

THE MEDIA AS PARTICIPANTS IN THE INTERNATIONAL LEGAL PROCESS

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INTRODUCTION

For most of the foreign policy audience, the really effective political map of the world—that is to say, their *operational* map of the world—is drawn by the reporter and the editor, not by the cartographer.

Bernard Cohen¹

We know what we know about current international events through the media. The media (with their instantaneous transmission of images and sound across great distances) inform us of everything from the train bombings in Madrid and London, to human rights abuses in Darfur, to the fall of Saddam Hussein's Iraq. Yet the media do not simply communicate raw information; they selectively filter, define and give shape to the events that they cover—in terms of what is happening, whether it is appropriate, and how relevant international actors should and do respond. The media thus are the nerves of the international system, and, as mass communicators, they perform critical functions in the international legal process.²

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1. BERNARD COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963).

2. This Article adopts the lens of the New Haven School of international legal jurisprudence. The New Haven School understands international law, not as a set body of rules, but in terms of processes of decision that are consistent with expectations of what is "right," and that are effected through various controls. For a thorough discussion on the New Haven School, see, for example, W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118 (1992) [hereinafter *View from New Haven*]; W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981) [hereinafter *International Lawmaking*].

The media's effects on societies and individuals have been studied from a gamut of academic and political angles.³ In international legal scholarship, however, the media tend to be discussed briefly⁴ or in certain limited contexts, such as the use of the media to disseminate propaganda⁵ or the regulation and control of the media.⁶ There has not been any comprehensive study on the media's functions in the international legal process. The lack of scholarship in this regard is likely attributable, at least in part, to the facts that the media are unconventional participants, and that they oftentimes operate "behind the scenes"—as messengers for other actors and at deep levels of the public subconscious. If anything, however, these characteristics increase, rather than decrease, the media's influence. This Article examines that influence.

In Part I of this Article, I put in context the question of the media's influence in the international legal process. That process is

3. For an analysis of the ways in which the media democratize society and increase cultural plurality, see, for example, STANLEY J. BARAN & DENNIS K. DAVIS, *MASS COMMUNICATION THEORY: FOUNDATIONS, FERMENT, AND FUTURE* 7, 99 (2000) (describing the media as an independent social institution that keeps the government in check). For an alternative analysis, arguing that the media contribute to the demise of social tranquility and of the public sphere, see, for example, *id.* at 20-55; TIM O'SULLIVAN, ET. AL., *KEY CONCEPTS IN COMMUNICATION AND CULTURAL STUDIES* 173-74 (1994) (describing the mass society theory, which contends that the media have a destructive influence on atomized and easily manipulated individuals); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1989) (blaming the media for the demise of the public sphere). For an argument that the media only moderately affect social organization, and that their ultimate messages depend on psychological and environmental factors among the audience for meaning, see, for example, Jennings Bryant & Richard L. Street, *From Reactivity to Activity and Action: An Evolving Concept and Weltanschauung in Mass and Interpersonal Communication*, in *ADVANCING COMMUNICATION SCIENCE: MERGING MASS AND INTERPERSONAL PROCESSES* 162 (Robert P. Hawkins, et al. eds., 1988).

4. See, e.g., Achilles Skordas, *Hegemonic Custom?*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 317, 323-24 (Michael Byers & Georg Nolte ed., 2003) (noting that the media contribute to the "public conscious" and play a role in policymaking); Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 *EUR. J. INT'L L.* 105, 125 (2003) (noting that when governments sign and ratify a treaty, they generally work "to persuade domestic and international media institutions" of the treaty's value).

5. See, e.g., B.S. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION* (1968); Lizzie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 *COLUM. HUM. RTS. L. REV.* 733 (2002).

6. See, e.g., Lewis E. Schnurr, *Media and Telecommunications Regulation and the Internet: Regulate or Strangulate?*, *MEDIA L. & POL'Y* Spring 2000, at 11, 17-18 (2000); Alison Harcourt, *The European Commission and Regulation of the Media Industry*, 16 *CARDOZO ARTS & ENT. L.J.* 425 (1998).

characterized by significant communicative gaps that the media help fill. In Part II, I analyze the media's functions at every stage of the international legal process—from the prescription of international law, to its codification, invocation, application and even termination. In Part III, I address systemic factors that impede media performance, demonstrating that, although the media perform important legal functions, they do not perform those functions perfectly. In Part IV, I consider efforts to minimize these imperfections. I conclude that the media will continue to operate imperfectly but as unique and specialized participants in the international legal process. The goal, then, is to recognize both the media's functions and their limits so that we, as international scholars and practitioners, can work within that process to achieve desirable legal and policy outcomes.

I. THE MEDIA IN THE INTERNATIONAL LEGAL PROCESS

All legal processes are processes of communication.⁷ In municipal legal systems, the relevant communications generally occur through institutionalized mechanisms, such that a State's legislature communicates the content of a law through the language of the legislation, and sometimes also through accompanying legislative history, and the courts may then communicate interpretations, refinements and modifications of the law in the orders and decisions that they issue.⁸ To the extent that a court communicates an understanding of the law with which the legislature disagrees, the legislature may communicate that fact through subsequent legislation.⁹ In this way, the legislature and the courts continually communicate with each other and with the relevant community concerning the law's substantive content.

These institutionalized mechanisms of communication are not well developed in the international system. Although the interna-

7. See Reisman, *International Lawmaking*, *supra* note 2, at 105-08. "Put in simplest terms, lawmaking or the prescribing of policy as authoritative for a community is a process of communication." See also *id.* at 105.

8. See, e.g., Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 133-34 (2002) (describing the dialogue between the judiciary and the legislature); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991).

9. See, e.g., Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 197-98 (2004) (referencing the legislature's corrective response to judicial communications); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 371 (1990) (also referencing the legislature's corrective response to judicial communications).

tional legal system may in some instances communicate a law's policy content through "legislation," and although that legislation may from time to time be interpreted or applied by international courts or tribunals, the legislative and judicial mechanisms of communication are not as comprehensive in the international system as they are in municipal systems.¹⁰ Much international law is not legislated, but rather established in the form of custom over time, and modifications or refinements of the law come, not from the judiciary, but from a variety of unorganized components, including but not limited to States, international organizations, major corporations, nongovernmental organizations, and large terrorist groups.¹¹ Despite this informal and disorganized nature of the international legal process, communication is nevertheless essential for the international norms to have the force of law, in terms of their meaning for and intended effect on the relevant community. In the absence of institutionalized channels, international legal communications often occur through the open lines of the media. The media, in other words, fill the communicative gaps in the international legal process.

In filling these gaps, the media are unique from more conventional international actors—and, by conventional actors, I primarily mean States, international organizations, and even nongovernmental organizations¹²—in that the media do not have a defined institutional role in the international legal process. Indeed, their role is so amorphous that the media are not seen as participants at all. The media do not "have a seat at the table" at international legal conferences, they do not participate in international organizations or nongovernmental organizations, and they generally are not considered proper subjects of international law.¹³ Rather, the media participate in the international process by operating in the background and at deep levels of

10. See Reisman, *International Lawmaking*, *supra* note 2, at 103.

11. See Reisman, *View from New Haven*, *supra* note 2, at 123.

12. As for the increasing "conventionality" of NGOs, see, for example, Jost Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 *IND. J. GLOBAL LEGAL STUD.* 31, 43-44 (2004) (noting some of the roles that NGOs play in the international legal process and describing them as "limited derivative legal subjects under secondary rules of international law"); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 *AM. J. INT'L L.* 611 (1994) (describing the increasingly important role that NGOs play in international judicial proceedings).

13. For a discussion of the proper subjects of international law, see generally, IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 66 (1998); MALCOLM N. SHAW, *INTERNATIONAL LAW* 1, 137-39 (1997).

the public subconscious. As I discuss below, this makes them quite powerful, and also potentially quite dangerous.

II. THE MEDIA'S POSITIVE FUNCTIONS

Because communication is essential throughout the international legal process, the media, as communicative gap-fillers, participate at every stage of that process. To varying degrees, they participate in the prescription, codification, invocation, application, and termination of international law. In this Part, I consider the media's functions during each of these stages of the international legal process.

Yet before examining, as a general matter, the media's functions in the international legal process, I consider for background a concrete case in which media participation was critical: the case of the Abu Ghraib prisoner abuse "scandal" in Iraq. This media "scandal" erupted in April 2004, when photographs depicting prisoner mistreatment were aired on CBS' *60 Minutes II*¹⁴. Yet "news" of that mistreatment existed long before the CBS broadcast. Between March and November 2003, the International Committee of the Red Cross (ICRC) claimed to have documented or observed numerous instances of mistreatment at Abu Ghraib—including the hooding and beating of detainees and acts of humiliation that would later incite such a strong public response.¹⁵ According to the ICRC, it regularly brought these instances of mistreatment to the attention of coalition forces, both orally and in writing, throughout 2003.¹⁶ Moreover, during the end of 2003, the U.S. military itself began investigating the matter. The investigation by the U.S. Army Criminal Investigation Command "uncovered numerous photos and videos portraying in graphic detail detainee abuse by Military Police personnel. . . ." ¹⁷ A different U.S.

14. *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast, Apr. 28, 2004), available at <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (last visited July 15, 2005).

15. *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (February 2004) [hereinafter *ICRC Report*], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 383, 390-93 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); see also Neil A. Lewis, *Red Cross Found Abuses at Abu Ghraib Last Year*, N.Y. TIMES, May 11, 2004, at A13; CBS News, *Abuses at Abu Ghraib: Timeline*, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (follow "Interactive: Abuse at Abu Ghraib" hyperlink; then follow "Timeline" hyperlink) (last visited Sept. 7, 2005).

16. See *ICRC Report*, supra note 15, at 385.

17. *The Taguba Report: Article 15-6 Investigation of the 800th Military Police Brigade* (March 2004), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 405, 415 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

military investigation, commenced in mid-January 2004,¹⁸ culminated in a March 2004 report by a Major General Antonio M. Taguba, who found ample evidence—in the form of written confessions, detainee statements and witness statements—of detainee mistreatment.¹⁹

The findings of the ICRC and of the U.S. military investigations had been kept confidential, but relatively modest reports of mistreatment trickled into the public domain as early as the spring or summer of 2003.²⁰ Further, in mid-January 2004, when the Pentagon initiated the investigation that would result in the Taguba Report, it announced publicly that it had begun an inquiry into the matter.²¹ Nevertheless, until the *60 Minutes* broadcast in April 2004, any discussion of detainee mistreatment in the press tended to be only cursory and relegated to back pages in the print media.²² The public, for the most part, seemed unaware of the issue.

This all changed when *60 Minutes* devoted an entire segment to Abu Ghraib, airing photographs that made real the acts perpetrated by individuals in the U.S. military police. The broadcast aroused public attention and suddenly sparked a media “scandal,” with photographs of the mistreatment appearing on the front pages of newspapers and on major television news programs around the world.²³ The

18. *Id.* at 407.

19. *Id.* at 416 (documenting that U.S. military police had arranged detainees in sexually explicit positions for photographing, had arranged them naked in a pile and then jumped on them, had placed dog chains around their necks while they were naked, had had sex with at least one detainee, and had used military dogs to intimidate detainees).

20. See Peter Slevin, *System Failures Cited for Delayed Action on Abuses*, WASH. POST, May 20, 2004, at A19 (“On May 15, [2003,] five weeks after major combat operations ended, Amnesty International publicized what it considered cases of ill treatment and raised its evidence with U.S. military personnel.”). Cf. Douglas Jehl & Eric Schmitt, *In Abuse, a Portrayal of Ill-Prepared, Overwhelmed G.I.’s*, N.Y. TIMES, May 9, 2004, at A1 (describing a May 2003 incident of abuse that later became the subject of testimony presented in a court-martial).

21. See *Who Knew of Abuses and When*, N.Y. TIMES, May 7, 2004, at A12 (“Pentagon officials said the photographs [depicting the abuses] were described in general terms to [Secretary of Defense] Rumsfeld in mid-January.”); Eric Schmitt, *Inquiry Ordered Into Reports of Prisoner Abuse*, N.Y. TIMES, Jan. 17, 2004, at A7.

22. See, e.g., Sewell Chan, *U.S. Soldiers Charged in Abuse of Iraqis*, WASH. POST, Mar. 21, 2004, at A21 (974 word story on page A21); Schmitt, *supra* note 20 (367 word story on page A7); *Eight Marine Reservists Face Charges in POWs’ Treatment; Two Charged with Negligent Homicide in Death of Iraqi*, WASH. POST, Oct. 19, 2003, at A23 (475 word story on page A23).

23. See, e.g., Jim VandeHei, *Kerry Assails Bush on Iraq; Senator Says War Is ‘Mismanaged’*, WASH. POST, May 13, 2004, at A01 (referring to “pictures of the abused prisoners [that] were plastered on television screens worldwide”); David Carr, *News Media Quandary over Showing Graphic Images of Abuse*, N.Y. TIMES, May 11, 2004, at A14 (discussing the publication and broadcast of the images in newspapers and on television); Sarah Lyall, *Europeans Like*

public response in the United States and abroad became intense, and the Bush Administration suddenly found itself responding publicly and quite extensively to an issue that it had managed quietly for months. Within days of the *60 Minutes* broadcast, Defense Secretary Donald Rumsfeld testified before Congress, apologized publicly for the abuses,²⁴ and flew to the Abu Ghraib prison in Iraq to condemn the mistreatment of detainees and to pledge that the United States would appropriately punish any wrongdoers.²⁵ President Bush also condemned the abuses, appearing on two Arabic language television networks to label them “abhorrent” deviations from U.S. morals.²⁶

The media played a critical role in disseminating intelligence about Abu Ghraib, in invoking and applying the relevant international legal norms, and in communicating the responses of the relevant international actors. For its part, the U.S. Government response, at least as reflected in public statements, was to uphold the violated international norms and to commit to taking appropriate enforcement actions.²⁷ The Abu Ghraib prison case thus exemplifies the media’s participation during various stages of the international legal process. With this example in mind, I turn to a more general and systematic analysis of the media’s functions at each such stage.

A. Prescription

Prescription or lawmaking occurs when a series of communications create in a target audience a set of expectations about policy content, authority and control.²⁸ Prescription may be accomplished

Bush Even Less than Before, N.Y. TIMES, May 8, 2004, at Sec. 1.4 (referring to “pictures showing the humiliation of Iraqi prisoners [that] were published all over the world”).

24. Thom Shanker & Eric Schmitt, *Rumsfeld Accepts Blame and Offers Apology in Abuse*, N.Y. TIMES, May 8, 2004, at A1.

25. Thom Shanker, *At Iraqi Prison, Rumsfeld Vows to Punish Abuse*, N.Y. TIMES, May 14, 2004, at A1.

26. Christine Hauser, *Many Iraqis are Skeptical of Bush TV Appeal*, N.Y. TIMES, May 6, 2004, at A16.

27. President Bush and Secretary Rumsfeld each underscored that the abuses were deviations from the norm and inconsistent with American values. *See id.*; Shanker & Schmitt, *supra* note 24. Each also promised that the wrongdoers would be brought to justice. *See id.*; White House Press Release (May 5, 2004), available at <http://www.whitehouse.gov/news/releases/2004/05/20040506-1.html>. In addition, Secretary Rumsfeld stated that he was seeking compensation for prisoners whose abuse included certain sexual acts. *See* Shanker & Schmitt, *supra* note 24.

28. Reisman, *International Lawmaking*, *supra* note 2; Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. IN WORLD PUB. ORD. 249, 250 (1980).

by a legislature or by some other organized body, but in international law it is largely accomplished through informal communications, such as public statements and actions, that result in the establishment of custom.²⁹ These informal communications are often transmitted through, or otherwise covered by, the media. As such, the media help establish the substantive policy that ultimately becomes law.

But helping to establish the substantive policy is only one way in which the media participate in the lawmaking process. The media also participate in that process by helping to define its parameters; they identify decision-makers, disperse intelligence, and allocate communal values.³⁰ These process-oriented functions are inextricably linked to the function of substantive lawmaking, because the substance of a law will vary according to the person who makes it, the information before him or her, and the policies and values that he or she perceives to be at stake. In this Section, I discuss the media's role with respect to each of these lawmaking functions.

1. *Identifying Decision-Makers.* In order for substantive policy to have the effect of "law," the actors that prescribe it must, in the minds of the prescription audience, have appropriate levels of authority and control.³¹ A mobster is simply a criminal, and not a lawmaker, because although he makes enforceable policy decisions, the public does not perceive him to be a legitimate lawmaker. In other words, the mobster is not viewed by the relevant audience as having the authority to make law. This public perception is based on a complex interplay of societal and institutional factors, including the facts that the mobster is not in an official position of authority, and that he acts extra-legally. But these specific factors are not necessarily sufficient to deny the mobster legitimacy. The freedom fighter also lacks an official position of authority and acts extra-legally, but, unlike the mobster, the freedom fighter's supporters view him as a legitimate participant in the legal process. The freedom fighter occupies a position of authority that the mobster does not because (of the two of them) the relevant audiences perceive only the freedom fighter as being a le-

29. See Reisman, *View from New Haven*, *supra* note 2, at 123.

30. Professors McDougal and Reisman identified these functions as inherent in the prescriptive process. See Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 103, 107 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983)

31. See Reisman, *International Lawmaking*, *supra* note 2.

gitimate decision-maker. The audience's perceptions thus help determine whether an actor will have the legitimacy to participate in the lawmaking process.³² The media influence these perceptions, and thus help identify decision-makers, in the manner and the substance of their coverage.

Especially in their coverage of public international events, the media tend to identify as decision-makers those who already occupy positions of authority and who, therefore, already participate in the international legal process.³³ These decision-makers include presidents or prime ministers of powerful States and heads of prominent international organizations, such as the United Nations or the European Community. They also include certain less conventional actors, such as multinational corporations and major terrorist groups. In these cases, media coverage usually does not introduce the prescriptive audience to the decision-makers, but does reaffirm the roles that these actors play in the lawmaking process. Media attention to high-level State officials, for example, both reflects and reinforces the positions of authority that the prescriptive audience endows upon those officials.

In addition to identifying as decision-makers actors that participate frequently in the international process, the media sometimes introduce the audience to new or more specialized decision-makers. With respect to these decision-makers, the media tend to focus on those who, because of context or circumstance, are uniquely situated to make or influence public order decisions. This is often the case with "talking heads" who have relevant expertise or experience, and who may be featured in the media to explain a particular incident or policy proposal. It is also the case for specialized interest groups, such as human rights organizations that use the media to publicize their work; media attention highlights the organization's activities and may make it politically inexpedient for conventional actors to ignore or impede those activities.³⁴

32. See *id.* at 110 (noting that the audience endows the prescriber with the authority that renders his or her communication a lawmaking activity).

33. See TED GALEN CARPENTER, *THE CAPTIVE PRESS: FOREIGN POLICY CRISIS AND THE FIRST AMENDMENT 5* (1995) (noting characteristics of the symbiotic relationship between government officials and members of the news media).

34. For instance, the Human Rights Watch (HRW) website lists the incidents for which HRW reports have led to a response by conventional international actors. See, e.g., Papua New Guinea: Police Respond to HRW Brutality Charge, <http://www.hrw.org/update/2005/10> (last visited Nov. 7, 2005) (noting that a HRW report documenting police brutality in Papua New Guinea prompted the country's police minister to publicly acknowledge those findings and to

Finally, the media may identify as decision-makers actors that, before media attention, were wholly outside the international legal process. The Falun Gong, for example, was practically unheard of in the West until, in the face of Beijing's crackdown in the late 1990s,³⁵ it actively solicited coverage and sympathy from the Western media.³⁶ The strategy was successful. A few weeks after the surge of attention by the Western media, the European Union publicly disapproved of Beijing's crackdown on "dissenters"—naming the Falun Gong, in particular³⁷—and the U.S. State Department's annual report on human rights referenced Beijing's actions against the Falun Gong as evidence of China's poor human rights conditions.³⁸ Media attention thus increased the likelihood and intensity of the international response in favor of the Falun Gong. Once the media propelled the Falun Gong into the public sphere, conventional international actors considered the group in subsequent policy decisions, such that even the act of "not dealing" would be an act of considering but rejecting.

In sum, media coverage identifies actors as legitimate decision-makers in the international legal process. The media tend to identify those who already occupy positions of authority in the eyes of the prescriptive audience, but they sometimes also introduce the audience to new actors. In either event, the actor identified by the media may come to participate (directly or indirectly) in the decision-making process.

2. *Dispersing Intelligence.* With respect to establishing the parameters of the prescriptive process, the media are perhaps most in-

express his intention to cure the problems); Uzbekistan: HRW Blocks Refugee Return, <http://www.hrw.org/update/2005/09> (last visited Nov. 7, 2005) (noting that HRW's activities contributed to the United Nations airlift of 439 Uzbek refugees to safety). The Amnesty International website also lists its "achievements." See http://www.web.amnesty.org/pages/aboutai-goodnews-eng?open=&target=goodnews&source=homepage_banner (last visited Nov. 7, 2005).

35. See Erik Eckholm, *China Sentences 4 in Spiritual Group to Long Jail Time*, N.Y. TIMES, Dec. 27, 1999, at A1.

36. See Mark Landler, *Spiritual Group Meets in Hong Kong*, N.Y. TIMES, Dec. 13, 1999, at A12; Erik Eckholm, *China Sect Members Covertly Meet Press and Ask World's Help*, N.Y. TIMES, Oct. 29, 1999, at A10.

37. *World Briefing: China: Pressed by Europe on Rights*, N.Y. TIMES, Dec. 22, 1999, at A16.

38. See BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (Feb. 23, 2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/284.htm>. According to officials in the Clinton Administration, Beijing's treatment of the Falun Gong provided the driving force behind the report's sharp language. See Jane Perlez, *U.S. Report Harshly Criticizes China for Deterioration of Human Rights; Russia Also Faulted*, N.Y. TIMES, Feb. 26, 2000, at A8.

fluent in their function of dispersing intelligence because, in performing this function, the media shape the knowledge that serves as the input for future decision-making. The media do not simply communicate raw information, but rather gather, process and organize such information into meaningful intelligence that their audiences can digest. Because the dispersal of intelligence involves these human acts of filtering, all intelligence transmitted through the media is, in a sense, “constructed.” The media, in other words, define and give shape to the global reality.

In addition to defining “reality” for the media audience, and therefore shaping the knowledge and input for future decision-making, the media-constructed intelligence influences the international legal process at a deeper level of the subconscious—by influencing expectations about policy content, authority, and control. Those expectations then play out in the prescriptive process. I discuss this second aspect in greater detail below.

Most of the intelligence dispersed by the news media implicates conventional international actors and thus reinforces expectations concerning those actors’ positions in the international legal process. The news media constantly cover contemporaneous issues on the agendas of local or State officials, and of major international organizations. Yet, even where the media do not directly cover those agendas, conventional international actors are frequently implicated by the intelligence that the media disperse because those actors define the political order that gives the intelligence social meaning.

For example, when the news media covered the tsunami of December 2004, they did not simply report the occurrence and effects of the tsunami. Rather, they placed the incident in the context of the broader international order: they reported on the countries hardest hit,³⁹ on the nationalities of the victims not from the region,⁴⁰ and on efforts to provide assistance by various unaffected actors, including

39. See, e.g., Scott Shane, *Powell, Praising Relief Effort, Views Sri Lanka Devastation*, N.Y. TIMES, Jan. 8, 2005, at A9 (noting then-current death tolls in Indonesia, Sri Lanka, Thailand and India); Robert D. McFadden, *Relief Delivery Lags as Deaths Pass 140,000*, N.Y. TIMES, Jan. 1, 2005, at A1 (“After Indonesia, Sri Lanka was the country next hardest hit.”).

40. See, e.g., Alan Cowell, *From Image of Disaster to a Safe Homecoming*, N.Y. TIMES, Jan. 3, 2005, at A10 (“Swedish officials say their nation is the hardest hit among Scandinavian countries . . .”); John Lancaster, *Toll from Tsunami Rises Above 25,000; Threat of Hunger, Disease Looms As Reeling Nations Appeal for Aid*, WASH. POST, Dec. 28, 2004, at A1 (“In Sri Lanka, at least 72 foreign tourists, including two Americans, died in the disaster.”).

major States and humanitarian organizations.⁴¹ By assigning meaning to the tsunami in terms of the already constructed social and political order, the mediated intelligence reinforced the audience's expectations concerning how international actors should respond and who among the potential actors could act most quickly or capably. Thus, President Bush was criticized for responding slowly and with an insufficient contribution on behalf of the United States; in response, the President significantly increased his monetary pledge to a level more consistent with the public's perceptions of the role and capacity of the United States in responding to the consequences of natural disasters.⁴² The news reports of the tsunami perhaps also contributed to the perception, at least among audiences in the developed world, of disorder and a lack of preparedness in the developing countries that were hardest hit.⁴³ These expectations and perceptions are based on already existing social constructs, but the media-constructed intelligence also helps reinforce or shape those constructs in ways that play out in the lawmaking process.

The media, then, have incredible power to define reality and shape public expectations through the intelligence that they disperse. What's more, the media are uniquely situated to perform this function because they are often presumed to be detached transmitters of information and have the technologies for mass communication and the expertise to quickly gather and process information. At least in open societies, these factors contribute to the public trust that the news media serve as the "watchdog" on the government, and that they expose intelligence, even if government officials would rather keep it out of the public sphere.⁴⁴

41. See, e.g., Wayne Arnold, *In Areas All but Unreachable, Helicopter Crews Bring Help*, N.Y. TIMES, Jan. 5, 2005, at A10 (describing U.S. relief effort s); Scott Shane, *Pledges Grow, Hurdles Loom in Relief Effort*, N.Y. TIMES, Jan. 5, 2005, at A1 (discussing aid from the U.S., German, and Japanese Governments, as well as from the United Nations and Doctors Without Borders).

42. See Michael Getler, *Aftershocks from Asia*, WASH. POST, Jan. 9, 2005, at B6; David E. Sanger & Warren Hoge, *U.S. Vows Big Rise in Aid for Victims of Asian Disaster*, N.Y. TIMES, Jan. 1, 2005, at A1.

43. See HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK AND TIME* 53 (1979) (noting that natural disasters in developing countries may lead to stories that focus on the social or moral disorder that surround the circumstances of the disaster).

44. Much has been written about the media as a "fourth estate" that serves as a "watchdog" on the government and that checks the integrity of democratic processes. See, e.g., BARAN & DAVIS, *supra* note 3; Christina S. Drale, *Communication Media in a Democratic Society*, 9 COMM. L. POL'Y 213, 224 (2004).

3. *Specifying Substantive Policies.* The lawmaking process requires the specification of substantive policies that, with time, transform into law. The media help specify these policies both by serving as messengers for more conventional actors and by developing substantive policies themselves.

Most frequently, the media help specify substantive policies by communicating the policy positions of other international actors.⁴⁵ Conventional actors frequently use the media for this purpose. They issue official statements, they hold press conferences,⁴⁶ they give speeches, and they conduct interviews with an eye toward attracting media attention and communicating the substance of their message to the broader public.⁴⁷ Because in communicating these messages the media make clear that the messages belong to the conventional actor, and not to the editor or producer of the particular medium, the communication maintains its signal of authority. And, to the extent that such communication is reinforced over time, the underlying substantive policy eventually transforms into law.⁴⁸

Less conventional actors also use the media to communicate to broad audiences their substantive policy positions. Osama Bin Laden, for example, has quite successfully used the international media to broadcast his anti-American positions.⁴⁹ Similarly, once the media identified the Falun Gong as an international decision-maker, that group successfully employed the media to spread its message.⁵⁰

45. See James Carey, *Journalists Just Leave: The Ethics of an Anomalous Profession*, THE MEDIA AND MORALITY 39, 51, 53 (Robert M. Baird, William E. Loges, & Stuart E. Rosenbaum eds., 1999) (describing the media as "middlemen" between the State and the public).

46. Press conferences pretend to exist for the benefit of the physically present audience, which may consist of journalists, other leaders, or a sample of the population, but such conferences in fact target the mass audience (or particular actors within the mass audience) of the media. See GANS, *supra* note 45, at 123. Moreover, press conferences purposefully create an image for the audience that consists of more than the speaker's words. The speaker's dress, audience, backdrop, and companions on the podium all target a particular conception of policy. The press conference thus communicates a policy perspective based on the totality of constructed images. Telephone Interview with Josh Gottheimer, Domestic Speechwriter for President Clinton, in New Haven, Conn. (Feb. 14, 2000).

47. See HENRY KISSINGER, WHITE HOUSE YEARS 21 (1979) ("Much as the journalist may resent it, he performs a partly government function. . . . Officials seek him out to bring their pet projects to general attention, to settle scores, or to reverse a decision that went against them.").

48. See Reisman, *International Lawmaking*, *supra* note 2.

49. See, e.g., Alexander Stille, *Cameras Shoot Where Uzis Can't*, N.Y. TIMES, Sept. 20, 2003, at B9; Edward Wong, *G.I.'s Kill Scores of Militia Forces in 3 Iraqi Cities*, N.Y. TIMES, May 8, 2004, at A1; Philip Shenon, *Threats and Responses: Wartime Economy; U.S. Tries to Ease Jitters on Terror*, N.Y. TIMES, Feb. 15, 2003, at A1.

50. See *supra* notes 35-37 and accompanying text.

Although the media usually communicate the substantive policies of other actors, they sometimes specify substantive policies themselves. The media do this in all sorts of ways, but different types of media tend to employ different techniques. The traditional news media, for example, tend to communicate policy judgments through their decisions on cover selection, font size, and the amount of time or print allocated to a news story.⁵¹ Thus, when these media believe that a news story is important, they print it on the front page and above the fold, or they broadcast it as “headline” news. These decisions as to format contribute to the formulation of communal policy because front-page or headline stories are more likely to attract public attention and to elicit comments from conventional actors. By contrast, media that are not constrained by the desire to appear “objective”—and this would include editorial pages and internet weblogs—may communicate policy choices directly to the audience. Other media, such as movies and television dramas, may specify policy preferences by endorsing or condemning particular social or political norms, usually in a fictional context. The U.S. movie media, for example, tend to endorse American sentiments against terrorism, drug smuggling and the proliferation of weapons of mass destruction.⁵²

In sum, the media participate in the lawmaking process by specifying substantive policies that, with time, transform into law. The media usually specify the policies of other international actors, such as those of state officials conveyed through public statements or press conferences. In addition, the media themselves sometimes specify policies, by indicating which stories are important or by explicitly endorsing particular policies.

4. *Allocating Values.* Finally, the media help establish the parameters of the prescriptive process by allocating among different actors certain systemic values, such as power, enlightenment, and communal loyalty.⁵³ The media usually allocate these values concurrently

51. GANS, *supra* note 45, at 111 (describing the process by which magazines and television news shows select and prepare their cover or lead stories).

52. See, e.g., THE SIEGE (Twentieth Century Fox 1998) (terrorism); AIR FORCE ONE (Columbia/Tristar Studios 1997) (terrorism); CRIMSON TIDE (Disney Studios 1995) (non-proliferation of nuclear weapons); CLEAR AND PRESENT DANGER (Paramount Pictures 1994) (drug smuggling); PATRIOT GAMES (Paramount Pictures 1992) (terrorism); THE HUNT FOR RED OCTOBER (Paramount Pictures 1990) (non-proliferation of nuclear weapons).

53. The New Haven School identifies a number of values as being at stake in the international legal process, including power, enlightenment, health, skill, well-being, affection, respect, and rectitude. See Reisman, *View from New Haven*, *supra* note 2, at 122.

with performing their other prescriptive functions. Thus, when the media identify a decision-maker, that actor's power to influence the legal process may increase accordingly. Similarly, when the media disperse intelligence, they contribute to the enlightenment of the audience, including the elite members of the audience who may be decision-makers themselves. Moreover, the nature and focus of the intelligence may help shape the audience's loyalties to the different myth systems and ideas that comprise individual or group identities.⁵⁴

The media are particularly influential in the allocation of communal loyalties. Monroe Price discusses this dynamic in terms of a "market for loyalties":

The sellers in this market are all those for whom myths and dreams and history can somehow be converted into power and wealth—classically states, governments, interest groups, and others. The "buyers" are the citizens, subjects, nationals, consumers—recipients of the packages of information, propaganda, advertisements, drama, and news propounded by the media. The consumer "pays" for one set of identities or another in several ways that, together, we call "loyalty" or "citizenship." Payment, however, is not expressed in the ordinary coin of the realm: It includes not only compliance with tax obligations, but also obedience to laws, readiness to fight in the armed services, or even continued residence within the country. The buyer also pays with his or her own sense of identity.⁵⁵

The market for loyalties that Professor Price describes takes place with respect to the establishment of national loyalties, as well as of loyalties across or within national boundaries.⁵⁶ In the United States, identities are established, for example, among those who regularly listen, read, or watch a particular medium, such as the *Weekly Standard* or *The Rush Limbaugh Show*. Similarly, foreign language media allow immigrant communities in the United States to continue to connect and identify with their countries of origin.

Because the media are so powerful in establishing communal loyalties, international actors have an incentive to manipulate the

54. See Monroe Price, *The Market for Loyalties: The Electronic Media and Global Competition for Allegiances*, 104 YALE L.J. 667, 678-79 (1994); Horace Newcomb & Paul M. Hirsch, *Television as a Cultural Forum*, in TELEVISION: THE CRITICAL VIEW 561, 562 (Horace Newcomb ed., 2000) (noting that the ritual model of communication views media communications as being directed toward "the maintenance of society in time"). Cf. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991) (explaining the press as a means through which imagined national communities develop).

55. Price, *supra* note 54, at 669-70.

56. See *id.*; W. PHILLIPS DAVISON, *INTERNATIONAL POLITICAL COMMUNICATION* 62 (1965).

media for this purpose.⁵⁷ International actors regularly use the media to influence the loyalties of audiences either in their own countries or transnationally.⁵⁸ During the Cold War, the United States and the Soviet Union each spent millions broadcasting in developing countries the news of world events through the capitalist or communist (respectively) lens.⁵⁹ Similarly, after September 11, 2001, the U.S. Government worked to “sell” its image to audiences in the Middle East. The Bush Administration appointed a former advertising executive, Charlotte Beers, as Under Secretary of State for Public Diplomacy, and high-level Administration officials started appearing on Arabic-language television networks to portray a positive image of the United States to the audiences of those media.⁶⁰

In short, in their function of allocating communal values, the media help determine the resources that each actor will have in the decision-making process. The dispersal of intelligence, in particular, contributes to the audience’s enlightenment, and the nature and focus of such intelligence help shape communal loyalties.

B. Codification

Codification is the reduction of rules to an authoritative code to govern future interactions. In international law, a codified rule sometimes presents itself in the form of a written code, yet more often the rule remains unwritten (until applied) but with broad consensus as to its content. In these instances, the international legal rule is “codified” when there is broad consensus that State practice has developed into binding custom.⁶¹ The media play a role in building that consensus because of the way in which their communications reflect and reinforce already-existent communal norms.⁶²

57. See Price, *supra* note 54, at 672-79.

58. See *infra* notes 102-108 and accompanying text (discussing propaganda in greater detail).

59. See DAVISON, *supra* note 57, at 195; ENRIQUE GONZALEZ-MANET, *THE HIDDEN WAR OF INFORMATION* 69-76 (Laurien Alexandre trans., 1988). Initiated during the Cold War's incipient stages, the Voice of America was reinvigorated in the mid-1980s, such that its annual budget surpassed \$116 million in 1983. *Id.*

60. See Elizabeth Becker, *In the War on Terrorism, a Battle to Shape Opinion*, N.Y. TIMES, Nov. 11, 2001, at A1.

61. For a discussion of the various ways in which international law is “codified,” see Shabtai Rosenne, *Codification of International Law*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 632 (1992).

62. See KATHRYN C. MONTGOMERY, *TARGET: PRIME TIME 6* (1989) (noting that the media reflect and shape the dominant values and norms in society); Diane M. Glass, *Portia in Primetime: Women Lawyers, Television, and L.A. Law*, 2 *YALE J. L. & FEMINISM* 371, 411

The media are products of their own social and political environments, and those environments shape the manner in which media actors (e.g., journalists, editors, and producers) define the world. For example, as discussed above, the U.S. movie media tend to reflect and reinforce—that is, help codify—international legal norms against terrorism, smuggling, and the proliferation of weapons of mass destruction.⁶³

Because the media are products of their own social and political environments, media from different parts of the world may codify the same legal norms in different ways, or may codify different legal norms altogether. For instance, Al Jazeera and other transnational, Arabic-language media have received significant attention for their reports involving the United States and Israel.⁶⁴ As Fouad Ajami explained, Al Jazeera communicates a pan-Arabic perspective, the “dark side” of which “is an aggressive mix of anti-Americanism and anti-Zionism.”⁶⁵ The Arabic-language media do not create these norms against the United States and Israel so much as they help solidify and even justify them. The norms themselves are deeply embedded in the audience’s social fabrics, and therefore in the social fabrics of the Arabic-language media.⁶⁶ These media thus “confirm,” for example, that American and Israeli actions in the region equate with terrorism, and that acts of aggression in response may be appropriate.⁶⁷ The norms against the United States and Israel then play out in

(1990) (noting that the media, and particularly the television media, reinforce or extend collectively-perceived norms). See also *supra* notes 40-43 and accompanying text (referencing in the context of the December 2004 tsunami the media’s ability to reinforce communal norms).

63. See *supra* note 53 and accompanying text.

64. See, e.g., Douglas Jehl, *Newspapers and TV Paint U.S. Action as Kind of Terrorism*, N.Y. TIMES, Nov. 11, 2001, at B5 (describing the Arabic language media’s negative depictions of the U.S. invasion of Afghanistan); Fouad Ajami, *What the Muslim World is Watching*, N.Y. TIMES MAG. 48 (Nov. 18, 2001); Joel Campagna, *Between Two Worlds: Qatar’s Al-Jazeera Satellite Channel Faces Conflicting Expectations*, available at http://www.cpj.org/Briefings/2001/aljazeera_oct01/aljazeera_oct01.html (last visited on Nov. 2, 2005) (reporting an Al Jazeera source’s claim that “some people would put [on the air] what could be called inflammatory rhetoric or people with outrageous views”).

65. See Ajami, *supra* note 64, at 50.

66. See Campagna, *supra* note 64 (reporting on an Al Jazeera source’s explanation that any bias at that network “did not stem from ill intent, but rather reflected the reporters’ own backgrounds and points of view”); CONTROL ROOM (Magnolia Pictures 2004) (documenting Al Jazeera’s broadcasts of the Iraq War as reflecting the reporters’ and producer’s own social and political understandings, despite their efforts to be “objective”).

67. See, e.g., *Reviewing the Arab Press*, UNITED PRESS INT’L, Sept. 1, 2004 (quoting an editorial in a United Arab Emirates newspaper as stating that recent suicide attacks in Israel were a “simple response to the Zionist terrorism”); *Hamas Leader Says Tel Aviv Blast Response to Israeli Terrorism*, BBC MONITORING INT’L REP., Sept. 9, 2003 (quoting a Hamas leader as as-

the international legal process, even if they are not accepted as formal law.⁶⁸

In sum, the media play a critical role in solidifying norms and understandings that already exist in the audience's social fabrics. In some instances, the codified norms may be recognized transnationally, but, because the media are products of their own social and political environments, media from different environments may codify the same norms in different ways or may codify different norms altogether. In the latter instance, the codified norms play a role in the international legal process even if they are not accepted formally as international law.

C. Invocation

Invocation is the provisional characterization of an act as inconsistent with established law.⁶⁹ The media help invoke the law primarily by disseminating intelligence of incidents that breach communal understandings of justice. When the Western media disseminate intelligence of human rights abuses, for example, they invoke (implicitly or explicitly) the international legal prohibitions against such abuses.⁷⁰ This invocation is often accompanied by demands for a

serting, on Al Jazeera television during an interview, that a recent suicide attack in Israel came "within the framework of the response to the Zionist terrorism which is being practised against the Palestinian people with US and European support"); *Selection List: Iraqi Press 10 Dec. 02*, WORLD NEWS CONNECTION, Dec. 10, 2002 (quoting an editorial in an Iraqi newspaper as stating that the "real terrorism" is the "U.S. -Zionist terrorism").

68. For a further discussion on the ways in which norms may constitute a "legal system," even if they are not recognized as formal law, see, for example, W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999). Professor Reisman explains:

What must exist in order for us to speak of a legal system is not a *formal enforcer* but an *expectation* accompanying a belief that there is a "right" way to act, that someone, possibly even the injured party, may properly respond, in ways that might otherwise be improper, to infractions of that expectation. It is this factor that helps sustain the norm. The durability of norms through time is what makes law, including microlaw, significant in our lives.

Id. at 13.

69. See Reisman, *View from New Haven*, *supra* note 2, at 123.

70. See, e.g., Ethan Wilensky-Lanford, *World Briefing Asia: Kyrgyzstan to Expel More Uzbeks*, N.Y. TIMES, June 24, 2005, at A10 (reporting that Kyrgyzstan would return to Uzbekistan survivors of a recent Uzbek Government crackdown, and quoting a Human Rights Watch researcher as saying that "[i]t is a violation of international law to return a person to a country that uses torture, and we know that Uzbekistan is such a country"); David Rieff, *The Precarious Triumph of Human Rights*, N.Y. TIMES MAG., Aug. 9, 1999, at 36, 39 (quoting the Advocacy Director for Physicians for Human Rights as saying that "[t]he only thing we really know how to do well is expose"); Carroll Bogert, Human Rights Watch Communications Director, Remarks at the Yale Law School Symposium on Human Rights and the Media: Media Responsibility and the Coverage of Human Rights (Apr. 1, 2000).

remedying response, but such demands are not always met.⁷¹ The process of invoking the law, however, is separate from the process of upholding or enforcing it. Thus, even if the dissemination of intelligence does not engender a response, the invocation remains.⁷²

D. Application

Application involves using the law to analyze a particular incident or set of facts.⁷³ The media help apply international law primarily by communicating the analyses of other international actors. For example, in advance of the July 1, 2004 transition to Iraqi sovereignty, Deputy Secretary of Defense Paul Wolfowitz appeared on PBS's *NewsHour* to explain application of the law governing that process.⁷⁴ Similarly, after President Bush appeared before the U.N. General Assembly in September 2004 to defend his decision to enter Iraq, two former U.S. Government officials appeared on the *NewsHour* to discuss the legal norms applicable to that war.⁷⁵

Although when the media apply the law it is usually by communicating the analyses of other actors, the media sometimes attempt to apply the law themselves. In some cases, the media may cultivate journalists who purport to have the expertise to apply international legal norms to particular fact patterns.⁷⁶ In other cases, the media,

71. MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 97 (1998) ("There is nothing *in* the pictures of atrocity or suffering that automatically engenders compassion or involvement. Some pictures, some places engage us; others do not."); Rieff, *supra* note 70, at 39 (warning of the dangers of "compassion fatigue," and stating that "[y]ou can no longer build a political consensus for action, assuming you ever could, by showing yet another clip of disaster pornography on television").

72. Especially in the human rights context, the unpredictability of the international response to an invocation by the media creates a double bind. On the one hand, by disseminating intelligence of violative behavior, the media increase the likelihood of an international response; public awareness of the incident may pressure international actors to demonstrate support (even if only verbal) for the violated rule and to call upon the responsible actors to cease their violation. On the other hand, if the media's invocation fails to elicit an international response, that failure may suggest that the norm is not so binding or widespread as to govern would-be violators, and the over-invocation may thus contribute to the erosion of the law's authority.

73. Reisman, *View from New Haven*, *supra* note 2, at 123.

74. *NewsHour with Jim Lehrer, Newsmaker: Paul Wolfowitz*, (PBS television broadcast, May 28, 2004), available at http://www.pbs.org/newshour/bb/white_house/jan-june04/wolfowitz_05-28.html.

75. *NewsHour with Jim Lehrer, Global Agenda*, (PBS television broadcast, September 21, 2004), available at http://www.pbs.org/newshour/bb/international/july-dec04/global_9-21.html.

76. For example, Christiane Amanpour of CNN and Fareed Zakaria of *Newsweek* have earned reputations for international legal analysis. In this sense, Amanpour and Zakaria may be distinguished from, for example, Linda Greenhouse of the *New York Times* because Ama n-

and particularly the movie media, may apply current legal norms to historical or fictional fact patterns. A number of movies, for example, have implicitly considered accounts of the Holocaust or other ethnic wars under the lens of the law prohibiting genocide.⁷⁷

In any event, the application process communicated through the media is intended for a mass audience and not for serious international lawyers. Thus, the analysis of applicable legal rules through or by the media tends not to address the intricacies of the issues, and tends to be simplified or incomplete.

E. Termination

A norm constitutes law only so long as it reflects communal expectations regarding authority, content and control. Where those expectations change—where, in other words, the relevant community no longer attaches a source of authority and control to the policy content of the norm—the norm will cease to exist as binding law, and that cessation will be reflected in the behavior of international actors. The termination process thus requires the dissolution of a set of expectations surrounding a particular legal principle. The media function in this process much in the same way that they function in the prescriptive one,⁷⁸ as the dissolution of one set of expectations necessarily requires the constitution of another.

III. THE MEDIA AND IMPERFECT ACTORS

In Part II of this Article, I analyzed the positive functions that the media perform in the international legal process. To varying extents, the media participate in the prescription, codification, application, invocation, and termination of international law. Moreover, media participation has essentially become indispensable. The media fill the communicative gaps of the international system, and because of their unique expertise and relationships with the audience, they participate in the international legal process in ways that other actors do not and cannot.

Yet the media do not perform their functions perfectly. Rather, media performance is impeded by a variety of institutional, cultural,

pour and Zakaria may themselves apply the law, whereas Greenhouse communicates the law as applied by a more conventional actor—the U.S. Supreme Court.

77. See, e.g., *HOTEL RWANDA* (United Artists 2004); *LIFE IS BEAUTIFUL* (Miramax Entertainment 1998); *SCHINDLER'S LIST* (Universal Studios 1993).

78. See *supra* notes 27-60 and accompanying text.

and practical factors. In this Part, I consider some of the most prevalent factors that impede the media's performance in the international legal process: controls on mediated messages, phenomenological biases among media actors, the institutionalized methods of news production, and the potential for media "capture" to disseminate propaganda. Each of these factors may bias or distort legally relevant communications and thereby corrupt the international legal process.

A. Controls on Mediated Messages

The media are often impeded from performing their functions as a result of externally or internally imposed controls on media communications. All States impose some controls on the media operating within their territory. Some States impose only limited controls, for example, with respect to the dissemination of licenses or the regulation of broadcasts involving pornography or violence.⁷⁹ Yet States that exercise considerable or total control over their media have available to them a variety of techniques for control, including intimidation,⁸⁰ censorship,⁸¹ and the development of technological barriers to media transmissions.⁸² These techniques impede the media from disseminating to their audiences messages that the State may find offensive, and they thus bias the media reality in favor of the State-preferred perspective.

In addition to these techniques, which generally affect the media's ability to transmit intelligence that they already have, States sometimes also impede the media from accessing that intelligence in

79. See MONROE E. PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER* 18, 91 (2002).

80. See, e.g., ARTICLE 19, *NO COMMENT: CENSORSHIP, SECRECY AND THE IRISH TROUBLES* 39 (1989) (noting that many journalists reporting on Northern Ireland "experienced violence or threats in the course of their duties"); Sam Dillon, *Zedillo Lectures the Mexicans: Obey the Law*, N.Y. TIMES, Oct. 1, 1996, at A3 (discussing "the kidnapping of a journalist . . . by what appeared to be plainclothes Government security agents" in Mexico).

81. See, e.g., ARTICLE 19, *supra* note 80, at 23-25 (discussing, for example, a 1988 United Kingdom ban on any discussion of five Republican paramilitary groups banned under antiterrorist legislation); Joseph Kahn, *Let Freedom Ring? Not So Fast. China's Still China*, N.Y. TIMES, May 3, 2004, at A3 (discussing "China's still all-powerful censors and standard-setters"); Celia W. Dugger, *Joining Sri Lanka's Sword: Might of Censor's Pen*, N.Y. TIMES, Mar. 11, 2000, at A3 ("[Sri Lanka's chief censor's] job is to purge criticism of the government's faltering war on separatist rebels from newspapers, radio and television."); Howard Schneider, *In a Spin Over the Web: Cautious Arab States Confront Challenges of Unleashing Internet*, WASH. POST, July 26, 1999, at A13 (discussing internet censorship in the Muslim world).

82. See PRICE, *supra* note 79, at 17-18 ("[N]ew technologies can enhance as well as diminish [a State's] forms of control."); *id.* at 202 (discussing radio-jamming).

the first place. State actors regularly engage in “information management,” or “spin,” to control the intelligence available to the media.⁸³ This technique is particularly effective where the underlying intelligence is available exclusively to State actors, as may be the case (to varying degrees) with respect to issues of foreign policy, national security and international armed conflict.⁸⁴ During the first Gulf War, for example, the Pentagon quite successfully managed the information that the media disseminated by restricting media access to military combat zones and recreating the Washington experience for reporters in Dhahran and Riyadh, with press briefings and pool reports.⁸⁵ In this way, the Administration was able to control the media’s access to newsworthy information about the war. As David Altheide explains: “[T]he war was covered, usually on the ‘sources’ terms because they supplied the visually dominating reports on which

83. See GANS, *supra* note 43, at 117 (explaining that as journalists try to extract information from their sources, the sources try to control the journalists’ knowledge base).

84. The relationship between the U.S. Government and the media during periods of armed conflict has evolved over time. During World War II, President Roosevelt saw both the information and the entertainment media as essential to the war effort, and U.S. officials were quite open with members of the press. See Becker, *supra* note 60, at B4. The intimacy between the Government and the press was feasible then because of an understanding that the press would not print information that could impede the U.S. military efforts. But, with the decline of the monopoly of the elite press corps over the news, the Government has learned to become more reserved. The media, first enlisted to promote the war effort in Vietnam, eventually grew critical of that war and began releasing gruesome footage that sensitized the American public to the devastation of war. See CARPENTER, *supra* note 33, at 166; Becker, *supra* note 60, at B5. Indeed, because many in the Government viewed the media as partially responsible for the loss of public support in Vietnam, the Government released almost no information about the subsequent U.S. invasion in Granada. See CARPENTER, *supra* note 33, at 165-66. The information disseminated during the first Gulf War was carefully managed, see *infra* notes 85-86 and accompanying text, and, in the second Gulf War, the Government embedded journalists into military units so that reporting could be conducted from U.S. front lines. See David D. Kirkpatrick, *News Industry Plans for War and Worries about Lost Ads*, N.Y. TIMES, Feb. 10, 2003, at C1 (“[M]ilitary officials have indicated a greater willingness than in Afghanistan or the previous Gulf War to let journalists cover the front, making preliminary arrangements for some reporters to travel ‘embedded with troops.’”). For a discussion on media reporting during modern wars, see MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 191-96 (2000); *id.* at 196 (“Truth is always a casualty in war, but in virtual war, the media creates the illusion that what we are seeing is true.”).

85. See David L. Altheide, *Postjournalism Is Dead, Long Live Journalism! The Gulf War in Perspective*, CONTROLLING BROADCASTING: ACCESS, POLICY AND PRACTICE IN NORTH AMERICA AND EUROPE 134-65 (Fulbright Papers vol. 13) (Meryl Aldridge & Nicholas Hewitt eds., 1994); CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* 23 (2002) (“[During the Gulf War] the international press willingly administered a restrictive pool system on behalf of the military under which carefully controlled groups of reporters were guided around the front lines by officers.”).

TV news formats thrive. News organisations covered the war even when they knew they were being misled systematically . . . ”⁸⁶

Apart from the controls imposed by States on the media, the media sometimes impose controls on themselves, for example, to preserve their relationships with useful sources or to satisfy commercial interests. Journalists who regularly depend on official sources may, in the interest of ensuring a future flow of information, choose not to disseminate intelligence that their sources would rather keep out of the public sphere.⁸⁷ In a similar vein, media enterprises may choose not to disseminate intelligence out of a more general respect for the host government. When Katherine Graham was President of the *Washington Post*, she reportedly assured a group of recruits for the U.S. Central Intelligence Agency that she believed “democracy flourishes when the government can take legitimate steps to keep its secrets and when the press can decide whether to print what it knows.”⁸⁸ More recently, U.S. television news broadcasters decided not to air videotapes delivered by Osama bin Laden after September 11, 2001, on the basis of the Administration’s characterization of those tapes as potentially containing sensitive or suspect information.⁸⁹

In addition, the media may control the structure or substance of their communications for commercial interests.⁹⁰ Structurally, the need to generate advertising revenues may compel a medium to interperse intelligence that relates to the national and global orders with “fluff” pieces or advertisements. The networks’ evening news programs, for example, tend to devote thirty seconds to three minutes on a major international event and then break for two minutes of commercials. This affects the significance that the viewers, consciously or not, attribute to the event. Substantively, commercial interests may either encourage the media to avoid topics from which their audience may feel disengaged or to increase the entertainment content in order to attract a wider audience.⁹¹

86. Altheide, *supra* note 85, at 141; see also IGNATIEFF, *supra* note 84, at 196 (“In the Gulf War . . . movement of journalists was used successfully to control their reporting.”).

87. See GANS, *supra* note 43, at 116-17; CARPENTER, *supra* note 33, at 5.

88. ALEXANDER COCKBURN & JEFFREY ST. CLAIRE, *WHITEOUT: THE CIA, DRUGS AND THE PRESS* 31 (1998).

89. See Bill Carter & Felicity Barringer, *The Coverage: Networks Agree to U.S. Request to Edit Future bin Laden Tapes*, N.Y. TIMES, Oct. 11, 2001, at A1.

90. For an argument that the capitalist interests of the mass media have deteriorated the informational quality of the public sphere, see generally HABERMAS, *supra* note 3.

91. WAR PHOTOGRAPHER (Christian Frei 2001) (noting that many media shirk away from images and stories that might depress or distance their audiences); David Gelber, Executive

In sum, the variety of controls on media communications—whether externally or internally imposed—impede media performance by resulting in the dissemination of biased or inaccurate information or in the failure to disseminate valuable information. In all instances, such controls may corrupt the international legal process.

B. Phenomenological Biases

The media are also impeded from performing optimally as a result of the inherent cultural biases that pervade their work. As discussed above, the media are products of their own social and political environments, and their constructions of reality reflect personal, professional and cultural biases.⁹² Indeed, it is by reflecting cultural biases that the media function to help codify communal norms, but the “underbelly” of this function is that the phenomenological biases may render media communications incomplete or inaccurate. This is evident from the discussion above with respect to the Arabic-language media, which tend to reinforce the audience’s phenomenological biases against the United States and Israel without necessarily questioning or challenging those biases.⁹³

As a general matter, media communications reflect the phenomenological biases that exist among media actors themselves, in terms of the value and reality judgments that media actors make when selecting what to report and how to report it. To the extent that media actors make those judgments without scrutinizing their phenomenological biases, the media reality will reinforce those biases among members of the audience, especially among those who lack any firsthand experience of the issue (which tends to be the case with respect to international issues).⁹⁴ As a result, the incomplete and bi-

Producer of *CBS News*, Remarks at the Yale Law School Symposium on Human Rights and the Media: Using the Media for Human Rights Advocacy (Mar. 31, 2000) (describing the consumer surveys that media enterprises undertake to cater to mass preferences).

92. See *supra* notes 57-59 and accompanying text.

93. See *supra* notes 64-66 and accompanying text.

94. Audience members generally process media communications through their own experiences, and a viewer with firsthand experience of the subject is more likely to reject messages that fail to comport with his or her own experiences. See DAVISON, *supra* note 56, at 28-29; John Tomlinson, *Cultural Globalization and Cultural Imperialism*, in INTERNATIONAL COMMUNICATION AND GLOBALIZATION 170, 181 (Ali Mohammadi ed., 1997) (“[W]e should not only avoid the rather patronizing attitude towards cultural agents that sees them as passive terminus of a flow of cultural influence, we should also be able to see that there is in fact never a simple ‘delivery’ of cultural influence.”).

ased media reality becomes the operative reality of the viewing audience.

C. Methods of News Production

Media performance is further impeded by certain methods of news production. In the United States, news production with respect to global events has, for the most part, become a collective process such that most information is obtained from a small sampling of sources. This is often done by way of official statements or press conferences.⁹⁵ When such information is obtained by other means, it tends to be processed by one of the four major wire services because only a few news organizations maintain extensive foreign bureaus.⁹⁶ As a result of this institutionalized process of news production, inaccurate or incomplete information gathered or disseminated by the original source will be repeated by a variety of news media, thereby incorrectly enforcing its signal of authority.

Moreover, all news media tend to simplify global events into truncated "news stories" that lose the details and intricacies of the event⁹⁷ and that often seek to entertain as much as, if not more than, they seek to educate or inform.⁹⁸ This tendency to simplify global events has, in recent years, been exacerbated by the 24-hour news cycle because the time pressure to deliver news reduces the time for

95. See, e.g., TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION 71 (1998); FRANK WEBSTER, THEORIES OF THE INFORMATION SOCIETY 79 (1995); GANS, *supra* note 43, at 116 (explaining that journalists actively pursue only a handful of regular sources).

96. WEBSTER, *supra* note 95, at 79 (noting that ninety percent of international news in the United States comes from one of the four major news agencies—United Press International, Associated Press, Reuters, and Agence France Presse).

97. See GANS, *supra* note 43, at 162; EDWARD JAY EPSTEIN, NEWS FROM NOWHERE 4 (1973) (quoting Reuven Frank, the initiator of NBC's nightly news program, as instructing his staff about the essence of a news story: "Every news story should, without sacrifice of probity or responsibility, display the attributes of fiction, of drama"); Michael W. Reisman, *A Jurisprudence from the Perspective of the "Political Superior"*, 23 N. KY. L. REV. 605, 614 (1996) ("Viewers of the mass media in advanced industrial systems perceive selected events presented as 'cause' and selected events presented as their 'effect' as a relatively straight-forward and unnuanced sequence and in an unusual, if not wholly unreal, physical and temporal proximity."); Gelber, *supra* note 91 (contending that the "fictionalization" of news persists in the production of television news today).

98. See, e.g., Robert C.L. Moffat, *Mustering the Moxie to Master the Media Mess: Some Introductory Comments in the Quest for Media Responsibility*, 9 U. FLA. J. L. & PUB. POL'Y 137, 146 (1998) (discussing the transformation of the news media into entertainment).

analysis and sourcing.⁹⁹ The tendency to reconfigure information into a (more or less entertaining) “story” results, not only in the manipulation of information, but also in the under-dissemination of stagnant political problems for which there are no “beginnings” or “ends.”

To be sure, there are exceptions to these trends. For example, newspapers continue to address issues in greater depth and range than television news programs, and, among television news programs, PBS’s *NewsHour* is noticeably more thorough in its content and sourcing.¹⁰⁰ Nevertheless, to the extent that the trends exist, they distort the media reality, and thus the reality as understood by the viewing public.

D. Propaganda

Finally, and perhaps most notoriously, the media corrupt the international legal process when they are “captured” by propagandists. The line between propaganda and “spin” is a fuzzy one, but propaganda may be defined as communications intended to influence the audience’s response with respect to the message or subject of the communication.¹⁰¹ Propaganda varies significantly in terms of the manner in which it is produced and in terms of its intensity and effects, but all propaganda presents the risk of biasing legally relevant communications. Despite these risks, it would be overly simplistic to assert that all propaganda is necessarily harmful or undesirable. To the contrary, the use of propaganda may be desirable, for example, to the extent it can be used to peacefully bring about positive changes in the world arena.¹⁰²

That said, propaganda might also be used to produce harmful outcomes. The paradigmatic case of such harmful propaganda is the Nazi Party’s use of the radio media—which Hitler referred to as “a terrible weapon in the hands of those who know how to make use of

99. See PROJECT FOR EXCELLENCE IN JOURNALISM, EXECUTIVE SUMMARY, THE STATE OF THE NEWS MEDIA 2005, at 5, <http://www.stateofthemediamedia.org/2005/execsum.pdf> (last visited July 23, 2005).

100. PROJECT FOR EXCELLENCE IN JOURNALISM, OVERVIEW (CONTENT ANALYSIS), THE STATE OF THE NEWS MEDIA 2005, http://www.stateofthemediamedia.org/2005/narrative_overview_contentanalysis.asp?cat=2&media=1 (last visited July 21, 2005).

101. I derive this definition from B.S. Murty. See MURTY, *supra* note 5, at 7; see also HAROLD LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1934) (cited in BARAN & DAVIS, *supra* note 3, at 74-75) (defining propaganda in terms of the manipulation of communications to bring about mass actions or beliefs).

102. See MURTY, *supra* note 5, at 82.

it”—as part of a broader, tightly integrated propaganda machine.¹⁰³ As the Nazi’s master propagandist, Joseph Goebbels, explained to the heads of German radio stations:

I believe radio to be the most modern and most important instrument of mass influence Radio must rally together 100% of the people. And once we have them, radio must hold this 100%, must defend them, and must so thoroughly indoctrinate them that none can break away.¹⁰⁴

More recently, the radio and print media were used to exacerbate latent tensions between the Tutsi and Hutu ethnic groups in Rwanda and to contribute to the 1994 genocide in that country.¹⁰⁵ The broadcasts of Radio Télévision Libre des Mille Collines (RTLM) were particularly powerful because television media were essentially nonexistent in Rwanda, and because, with the exception of government-run Radio Rwanda, RTLM was the only available radio station in the region.¹⁰⁶ Moreover, because RTLM was next to Radio Rwanda on the dial, RTLM communications were sometimes broadcast over the government frequency, thus giving them an air of authority¹⁰⁷ In this environment, the media were a powerful tool with which to manipulate latent prejudices, emotions and belief systems in Rwanda.

IV. MEDIA ENVIRONMENTS

In Part II of this Article, I described the positive functions that the media (as mass communicators) perform in the international legal process. Yet, as I discussed in Part III, the media do not perform those functions perfectly. Rather, they are impeded by a variety of systemic factors. These include controls on mediated messages, phenomenological biases among media actors, the methods of news pro-

103. JULIAN HALE, *RADIO POWER: PROPAGANDA AND INTERNATIONAL BROADCASTING* 1-9 (1975).

104. Joseph Goebbels, *Ansprache an die Intendanten und Direktoren der Rundfunkgesellschaften* [Speech to the Directors of the Radio Broadcast Companies] (Mar. 25, 1933), in 1 *GOEBBELS-REDEEN, 1932-1939*, at 82, 91-92 (Helmut Heiber ed., 1971) (translated by Kevin S. Blume).

105. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003) (finding two founders of Radio Télévision Libre des Mille Collines and the editor-in-chief of the newspaper *Kangura* guilty of numerous counts of genocide); Gregory S. Gordon, "A War of Media, Words, Newspapers and Radio Stations": *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 *VA. J. INT'L L.* 139 (2004); *Recent Cases: The Media Case*, 117 *HARV. L. REV.* 2769 (2004); Dina Temple-Raston, *Radio Hate*, *LEGAL AFF.*, Sept.-Oct. 2002, at 30.

106. See Temple-Raston, *supra* note 105, at 30.

107. *Id.*

duction, and the use of the media for propaganda. To varying degrees, these factors contribute to the dissemination of inaccurate, biased, or manipulated communications, and to the extent these communications are legally relevant, they may also contribute to the corruption of the international legal process. In light of all this, two questions arise: in what conditions do the media perform optimally, and how might those conditions be fostered?

With respect to the first question, it seems clear that, as a general matter, the media best perform their legal functions when they operate in a liberal media environment—where a variety of media compete for the audience’s attention, and the media are, for the most part, free from external controls and committed to minimizing internal controls.¹⁰⁸ This sort of environment finds support in the Universal Declaration of Human Rights, which provides that “[e]veryone has the right to freedom of opinion and expression,” including the rights “to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁰⁹ The Universal Declaration of Human Rights thus supports a liberal media environment as an end in itself. Media communications contribute to the audience’s enlightenment, and there is, therefore, inherent value in an environment in which there is wide access to the shaping and sharing of media messages.

Such an environment is also desirable from the perspective of minimizing the systemic factors that impede the media in the performance of their international legal functions. Where there is wide access, in terms of both the communicator and the audience, there is a decreased likelihood of the media collectively being limited by controls, phenomenological biases, methods of news production, or of their communicating propaganda with harmful effects. This is not to say that the media will never be impeded by such factors. The media environment in the United States is quite liberal, but, as discussed in Part III, it is not free from such impediments. Rather, although in liberal environments the media are free to produce poorly sourced or inaccurate communications, or communications that lack rigor in analysis, such environments also enable other media to cancel out such communications—by revealing the biases of such communica-

108. I derive this understanding of the optimal media policy from B.S. Murty. See MURTY, *supra* note 5, at 77-78, 287.

109. Universal Declaration of Human Rights, art. 19, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

tions or maintaining independent commitments to thorough and accurate reporting.

Thus, as a general matter, media operating in liberal environments are unlikely to communicate propaganda with harmful effects because, in such environments, propagandistic communications are likely to be offset by other media communications.¹¹⁰ Yet any propaganda that correlates with imminently harmful outcomes should be controlled. (In these limited cases, the interest against such propaganda outweighs the interest against State-imposed controls on media communications because of the imminent harmful outcomes of the propaganda.) There can be no bright-line rule as to when media communications will correlate with imminently harmful outcomes.¹¹¹ Particular communications must be considered in context. That is, they must be considered in light of the intents and capabilities of the communicator(s), the expectations and responses of the audience, and whether audience members will be favorably disposed to the message of the communication.¹¹² In Rwanda, for example, a number of factors contributed to RTLTM's harmful effects, including the latent tensions between Tutsi and Hutu groups, the relative lack of alternative media, and the appearance that RTLTM operated under the authority of the government.¹¹³

Although the international community has indicated support for liberal media environments in general terms, it has succeeded neither in establishing such environments nor in setting forth aspirational standards. Rather, to the extent that the international community has tried to legislate in this area, it has focused only on transborder communications and has been unable to square the interest in a liberal media environment with the preservation of State sovereignty over its internal media space.

The failure to resolve this tension is apparent in a number of international instruments addressing media communications. For instance, the International Covenant on Civil and Political Rights (ICCPR) provides that "[e]veryone shall have the right to freedom of expression," which includes the right to "impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in

110. See MURTY, *supra* note 5, at 78.

111. See *id.*

112. See *id.* at 7, 44.

113. See *supra* notes 105-107 and accompanying text.

print, in the form of art, or through any other media.”¹¹⁴ Yet the Covenant then subjects that right to any restrictions necessary for (among other things) the “respect of the rights or reputations of others,” or for the protection of “public health or morals.”¹¹⁵ The ICCPR thus gives a State quite a bit of leeway to restrict media communications that it finds undesirable.

Similarly, the mass media declaration issued by the United Nations Organization for Education, Science and Culture (UNESCO) endorsed both the “free flow” of information and the “wider and more balanced dissemination of information.”¹¹⁶ The latter standard was intended to shield developing States from the strong influences of the Western media,¹¹⁷ and UNESCO’s implication in its declaration and subsequently that the interest in a “wider and more balanced dissemination of information” might warrant restricting the “free flow” of information caused significant controversy and ultimately contributed to the U.S. Government’s decision to withdraw from the organization.¹¹⁸ The international community, then, has not succeeded in resolving the tension between the interest in the free flow of media communications and the interest in preserving State sovereignty over internal media space.¹¹⁹

114. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 19(2), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

115. *Id.* at art. 19(3). Article 19(3) of the International Covenant on Civil and Political Rights provides in full:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

For respect of the rights or reputations of others;

For the protection of national security or of public order (*ordre public*), or of public health or morals.

116. General Conference of UNESCO, Oct.-Nov. 1968, *Declaration on Mass Media*, art IX, UNESCO Doc. 20C/20 Rev. (Nov. 21, 1978).

117. *Id.*

118. See generally Michael J. Farley, Comment, *Conflicts over Government Control of Information—The United States and UNESCO*, 59 TUL. L. REV. 1071 (1985).

119. Another poignant example of the international community’s failure to resolve the tension between the free flow of information and State sovereignty over internal media space is the (failed) international effort to regulate the use of direct satellite television broadcasting. During the multilateral discussions on this issue, three basic positions developed. The first position focused on the interest of States to define their own cultural and communication policies without interference from foreign actors, and argued for a regime in which the host State’s consent would be required for any transnational satellite transmissions. The second position focused on the interest in the robust freedoms of speech and expression, and argued against State control of any outgoing or incoming satellite transmissions. The third position sought compromise between the other two, and sought to resolve the tension largely on the basis of bilateral agree-

To some extent, particular States have resolved this tension through bilateral or even multilateral negotiations with other States or with media enterprises. For instance, the European Television without Frontiers Directive essentially provides for the free flow of transborder communications, except where one member State hosts programs that significantly impair the moral development of children in another member State, in which case the Directive requires bilateral consultations.¹²⁰ Similarly, information ministers of the Gulf Cooperation Council have mediated disputes between Qatar, which hosts Al Jazeera, and Bahrain arising out of Bahrain's assertion that Al Jazeera's broadcasts violate the public order.¹²¹ And China negotiated with Star-TV to give that media enterprise access to the Chinese market, but, in exchange for such access, Star-TV was prohibited from carrying the BBC.¹²²

Negotiations between States or between one State and a media enterprise may result in fewer controls being imposed on media communications than if the host State acted unilaterally to close its media space to all foreign media. But these context-specific negotiations do not on their own create liberal media environments and, in any event, are not comprehensive.

In the absence of any such comprehensive regime, liberal media environments can be fostered through other means. States may work unilaterally to bring about these conditions. For instance, States may limit the controls they impose on the content of media communications in their own territories and work to expand media options in other States, especially those with closed or restrictive media markets. States have a variety of tools to affect the media markets in other States. These range from subsidizing or sponsoring media that broadcast into such markets to supporting the development of technologies that circumvent host State controls, and even to blocking media communications that directly correlate with violence.¹²³ The appropriate tool in any given situation would, of course, depend on the particular social and political environment of the host State.

To the extent that States, working together or unilaterally, succeed in liberalizing media environments, such liberalization will cur-

ments between sending and receiving countries. See CEES J. HAMELINK, *THE POLITICS OF WORLD COMMUNICATION* 140-43 (1994).

120. PRICE, *supra* note 79, at 22.

121. *Id.*

122. *Id.*

123. See *id.* at 188-89.

tail but not eliminate the factors that impede the media's performance of their functions in the international legal process. As noted above, the factors that impede this performance exist even in liberal media environments like the one in the United States. In these environments, the media themselves are, for the most part, responsible for their performance.

Thus, if we are to see changes in the way the media perform their international legal functions, they must come from the media themselves. The media, for example, must take steps to overcome phenomenological biases, double-check the accuracy of source material, provide thorough and comprehensive news coverage, and avoid errors or misstatements. To some extent, news media enterprises in the West already take such measures,¹²⁴ not only out of a sense of professional integrity, but also because the vibrant media environment in the West contains certain checks on the dissemination of misinformation or on the failure to disseminate information. As discussed above, however, there is significant room for improvement, even among news media enterprises in the West.

CONCLUSION

The international legal process is characterized by significant communicative gaps that the media (as mass communicators) help fill. As I discussed in Part II of this Article, the media perform functions at every stage of the legal process. With respect to lawmaking, the media help establish both the parameters of the lawmaking process and the audience's expectations concerning the policy content, authority and control of the legal norms. The media also play roles, to varying degrees, in the codification, application, invocation and termination of international legal norms.

Although the media perform indispensable functions in the international legal process, their performance is sometimes impeded by one of a number of systemic factors. States may try to reduce the prevalence of such factors in their own media spaces by sustaining liberal media environments—where a variety of media compete for the audience's attention, and the media are, for the most part, free from external controls—and may work unilaterally to liberalize the media spaces of other States.

124. See, e.g., The Society of Professional Journalists Code of Ethics, available at http://spj.org/ethics_code.asp (last visited November 2, 2005).

Yet there is only so much that States can do. Ultimately, it is up to the media themselves to transcend the factors that impair the international legal process and to take responsibility for their legally relevant communications. At least among the Western news media, this is not likely to happen in the absence of commercial incentives. Rather, given their unique expertise and relationships with the audience, the media are likely to continue operating in the international legal process as they do now—performing important functions but not performing those functions perfectly. In the final analysis, other actors must recognize both the functions and the limits of the media in the international legal process. The failure to recognize the media's functions would constrict our understanding of the international legal process and thus our ability to achieve desirable community policies; the failure to recognize the media's limits would risk implementing policies that are based on misunderstood realities.