Human Rights and the Mediatization of International Law

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Abstract
This article considers the relationship of international law and the media through the prism of human rights. In the first section the international regulation of the media is examined and visions of good, bad, and new media emerge. In the second section, the enquiry is reversed and the article explores the ways in which the media is shaping international legal forms and processes in the field of human rights. This is termed the 'mediatization of international law'. Yet despite hopes for new media and the Internet to transform international law, the theoretical work of Jodi Dean warns of the danger to democracy of commodification through the spread of 'communicative capitalism'.

Key words
commodification; free speech; human rights; incitement; international law; Internet; media; mediatization

The power of the media is a significant dimension of modern life and a much-discussed facet of globalization. Yet the media are little analysed within the discipline of international law.[1] This article aims to foreground the relationship of the media and international law through the example of human rights.

So what do we mean by 'the media'? The common use of the term 'media' is noted in the *Oxford English Dictionary* as referring to the 'main means of mass communication, *esp.* newspapers, radio, and television, regarded collectively; the reporters, journalists, etc., working for organizations engaged in such communication' and also

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1   The media is a subject of greater analysis in other disciplines. See further M. D. Alleyne, *Global Lies? Propaganda, the UN and World Order* (2003); C. Bob, *The Marketing of Rebellion: Insurgents, Media, and International Activism* (2005); J. Der Derian, *Virtuous War: Mapping the Military–Industrial–Media–Entertainment Network* (2009); H. Friel and R. Falk, *The Record of the Paper: How the* New York Times *Misreports US Foreign Policy* (2004); E. Gilboa, 'The CNN Effect: The Search for a Communication Theory of International Relations', (2005) 22 *Political Communication* 27; S. Redhead (ed.), *The Paul Virilio Reader* (2004); P. Robinson, 'The CNN Effect: Can the News Media Drive Foreign Policy?', (1999) 25 *Review of International Studies* 301; J. Baudrillard, *Simulacra and Simulation*, trans. S. Faria Glaser (1994 [1981]); N. Couldry, *Media Rituals: A Critical Approach* (2003); G. Debord, *The Society of the Spectacle*, trans. D. Nicholson-Smith (1995 [1967]); J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. T. Burger with the assistance of F. Lawrence (1991 [1962]); E. S. Herman and N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (1994); M. McLuhan, *Understanding Media: The Extension of Man* (1964); N. Mirzoeff, *Watching Babylon: The War in Iraq and Global Visual Culture* (2005); J. B. Thompson, *The Media and Modernity: A Social Theory of the Media* (1995).

as referring to 'a particular means of mass communication'.[2] Even in this simplest definition there is a sense of the variety of meanings of the term, both singular and plural. Thus I shall use the term to refer broadly to the phenomenon of mass communication, its various forms and processes, the profession of journalism, and the social institution of the mass media. In this article I am especially interested in the news media, given its particular significance for the field of human rights.

In considering the relationship between media and law as a potential field of international law, there are several directions which can be taken.[3] We can analyse the regulation of the media at the international level in fields as diverse as human rights, criminal justice, humanitarian law, intellectual property, trade, and telecommunications. This reveals an emerging layer of international regulation of the media, but one which is to a large degree dominated by free expression concerns and a consequently deregulatory emphasis. Important work has begun here in comparative media law and European media law. Yet a truly international focus remains hesitant, despite indications of its relevance and urgency in the context of rapidly globalizing media forms.

Another level at which the relationship between international law and the media can be analysed is from the perspective of the impact of the media on law, which is the approach this article will take in section 2. Attention to regulatory frameworks can reveal the impact of law on shaping our visions of the media, but it is also important to consider the impact of the media on the system of international law. I call this the 'mediatization' of international law. Again the focus is on the field of human rights, although other fields such as international humanitarian law and international criminal law also provide useful case studies. It is important to consider both levels at which international law and the media interrelate so as to better understand the significance of their complex and under-analysed relationship.

This is, though, a relationship with antecedents. A first search for 'the media' in the indexes of international law texts reveals little.[4] Yet, digging deeper, it is

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2   *Oxford English Dictionary* online (2001), entry for 'media', n., I.I. simple uses.

3   For further discussion of this uneasy relationship in a domestic context see L. Gies, *Law and the Media: The Future of an Uneasy Relationship* (2008).

4   There are important exceptions. See further S. Marks and A. Clapham, *International Human Rights Lexicon* (2005); G. Schwarzenberger, *International Law and Order* (1971); R. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998); C. G. Weeramantry, *Universalising International Law* (2004); J. M. Anderman, 'Swimming in the New Stream: The Disjunctions between and within Popular and Academic International Law', (1996) 6 *Duke Journal of Comparative and International Law* 293; D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005); D. Kennedy, *Of War and Law* (2006); W. G. Werner, 'Armed Conflicts, Images of Law and Legal Semiotics', (2001) 14 *International Journal for the Semiotics of Law* 327; W. P. Nagan and C. Hammer, 'Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights', (2007) 47 *Virginia Journal of International Law* 725; M. Steinitz, '"The Milosevic Trial – Live!": An Iconical Analysis of International Law's Claim of Legitimate Authority', (2005) 2 *Journal of International Criminal Justice* 103; A. Carty, 'The Media and International Law in European Foreign Policy during the Bosnia-Herzegovina Crisis', in C. Harding and C. L. Lim (eds.), *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (1999); D. L. Altheide, 'The Mass Media, Crime and Terrorism', (2006) 4 *Journal of International Criminal Justice* 982; A. Balguy-Gallois, 'Protection des journalistes et des médias en période de conflit armé', (2004) 86 (853) *International Review of the Red Cross* 37; M. Craven, S. Marks, G. Simpson, and R. Wilde, 'We Are Teachers of International Law', (2004) 17 LJIL 363; M. Hakimi, 'The Media as Participants in the International Legal Process', (2006) 16 *Duke Journal of Comparative and International Law* 1; M. G. Kearney, *The Prohibition of Propaganda for War in International Law* (2007); F. Mégret and F. Pinto, '"Prisoners' Dilemmas": The Potemkin

clear that international law has considered the media's role both as the object of regulation and as an influence on international society. The development of new technologies for communication, such as radio and the telegraph, were seen as enabling forms of interconnection in international society, offering greater international co-ordination and understanding across traditional divides of geography and culture. Some argued that these developments would create opportunities for the advancement and growth of international law. In 1910, the international lawyer A. Pierce Higgins wrote of international law itself as propaganda, in an era when the concept of propaganda had yet to be seen in purely negative terms:

> The apostles of the propaganda of International Law must of necessity be statesmen and lawyers, but all classes of the community in every nation, journalists, clergy, merchants and artisans, must co-operate, for there is need for a fuller knowledge of the existing rules of law so that their value may be better appreciated.[5]

At this time international law was aware of the role for journalists and the media in 'education', in the formation of public opinion. The relationship of the media and international law, when seen through the prism of public opinion and notions of propaganda, is in fact revealed as a constant theme in the modern evolution of public international law. It is a theme which featured in Elihu Root's opening editorial of the first *American Journal of International Law* and remained an important concern throughout the twentieth century.[6] Attracting the attention of distinguished scholars such as Hersch Lauterpacht in the middle of the century, it was then diverted by the Cold War, before now re-emerging as a theme in the context of debates over globalization, a global civil society, the role of non-state actors, and the Internet.[7]

This article will narrow its focus to human rights and the media, the area where arguably the relationship between the media and international law is at its strongest and most familiar. In section 1 I consider our visions of the media which emerge in certain human rights regulatory frameworks, making the point that while often cautious and critical of the media, the law has in fact helped to shape the media as an institution and an ideal. I shall argue that mainly we are limited to two images which operate in conflict, that of good and bad media, and that these have begun to be both challenged and affirmed by a third vision, that of new media.

Villages of International Law?', (2003) 16 LJIL 467; K. C. Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda', (2002) 26 (2) *Fletcher Forum of World Affairs* 21; A. O. Odora, 'Criminal Responsibility of Journalists under International Criminal Law: The ICTR Experience', (2004) 73 (3) *Nordic Journal of International Law* 307; B. S. Murty, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion* (1968); A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003); M. E. Price and M. Thompson (eds.), *Forging Peace: Intervention, Human Rights and the Management of Media Space* (2002); M. E. Price, *Media Sovereignty: The Global Information Revolution and Its Challenge to State Power* (2002); M. W. Reisman, 'International Lawmaking: A Process of Communication', (1981) 75 *American Society of International Law Proceedings* 101; P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005); T. Verfuss, 'Trying Poor Countries' Crimes in a Rich City: The Problems of the Press from the Former Yugoslavia', (2004) 2 *Journal of International Criminal Justice* 509.

5   A. Pearce Higgins, *The Binding Force of International Law* (1910), 41.

6   E. Root, 'The Need of Popular Understanding of International Law', (1907) 1 AJIL 1.

7   Hersch Lauterpacht was especially prominent in calling for the regulation of propaganda, sedition, and hate speech as part of the emergent framework for international human rights protection. See, e.g., H. Lauterpacht, *An International Bill of the Rights of Man* (1945), 108.

In section 2 I shall move to consider the media not just as an object of regulation, but as a process. I shall argue that this process of mediatization is affecting the system of international law. To illustrate this, I shall again draw on the field of human rights, considering the significance and potential of the media within human rights. I then take a more critical view of the media's impact and the role of publicity within the international legal system. To do so I engage the work of Jodi Dean to consider the potential for distortion and commodification which the media bring. This is done to give theoretical depth to an area which is largely swept up by hopes for the good media.

1. REGULATORY VISIONS OF THE MEDIA

1.1. Good media

Free expression is one of the most discussed fields of international human rights law, and a significant area of international regulatory activity as regards the media.[8] It is commonly thought of as a central and facilitative human right, universally recognized and forming the basis for the contestation and safeguarding of other rights.[9] In this sense, the theoretical foundations of free expression – what is often termed 'the right to free speech' – can be traced back to recognition of the need for unhindered political communication between citizens in their efforts to form and participate in government and the development of society. Although different approaches to free expression have been theorized and practised, the present system of international regulation was developed in the context of post-war efforts to universalize human rights.

The foundational document of the modern human rights era, the Universal Declaration of Human Rights of 1948 (UDHR), touched on the role of the media in a number of ways. The protection of freedom of expression has proved to be the most influential and long-lasting of these in terms of international regulation of the media. Freedom of expression is addressed in Article 19, which guarantees that '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

From this flows an emphasis in the other international and regional instruments dealing with freedom of expression on two aspects: the right to express oneself and the right to seek and receive information.[10] The International Covenant on Civil and Political Rights (ICCPR) follows this formula in its own Article 19, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

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8   For much greater detail than is possible here see E. Barendt, *Freedom of Speech* (2005).
9   See, e.g., M. Ignatieff, *Human Rights as Politics and Idolatry* (2001), 90.
10   See further African Charter on Human and Peoples' Rights (Banjul Charter), Arts. 9 and 27(2); as interpreted in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria* (Communications 140/94, 141/94, 141/95), Decisions of the African Commission on Human and Peoples' Rights, November 1999; American Convention on Human Rights, Arts. 13 and 14; American Declaration on the Rights and Duties of Man, Arts. IV and XXVIII; as interpreted in Inter-American Court of Human Rights, *Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985; Arab Charter on Human Rights, Arts. 4, 24, 32.

provides a detailed right to freedom of expression in its Article 10, which has been the subject of a good deal of litigation and comment.

As the dominant international legal framework affecting the media, freedom of expression has proved adaptable to a variety of contexts, from media organization through to competition and in the emerging area of Internet regulation. It is conceptually linked with media freedoms, although it has also developed to regulate the limits to free speech. While universal norms exist and a jurisprudence evolves, much of the significant transnational activity concerning freedom of expression is occurring in regional fora, such as Europe, the Americas, or Africa. This has fostered a degree of convergence of principles, but also some tensions between national and regional practices, on the one hand, and international regulatory standards, on the other. Conventional analysis pitches the US First Amendment tradition against international and European approaches, which are seen as more accepting of limits to free speech in the context of abuse of rights and concerns over pluralism and access.[11]

However, the broad characterization of the media within freedom-of-expression jurisprudence is as a social good which is to be protected. This comes back to the connection emphasized in the jurisprudence between free expression and democratic government. The right to freedom of expression is said to constitute 'one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man'.[12] Here the media is seen as performing a watchdog role in democracy.[13] Echoing other international courts and bodies, the Inter-American Court has insisted that freedom of expression 'constitutes the primary and basic element of public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard'.[14]

In summary, freedom of expression is a significant and dynamic field of international regulation of the media. Human rights approaches to media regulation can be seen to emphasize the media's democratic function. The media is valued for its role in publicity and deliberation. Also implicit are limits to freedom of expression in areas such as censorship, libel, contempt, national security, and privacy. Overall, however, the emphasis is on the regulation of media practices and their protected role in democracy. International law and regulation in this mode aims to shelter the media from state interference, so that it can perform its role as public watchdog. Thus the media are left largely to self-regulate, with laws crafted to facilitate rather than constrain media activity. This reflects the theoretical foundations of freedom of expression in liberal political philosophy, with its emphasis on safeguarding liberties. But is this the only approach that informs international legal initiatives within human rights?

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11 See further F. Schauer, 'The Exceptional First Amendment', in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (2005), 29.

12 *Handyside v. United Kingdom*, (1976) 1 EHRR 737, para. 48.

13 *Goodwin v. United Kingdom* (16/1994/463/544), Judgment of the European Court of Human Rights, 22 February 1996, para. 39.

14 Inter-American Court of Human Rights, *supra* note 10, para. 69.

1.2. Bad media

My focus so far has been on the largely optimistic account of the media that accompanies the protection of freedom of expression. This area of international human rights law, with its emphasis on democracy and the public sphere, also, of course, comes with a sense of the proper limits of free expression and media activity. Here we encounter the darker side of the media and its relationship to violence. The thrust of international legal efforts in this context is not so much to protect the media as to constrain it, and the vision which emerges is that of bad media as typified in the concept of propaganda. Once again international human rights law is involved (along with international criminal law and international humanitarian law). Concepts of incitement and 'hate speech' reflect an attempt to link expression with its (at times violent and, in the extreme case, genocidal) consequences. Conceptually, then, incitement falls under the broader category of abuse of rights, which aims to curb invocations of rights that have antisocial or illegal consequences in order to protect the community's interests.[15]

The international human rights framework takes account of both incitement and the broader notion of abuse of rights.[16] Article 20 of the ICCPR introduces prohibitions of propaganda for war,[17] 'hate speech', and incitement, and follows closely Article 19, which deals with free expression and recognizes the possibility of lawfully constituted restraints on free expression.[18] 'Hate speech' is prohibited in terms of 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[19]

Well before the legal developments just discussed, international legal scholars and tribunals had begun to address the question how international law might play a part in restraining the negative potentials of the media.[20] In Nuremberg, Julius Streicher was tried for his activities as publisher and editor of *Der Stürmer*, an anti-Semitic weekly newspaper which operated from 1923 to 1945.[21] Streicher was the first media professional to be convicted of international crimes arising out of his media activities. The Nuremberg Tribunal found him guilty of crimes against humanity. In particular, he was held to have perpetrated crimes of incitement and

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15 See, e.g., ECHR, Art. 17. This notion of abuse of rights is a civil law concept which has been adapted to the international law context and is sometimes seen as a general principle of international law or as part of customary international law. See further H. Lauterpacht, *The Function of Law in the International Community* (1933), ch. 14, esp. at 298, where he concludes that 'the prohibition of abuse of rights is a general principle of law'. See also M. Byers, 'Abuse of Rights: An Old Principle, a New Age', (2002) 47 *McGill Law Journal* 389, esp. at 397.

16 See, e.g., ICCPR, Art. 5, which operates as an abuse of rights provision in relation to other rights protected, such as freedom of expression in Art. 19.

17 For a full-length study of the prohibition of propaganda for war, see Kearney, *supra* note 4.

18 Art. 20 of the ICCPR is not, as such, replicated in the regional human rights frameworks.

19 ICCPR, Art. 20(2).

20 See, e.g., the discussion of propaganda in E. Castrén, *The Present Law of War and Neutrality* (1954), 208–10. See also J. Stone, *Legal Controls of International Conduct: A Treatise on the Dynamics of Disputes and War-Law* (1954), ch. 11, Discourse 15, 318–23. See further for a limited view of state responsibility for offending media broadcasts, H. Lauterpacht, 'Revolutionary Propaganda by Governments', in H. Lauterpacht, *International Law*, collected papers arranged and ed. E. Lauterpacht, Vol. 3, *The Law of Peace, Parts II–VI* (1977), ch. 8, esp. 293–5.

21 *Streicher Judgment*, Judgment of the International Military Tribunal for the Trial of German Major War Criminals, available at www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm.

persecution,[22] linked to his role as author of published articles in which 'the poison Streicher injected into the minds of thousands of Germans . . . caused them to follow the National Socialists [*sic*] policy of Jewish persecution and extermination'.[23] The judgment refers to evidence before it of a wide range of articles where Streicher specifically called for the extermination of Jews. The Tribunal concluded that 'Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity'.[24]

The case of Julius Streicher prefigured recent jurisprudence concerning the media in the context of international criminal law.[25] The International Criminal Tribunal for Rwanda (ICTR), in particular, has considered the role of the media as a propagandist for and perpetrator of genocide, and this has resulted in the conviction of a Belgian journalist[26] and most prominently in the *Media Genocide* case,[27] in which, for the first time since the Nuremberg Tribunal's conviction of Julius Streicher, three media executives, two involved with radio and one with a newspaper, were found guilty of a wide range of international crimes. For the ICTR Trial Chamber, the media in the *Media Genocide* case were an ideological tool for Hutu extremism – a limit case for the media as attack dog. The radio station and magazine were 'the bullets in the gun', the actual weaponry of genocide,[28] and those in charge of them bore both individual and command 'responsibilities inherent in ownership and institutional control over the media'.[29]

Thus a second, opposing vision emerges of the media, not as democratic watchdog but as a threat to peace and security. These visions of good and bad media operate in tension, but both are partly revealed as international legal constructions and to a degree are dependent on one another. In recent times a third vision has emerged, that of the new media. Has it brought with it a new conception of the media and regulation?

1.3. New media

The Internet has transformed the mass media and our practices of communicating. The arrival of the Internet and the development of new media technologies have also intensified debate over international media regulation. Some have argued for

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22 Charter of the International Military Tribunal, Nuremberg, Art. 6.
23 *Streicher Judgment, supra* note 21.
24 Ibid. Note the reference in Art. 6 of the Charter of the International Military Tribunal to 'persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal' as forming a part of the definition of crimes against humanity.
25 Odora, *supra* note 4.
26 *Prosecutor v. Ruggiu*, Case No. ICTR 97–32-I, Trial Chamber I, Judgement and Sentence, 1 June 2000.
27 *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (hereafter *Nahimana*), Case No. ICTR-99-52-T, Trial Chamber I, Judgement and Sentence, 3 December 2003. For more extensive background to the media's role in the Rwandan genocide than is possible here, see A. Thompson (ed.), *The Media and the Rwandan Genocide* (2007).
28 *Nahimana, supra* note 27, para. 953.
29 Ibid., at para 979. This case has subsequently been appealed, but the characterizations of the media as attack dog remain a significant feature in the jurisprudence.

greater regulation, given the globalizing character and transnational impact of the Internet. Others have opposed such changes and have continued to uphold a private-law model of media regulation and self-regulation. In fact, already there are many aspects of the Internet which are regulated, in both traditional and less traditional ways, although, as John Naughton observes, 'it has no central authority' and in many ways the Internet presents 'an example of a self-organising system . . . where there is order without control'.[30] To begin with there is a preference for self-regulation in the form of the technical standards which have emerged within the Internet community. The Internet evolved in collaborations between the government, the military, and academic institutions. It is now developing in a largely commercialized context, as are associated new media. This has left a legacy of both public and private regulatory paradigms.

Areas of regulatory activity include the role of the US non-profit Internet Corporation for Assigned Names and Numbers (ICANN) in determining domain names, Internet addresses, and protocols,[31] the creation of World Wide Web technical standards, the development of codes of conduct for service providers, and, increasingly, norms emerging from international initiatives such as the World Summit on the Information Society (WSIS) and from organizations such as the International Telecommunication Union (ITU), the Internet Engineering Task Force, the Internet Society and UNESCO.[32] These developments have been accompanied by a renewal of debates over 'information rights'[33] and the 'right to communicate', after earlier similar efforts through UNESCO in the 1970s and 1980s.[34] The World Summit met initially in Geneva in 2003 and then again in Tunis in 2005, and generated a range of soft-law instruments concerning development, communication, and, most controversially, governance. The principles developed during the WSIS outline the vision and concept of an 'information society'.[35]

The WSIS and the concept of an 'information society' are also directly linked to the media, and express mention of the media's role in the gathering and provision of information is made in the Geneva Declaration of Principles.[36] Here there is an attempt to build on traditional principles of international media regulation, such

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30   J. Naughton, *A Brief History of the Future: The Origins of the Internet* (2000), 43.

31   For further information on the activities of ICANN see their website, available at www.icann.org/.

32   See the work of the Internet Society (ISOC), which is an umbrella organization for a number of bodies involved in 'global co-ordination and co-operation on the Internet, promoting and maintaining a broad spectrum of activities focused on the Internet's development, availability, and associated technologies'. See further www.isoc.org/isoc/. See also International Telecommunication Union (ITU) Resolution 101, 'Internet Protocol (IP)-based networks', Plenipotentiary Conference of the International Telecommunication Union (1998) aiming to achieve co-ordination between the Telecommunication Standardization Sector (ITU-T), the Internet Engineering Task Force (IETF), and ISOC; see further the Internet Governance Project, available at www.Internetgovernance.org/index.html. See further W. H. Dutton and M. Peltu, 'The Emerging Internet Governance Mosaic: Connecting the Pieces', OII Forum Discussion Paper No. 5 (2005), available at www.oii.ox.ac.uk/resources/publications/FD5.pdf; W. H. Dutton, J. Palfrey, and M. Peltu, 'Deciphering the Codes of Internet Governance: Understanding the Hard Issues at Stake', OII Forum Discussion Paper No. 8 (2007), available at www.oii.ox.ac.uk/research/publications/FD8.pdf.

33   See, e.g., African Charter on Human and Peoples' Rights (Banjul Charter), Art. 9.

34   Weeramantry, *supra* note 4, at 139–41.

35   First Phase of the WSIS (10–12 December 2003, Geneva), Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/0004, principle 1.

36   Geneva Declaration of Principles, Principle 55.

as free expression, and to apply them in a new media context. The media is given a central role in an 'information society', and this is said to come with ethical and professional responsibilities regarding the treatment of information. The '[d]iversity of media ownership' and reduction of 'international imbalances affecting the media, particularly as regards infrastructure, technical resources and the development of human skills', are seen as further regulatory goals for an 'information society'.[37]

Global Internet regulation is thus linked both to the right to freedom of speech and to the problem of the 'digital divide'. The vision of new media can be seen as blurring both content and infrastructure distinctions common to earlier forms of media regulation. However, the development of the new media has triggered the re-emergence of older debates over governance, which again recall, and to some degree remain framed by, law's more traditional images of good and bad media. Indeed, standards of free expression remain an important aspect of regulatory debates, as does the threat of the Internet in terms of incitement and propaganda. Some of this carries hopes of a revival of the democratic public sphere by the Internet and new forms of interaction, communication, and community formation. In section 2 I shall call these hopes into question by reference to the work of Jodi Dean.

For the moment it is important to note that as the new media vision emerges it is again dominated by the tension between good and bad media, and between public and private templates for regulation. Security concerns can be seen, in some sense, as limits both to the vision of a global 'information society' and to the ideal of Internet self-regulation. The concerns relate to pornography and indecency, terrorism, 'hate speech' and incitement, privacy and data protection, cybercrime, gambling, and child protection. One example of the re-emergence of bad media in the guise of new media comes with terrorist organizations communicating their agendas through the Internet to their own audiences and to the West. Indeed such transnational media forms provide a powerful public platform from which to engage global publics and governments.

Thus the new media, as typified by the Internet, bring new regulatory concerns and add depth to calls for greater international media regulation. These new media concerns, while freshly situated, are also, however, largely dependent on visions of good and bad media. Such debates remain alive, and recall earlier controversies over communication and information rights.[38] It remains to be seen how international law will continue to respond to the emergence of the Internet and whether the new media regulatory framework will strengthen.

What is perhaps clearer is the process in reverse, the impact of the media on international law. Here I focus on the field of human rights. Another area which could be chosen, but which is largely beyond the scope of this article for reasons of

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37 Ibid.
38 See the following regarding debates over the 'right to communicate' and the efforts within UNESCO to develop a New World Information and Communications Order. UNESCO Resolution 4.121, Right to Communicate, 1974; UNESCO Resolution 3.2, Right to Communicate, 1983; MacBride Commission, 'Many Voices, One World: Communication and Society. Today and Tomorrow', 1980, all available at www.righttocommunicate.org; UNESCO Resolution 4.19 related to A New World Information and Communication Order, XXI session of the General Conference, Belgrade, 1980.

space, is the relationship between the media, war, and international humanitarian law.[39] While the transformation of the media landscape and the development of new media and the Internet has drawn our attention to the significance of the media's role in shaping international affairs, governments have long understood the power of the media and its role in foreign policy formation and on the international plane. This is especially the case in times of war, as evidenced in a variety of twentieth-century conflicts.[40] Suitable case studies focusing on the law–media–violence axis might include the bombing of Guernica and international humanitarian law, media representations of international law by reference to the two world wars and the subsequent development of the United Nations system, later Cold War conflicts such as Vietnam, or international law's image-making during the 'war on terror'. I now turn to examine briefly this mediatization, not of war and humanitarian law, but in the field of human rights – its possibilities and dangers.

2. THE MEDIATIZATION OF HUMAN RIGHTS

2.1. Mediatization

We are saturated with images and information, from a dizzying variety of sources and technologies, such is the nature of a heavily mediatized world. 'Mediatization' is a term which encapsulates the dynamic involved in the shaping of international legal forms, discourses, and processes. Another term which is often used interchangeably is 'mediation'.[41] Increasingly, what the media does is to translate international law for global audiences, and this is changing the character of the discipline.

Indeed, the concepts 'mediatization' and 'mediation' draw attention to the communicative character of both media and international law. Sociologists such as John Thompson have argued that it is important to focus on the media as communication, rather than merely as form or content.[42] Thompson characterizes communication as 'a distinctive kind of social activity which involves the production, transmission and reception of symbolic forms, and which involves the implementation of resources of various kinds'.[43] David Garland writes of the impact of television and media consolidation: '[t]he emergence of a single nation-wide information system

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39. See further Kennedy, *Dark Sides of Virtue*, *supra* note 4; Kennedy, *Of War and Law*, *supra* note 4; Werner, *supra* note 4; A. Balguy-Gallois, *supra* note 4, at 37; R. W. Gutman, 'Spotlight on Violations of International Humanitarian Law: The Role of the Media', (1998) 80 (325) *International Review of the Red Cross* 619; Kearney, *supra* note 4; Mégret and Pinto, *supra* note 4; Orford, *supra* note 4; D. C. Hallin, *The 'Uncensored War': The Media and Vietnam* (1989); Der Derian, *supra* note 1; Mirzoeff, *supra* note 1. The ICRC website is also a useful resource regarding the media and international humanitarian law, available at www.icrc.org/Web/eng/siteeng0.nsf/html/section_ihl_media_and_ihl!Open.

40. For an excellent history of war correspondents and their role in the coverage of conflict see P. Knightley, *The First Casualty: The War Correspondent as Hero and Myth-Maker from the Crimea to Iraq* (2004). For an analysis of the significance of the media in the Vietnam War see Hallin, *supra* note 39. For a more recent analysis of the interaction of global visual culture and the second Iraq war see Mirzoeff, *supra* note 1.

41. See further T. de Zengotita, *Mediated: How the Media Shapes Your World and the Way You Live in It* (2005). He writes that mediation 'refers to the arts and artefacts that represent, that communicate – but also, and especially, to their effects on the way we experience the world, and ourselves in it' (at 8). This is also a term used in Mégret and Pinto, *supra* note 4.

42. Thompson, *supra* note 1.

43. Ibid., at 18.

to which everyone has constant access had major consequences for group identities and relations.'[44] Global mediatization may in turn have its own effects on transnational identities and international relations. Television's audio-visual aspect has also meant that shared experience has come to depend less on 'a shared locale and direct experience' and more on the media's 'decisions about what and how to broadcast'.[45] It remains to be investigated whether similar effects are experienced through global media interactions and representations of international law and relations. New (often commercialized) forms of media with global reach are particularly of interest in relation to international law and human rights, although the significance of domestic media markets should not be underestimated.

These forms of traditional and new media impact on the system of international law, especially in the field of human rights, characterized as it is by media advocacy, techniques of naming and shaming, the significance of civil society, and the presentation of evidence and victim narratives. In this second section I begin to point to this systemic significance of the media, before considering one less desirable consequence of its influence which is highlighted by the theoretical work of Jodi Dean.

International lawyers are coming to recognize the role and significance of global media, especially in the sphere of human rights.[46] The mediatization of human rights has been closely linked to the increasing role and changing form of international institutions and non-governmental organizations (NGOs), and their relationships with and reliance on the media.[47] Indeed, the mediatization of law can be seen as an aspect of the socialization involved in the spread of human rights discourses, as noted in constructivist and behaviouralist literature. For example, Okafor's study of the African human rights system makes reference to the role played not only by NGOs, lawyers, and a range of other activists, but also by 'activist journalists' as civil society actors.[48] This role for the media as a civil society actor within the field of human rights is relatively familiar, but not often explored in depth in international legal scholarship.

The concept of the transnational advocacy network (TAN) has been developed to show how such networks operate as value-driven social movements with an emphasis on shared discourse and the exchange of information to open up access to the structures of the international system or else to bypass such structures.[49] As Abbott writes of TANs oriented to the pursuit of human rights and global justice, '[t]hey adopt conscious political strategies, selecting and "framing" issues for maximum political impact, publicizing abuses in dramatic ways, exposing discrepancies

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44   D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), 86.
45   Ibid.
46   Hakimi, *supra* note 4; Marks and Clapham, *supra* note 4; B. Simma and A. L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', in S. R. Ratner and A.-M. Slaughter (eds.), *The Methods of International Law* (2005), 23, at 29; J. Crawford, 'Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty', in Crawford, *International Law as an Open System* (2002), 95, at 116.
47   J. F. Metzl, 'Information Technology and Human Rights', (1996) 18 (4) *Human Rights Quarterly* 705; International Council on Human Rights Policy, 'Media: Reporting Human Rights Issues' (2002).
48   O. C. Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (2007), 134.
49   M. E. Keck and K. Sikkink, 'Activists beyond Borders', extracted in O. A. Hathaway and H. H. Koh, *Foundations of International Law and Politics* (2005), 217.

between government rhetoric and practice, and seeking material leverage over target countries'.[50] This approach highlights the activities of civil society and places great importance on media strategies in their work. Indeed, as noted above, there is recognition of the media as an actor in its own right within these TANs, and of the role of communication within such networks.[51] As Pearson argues, the Internet and new media technologies have been crucial to the growth of international civil society, and are 'clearly important factors in facilitating the increased role of NGOs in information dissemination'.[52]

There is also widespread recognition of the significance of the media as regards the enforcement of international law in a variety of human rights contexts. The mediated operation of transnational activism frequently occurs in the context of issue-specific campaigns, contemporary examples being the efforts to ban landmines, restore democracy to Burma, end genocide in Darfur, provide inexpensive HIV medication, relieve debt in the developing world, stop trafficking of women and children, deal with food shortages, and combat climate change. Yet even where the torch is shone there will often be an accompanying silence as regards other equally pressing human rights violations and issues. Here the traditional criticisms – of the narrow and ideological focus of much media and its lack of diversity and short attention span – have particular currency for the international legal system.[53]

Yet despite these dangers the media can also be used as a leveraging tool by activists in their dealings with institutional human rights frameworks. Andrew Clapham writes of the various uses by NGOs, Amnesty International in particular, of the media in their interactions with UN human rights treaty bodies, and also suggests that, when the press are present during hearings, there is greater pressure on members to ask tough questions.[54] Of course, the presence of media operates in tension with the use of confidentiality in human rights complaints procedures. The newly revised complaints procedure of the Human Rights Council retains this controversial aspect of the old 1503 procedure.[55] One further aspect which can militate against the strategic use of media in such fora is the concern for victims and their right to privacy and need for confidentiality, especially if exposure may involve dangers of further persecution. But here, too, the relationship between secrecy and transparency is complex and familiar to the professional culture of news media where exposure is often only possible through the protection of confidential sources.[56]

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50   F. M. Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts', in Ratner and Slaughter, *supra* note 46, at 146–7.

51   Z. Pearson, 'Non-governmental Organizations and International Law: Mapping New Mechanisms for Governance', (2004) 23 *Australian Yearbook of International Law* 73, at 95–7.

52   Ibid., at 97.

53   See further the classic critique of the ideological character of mass media and its technique of 'framing' issues in Herman and Chomsky, *supra* note 1.

54   A. Clapham, 'UN Human Rights Reporting Procedures: An NGO Perspective', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), 175.

55   ECOSOC Resolution 1503 (XLVIII) of 27 May 1970 as revised by Resolution 2000/3 of 19 June 2000; this procedure has been revised, though confidentiality retained, in the Human Rights Council, UN HRC Resolution 5/1 on institution building of 18 June 2007.

56   The issue of the protection of anonymous sources is far from resolved in domestic law; see D. Joyce, 'The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function', (2007) 17 (3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 555. This

Despite such concerns the media can play a role in human rights in terms of investigation, advocacy, publicity, and enforcement. At a deeper level, these roles link back to the media's position in the provision of information. Indeed, some have argued that information and awareness will be significant in dealing with the serious threats posed in the coming century, and that the media can play an important role, in its publicity and monitoring functions, in helping to develop sound public policy and to avert financial, environmental, and humanitarian disasters.[57] This recognition has also spread to institutional contexts. The Secretary-General's High-Level Panel considering reform of the UN system found in their report that the international system required better information and analysis, especially to effect early warning and prevention of conflict and crises.[58] Despite such hopes it must also be conceded that there are clear and repeated examples of the failure of the media to cover adequately human rights issues or to predict crises; indeed, the mainstream Western media's failures have led it to become something of a bête noire in this regard.[59] But here I think it is important to recognize that while the media will not provide easy solutions, it does have an important and under-appreciated role to play. Further, criticism of the media's failures is often too easy when international law's own failures remain more obscured.[60]

As examined above, the media is relied on in a variety of human rights contexts. What is especially interesting here is the way in which the roles of the media and NGOs in the provision of information can be seen as increasingly blurred, with NGOs taking on the role of specialist media.[61] This follows the mediatization of international institutions such as courts, tribunals, and intergovernmental organizations (IGOs) which has accompanied the growth of outreach and the increasing institutional significance of public relations strategies.[62] Indeed, the systemic effects of mediatization in the field of human rights are well illustrated by reference to the development of the transnational NGO as a mediatized actor.[63]

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issue has also arisen in the context of the International Criminal Tribunal for the former Yugoslavia (ICTY), where journalists have differed in their approach to giving evidence, some refusing to do so on the basis of protecting their relationship with their sources. See *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No IT-99-36-AR3.9, Decision on Interlocutory Appeal, 11 December 2002; S. Powles, 'To Testify or Not to Testify – Privilege from Testimony at the Ad Hoc Tribunals: The *Randal* Decision', (2003) 16 (3) LJIL 511; see also A. Heeger, 'Securing a Journalist's Testimonial Privilege in the International Criminal Court', (2005) 6 *San Diego International Law Journal* 209.

57   Amartya Sen, *Development as Freedom* (1999), 181; J. Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life', in M. Gibney (ed.), *Globalizing Rights: The Oxford Amnesty Lectures 1999* (2003), 115, esp. at 135–6.

58   'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, UN General Assembly, UN Doc. A/59/565, 2 December 2004, paras. 98–99.

59   As the editor of the influential UK *Guardian* newspaper writes, 'Some of the most critical developments concerning economics, security, the environment, and social policy are immensely complex and worthy of careful explanation. But they do not necessarily sell newspapers.' A. Rusbridger, 'A Chill on "The Guardian"', (2009) 56 (1) *New York Review of Books*.

60   See further Orford, *supra* note 4.

61   P. Alston, 'Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective', in Alston and Crawford, *supra* note 54, 501 at 513–14; see also Pearson, *supra* note 51, at 87.

62   I am unable to explore these wider systemic changes in this article. See further International Council on Human Rights Policy, *supra* note 47.

63   M. S. McDougal, H. D. Lasswell, and L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980), 255. David Kennedy has powerfully written of the CNN effect and

The NGO obviously takes a wide variety of forms, but if we consider the leading human rights NGOs, such as Human Rights Watch, Human Rights First, Amnesty International, and the Open Society Initiative, they all operate as highly sophisticated communicators. Their websites are relied on as respected sources of information, and many take the form of news sites with constant updates, in-depth reports, multimedia flash sites, and a variety of documentary new-media formats.[64] Most human rights NGOs of any significance and size employ media officers, and communicate increasingly through both specialized lobbying and wider outreach activities designed to engage the sympathies of the public and leverage decision-makers through media pressure.

The development of the human rights investigator parallels that of the investigative foreign correspondent or conflict journalist, and, indeed, media and NGO personnel frequently collaborate in the field. The rise of the publicity-savvy humanitarian NGO Médecins sans Frontières is illustrative of the ways in which NGOs have developed new techniques of advocacy, often relying on victim narratives and powerful visual imagery.[65] The activist and the journalist have become increasingly indistinguishable in their style, persona, and activity. Given the targeting of media personnel in situations of armed conflict, it is in fact often this new breed of human rights investigator and advocate who is able to report on and call attention to human rights violations. A quick visit to the Human Rights Watch website is enough to bring out the resemblance to big news media websites.[66] In turn, of course, the latter are not left unaffected: these changes within civil society have been one factor behind the increasing interest within the media itself in issues of human rights, international law, and justice. An example of the media's turn to international law and its increasing awareness of the potential of its own role in international legal processes can be found in the creation by journalists Roy Gutman and David Rieff of the Crimes of War book project, now also a website, to educate the media and photographers about international law, war crimes, and human rights, such that their coverage might improve and their role in international justice be better effected.[67]

NGOs in their media advocacy can thus be seen to be taking on something of the function of the media and even its form. More than that, NGOs today appeal not only to decision-makers, but directly to the public, in an effort to shape public opinion. At issue is the watchdog role of the press, carried over into other institutional contexts.[68] Of course, this is not a one-way process, and governments, corporate interests, and donors can also be seen to influence (and at times pressure) both NGOs and the

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warfare, of the perils of representation by human rights professionals, of the construction of the 'international community' by reference to the 'first world media audience', and of the bureaucratization of human rights: Kennedy, *Dark Sides of Virtue*, *supra* note 4, at 22–3, 26–30, 276–7, 280, 295, 311.

64   Pearson, *supra* note 51, at 97–8.
65   See further D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002); S. Cohen, *States of Denial: Knowing about Atrocities and Suffering* (2001).
66   See further www.hrw.org.
67   See the Crimes of War Project at www.crimesofwar.org/. See also Gutman, *supra* note 39.
68   See, e.g., the description of environmental organizations as 'watchdogs', in P. Sands, *Principles of International Environmental Law* (2003), 199–200.

media. There are also criticisms of the ways in which NGOs can simplify and distort information to fit media-friendly categories and to suit their particular agendas.[69]

Despite such criticisms there are increasing hopes in the field of human rights that new media technologies may strengthen the possibilities for witnessing and connection. Hopes for new media witnessing have been translated into institutional settings. Among the activities involved here are citizen-driven formats that appear to have considerable potential in supplementing existing forms of human rights monitoring and publicity. The NGO Witness, for example, has developed a human rights Internet portal, somewhat akin to the 'YouTube' concept, to monitor and record violations of human rights.[70] In addition, citizen-generated media is on the rise and further enabled by social networking applications such as Facebook and Twitter. This has seen events of international significance reported directly by citizens, by-passing more traditional forms of media, an example being the use of Twitter and digital technology to report developments during the Mumbai terrorist attacks of 2008.[71] A further example includes the role of social networking and online media in providing a focus for democracy activists during the 2009 Iranian elections.[72] However, in Iran the significance of such social media has led to attempts to control and block them by the government and to fears that activists might be able to be tracked through their online activity.

China provides another example where the government has attempted to control the Internet and its activist potential. It has done so with a mixed response from multinational media companies, with Google recently changing its policy of deference to government censorship to one more concerned with free expression online.[73] Nevertheless, the success of the Chinese government in maintaining its grip on cyberspace has led commentators such as Tim Wu and Jack Goldsmith to conclude that the arrival of the Internet has not in fact heralded a 'borderless world', but should be seen instead as a further example of the success of state sovereignty as a mechanism for media and social control.[74] At the same time, however, the views of Wu and Goldsmith are challenged by increasing numbers of web users in China. Among them the Chinese blogger Hong Bo observes that the behaviour of 'netizens' still confounds the government's expectations. 'They ban websites and delete posts, but they haven't got everything under control.'[75]

Despite the ability of governments to control and regulate aspects of the Internet there remains much optimism about the potential for new media, and especially

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69   Pearson, *supra* note 51, at 98–9.

70   Witness, The Hub, available at http://hub.witness.org/.

71   B. Stelter and N. Cohen, 'Citizen Journalists Provided Glimpses of Mumbai Attacks', *New York Times*, 30 November 2008.

72   L. Grossman, 'Iran Protests: Twitter, the Medium of the Movement', *Time*, 17 June 2009, available at www.time.com/time/world/article/0,8599,1905125,00.html; D. West, 'The Two Faces of Twitter: Revolution in a Digital Age', Huffington Post, 22 June 2009, available at www.huffingtonpost.com/darrell-west/the-two-faces-of-twitter_b_218734.html. See further the Iran Election Twitter Feeds at the Huffington Post website: www.huffingtonpost.com/2009/06/14/iran-election-twitter-fee_n_215330.html.

73   Google blog, 'A New Approach to China', 12 January 2010, available at http://googleblog.blogspot.com/2010/01/new-approach-to-china.html.

74   J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (2006).

75   J. Watts, 'Behind the Great Firewall', *Guardian*, 9 February 2008, 17.

the Internet, to revive the public sphere and enable democratic discourse.[76] Could it also do the same for international law? Indeed, this promise of change, transparency, information, and interconnection infuses both the marketing of media and international law. In these narratives the 'new' is associated with technological progress, increased participation of citizens and further creative means of interaction, knowledge creation, and sharing. The promise of participation is powerful and carries implications for international community formation. Yet in both domains a big question mark remains over the claim for an international public sphere enabled by globalization and the communications revolution.

2.2. Commodification – Jodi Dean's critique

In a variety of ways the human rights system has relied on the mediatization of violations in its methodology and functioning. Its methods have subsequently proved to be influential in other spheres, such as international environmental or criminal law, and provide an important example of the role for the media in international law. Conor Gearty has spoken of human rights as being a 'visibility project', and communication and revealing are central to the field.[77] Publicity is seen as one media technique which can be used where legal frameworks or political will cannot be guaranteed. However, again this image of good media is countered by that of bad media. One reason for this is that the media also brings dangers in terms of distortion and commodification. One theorist who has valuably drawn attention to this aspect of mediatization is Jodi Dean.

In Marxian terms the concept of commodification encapsulates the process whereby social relations are reduced to a relation of capitalist exchange. As Susan Marks argues, this process of commodification also connects with 'the way in which, in capitalist society, the market comes to dominate life'.[78] Here it is important to see commodification not just in terms of the labour process, as originally analysed by Marx, but also in terms of the cultural economy and in the context of the rise of advertising and public relations.[79] Dean writes of the transformation of the democratic and public potential of the Internet and new media into a commercialized space driven by market, rather than social or public, values. She points to the ways in which technology has been used to turn ideas and political concepts into commodities, arguing that 'technocultural ideology obscures the ways that Net freedom

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76   See further Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006); S. Coleman, 'New Mediation and Direct Representation: Reconceptualizing Representation in the Digital Age', (2005) 7 (2) *New Media and Society* 177; D. Gillmor, *We the Media: Grassroots Journalism by the People for the People* (2004); W. A. Carroll and R. A. Hackett, 'Democratic Media Activism through the Lens of Social Movement Theory', (2006) 28 (1) *Media, Culture and Society* 83.

77   C. Gearty, Remarks, CRASSH seminar on Human Rights and Evidence, St John's College, Cambridge, 27 April 2007. See further R. Brett, 'The Role and Limits of Human Rights NGOs at the United Nations', in D. Beetham (ed.), *Politics and Human Rights* (1995), 96; C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000), at 29.

78   See further S. Marks, 'Introduction', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 6; C. Miéville, 'The Commodity-Form Theory of International Law: An Introduction', (2004) 17 LJIL 271; C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2006).

79   K. Marx and F. Engels, *The Communist Manifesto*, with introduction by G. Stedman Jones (2002); K. Marx, *Capital, Volume 1*, with introduction by E. Mandel (1976).

is the freedom of the market, the freedom of corporations to extend market forces throughout the domain of the social'.[80] She writes of the dangers of commodification that come with increasing reliance on communications technologies and publicity:

> Rather than actively organized in parties and unions, politics has become a domain of financially mediated and professionalized practices centered on advertising, public relations, and the means of mass communication. Indeed with the commodification of communication, more and more domains of life seem to have been reformatted in terms of market and spectacle . . . In effect, changing the system – organizing against and challenging communicative capitalism – seems to require strengthening the system: how else to get out the message than to raise the money, buy the television time, register the domain names, build the websites, and craft the accessible, user-friendly, spectacular message?[81]

Dean's critique is a useful limit for contemporary enthusiasms regarding the rise of the Internet, the blogosphere, social networking and so forth, and their associated impact on the public sphere. Her warning is especially acute for the field of human rights, which has rapidly professionalized and turned to increasingly sophisticated communication and marketing strategies as discussed in subsection 2.1. For, as Dean cautions, 'mediatization accompanies a reconfiguration of the political'.[82] This can also be used to call into question the progress narrative associated with increasing mediatization of international law and visions of what I have termed the good media and its regulation. Looking specifically at 'technoculture' and the rise of the Internet, Dean questions whether these developments result in the formation of a new public or publics. Indeed, she argues that, in fact, 'the expansion and intensification of communication and entertainment networks yield not democracy but something else entirely – communicative capitalism'.[83] Thus she highlights the fact that 'the public' is an ideological construct which acts to decontextualize and depoliticize.

The emphasis on communication and publicity in contemporary culture obscures the effects and possibilities of action. As Dean herself argues, '[t]he ideal of a public displaces antagonism from politics.'[84] She also emphasizes the links between publicity and secrecy. A simple illustration here (as raised above) is that of the 'watchdog' journalist's reliance on anonymous sources, another the need for confidentiality in human rights processes for purposes of either victim protection or national interests. Information by itself will not necessarily lead to greater public engagement, access, or satisfaction with politics or international legal processes. Indeed, as many have argued, we are in fact often hindered by information and its volume, with the information era increasingly reliant on search mechanisms such as Google and other aggregators to navigate the information swamp.[85] This itself

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80   J. Dean, *Publicity's Secret: How Technoculture Capitalizes on Democracy* (2002), 110.
81   Ibid., at 3–4.
82   Ibid., at 45.
83   Ibid., at 3. See further A. Mattelart, *Networking the World, 1794–2000* (2000); J. Anderson, J. Dean, and G. Lovink (eds.), *Reformatting Politics: Information Technology and Global Civil Society* (2006); J. Dean, *Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics* (2009).
84   Dean, *supra* note 80, at 9.
85   Ibid., at 47.

raises the possibility that Google's algorithm may come to have undue regulatory and editorial functions while itself remaining largely self-regulated.

Dean goes on to question whether the early promise of the Internet – that it would lead to some kind of new, post-national, public sphere – has eventuated. Rather, she analyses the Internet as a space of fragmentation and market capitalism. For Dean real questions remain as to whether the computer has been an emancipatory tool.[86] Such anxieties regarding fragmentation and the dominance of commerce over other 'public' interests have productive echoes in contemporary debates over international law and its rapid post-war growth. One can similarly ask whether such developments have led to greater emancipation and participation, or to fragmentation and exploitation.[87] The Internet and the rise of new media may not, then, provide a quick fix for democratic debates and developments in the global era.

However, Dean still finds the web 'a source of democratic potential' – not in the sense that it provides a unifying ideal of a public sphere – but in its activist potential as seen in the increasing role of networked communications and protests in human rights activism.[88] Recent examples include the use of media and new media in demonstrations against the World Trade Organization (WTO), in various forms of peace activism, and by human rights witnesses trying to subvert governmental control of media, such as in the Burmese monks' protests, where new media coverage operated in spite of official-media control. Dean calls such activists and their formations 'neo-democracy networks'. They thrive on contestation and manage to use new technologies to avoid suppression. Rather than transparency as a goal, such movements are characterized by decisiveness and action.

While I agree with Dean that new media and technologies can empower new forms of human rights activism and neo-democratic movements in general, I am unsure whether we can separate communication (or information flows) and action in the way in which she does. This is a significant weakness in her argument. Nevertheless, Dean's critique is powerful and her project of reimagining democracy without 'the public' is challenging and productive.[89] For present purposes it also forms an important limit to blind optimism concerning the mediatization of international law and human rights. The web and new media do offer possibilities for greater participation and human rights activism, but these possibilities come with the dangers of spectacle and commodification.

The danger of spectacle has loomed large in international criminal law since Nuremberg, and has re-emerged in the era of the international criminal tribunal and the ICC. Televising trials can educate, but equally can distort, as witnessed in the case of Slobodan Milošević and his use of his trial by the International Criminal Tribunal for the former Yugoslavia as a media platform. Further, the mediatization

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86   Ibid., at 76, 89.
87   'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi (2007); S. Marks, 'Exploitation as an International Legal Concept', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 281; A.-C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', (2009) 22 LJIL 1.
88   Dean, *supra* note 80, at 166.
89   Ibid., at 175.

of human rights concerns and activism can also lead to their distortion and simplification, even to their commodification. The demand for publicity and the effects of communicative capitalism can oversimplify complex human rights issues. The processes Dean describes can, in the field of human rights, lead to de-politicization of human rights concepts and even to their co-option by commercial enterprises. An illustration here is the recent advertising campaign for the soft drink Sprite, whose slogan 'Freedom from Thirst' co-opts and commodifies human rights discourse to sell its products. This example is made even more disturbing when one realizes that often, in situations where clean drinking water is scarce or unavailable, Sprite and other commercial soft drinks are ever present, though for a price. The slick aesthetics of contemporary human rights media campaigning and new media activism online also come with associated risks of commodification and distortion of underlying issues and causes. The mediatization of human rights thus offers possibilities and problems. And again we are left with images of good, bad, and new media.[90]

While visions of both good and bad media are significant, ultimately we should resist their polarizing tendencies and treat the media in international law as a potential source of both good and bad. In this regard international lawyers seem to be stuck in a view of the media which is largely outdated in media studies and the social sciences more broadly, seeing the media as either the touchstone for a democratizing public sphere, or conversely as an all-powerful tool for propaganda and control. Attention to the active nature of media audiences goes some distance to calling both extremes into question. And ultimately a political choice about the potential for human agency tempers a complete propaganda model of the media's power as suggested by Herman and Chomsky's influential account of the manufacturing of consent.[91] I have attempted to progress the discourse beyond a good media/bad media paradigm, and to give a sense of the need for both regulation and recognition. Too often the media are simply acclaimed as a solution or decried as the problem; we need a more nuanced analysis that takes into account the more complex realities of particular media in particular contexts. For some it may not be enough to characterize the relationship as complex, but I argue that it is precisely an awareness of this complexity that has been missing from the relatively limited discussion of the media and international law's interactions to date.

3. CONCLUSION

In this article I have attempted to analyse the multifaceted relationship between the media and international law. To do so, I have focused on human rights as a field where the media itself is both an object of protection (and normative symbol) and a mechanism with the potential to shape responses, to assist compliance, to set agendas, and to help to crystallize the formation of public opinion. In section 1

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90   For a different take on these themes and the dichotomous presentation of the Internet, see M. Hand and B. Sandywell, 'E-topia as Cosmopolis or Citadel: On the Democratizing and De-democratizing Logics of the Internet, or, toward a Critique of the New Technological Fetishism', (2002) 19 *Theory Culture Society* 197.

91   Herman and Chomsky, *supra* note 1.

consideration was given to international legal regulation of the media, noting the images which emerge of a good, a bad, and a new media. This illustrated the ways in which international law is already shaping the media. In section 2 attention was focused on the ways in which the media is, by contrast, affecting international law and its various mechanisms – what I have termed the mediatization of international law. Again, human rights as a field is illustrative of significant trends towards the increased use of and engagement with media and processes of publicity. Much hope lies in this direction, itself another variant of the good media narrative, situated in a new media vision of technologically determined 'e-topia'. Here the Internet is seen as a new mechanism for interconnection, the promotion of cosmopolitan citizenship, and the revival of the public sphere. Yet such hopes are again balanced by fears of a more dystopian fragmentation and commodification of the global public sphere. Jodi Dean's theoretical work on the Internet and the threat to democracy from what she terms 'communicative capitalism' is especially useful in this regard. Indeed, the Internet and the new media will not provide a panacea for the failures and inefficiencies of the human rights system. There are costs and dangers involved, not least the dangers of spectacle and commodification. But ultimately I argue that the mediatization of international law, and the field of human rights in particular, heralds fresh possibilities even while reviving familiar anxieties.

It is important to remain critical of talk of a transition to an information-based society and economy, no matter how profound the changes we are witnessing, and to investigate the assumptions underlying the emergent narratives. For a true information society we shall need to have adequate material resources and infrastructure shared in an equitable way across regions and within societies, and at present this is plainly not the case. If the media and international law are to work together to ensure a peaceful and secure environment for the citizens of this world of global communication and interactivity, there needs to be much greater awareness of both the threat and the promise of law and technology, of the complexity of the relationship between the media and international law, and ultimately of our interdependence.

More optimistically, alternative media provide an important site for activism and political communication, and may prove to have a greater 'democratic' impact than market-driven new media entrepreneurial activity. The blogosphere and radical media organizations anticipate the end of media conglomerates through the democracy of free space for independent content, the possibility of new means of networking, and connecting to audiences eager to avoid the syndicated content of media conglomerates. Independent (or 'indy') media and bloggers have captured the popular imagination and offered an example of fresh ways to engage with the media and audiences outside the mainstream. However, it ought to be noted that many bloggers remain in a self-referential world which is still dominated by mainstream media, with journalists involved in many of the most successful political news blogs, and with the increasing commercialization of the blogosphere and systems of social networking online. Further, the 'Google effect' of consolidating new mainstreams through the architecture of search engines and other software may in fact work against arguments for increasing diversity. The Internet is in many ways extremely concentrated as a medium, at least in terms of where people actually go for their news

and information, although from a different perspective the hierarchies of content and expert knowledge have been challenged by the collective intelligence framework of collaborative journalism and sites such as the online Wikipedia, where knowledge is edited but alive and constantly changed by users. The Internet has the ability, then, to create collective and collaborative sources of knowledge, but also to fragment and undermine, to fuel rumour and innuendo, and to be manipulated by minority views.

Whether one views developments such as citizen media and the globalization of media with optimism or pessimism, it is clear that, in the context of its mediatization, the image of international law, and its associated symbolic power, now matters more than ever. Despite the limits and dangers associated with international law and the media, both can offer much, and at their best can help to bridge the divisions and inequities of international life.