools of regulation in independent, neutral hands, rather than in the control of individuals or groups who might be more tempted to use them for illicit purposes. While the UN was in charge of civil administration of Kosovo in its post-war period and Dayton charged OSCE with the task of democratization of Bosnia's post-war institutions, the international community has no such mandate in Iraq. Under the current political arrangements, regulations and anti-incitement measures will be imposed by the Iraqi government itself. This raises concerns that are less prominent when international regulators are in charge. One reason that the principle of non-regulation is so strong is the historical tendency of rulers to use regulation as a means of stifling criticism of or dissent against the government itself. And it was, in part, fear of setting a precedent for this type of use of regulation that prompted such vocal opposition to regulatory schemes in Bosnia and Kosovo.[245] In those places, however, the regulatory regime was aimed at preventing one local faction from criticizing another, not at stifling critical commentary of government actions or the dissemination of information unfavorable to governing authorities.[246] But once the regulatory reins are handed over to the local government, the risks that it will be used for these improper purposes increases.

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[245] *See supra* notes 144-145 and accompanying text.

[246] *See* Krug & Price, *supra* note 31, at 156.

The regulatory regime in Iraq does make efforts to ensure the independence and non-partisanship of membership on the CMC and its appeals board.[247] But they are purely Iraqi. Moreover, as noted above, Order 100 gave the Iraqi prime minister the power to continue media enforcement authority under Order 14 after he took over.[248] There is no simple solution to this situation. If the Iraqis are willing, perhaps administration of media regulation could be handed over to an independent international body, such at the OSCE or the UN. Or perhaps the hearings and boards could include media professionals from outside Iraq.[249] But whatever the solution, this concern must be addressed, because it is clear that journalists and reporting are seen as elements of the political struggle. In addition to the targeting of journalists for violence, kidnapping, and assassination, accusations of the prosecution of journalists for political purposes are already being made.[250]

As discussed above, stability is one of the fundamental elements of established democracies that is often taken for granted when considering principles that should guide media reform in societies in transition. Stability includes respect for the rule of law as well as acceptance, both by political actors and by civil society, of the accepted liberal democratic norms. In places where this acceptance is still an aspiration and not a reality, establishing the preconditions necessary for a free, independent, responsible press becomes a challenge. The broader media environment must permit access to relevant information and refrain from exerting or permitting others to exert pressure – such as overt censorship, intimidation, defamation punishments, or physical threats – that might chill journalists' speech and effect their editorial

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[247] Price, *supra* note 204, at 10; Price & Griffen, *supra* note 204, at 20.

[248] Price & Griffen, *supra* note 204, at 28.

[249] *See* Allen & Stremlau, *supra* note 30, at 14 (suggesting a hybrid domestic/international structure similar to that of the Sierra Leonian Truth and Reconciliation Commission).

[250] Committee to Protect Journalists, *CPJ Urges the Interim Authorities to Reverse their Decision to Ban Al-Jazeera* (Aug. 8, 2004), http://www.cpj.org/news/2004/Iraq08aug04na.html; Price & Griffen, *supra* note 204, at 27.

decisions.[251] Without these, even the most well-meaning journalist will struggle to satisfy the requirements of professionalism and reform efforts can hardly hope to succeed.

Unfortunately, it is in this area where Iraq is perhaps most distinguishable from Bosnia and Kosovo. Violence and the absence of basic rule of law pervade not just the media environment but all of Iraqi life. Iraq is currently one of the most dangerous places in the world to be a journalist.[252] Journalists who report on news in a way that displeases certain political parties are targeted for violence.[253] And because of the inability of the Iraqi state to protect its citizens generally, there is certainly no way to protect journalists. Moreover, the breakdown of the pre-existing system of authority was much more complete in Iraq than it was in Bosnia or Kosovo. And while this has benefits in the sense that it dissolves old power structures that might have controlled and manipulated the media, it also has left the country with almost no semblance of stability on which to build. Instead, it is a complete reconstruction.

The volatility of life in Iraq adversely affects the development of rule of law culture in other ways as well. While NGOs of all shapes, sizes, and agendas were engaged in both Bosnia and Kosovo, very few are currently operating in Iraq. Their absence can be explained partly by safety concerns,[254] partly by a lack of familiarity in partnering with the military authorities currently in charge in Iraq. These are groups that are more familiar with diplomats than with

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[251] *See supra* Part I.A.

[252] As of August 2007, the number of journalists killed since the beginning of hostilities in 2003 is 112. In addition, 40 media support workers have been killed in that time. 2006 was the deadliest year, seeing 32 journalists killed. Thus far in 2007, 19 have lost their lives. Committee to Protect Journalists, *Iraq: Journalists in Danger*, http://www.cpj.org/Briefings/Iraq/Iraq_danger.html; Joel Campagna & Hani Sabra, Committee to Protect Journalists, *Under Threat*, May 17, 2004 (describing the dangers associated with being a reporter in post-war Iraq, especially for local journalists), http://www.cpj.org/Briefings/2004/iraq_journ_5_04/iraq_journ_5_04.html; Bassam Sebti, Committee to Protect Journalists, *Heading into Danger*, DANGEROUS ASSIGNMENTS, May 4, 2006 (describing physical danger associated with working for an American news publication), http://www.cpj.org/Briefings/2006/DA_spring_06/bassam/bassam_DA.html.

[253] Al-Marashi, *supra* note 201, at 87.

[254] PUTZEL & VAN DER ZWAN, *supra* note 6, at 14.

soldiers.[255] As a result, one valuable resource that is normally quite active in encouraging the development of civil society in democratizing or transitional societies is simply not a factor in Iraq.

So where does all of this leave Iraq? In some ways, there is reason for optimism. The existing regulatory system, designed by those with experience in Bosnia and Kosovo in conjunction with Iraqis, contains many of the hallmarks of an ideal media regulation scheme. The media sector is exceedingly pluralist, consisting of many voices from many different perspectives. And some of those voices are operating as a true Fourth Estate, challenging corruption and providing an outlet for citizens' concerns.

But there are disturbing trends as well. The increasing divisiveness of the media, the disintegration of the overall media sphere into what one commentator describes as "sphericules," which each set out their own perspective, but which reaches only an audience that shares this perspective. Within their spherical, each group portrays itself as a victim of the others, thereby increasing tension and the perceived need for self-defense, leading to further polarization.[256] The result is that instead of a healthy pluralism permitting public debate on contested issues, there is simply an increasingly loud cacophony of voices reinforcing their own points of view in increasingly hostile terms.

In this context, the effect on the ground of Iraq's well-crafted regulation scheme, is seemingly negligible. In other words, all of the rules, regulations, and codes of practice are only so many words, superficially imposed over a much more complex situation which was not the result of and is not amenable to reform through any conscious effort.[257] In other words, the

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[255] Price, *supra* note 204, at 10.

[256] Al-Marashi, *supra* note 201, at 90.

[257] Price & Griffen, *supra* note 204, at 30.

political realities on the ground, the lack of physical security, the rabid sectarianism of vying

factions are simply too powerful for even the most well-designed reform plan to overcome.

Conclusion

The foregoing arguments may appear as attempts to justify anti-democratic, totalitarian,

or illiberal measures against the media in post-conflict societies. And to many, even the

desirable end known as democracy may not be pursued through such means. What this paper

posits, however, is that there are fundamental differences between democracy and

democratization. And that the conditions presented by some nations during the democratization

process both render that process extremely fragile and make some liberal democratic principles

temporarily irrelevant. Once it is understood that the norms regarding the free press developed

in the context of stable democracies not only serve to preserve the democratic nature of those

societies but also rely upon the media environment that that democratic nature provides to be

effective, it becomes clear that in the absence of established democracy, a different set of norms

and principles might be more suitable. In other words, when the conditions in a transitional

society do not reflect democratic conditions, the application of democratic norms will be

ineffective. And because they will be ineffective, strict adherence to them should not be

required.

The early democratization period in both Bosnia and Kosovo exhibited several

characteristics that justify a departure from the application of liberal democratic principles

inappropriate. The deep societal divisions and the concomitant ethnic-based regional or

sectarian power structures and political consciousnesses, the recent violent conflict and its

lingering tensions that threatened to lead to renewed violence, and the lack of culturally

embedded democratic traditions all contributed to a media environment incapable of fulfilling its

assigned roles in a democratic society as watchdog, as information disseminator, and as sphere of public debate. So while the aim of international regulators and reformers to establish a pluralist, independent, and professional media in Bosnia and in Kosovo is the appropriate goal, assuming that this goal could be achieved without modifying the usual rules that are applied to the media to accommodate the conditions with which these reformers were faced seems, in hindsight, naïve.

International media reformers' experiences in Bosnia and Kosovo indicate that, when deep divisions within society result in local resistance to an independent media, aggressive regulation both to influence media content and to break down political control over the media may be necessary. When a recent conflict or extreme inter-ethnic tension presents a real risk that certain media content may result in renewed violence or a destabilization of the democratization process, measures that may be considered impermissible censorship in other circumstances may be justified. When a national political consciousness is less salient to citizens than their sectarian identity, intra-ethnic media pluralism is likely to be more effective than attempts to create nationwide media pluralism. When local journalists lack the culture and tradition of media professionalism, permitting them to self-regulate will not result in a development of that culture. And when the non-media actors fail to respect the democratic norms surrounding the media environment – avoiding exerting political influence over content, permitting access to information, etc. – a truly independent media is unlikely to develop.

While these lessons are highly contingent on the specific conditions present in Bosnia and Kosovo – deeply divided societies, recent conflict along ethnic lines, a history of media contribution to ethnic and political tensions – the hope is that they will nonetheless prove useful to future reform efforts. At the very least, the experience of Bosnia and Kosovo indicate that

reformers must pay close attention to the context in which they are working, that they must craft

reforms and regulations to address the hurdles to media democratization that exist there, and that

when the preconditions for the proper functioning of liberal norms do not exist, they must depart

from those norms in order to create a media environment where ultimately those norms will be

respected.