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Democratizing the Media

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DEMOCRATIZING THE MEDIA

Emily Berman
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EMILY BERMAN∗

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I. 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

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1. This Article 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 successful with respect to democratization of the media environment. It is true that there should perhaps be some limits that constrain the scope or extent of administrative and legislative powers exercised by international intervention forces. See, e.g., Kristen Boon, Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers, 50 MCGILL L.J. 285, 287 (2005) (arguing that a distinct jus post bellum framework based on principles of trusteeship, accountability, and proportionality is required by international actors). The goal of these interventions is nearly always to establish a democratic political system.
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.

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 neutral and impartial adjudicators. 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. As 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, nongovernmental 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 fol-

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². Unlike the nonbinding 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 II.A.
Following civil wars, these principles 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. 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 into an independent, professional, and pluralist sector.

What their experience shows is that, while generally accepted international norms and standards may define the desired result of media democratization, 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. 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 a successful democracy.

Using the lens of the media reform efforts undertaken in Bosnia and Kosovo, this Article 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

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4. See infra Part III.A.

5. Throughout this Article, 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.

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 Article 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, and geographical 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 ability to generalize this Article’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 Article, 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 Article proceeds in three parts. Part II.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 II.B then discusses possible justifications for departing from those norms, many of which were present in both Bosnia and Kosovo. Part III 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 IV considers the situation in Iraq in light of the lessons that may be drawn from the Bosnia and Kosovo experiences. The Article then briefly concludes.

II. DEMOCRACY & DEMOCRATIZATION

In post-conflict situations where the international community intervenes, its ultimate goal is to reestablish in the formerly conflict-torn territory or country a liberal democracy in the Western European/North American model.7 All institution-building and reform ef-

forts are simply instrumental means aimed at achieving this goal. The media component of these reform efforts is a result of the sentiment that both the right to free expression and a vibrant free press are considered integral elements of liberal democracies. While the entitlements to free expression, to seek out information, and to hold opinions are important in their own right, “the full enjoyment of
8. E.g., Press Release, United Nations Democracy Fund, Secretary-General Sees Free Press an 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 Co-operation in Europe, OSCE Mission in Kosovo: Media Standards, http://www.osce.org/kosovo/13419.html (last visited Aug. 25, 2008) [hereinafter OSCE Mission in Kosovo: Media Standards] (“A free and responsible media is an integral component of any democratic society.”). These rights are enshrined in all of the major human rights instruments. Organization of African Unity, African [Banjul] Charter on Human and Peoples’ Rights, art. 9(1) & (2), adopted June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter] (“Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.”); Organization of American States [O.A.S.], American Convention on Human Rights, art. 13(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] (“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.”); ICCPR, supra note 7, art. 19(2) (“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.”); Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention] (“Everyone has the right to freedom of expression. This right shall include free-
[free expression] is the most potent force to achieve individual freedoms, strengthen democracy, and pre-empt repression, conflict, war and genocide.\textsuperscript{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. Further, 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 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]\textsuperscript{11} of democratic society—a necessary precondition for liberal democracy to flourish.

These norms surrounding the free flow of information, which lead to the more specific norms regarding the press set forth below, are considered fundamental to a stable, successful democracy. Consequently, 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, some day, 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.

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 a 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 and why such strident opposition arose to other reform efforts that were sorely needed.

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. In fact, 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, 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 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 everywhere from the jurisprudence of the European Court of Human Rights,17 to the World Bank’s focus on accountabil-

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.
   OSCE Mission in Kosovo: Media Standards, supra note 8.


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).
ity, transparency, and anticorruption,\textsuperscript{18} to the work of NGOs such as Freedom House, which annually measures press freedom around the world.\textsuperscript{19}

In addition to its watchdog function, the press also must create a space for public debate.\textsuperscript{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.\textsuperscript{21} But the effect of the 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 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.


\textsuperscript{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. \textit{Freedom House, Freedom of the Press: Methodology} (2006), http://www.freedomhouse.org/template.cfm?page=350&ana_page=102&year=2006.

\textsuperscript{20} See, e.g., Declaration on Freedom of Political Debate in the Media, supra note 10, at III; OSCE Mission in Kosovo: Media Standards, supra note 8.

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 reflect and comment on the preoccupations of public opinion,” 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.”

Finally, the media’s use of their right to free expression to facilitate public debate should promote tolerance and understanding among different elements of society. This role of the media is seen as especially crucial in conflict and post-conflict situations, where the institutions of civil society are important elements for reconciliation and for fair and effective democratic elections.

In order for the media to fulfill these roles—as watchdog, as facilitator of public debate, and as promoter of pluralistic tolerance—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 media

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24. E.g., Inter-American Declaration of Principles on Freedom of Expression, supra note 10, ¶ 6 ("The right to freedom of expression is essential for the development of knowledge and understanding among peoples."); Council of Eur., Steering Comm. on the Media and New Commc'ns Servs., 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, Doc. No. CDMC(2006)028, ¶ 6 (Feb. 7, 2007) [hereinafter Alignment of Laws of Defamation] ("Without open public debate there can be no pluralism, tolerance and broadmindedness which, in turn, are preconditions for the existence of a democratic society.").
25. E.g., Council of Eur., Comm. of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism, 917th Mtg., pmbl. (Mar. 2, 2005) ("[T]he free and unhindered dissemination of information and ideas is one of the most effective means of promoting understanding and tolerance, which can help prevent or combat terrorism."); UNESCO, Media in Conflict and Post-Conflict Situations, http://portal.unesco.org/ci/en/ev.php-URL_ID=18538&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Aug. 25, 2008) ("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.").
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.  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 standards 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


28. Perhaps the idea is embodied most strongly in the work of the World Press Freedom Committee (WPFC), an umbrella organization made up of dozens of journalistic groups that is dedicated to resisting attempts to regulate the press. See WPFC Charter, supra note 27. In pursuit of this aim, WPFC monitors UNESCO, the UN General Assembly, the UN Commission on Human Rights, OSCE, the Council of Europe, the EU, and any other international organization or meeting considering issues that might impinge on the free press. It then provides a unified, global platform through which the profession can combat any proposed restrictions that the media see as a threat to press freedom. See World Press Freedom Comm., About WPFC, http://www.wpfc.org/index.html (last visited Aug. 25, 2008). Resistance to media regulation is not confined, however, to the agenda of entities made up only of journalists. See, e.g., Kaufmann, supra note 18, at 1; UNESCO, Freedom of Expression, supra note 26.
of confidential sources, the physical protection of journalists, the


30. The norm regarding physical protection of journalists is robust. In fact, over the years, there have been several attempts to formulate a convention on the protection of journalists; however, none of these attempts has resulted in the adoption of a convention. Jennifer Lee, Peace and the Press: Media Rules During U.N. Peackeeping Operations, 30 VAND. J. TRANSNAT'L L. 135, 157-60 (1997); Dylan Howard, Note, Remaking the Pen Mightier Than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists, 30 GA. J. INT'L & COMP. L. 505, 510-23 (2002) (discussing the history and progression of violence against journalists); see Amit Mukherjee, International Protection of Journalists: Problem, Practice, and Prospects, 11 ARIZ. J. INT'L & COMP. L. 339, 346-53 (1994) [hereinafter Mukherjee, International Protection of Journalists]; see generally Amit Mukherjee, The Internationalization of Journalists’ ‘Rights’: An Historical Analysis, 4 J. INT'L L. & PRAC. 87 (1995). There are, however, several formal international treaties that protect journalists’ bodily integrity. According to the Geneva Conventions, journalists who accompany the armed forces and are wounded or sick in an area of conflict are entitled to all the protections afforded to wounded or sick combatants and to prisoners of war. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13(4), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 13(4), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. And the First Optional Protocol to the Conventions, adopted in 1977, reclassified journalists as civilians, so that reporters who differentiate themselves from members of the armed forces are entitled to all of the protections offered to civilians. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Pro-
prevention of the abuse of defamation claims to harass reporters and editors,31 and liberal access to information policies.32

31. For example, most international and transnational institutions agree that criminal penalties for defamation are inappropriate. E.g., MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 52 (2d ed. 2004) (distributed by the Council of Europe); Pasqualucci, supra note 30, at 393; see also Special Rapporteur on the Right to Freedom of Expression and Opinion, Report on Civil and Political Rights, Including the Question of Freedom of Expression, ¶ 36, delivered to the Comm’n on Hum. Rts., U.N. Doc. E/CN.4/2003/67 (Dec. 30, 2002) (“[T]he sentencing to a prison term for libel or defamation is clearly not a proportionate penalty . . . .”); 2000 Report of the Special Rapporteur, supra note 15, ¶ 52 (“Criminal defamation laws should be repealed in favour of civil laws . . . .”); Inter-American Declaration of Principles on Freedom of Expression, supra note 10, at princ. 10; Alignment of Laws on Defamation, supra note 24, ¶ 20; ARTICLE 19, DEFINING DEFAMATION: PRINCIPLES ON FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION 7 (2000), available at http://www.article19.org/pdfs/standards/definingdefamation.pdf (“All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”); HUMAN RIGHTS WATCH, EUROPE AND CENTRAL ASIA: 2005 WORLD REPORT 6, 11, 33-34 (2005); Darian Pavli, The Cost of Speech: Violations of Media Freedom in Albania, HUMAN RIGHTS WATCH, June 2002, at 29 (“Human Rights Watch opposes, generally and as a matter of principle, all laws that make defamation a criminal offense.”); Press Release, Int’l Press Inst., Resolution on Criminal Defamation and Insult Laws (May 18, 2004) (“The view that the criminalisation of defamation is illegitimate is shared by the world’s leading courts such as the European Court of Human Rights, the Inter-American Human Rights Commission and the US Supreme Court. The clear trend of their opinions is that defamation (libel and slander) should be treated under civil law, to be adjudicated between the parties by civil courts not as criminal offences subject to state punishments.”).
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 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. 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: 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 evenhandedly; 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.\textsuperscript{34}

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.\textsuperscript{35} This pluralism has structural elements, meaning that there should be multiple independent and autonomous media outlets as well as a content elements, meaning that those media outlets should provide diverse content and viewpoints. A pluralist press 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 press 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.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{34} Practical Guide for Journalists, supra note 21, at 16.
\item \textsuperscript{36} “[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 2 (LSE Crisis States Research Ctr., Discussion Paper No. 8, 2005). “[W]hen 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.” Id. at 3.
\end{itemize}
B. THE PROCESS OF DEMOCRATIZATION

In a democracy, an ideal press—one able to carry out its functions of facilitating the effective exercise of free expression—must be free and independent, must be able to resist external pressures that might affect editorial decisions, must be committed to an ethical code that insists on placing the public interest ahead of any political agenda, and must be pluralist. These ideals are important, and they are effective in situations where their application is justified. They are not, however, universally applicable. In fact, there are some contexts that 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. This Article 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 must understand first 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, 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 society—stable rule of law, a society-wide


38. E.g., LAURENCE WHITEHEAD, DEMOCRATIZATION: THEORY AND EXPERIENCE 7-35 (2002) (treating as separate inquiries what is meant by democracy—the end goal of democratization—and what is meant by democratization—the process by which a political entity moves toward democratic governance).
political identity, political contestation through nonviolent means, and so on.  

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

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. In this view, democratization processes are simply those institutional changes that successfully lead to the desired outcome—political competition. 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. An alternative view, and the one which this Article adopts, is that “[d]emocratization is best understood as a complex, long-term, dynamic, and open-ended process.” 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 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. “[I]nstitutional design for new democracies needs to be seen as an exercise in social construction and persuasion,

39. See Allen & Stremlau, supra note 36, at 4 (“[T]he starting point here is the benefits of the media at ‘optimal performance’ – i.e. in rich democracies. . . . [P]roponents 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.”).
40. 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 Article are intended to apply only to the media.
41. Whitehead, supra note 38, at 27-29.
42. Id. at 28.
43. Id. at 27.
rather than in terms of the importation of internationally approved and standardized ‘right’ answers . . . .”44 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 stages 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.45 In these deeply divided societies, large segments of the society are susceptible to co-option and control by nondemocratic networks or power bases held over from the pre-transition 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 intersocietal tensions and even violence. These characteristics pose challenges to successful democratic governance that 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, fragile institutions, and constant risk of renewed violence present in post-conflict transitions

44. *Id.* at 112.
45. See *id.* at 76-77 (pointing out that deep divisions can form obstacles to the development of healthy civil society).
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. 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 actors are independent of inappropriate influence and committed to acting within the legal rules, the media in societies emerging from authoritarian or other nondemocratic rule often have a tradition of being tools of propaganda and mouthpieces for particular political agendas. Because the media in such places have never developed a sense of their role as instruments of the public interest—committed to independence, accuracy, and evenhandedness—reforms designed to create such 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 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

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

47. See id. at 73 (setting out a working definition of civil society).
that the best ways of accomplishing the ultimate goal is through means of democratization that depart from principles proscribed by democratic norms.

III. THE CASES OF BOSNIA & KOSOVO

First, this Part 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 actually were necessary, and suggesting ways in which such impediments might have been avoided or minimized.

A. POLITICAL CONTEXT

The efforts by intergovernmental agencies and organizations in an attempt 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 that 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 propaganda tools 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 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)\(^{48}\) 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 Muslim-Croat Federation—a federation of territories controlled by the Bosnian

Muslims and Croats respectively—and the Serbian Republic, populated largely by Bosnian Serbs.\(^49\) Politically, very few issues were to be decided at the national level, but instead power devolved largely to the entity or local level.\(^50\) 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, multiethnic Bosnian national identity.\(^51\)

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 ensured that political leaders within each ethnic community would have a great deal of power.\(^52\) 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.\(^53\) 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.\(^54\) 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 (HRT), and Bosnia-Herzegovina Radio and Television.

\(^{49}\) Dayton Accords, supra note 48, at 76; Gary T. Dempsey & Roger W. Fontaine, Fool’s Errands: America’s Recent Encounters with Nation Building 86 (2001).


\(^{51}\) Dempsey & Fontaine, supra note 49, at 85; Price, supra note 35, at 6.

\(^{52}\) See Inglis, supra note 50, at 84; Morrison, supra note 50, at 145.

\(^{53}\) Price, supra note 35, at 6.

\(^{54}\) Mark Thompson, Slovenia, Croatia, Bosnia and Herzegovina, Macedonia (FYROM) and Kosovo: International Assistance to Media 32 (2000); see Price, supra note 35, at 5.
(RTBiH), were broadcast in the territory where a particular ethnic group was concentrated and served as the major source of information within that area. 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 with local politicians. 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. 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. 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. Dayton itself contained no specific provisions for media reform. It did, however, provide that the Organization for Security and Cooperation in Europe (OSCE) would organize elections, 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 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. Such a result would entrench the existing ethnic

55. THOMPSON, supra note 54, at 36; Price, supra note 35, at 6.
57. THOMPSON, supra note 54, at 36; Price, supra note 35, at 5.
58. See THOMPSON, supra note 54, at 41.
59. 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 Stabilisation Force (SFOR), was responsible for the military aspects of the implementation. THOMPSON, supra note 54, 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 48, at annex 10, art. I. 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. See S.C. Res. 1031, ¶ 15, U.N. Doc. S/RES/1031 (Dec. 15, 1995).
60. THOMPSON, supra note 54, at 33.
61. Dayton Accords, supra note 48, at annex 3, art. II; THOMPSON, supra note 54, at 34; Price, supra note 35, at 6.
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 broader implementation of Dayton.

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 journalists do their jobs, trying to shape the Bosnian media into the western image of a free press that is independent from political or other improper influence and that conforms 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.

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, 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. Interethnic 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.\textsuperscript{65} 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.\textsuperscript{66}

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 violence.\textsuperscript{67} 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.\textsuperscript{68} Albanian-language newspapers were generally permitted to continue to operate, but always under threat of harassment or closure.\textsuperscript{69} 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.\textsuperscript{70}

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.\textsuperscript{71} Between Serbian leader Slobodan Mil-

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\textsuperscript{65} See Dempsey & Fontaine, supra note 49, at 135-36. 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. \textit{Id}.

\textsuperscript{66} The most powerful was the Kosovo Liberation Army (KLA), which had spearheaded the war for independence against the Serbs, led by Hashem Thaci. Thaci had a strong rival, however, in Ibrahim Rugova, leader of the self-proclaimed Republic of Kosovo since 1992. See id. at 141; Thompson, supra note 54, at 62.

\textsuperscript{67} Price, supra note 35, at 27.


\textsuperscript{69} Thompson, supra note 54, at 61.

\textsuperscript{70} Price, supra note 35, at 28-30.

\textsuperscript{71} See Thompson, supra note 54, at 61-62 (noting that Kosovo’s media was functioning in exile during NATO bombing); Price, supra note 35, at 27-28 (describing Serbian takeover of media in Kosovo); id. at 30 (noting that half of Kosovo’s population had fled and the other half had gone underground).
osevic’s crackdowns and the NATO bombing campaign, any indigenous, Albanian-language media that had existed prior to the war had been wiped out.\(^72\) 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. Yet the television landscape remained barren.\(^73\)

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).\(^74\) 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, “[p]romot[e] the establishment . . . of substantial autonomy and self-government, . . . [p]erform[] basic civilian administrative functions,” and “promot[e] human rights,”\(^75\) while military and security issues would be governed by the NATO-led Kosovo Force (KFOR).\(^76\) 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 it eventually would become an independent entity as the Albanian population wanted or whether Serbia would retain control over it in some form.\(^77\) 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.\(^78\) But OSCE, again charged with democratization and institution-building,\(^79\) considered media reform in Kosovo to

\(^{72}\) Price, supra note 35, at 27-30; see Thompson, supra note 54, at 62.

\(^{73}\) Thompson, supra note 54, at 62-63.

\(^{74}\) S.C. Res. 1244, supra note 63; Thompson, supra note 54, at 62; Price, supra note 35, at 26-27.

\(^{75}\) S.C. Res. 1244, supra note 63, ¶ 11.

\(^{76}\) See Thompson, supra note 54, at 62.

\(^{77}\) See Dempsey & Fontaine, supra note 49, at 125-26.

\(^{78}\) S.C. Res. 1244, supra note 63; Thompson, supra note 54, at 63.

be an integral element of its institution-building program.80 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.”81 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 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 that 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 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.82 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 influ-

82. Price, supra note 35, at 7-8; see THOMPSON, supra note 54, at 26-27.
ences 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.83 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 locally controlled, autonomous national networks might be a valuable development at a later 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 loath 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, in part, an attempt to ensure this pluralism of content.84 By creating a media outlet that was unbiased and impartial, which would cover issues from all angles without filtering it first through the lens

84. This goal is evident in the way the networks’ purposes were discussed. Each was envisioned as a national media outlet, serving all residents of the relevant political entity and presenting all sides of the issues. See THOMPSON, supra note 54, at 67 (describing the goal of making RTP a “genuine public broadcaster”); Price, supra note 35, at 7-8 (OHR proposed creating an independent television network in Bosnia to provide balanced information, i.e., news from all points of view).
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 semiautonomous 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 had nothing to gain by the development of 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 semiautonomous province, premised on the right to self-determination of ethnic Albanians living in Serbia, embedded this ethnic conflict in the political reality on the ground.

In failing to recognize that the necessary element of a shared sense of 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 toward 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 independent 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 establishing a nationwide broadcasting network in Bosnia, known as the Open Broadcast Network (OBN), 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. 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, and George Soros’ Open Society Institute. 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 and intended to use and develop local journalists.

86. There were initially two different potential models for the network. The OHR wanted to “build a new network with journalists covering all sides of the ethnic conflict, as well as a large number of staff and officers brought from outside the country.” Id. All of the donors, however, wanted “to provide training to the existing independent stations, then build an affiliate network that would connect them.” Id. The donors feared that an entirely new entity created by the OHR would be seen as imposed on Bosnia by foreigners and therefore would lack credibility. Id.
87. Id.
88. Id. at 7.
89. THOMPSON, supra note 54, at 38.
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.90 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.91 As a result, OBN was spectacularly unsuccessful in transforming the Bosnian media into a forum for accurate, pluralist, nonpartisan 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.92 Unable to sustain itself financially, OBN declared bankruptcy and shut down in 1999.93

Similarly, local authorities obstructed FERN’s ability to proceed. For example, Bosnian Serbs “claimed they could not install the transmitters FERN needed because the roads leading to the mountains where they needed to be placed were mined.”94 Due to tactics such as this, FERN went on the air just two months before the 1996 election and reached only forty percent of the territory of Bosnia, none of which was in the Serbian entity.95 Neither OBN nor FERN were able to threaten the dominance of the politically and ethnically aligned media whose influence over the elections they were meant to mitigate.96

In Kosovo, reformers only temporarily avoided the mistakes 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 relaunched it as Radio Television Kosovo (RTK).97 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 rehire the Kosovar Albanians who had worked for RTP prior to the Serbian

90. See Price, supra note 35, at 8.
91. Id.
92. Id. at 9.
95. Id. at 7.
96. See THOMPSON, supra note 54, at 38.
takeover.\textsuperscript{98} Not surprisingly, this hiring decision created resentment among former employees,\textsuperscript{99} 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.\textsuperscript{100} As a result of the international control over editorial and content decisions, RTK provided relatively evenhanded and accurate reporting of events within and around Kosovo during 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.\textsuperscript{101} As this move progressed, the broadcast content became more one-sided, anti-Serb, anti-UN, and anti-KFOR.\textsuperscript{102} The Serbian-language aspects of the network were eliminated when a Kosovar Albanian journalist took over management.\textsuperscript{103} And as RTK became more and more a wholly local entity, there were accusations that it favored one local politician over another.\textsuperscript{104} Though such allegations could not be proved (the tapes of the broadcasts in question mysteriously disappeared before they could be reviewed),\textsuperscript{105} 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.\textsuperscript{106}

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,\textsuperscript{107} 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 further their po-

\textsuperscript{98} Id. at 36.
\textsuperscript{99} Id.; Amalou Florence, L'ONU Impose sa Propre Télévision au Kosovo, LE MONDE, Sept. 9, 1999, available at http://www.lemonde.fr/web/recherche_resultats/1,13-0,1-0,0.html.
\textsuperscript{100} THOMPSON, supra note 54, at 67.
\textsuperscript{101} See id. at 68.
\textsuperscript{102} See id. at 68-69; SHIRA LOEWENBERG, UNITED NATIONS MEDIA STRATEGY: RECOMMENDATIONS FOR IMPROVEMENT IN PEACEKEEPING OPERATIONS 20 (2006).
\textsuperscript{103} THOMPSON, supra note 54, at 71.
\textsuperscript{104} Id. at 69.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 71-72.
\textsuperscript{107} See infra Part III.B.2.
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 forging 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. 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 toward 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. 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 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.

108. Thompson, supra note 54, at 61 (noting politicization of Kosovo’s media); see supra notes 66-70 and accompanying text.
109. See supra Part II.B.
110. 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.”).
Theorists 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.\footnote{Palmer, supra note 93, at 3.}

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 can only be embarked upon through a rejection of the democratic nonregulation 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 simply to 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 re-
form 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, 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 the 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 nationwide 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. Unlike the pluralist network initiatives, these proposed regulatory schemes met 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 processes. 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 and failed 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 speech. 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 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

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112. These comprehensive schemes also included noncontroversial elements that governed—for example, the assignment of broadcast frequencies. These aspects of the plans are not relevant to the focus of this Article, 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.

113. For the purposes of this Article, any speech that constitutes incitement to prejudice, discrimination, or hatred of a group or individual on the basis of ethnicity, race, religion, or political views constitutes hate speech.
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, evenhanded reporting—had never taken hold there. In fact, contrary to what some detractors claimed,114 the media sectors in Bosnia and Kosovo had 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. For example, in the summer of 2000, the Kosovo daily Dita 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.115 In the aftermath of these events, Dita’s publisher was unapologetic as he explained that the UN’s failed criminal justice efforts in Kosovo forced his actions, and he pledged to continue to act in the same manner going forward.116 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 it 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

114. THOMPSON, supra note 54, at 64; Steven Erlanger, NATO Peacekeepers Plan a System of Controls for the News Media in Kosovo, N.Y. TIMES, Aug. 16, 1999, at A8.
115. Llazar Semini, UN to Stamp Out Vigilante Journalism, INST. FOR WAR AND PEACE REPORTING, BALKAN CRISIS REPORT NO. 146 (June 6, 2000).
116. Id.
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. And, as discussed above, Bosnian broadcast networks clung to their 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 the local source of most news and information, 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. These publications used their pages to further a political agenda, often labeling the few independent editors and journalists that did exist as Serb collaborators. In short, the media in both places engaged in biased reporting, which often took the form of attacks on rival political or ethnic groups. 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, and in drawing attention to and highlighting the ethnic divisions extant in the country or territory in question. This type of reporting resulted from local political leaders’ influence exerted in a variety of ways, leading to 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 ideally 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.

118. THOMPSON, supra note 54, at 63 (“[N]ewspapers were the main source of information, followed by radio, with television in third place.”). 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. See Price, supra note 35, at 37; INT’L CRISIS GROUP, BALKANS REPORT NO. 97, ELECTIONS IN KOSOVO: MOVING TOWARD DEMOCRACY? 13 (2000), available at http://www.crisisgroup.org/library/documents/report_archive/A400007_07072000.pdf.
120. See id. at 33-34.
The principle of nonregulation 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, nonregulation 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 toward a professional, independent media. And they repeatedly designed plans aimed at achieving those goals. But each attempt to implement such a plan fell victim 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 nonregulation of the media in any form.

In Bosnia, the Dayton Accords’ 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 adver-
tisements. The three party-controlled networks also were expected to allow equal advertising time to opposition parties. The OSCE failed to enforce these regulations systematically, however, thus rendering them largely ineffective. 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, to conclude that more aggressive efforts to encourage independent, professional, and pluralist media were needed. 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, the resulting so-called Sintra Declaration gave OHR significantly more power, including the right to “curtail or suspend any media network or programme whose output is in persistent and blatant contravention of either the spirit or letter of [the Dayton Accords].” The OHR used its enhanced powers to create a comprehensive media law framework to address irresponsible, unprofessional reporting. The Independent Media Commission (IMC), created in 1998, had the power to license broadcasters, to develop codes of practice for broadcast media, and to impose sanctions for violations of those codes. 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.

Despite the Steering Board and OHR’s conclusion that aggressive media regulation was the most promising means of increasing the professionalism and independence of Bosnia’s media sector, international media organizations and other groups devoted to preserving the principles of free speech found the IMC, its codes of conduct, and

122. One commentator describes OSCE’s early regulatory efforts in Bosnia as “spineless.” Thompson, supra note 54, 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).
125. Thompson, supra note 54, at 38-39.
128. Thompson, supra note 54, at 40 Price, supra note 35, at 12.
129. Thompson, supra note 54, at 40 Price, supra note 35, at 12.
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 press is the ultimate goal, they do not accept that the means of achieving this goal sometimes might need to depart from established norms. According to this view, it is the very regulation that the international 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.

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. 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.”

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. 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 in-
tended to regulate the media there rigorously from the outset.\textsuperscript{137} 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 [was] becoming re-established”\textsuperscript{138} and was a necessary means of avoiding the potentially bloody consequences of hate speech.\textsuperscript{139} 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.\textsuperscript{140} The regulatory regime would have “the power to censor material judged dangerous or incendiary,”\textsuperscript{141} and to penalize, fine, or shut down media outlets that violated internationally established reporting standards.\textsuperscript{142} It also would write and administer a Broadcasting Code of Practice and a Press Code for print journalists.\textsuperscript{143} 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” so “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.”\textsuperscript{144}

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,\textsuperscript{145} was swift and almost universally opposed 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.\textsuperscript{146} In response to the strident and well-publicized opposition to OSCE’s initial proposed regulatory scheme, UNMIK limited

\begin{footnotes}
\item[137.] Price, supra note 35, at 27; see Thompson, supra note 54, at 63-64.
\item[138.] Dempsey & Fontaine, supra note 49, at 127 (quoting Int’l Crisis Group, supra note 118, at 17).
\item[140.] Price, supra note 35, at 31.
\item[141.] Id. at 31-32.
\item[142.] Id. at 31.
\item[143.] Id. at 31.
\item[144.] Erlanger, supra note 114.
\item[145.] Thompson, supra note 54, at 64; Erlanger, supra note 114.
\item[146.] Thompson, supra note 54, at 64; Price, supra note 35, at 32; Erlanger, supra note 114; Schwartz, supra note 134; Editorial, Kosovo’s Incipient Media Ministry, N.Y. Times, Aug. 30, 1999, at A18.
\end{footnotes}
OSCE’s mandate, removing its ability to impose binding sanctions on media outlets that violated the established codes of practice. 147 Instead, OSCE had the power only to “encourage journalists to voluntarily establish an ethical code.” 148 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. 149

This now-familiar dance repeated itself time and time 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, 150 to promulgate anti-hate speech regulations, 151 to temporarily shut down an offending publication, 152 and finally to impose a comprehensive regulatory scheme remarkably similar to the one contemplated at the outset of OSCE’s mission in Kosovo. 153 And in response to each proposal or regulatory action, a hue and cry was raised that UNMIK and 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. 154 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. 155 Sometimes they came from within the local Kosovar journalism community. 156 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. 157

147. Price, supra note 35, at 32; see Thompson, supra note 54, at 64.
149. Id. at 32-35. 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. Id. at 34.
150. Thompson, supra note 54, at 65.
151. Loewenberg, supra note 102, at 18. 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. Price, supra note 35, at 34.
152. See, e.g., Dempsey & Fontaine, supra note 49, at 127-28; Semini, supra note 115.
153. 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. Int’l Crisis Group, supra note 118, at 16.
154. See id. at 16-17.
155. Peter van Agtmael, Dita in the Dock Again, in 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); Schwartz, supra note 134.
156. Semini, supra note 115.
157. 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 54, at 65. Similarly, when SRSG temporarily shut down the daily paper Dita for a report in which it published the
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 Article fundamentally argues, however, is that accepted norms—which are highly valuable or even necessary in established democracies—do not necessarily 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.

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, and 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.\(^{158}\) 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”\(^{159}\) 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.

\(^{158}\) See INT’L CRISIS GROUP, supra note 118, at 16-17; van Agtmael, supra note 155.

\(^{159}\) World Press Freedom Committee, supra note 135.
when opposing regulatory plans.\textsuperscript{160} 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.

In a place where, as the WPFC itself pointed out,\textsuperscript{161} 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.\textsuperscript{162} 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 \textit{New York Times}, the \textit{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 ineffectual. After all, it was not the existence of the codes themselves that was deemed problematic.\textsuperscript{163} 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 themselves was asserted, along with the claim that robust professional organizations of journalists would be able to achieve the same goals as the regulatory scheme.\textsuperscript{164} Again, these principles, which are

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\item See \textit{Putzel & van der Zwan}, supra note 6, at 6 (noting that “[a]t times, political concerns and beliefs of external (Western) actors take priority over the realities that are present on the ground [in transitional societies]”); Allen & Stremlau, \textit{supra} note 36, at 10 (recognizing an “international legal absolutism” adopted by many Western NGOs, such that “[a]specific 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’”).
\item World Press Freedom Committee, \textit{supra} note 135.
\item See \textit{Allen & Stremlau, supra} note 36, 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.”).
\item See \textit{Int’l Crisis Group, supra} note 118, at 16; Schwartz, \textit{supra} note 134. 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. Price, \textit{supra} note 35, at 13. Their provisions included guidelines on accuracy and balance and on reporting provocative statements. Thompson, \textit{supra} note 54, at 40. Provisions also included rules and standards requiring that the media not broadcast any material which incites ethnic or religious hatred, and a requirement to observe general community standards of decency and civility. Pech, \textit{supra} note 81, at 14. They also promoted respect for the principles of freedom of information and an obligation to protect confidential sources. Id. at 15.
\item See \textit{Int’l Crisis Group, supra} note 118, at 16-17; Schwartz, \textit{supra} note 134.
\end{enumerate}
\end{footnotesize}
powerful weapons against improper external influence of the press in places where the principles of media professionalism are firmly entrenched, are simply inapplicable in contexts where fundamental elements of a free press—the idea that the media operate in the public interest and that they are 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 stemmed from a commitment to 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, thus allowing counterarguments to win the day. Consequently, all government action to limit speech through media regulation would seem to contradict this principle. But like the principle of nonregulation, this concept is inapplicable in some transitional situations. It relies on the premise 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 is one or 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. This is also what 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,\textsuperscript{166} 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—involving 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 proposed or implemented by the UN, OSCE, OHR, and SRSG were aimed at stamping out the phenomenon of accusatory, biased, stereotype-based reporting\textsuperscript{167} that posed a 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,\textsuperscript{168} and

\textsuperscript{166} See supra Part II.B.

\textsuperscript{167} All of the proposed press codes for both Bosnia and Kosovo included provisions prohibiting the incitement of ethnic or religious hatred and calling for civility. Pech, supra note 81, 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 35, at 34.

\textsuperscript{168} 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, 803 (Austria, Belgium, France,
such regulations are considered fully compatible with international
human rights requirements. Many of the provisions of the press
codes to which the WPFC and the New York Times were so opposed
were aimed at eliminating the stereotype-based, accusatory reporting
that is often described as hate speech. Given the widespread accep-
tance of hate speech regulation, this opposition rests on one of two
bases. First, the true objection may not have been 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 or-
ganizations’ 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 or rises to the
level of incitement, as opposed to 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 actu-
ally violated accepted norms. Similarly, blind adherence to the ex-
tremely 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 Bos-
nia and Kosovo in particular.

Germany, Israel, Italy, Sweden, and Switzerland); Gregory S. Gordon, “A War of Media,
Words, Newspapers, and Radio Stations”: The ICTR Media Trial Verdict and a New Chap-
and the Netherlands); Joshua Wallenstein, Note, Punishing Words: An Analysis of the Ne-
cessity of the Element of Causation in Prosecutions for Incitement to Genocide, 54 STAN. L.

169. The International Covenant on Civil and Political Rights and the International
Convention 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,
art. 20; International Convention on the Elimination of All Forms of Racial Discrimination,
Protection of Human Rights and Fundamental Freedoms permits (but does not require)
member states to outlaw hate speech. European Convention, supra note 9, art. 10(2).


Even if prevailing norms in established democracies precluded hate speech regulation (or if all 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 in Bosnia and Kosovo would call for a departure from the nonintervention norm during 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. 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—meaning 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 allowed in an established democracy. In the U.S., 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 U.S. law) is considered a threat justifying the limitation of 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

172. See Sener v. Turkey, 2000 Eur. Ct. H.R. 377, ¶ 42 (“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.”); Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism, supra note 10; Pasqualucci, supra note 30, at 432 (quoting Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 945 (Dec. 3, 2003)).

that, in the U.S., might appear innocuous. 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 regulated, 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 that destabilizes the transition process. For example, several of Kosovo’s newspapers consistently inveighed against all Serbs as criminals and “routinely portray[ed] UMNIK and KFOR as being in league with the Serbs against the Albanians.” 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 the New York Times’ response to such regulations are not inconsequential concerns. Any regulatory scheme that purports to affect content and editorial decision must be as minimal as 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 any other location where the enmities that once led to violent conflict remain alive.

174. For an example of this principle, consider that many observers now argue that, in the case of the Rwandan genocide:

[T]he 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 [was] 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.

Allen & Stremlau, supra note 36, at 6-7.

175. THOMPSON, supra note 54, at 66.
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.\textsuperscript{176} And the international community also has the authority to criminally prosecute incitement to genocide. In fact, in \textit{The Prosecutor v. Nahimana}, a case known as “The Media Trial,” members of the Rwandan media were convicted in the International Criminal Tribunal for Rwanda (ICTR) for 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.\textsuperscript{177}

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.\textsuperscript{178} An incident already referred to above is illustrative of the problem. Recall the publication by \textit{Dita} of the name, address, and photograph of the alleged Serb collaborator that resulted in his death.\textsuperscript{179} The SRSG’s response was to shut down \textit{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.\textsuperscript{180} \textit{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.\textsuperscript{181} The Kosovo Journalists’ Association\textsuperscript{182} also denounced the closure of \textit{Dita} as endangering press freedom.\textsuperscript{183} These objections illustrate the self-serving fashion in which some local journalists invoked international norms in an at-

\begin{itemize}
\item \textsuperscript{176} \textit{Brandenburg}, 395 U.S. at 447.
\item \textsuperscript{178} Price, \textit{ supra} note 35, at 34.
\item \textsuperscript{179} See \textit{ supra} notes 115-16 and accompanying text.
\item \textsuperscript{180} DEMPSEY \\ & FONTAINE, \textit{ supra} note 49, at 127; see Semini, \textit{ supra} note 115.
\item \textsuperscript{181} Semini, \textit{ supra} note 115.
\item \textsuperscript{182} OSCE helped Kosovar journalists form a professional association with a board of directors and an ethical code. Price, \textit{ supra} note 35, at 35. When informed of violations, however, they failed to act decisively. Further, newspapers affiliated with political parties, usually the worst offenders, are not part of the association and therefore not subject to its code of conduct. \textit{Id}.
\item \textsuperscript{183} Semini, \textit{ supra} note 115.
\end{itemize}
tempt to continue their irresponsible and destructive tactics. However, despite their claims that preventing such reporting is an impingement on their free speech rights, 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. As noted above, hate speech is freely regulated in many western democratic societies and there is no consensus that such regulation constitutes a violation of free expression or media norms. 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 yet still have 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, 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 and the tribunal’s conclusion that the use of hate speech could constitute the crime against humanity of persecution. These commentators point out that by expanding the definition of incitement to geno-

185. See supra notes 168-69 and accompanying text.
cide and by allowing the use of hate speech to qualify as persecution rising to the level of a crime against humanity, the ICTR 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 governments to impose restrictions on the press in their countries.189 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.

Determining exactly which media reports should be subjected to such civil penalties or enforcement measures is a difficult task. 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 Trial, determining what qualifies as incitement requires a highly contextual inquiry.190 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 expertise in local affairs. 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.

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, along with the imposition of press codes and guidelines regarding content, must include a component aimed at this broader

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media environment. As discussed above, stability is one of the elements most taken for granted in established democracies. 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 the media specifically—of all of the accepted liberal democratic norms, including 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, excessive defamation punishments, or physical threats—that might chill journalists’ speech and effect their editorial decisions.\textsuperscript{191} 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.

In crafting their media regulatory priorities, officials in Bosnia and Kosovo seem 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, evenhanded 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.

\textsuperscript{191} Kaufmann, \textit{supra} note 18, at 2; Freedom House, \textit{Freedom of the Press: Survey Methodology}, \textit{supra} note 32, at A(5) (“Is freedom of information legislation in place and are journalists able to make use of it?”); Reporters Without Borders, \textit{Questionnaire}, \textit{supra} note 32.
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, or exerting pressure through intimidation or harassment means that even reporters committed to producing unbiased content 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, a journalist can do very little 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 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. 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 re-

192. See supra notes 54-58 and accompanying text.
193. See THOMPSON, supra note 54, at 68-70 (noting that local factions were “jostling to dominate RTK” and that it succeeded in recreating the old structure rather than creating something new).
194. Shenon, supra note 134.
porting targeted by the types of speech that the regulation was meant to curb supported the measure.\textsuperscript{195} It is therefore clear that the extent to which any particular actor honored the right of journalists to engage in independent, professional reporting was dependent upon whether that actor 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.\textsuperscript{196} For example, politically motivated defamation suits had become an effective tactic of preventing journalists from pursuing unfavorable reports about local government leaders.\textsuperscript{197} In response, OHR, in conjunction with OSCE and the IMC, launched a program to protect journalistic inquiry and free speech. Measures included a “d]ecision on freedom of information and decriminalisation of libel and defamation' which called on the 'entities' to adopt legislation 'to create civil remedies for defamation, libel and slander in accord-ance with the 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.\textsuperscript{198} As mentioned above, the call to enact these legislative provisions was ignored by both entities.

\textsuperscript{195} Price, \textit{supra} note 35, at 34.
\textsuperscript{196} THOMPSON, \textit{supra} note 54, at 47-48; see Pech, \textit{supra} note 81, at 16.
\textsuperscript{197} THOMPSON, \textit{supra} note 54, at 48.
\textsuperscript{198} THOMPSON, \textit{supra} note 54, 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, that the OHR, OSCE, and IMC launched their “programme intended to protect journalistic inquiry and free speech,” which included the drafting of guidelines for the police on the treatment of journalists. Id. at 48. 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. See \textit{supra} notes 115-16 and accompanying text. Further, these attacks ultimately led to the SRSG’s promulgation of the hate speech law in an attempt to diffuse some of the tensions. See \textit{supra} note 151 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
Ultimately, a reform policy that focuses on requiring media content simply to meet 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. No code of conduct or regulation 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 complementary 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—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 would 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.

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. FREEDOM HOUSE, FREEDOM OF THE PRESS: A GLOBAL SURVEY OF MEDIA INDEPENDENCE, supra note 30; INT’L PRESS INSTITUTE, WORLD PRESS FREEDOM REVIEW, supra note 30; REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX, supra note 30; WPFC Charter, supra note 27, at princ. 10.

199. See, e.g., THOMPSON, supra note 54, at 66 (quoting a radio broadcast that implied that all Serbs are criminals).
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, all 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 for by law and are no more restrictive than necessary. This means that, as discussed above in the context of hate speech regulation, any press regulation and the potential sanctions for violation or noncompliance should be clearly and publicly spelled out prior to its enforcement. For 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. 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. 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 Dita was not the only paper to publish lists of suspected war criminals. This objection seemed more based on the dis-
cretionary nature of the SRSG’s ability to sanction media outlets than on any sense of solidarity with Dita’s message. 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.

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 for fear 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 one production center in Pale loyal to Radovan Karadzic and the other in Banja Luka, favoring Biljana Plavsic. The international community, which was firmly in favor of Plavsic’s candidacy, responded to a series of inflammatory broadcasts that were highly critical of both political candidates sympathetic to the goals of the international community and the international authorities themselves by having the international peacekeeping forces (SFOR) seize several of SRT-Pale’s key transmitters, which in effect, bolstered Plavsic’s political strength.

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 Bosnian broadcasts at the time, often using inflammatory language and criticizing SFOR and other international organizations as enemies of the Croat people. Despite exhibiting characteristics similar to those of the SRT broadcasts that had prompted SFOR’s in-

205. INT’L CRISIS GROUP, supra note 118, at 15 (noting that Koha Ditore’s headline read “Dita is closed by decree, not through normal procedure”).
206. Thompson & De Luce, supra note 122, at 208.
207. Price, supra note 35, at 11-12; Thompson & De Luce, supra note 122, at 208-12.
208. Thompson & De Luce, supra note 122, at 215.
Intervention in 1997, no action was taken to prevent Erotel's broadcasts, in part to protect the electoral chances of opposition parties in Croatia.209

There were indications that interference with broadcasts and publications were more likely to occur 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.210 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 of media reform and enforcing rules and regulations evenhandedly, 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.

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

209. The failure to act was due to opposition by American diplomats. The OHR and OSCE both urged action, but the U.S. diplomats in Sarajevo and Zagreb insisted on waiting until after the Croatian elections. Thompson, supra note 54, at 47; Thompson & De Luce, supra note 122, at 217.

210. In August 1999, NATO forces shut down Çlirimi, an Albanian-language newspaper, for publishing an editorial critical of KFOR, and also arrested the publisher and confiscated the issues. Dempsey & Fontaine, supra note 49, at 126. Additionally, in August 2000, the UN shut down Radio S in Kosovska Mitrovica because it referred to the UN and NATO as occupying forces and encouraged Serbs to boycott upcoming elections. Id. at 128.
most acute when the holders of power have 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 member 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 expertise in local affairs 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 of the 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, the rules must be written 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 Article: 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

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211. See supra notes 186-89 and accompanying text.
police force and legal system builds capacity 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 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 least amount of regulation that is 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 in 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 Article 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. To avoid this type of abuse, any media regulation scheme that goes 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

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212. 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.
and Kosovo provided for appellate review of sanctioning decisions.\(^{213}\) 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.\(^{214}\) 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.

### IV. Implications for Iraq

Any contemporary discussion of democratization immediately raises the specter of Iraq. 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 face in Iraq. 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 offers some critiques of the media reforms that 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 U.S.-led overthrow of the Ba’athist government. The current focus of international efforts is to break down the salience of these divisions and reestablish a reconciled, national

\(^{213}\) Krug & Price, *supra* note 37, at 151.

\(^{214}\) Mertus & Thompson, *supra* note 37, at 274.
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, reflect increasingly these emerging and deepening societal schisms.215

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 U.S.-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 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.”216 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.

215. 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, Chaos in the Iraqi Media, INST. FOR WAR AND PEACE REPORTING, IRAQI CRISIS REPORT NO. 23 (June 20, 2003).

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. 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. 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. 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 an entirely new skill set.

At the same time, there is reason to be relatively optimistic about the Iraqi media sector’s legacy. While the media has certainly been used as a propaganda tool, historically it has not contributed to and inflamed conflict in Iraq in the way that it has in Balkan countries. Further, while the media has certainly been abused, censored, and restricted, prior to the fall of Saddam it was not an independent source of tension. In other words, while the history of the Iraqi media does not reflect the liberal, democratic model of an independent free press, it also does not 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, and a dearth of embedded culture of professional journalism—are extant. Despite these warning signs, media reform efforts embarked upon in Iraq exhibit only in-

217. See 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.


cremental 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 nationwide, 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. IMN was envisioned as a media entity that would provide a variety of types of multi-lingual 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. Despite millions of dollars of investment in the project, 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 influence, and finally it came to reflect the agenda of the Iraqi government, emphasizing unity along with an alleged Shi’a-Kurdish bias.

The short history of IMN is similar to that of Kosovo’s RTK. Recall that the United Nations relaunched 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.

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.

Iraq also shows evidence of the competing pressures with respect to content regulation and government intervention in the media sector that were present in both Bosnia and Kosovo. On the one hand, U.S. policy in the immediate post-Saddam era reflected an optimism

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221. Id. at 41.
222. Price, Foreword, supra note 219, at 12.
223. Al-Marashi, supra note 216, at 106; see also Price, Policy Recommendations, supra note 219, at 74 (noting that IMN still fails to exhibit truly balanced reporting).
224. See supra notes 97-106 and accompanying text.
for freedom of the press. It therefore permitted, and even encouraged, the emergence of a rash of new publications.\textsuperscript{225} 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-Jazeera) led to a sort of media chaos.\textsuperscript{226} This hands-off approach reflected the typical U.S. approach to media, reflected in the positions of the WPFC and the \textit{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.\textsuperscript{227} Early efforts to that end led to Coalition Order 14, under which Ambassador Paul Bremer had the sole authority to close media organizations.\textsuperscript{228} Any media outlet shut down under this order could appeal the decision only to Bremer himself.\textsuperscript{229} Order 14, whose proclaimed purpose was to enhance stability and prevent the inflation of tensions through irresponsible journalism,\textsuperscript{230} was used to close or ban media outlets temporarily and to detain editors or managers.\textsuperscript{231} But the perception, no doubt resulting in part from the anemic process provided 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.\textsuperscript{232} Order 14’s inability to deal effectively with the challenges

\begin{itemize}
\item \textsuperscript{225} Borden, supra note 215; see Brian Whitaker, \textit{Getting a Bad Press}, GUARDIAN UNLIMITED, June 23, 2003.
\item \textsuperscript{226} Price, \textit{Foreword}, supra note 219, at 11.
\item \textsuperscript{227} Allen & Stremlau, supra note 36, at 5; see Price, \textit{Foreword}, supra note 219, at 16.
\item \textsuperscript{228} Coalition Provisional Authority, Order No. 14, \textit{Prohibited Media Activity}, § 5, U.N. Doc. CPA/ORD/10Jun2003/14 (June 10, 2003) (prepared by L. Paul Bremer), 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. at § 2.
\item \textsuperscript{230} Price, \textit{Foreword}, supra note 219, at 13 n.17.
\item \textsuperscript{231} See Katulis, \textit{ supra} note 229. For example:
\begin{quote}
[I]n 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 . . . .
\end{quote}
\textit{Id.}
\item 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.” \textit{Id.}
\item \textsuperscript{232} See, e.g., Whitaker, \textit{ supra} note 225.
\end{itemize}
posed by Iraq’s post-war media sphere prompted authorities to design a more comprehensive media policy.233

After much political wrangling, Order 65 emerged to impose some sense of order on the post-war media scene.234 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.235 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.236

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.237 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 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.238 And the CMC procedures do not live up to the due process ideals neces-

235. CPA, Order 65, supra note 234, at §§ 3, 5; Price, Policy Recommendations, supra note 219, at 31-32.
236. CPA, Order 65, supra note 234; Price, Policy Recommendations, supra note 219, at 31-34.
238. Id. at 67-68.
sary to protect media defendants from unwarranted restrictions on
their expression.239 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 initi-
ated any complaints under the mandatory Codes of Practice, and its
rules are routinely flouted by domestic and international broadcast-
ers alike.240 Some journalists have never even heard of the CMC; oth-
ers complain that it simply looks the other way in the face of viola-
tions.241

The implementation of Order 65 early in the post-war era repres-
sents a significant improvement over what took place in Bosnia and
Kosovo. Rather than hesitating to assert regulations 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 inter-
national input attempted to craft a regulatory framework both to en-
courage press freedom and to prevent the media from contributing to
instability.242 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 time as its capacity
slowly ramps up to speed and that the permanent 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 im-
provement. Few of the new media entities formed in the post-war era
exhibit the type of media professionalism and independence consid-
ered the hallmarks of an ideal free press. Instead, with a few signifi-
cant exceptions, these publications fail to live up to professional
standards, and instances of balanced reporting are few and far be-
tween.243 In fact, the media is dominated by outlets controlled by
ethno-sectarian or political factions,244 who see media as it was seen
under Saddam: as a tactical tool to be used to support the group that
sponsors it.245

239. Id. at 70-71.
240. Id. at 38.
242. See supra note 234 and accompanying text.
243. Layla Al-Zubaidi, Walking a Tightrope: News Media & Freedom of
Expression in the Arab Middle East 47-48 (Heinrich Böll Found. 2004), available at
244. Al-Marashi, supra note 216, at 97; Price, Policy Recommendations, supra note
219, at 28-29.
245. Price, Policy Recommendations, supra note 219, at 28. Shi’a networks tend to
emphasize Shi’a victimization by Sunni militants and a pro-government unity agenda. See Al-
Marashi, supra note 216, at 109-10. 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
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. Over time, however, the labels have become increasingly divisive, reflecting the similar trend in local politics, and setting the groundwork for conflict. 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 picture. 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, they face nearly insurmountable challenges. For example, they lack the financial support that their politically and ethnically aligned counterparts enjoy. 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. In short, the media is becoming increasingly factionalized, increasingly aligned with religious or sectarian agendas, and 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 evidenced in the media. Aggressive enforcement of regulations regarding fair and balanced reporting and against hate speech and 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 is especially salient with respect to the use of Order 14. An example is the case of Al

forces. Id. at 111. Kurdish media is essentially a mouthpiece for the two dominant Kurdish political organizations emphasizing 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 112. 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 113-14.

246. Al-Marashi, supra note 216, at 97.
247. Id. at 96-99.
248. Id. at 124-25.
249. Id. at 120; Price, Policy Recommendations, supra note 219, at 28; see also Whitaker, supra note 225.
250. Al-Marashi, supra note 216, at 104.
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. But when 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. 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. Thus, despite the creation of a comprehensive regulatory framework, the relatively arbitrary use of Order 14 continued.

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, and appeals of its penalties are decided by the same authority that initially imposed the sanction. Each of these troubling aspects of Order 14 remains relevant, because Order 100 gave the authority to enforce Order 14 to the Iraqi authorities following the handover of power.

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, and to indicate whether there is a right to call witnesses or to legal assistance. In addition, while the Order 65 framework provides for an appeals process, the appointments to the appeals board have not been made. 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, sectarian tone in the Iraqi media, it must be prepared to do so in a way that is unimpeachable. In order to do that, it must insist on the procedural safe-

252. See Allen & Stremlau, supra note 36, at 1.
253. Id.
256. See supra note 228 and accompanying text.
259. Id. at 55.
guards necessary to fend off 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 nonregulation 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. 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. But once the regulatory reins are handed over to the local government, the risk that it will be used for these improper purposes increases.

The regulatory regime in Iraq does make efforts to ensure the independence and nonpartisanship of membership on the CMC and its appeals board. 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. 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 as the OSCE or the UN. Or perhaps the hearings and boards could include media professionals from outside Iraq. Whatever the solution, this concern must be addressed, because it is clear that journalists and reporting are seen as

260. See supra notes 158-59 and accompanying text.
261. See Krug & Price, supra note 37, at 156.
264. See Allen & Stremlau, supra note 36, at 14 (suggesting a hybrid domestic/international structure similar to that of the Sierra Leonean Truth and Reconciliation Commission).
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.265

As discussed above, stability is one of the fundamental elements of established democracies that are 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 affect their editorial decisions.266 Without meeting these preconditions, 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 one of the most dangerous places in the world to be a journalist.267 Journalists who report on news in a way that displeases certain political parties are targeted for violence.268 And because the Iraqi state has struggled to protect its citizens generally, there is certainly no way to guarantee that it will protect journalists.


266. See supra Part II.A.

267. As of August 2008, the number of journalists killed since the beginning of hostilities in 2003 is 132. In addition, fifty media support workers have been killed in that time. The years 2006 and 2007 were the deadliest, seeing thirty-two journalists killed each year. Thus far in 2008, seven journalists have lost their lives. Committee to Protect Journalists, Iraq: Journalists in Danger, A Statistical Profile of Journalists Killed on Duty Since March 2003, http://www.cpj.org/Briefings/Iraq/Iraq_danger.html (last visited Aug. 25, 2008); see also Joel Campagna & Hani Sabra, Under Threat: Iraqi Journalists Frequently Face Hazardous Conditions on the Job, COMM. TO PROTECT JOURNALISTS, May 17, 2004, http://www.cpj.org/Briefings/2004/iraq_journ_5_04/iraq_journ_5_04.html (describing the dangers associated with being a reporter in post-war Iraq, especially for local journalists); Bassam Sebti, Heading into Danger: An Iraqi Reporter Must Hide His Profession Even as He Is Compelled to Follow its Demands, COMM. TO PROTECT JOURNALISTS: DANGEROUS ASSIGNMENTS, May 4, 2006, http://www.cpj.org/Briefings/2006/DA_spring_06/bassam/bassam_DA.html (describing physical danger associated with working for an American news publication).

Moreover, the breakdown of the pre-existing system of authority was much more complete in Iraq than it was in Bosnia or Kosovo. 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 and 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, and partly by a lack of familiarity in partnering with the military authorities currently in charge in Iraq. NGOs are more familiar with diplomats than with soldiers. 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 the 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 check on government action, challenging corruption and providing an outlet for citizens’ concerns.

But there are disturbing trends as well. The increasing divisiveness of the media and 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, are both present in Iraq. Within their sphericule, each group portrays itself as a victim of the others, thereby increasing tension and the perceived need for self-defense, leading to further polarization. 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 may be 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 ef-

269. Putzel & van der Zwan, supra note 6, at 14.
270. Price, Foreword, supra note 219, at 15.
271. Al-Marashi, supra note 216, at 129.
The political realities on the ground, the lack of physical security, and the sectarianism of vying factions are simply too powerful for even the most well-designed reform plan to overcome.

V. CONCLUSION

The foregoing arguments may appear as attempts to justify antidemocratic, 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 Article posits, however, is that there are fundamental differences between democracy and democratization. It also posits 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. The norms regarding the free press developed in the context of stable democracies not only serve to preserve the democratic nature of those societies; these same norms also rely upon the media environment provided by that democratic setting to be effective. Media norms in an established liberal democracy are both a cause and an effect of that stable political climate. Once this fundamental relationship between norms and stability is recognized, it becomes less obvious that, in the absence of established democracy, the same set of norms and principles remain 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. 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 an information disseminator, and as a sphere for 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, making the assumption 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 interethnic 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 with recent conflict along ethnic lines and 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.