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Internet Regulation: Foreign Actors and Local Harms - at the Crossroads of Pornography, Hate Speech, and Freedom of Expression

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Comment

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I. Introduction

The Internet, like the telephone and the printing press, has revolutionized the way people communicate, providing a global audience with instant access to a wealth of political, cultural, and scientific data. Recent figures estimate that there are at least 580 million Internet users. Individuals from around the globe can exchange emails, join chat rooms and post information on electronic bulletin boards. What sets the Internet apart from other mediums of communication is its decentralization and its openness. As a result, individuals can use the Internet to circumvent repressive governmental restrictions on freedom of speech, and thus many governments fear the Internet as a threat to regime stability because it can be used as a tool to organize opposition. Unfortunately, though, there is a much darker and sinister side to the Internet, one full of hate speech and pornography. Neo-Nazis, white supremacists, and terrorists have all used the Internet to spread their form of hate. Sexual deviants have used the Internet to exchange pictures of children being


3 See Kristina M. Reed, From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce, 13 TRANSNAT'L LAW 451, 461 (Fall 2000).

forcibly raped and sodomized.⁵

In the face of this threat to public safety and morals, many nations have enacted legislation to combat hate speech and pornography.⁶ However, given the transnational nature of the Internet, some legal scholars argue that the Internet defies regulation at the national level.⁷ This paper examines the two main obstacles that nations encounter when they try to regulate Internet content at the national level.

The first obstacle is that of extraterritorial jurisdiction.⁸ While a nation certainly has the right to regulate conduct and content within its territory, there is a great deal of uncertainty as to whether a nation can regulate Internet content originating from outside its borders.⁹ This paper explores two theories of extraterritorial jurisdiction, the objective territorial jurisdiction principle and the universal jurisdiction principle, and whether they apply to the Internet.¹⁰ In particular, there will be a great amount of discussion devoted to the objective territorial principle and "targeting-based analysis," which arguably is a refined subset of the objective territorial principle.¹¹

The second obstacle to national regulation of the Internet is posed by the international norms of free expression as espoused by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.¹² In examining these norms, this paper will attempt to ascertain whether there are any limits to national regulations of the Internet, and if so, what those limits are. The problem particular to international norms of free expression is that there is no single definition as to what

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⁶ See infra Part II.
⁷ See infra notes 40–41 and accompanying text.
⁸ This paper only examines whether a nation can legally exercise extraterritorial jurisdiction to proscribe acts originating outside of its borders, and not whether a nation in asserting extraterritorial jurisdiction can actually enforce its judgments.
¹⁰ The objective territorial principle is often also referred to as the "effects" doctrine. See Sanjay S. Mody, National Cyberspace Regulation: Unbundling the Concept of Jurisdiction, 37 STAN. J. INT’L L. 365, 375 (2001).
¹¹ See infra note 114 and accompanying text.
¹² See infra Part IV.
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constitutes pornography or hate speech.\textsuperscript{13} What one nation views as art, another nation views as smut. What one nation views as political discussion, another nation views as a threat to state security. This paper will explore the possibility that at a minimum, there is some universal agreement as to what is acceptable and unacceptable speech. However, before this paper broaches the topics of extraterritorial jurisdiction and the international norms of freedom of expression, it will first provide the reader with a brief history of the Internet and an introduction to how different nations within the past seven years have attempted to regulate Internet content at their respective national levels.\textsuperscript{14}

II. Background

Created by the U.S. Department of Defense in the 1960s, “the Internet is an ever-increasing number of computer networks that communicate via telephone lines.”\textsuperscript{15} Originally designed to facilitate the free exchange of ideas and scientific findings between the government and government-funded researchers,\textsuperscript{16} the Internet has evolved from a product of the Cold War into a truly revolutionary tool of mass communication.\textsuperscript{17} As of the year 2002, there were an estimated 580 million Internet users.\textsuperscript{18} This phenomenal growth is expected to continue with projections indicating that there will be 765 million Internet users by the year 2005.\textsuperscript{19}

However, one of the by-products of this phenomenal growth is that nations have become alarmed by the potential threat that Internet hate speech and pornography posed to national security and morals, and have begun to enact legislation to combat this


\textsuperscript{14} See infra notes 21–37 and accompanying text.

\textsuperscript{15} Reed, supra note 3, at 456.

\textsuperscript{16} O’Rourke, supra note 2, at 615.


\textsuperscript{18} Frischmann, supra note 1.

\textsuperscript{19} Margaret Khayat Bratt & Norbert F. Kugele, Who’s In Charge?, 80 MICH. BAR J. 42, 43 (Aug. 20, 2001).
problem. In 1996, the Chinese government enacted a comprehensive set of Internet regulations composed of five chapters designed to protect state security and morality. The Chinese government went so far in its regulations as to require individuals to register with the Ministry of Posts and Telecommunications before using the Internet as well as mandating that all Internet Service Providers (ISPs) actively assist the Ministry of Public Safety in discovering users who violate these regulations. In 1998, the Malaysian state police established an Internet unit under Malaysia’s Internal Security Act to monitor sites and newsgroups.

However, it is not only the developing world that has attempted to regulate content on the Internet. For example, German officials in 1997 brought charges against CompuServe Deutschland, its managing director, Mr. Felix Somm, and Compuserve USA for making “accessible to the public pornographic writings containing acts of violence, sexual abuse of children and sex acts between human beings and animals” in violation of the German criminal code. Mr. Somm’s conviction was eventually overturned, but not before the German parliament enacted the Information and Communications Services Act (ICSA).

ICSA made ISPs liable for any original content, but provided some relief for ISPs from liability for third party content as long as the ISP was not “knowingly” acting as a conduit for illegal content.

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21 Reed, supra note 3, at 462 (explaining that Chapter 1 enumerates what types of activities are deemed illegal, that Chapters 2 and 3 outline the responsibilities of the Internet Service Providers (ISPs) and the Ministry of Public Security in administering the networks, and that Chapters 4 and 5 establish penalties for violations).
22 Id.
23 Konkel, supra note 20, at 468.
24 Id. at 460.
25 Id. at 463–64 (explaining that Somm’s conviction was overturned on the grounds that he did not actively distribute pornographic materials).
27 Kim L. Rappaport, In the Wake of Reno v. ACLU: The Continued Struggle in
In May 2000, the Superior Court of Paris held both Yahoo France and its American-based parent, Yahoo! Inc., liable for violating article R.645-1 of the French criminal code which prohibits the exposition of Nazi objects for the purpose of sale. Yahoo! Inc., argued that the French court did not have jurisdiction over it because its servers are located on American soil, its services are primarily directed at its American audience, and that any ruling by the French court limiting speech would conflict with the First Amendment of the U.S. Constitution. Judge Gomez who presided over the case rejected Yahoo! Inc.'s argument and ordered Yahoo! Inc. to take all measures necessary to make it impossible to access Nazi auction sites as well as any other site or service offering an apology for Nazism or questioning whether Nazi crimes occurred. After granting a two-month reprieve during which a group of experts ascertained that it was technologically feasible for Yahoo! Inc. to install blocking software, the court granted Yahoo! Inc. three months to block access or begin paying a 100,000 franc (US$13,000) fine per day once the three months had expired. Eventually, Yahoo! Inc. agreed to monitor its global auction site for Nazi-related objects and speech.

Finally, in December 2000, Germany's highest court, the Bundesgerichthof, went so far as to hold that an Australian based website could be subject to Germany's criminal provisions against pro-Nazi speech and denial of the Holocaust. Unlike its earlier

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28 CODE CIVIL [C. PÉN.] art. R. 645-1 (Fr.).


30 Id. ¶ 5; Bratt & Kugele, *supra* note 19, at 44.

31 Akdeniz, *supra* note 29, ¶ 4; Bratt & Kugele, *supra* note 19, at 44.

32 Bratt & Kugele, *supra* note 19, at 44.


34 *Id.* at 28–29.
prosecution of CompuServe and its German subsidiary CompuServe Deutschland, the German court exerted jurisdiction over an Australian citizen, Mr. Frederick Toben, whose only contact with Germany was having been born there. A judge in this case ordered an arrest warrant for Mr. Toben. Toben was informed that if he returns to Germany he will face charges for the racist contents of his Internet site.

What all of these examples prove is that many nations, including Western democracies, that have a strong tradition of protecting free expression are willing to exert extraterritorial jurisdiction over foreign corporations and nations who have, at best, only the most minimal of contacts with the forum state. The fear among Internet proponents is that national legislation directed at regulating Internet content will lead to ever increasing restrictions on the free flow of information, thus reducing the Internet's utility. While these fears may be well justified, this paper will not discuss the normative arguments as to whether the Internet should be regulated, but will instead explore the positive law to determine whether, under international law, the Internet can be regulated.

III. Jurisdictional Arguments

a) Introduction

Whether the Internet can be regulated at all under the principles of international law is a matter of some dispute. Critics of Internet regulation, such as David R. Johnson and David Post, argue that territorial concepts of jurisdiction prevalent in law do not apply to the Internet because cyberspace lacks any

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35 *Id.*

36 *Id.* at 29.


38 See Mody, *supra* note 10, at 384–86.


40 David R. Johnson and Professor David Post, at the time their article was published, were co-directors of the Cyberspace Law Institute. Professor Post currently teaches at Temple University Law School.
recognizable geographical boundaries.\textsuperscript{41} In other words, the Internet is supposedly immune from all regulations enacted by individual nation-states because it does not reside in any one locality and is not the property of any one nation.\textsuperscript{42} However, this view that the Internet is somehow beyond national regulation ignores the realities of cyberspace.\textsuperscript{43} While it is true that the transnational nature of the Internet may make jurisdictional issues more complicated, the Internet, like other means of mass communications, can be regulated.\textsuperscript{44} After all, the Internet is nothing more than a network of computers that are accessed by real people sitting in front of their monitors which are physically located within the borders of some nation. Moreover, the information communicated over the Internet can cause real harm to governments or individuals within countries.\textsuperscript{45} Internet pornography and hate speech can degrade, humiliate, and incite.\textsuperscript{46} Given that the Internet is populated by real people causing real harm, there is no reason to believe that the Internet is beyond the jurisdictional scope of national regulation.\textsuperscript{47}

\textit{b) Territorial Principle of Jurisdiction}

Even if one believes that the Internet can and should be regulated, the Internet's open and decentralized framework does pose some difficult jurisdictional entanglements.\textsuperscript{48} Concepts of

\begin{itemize}
\item \textsuperscript{41} Johnson & Post, \textit{supra} note 9, at 1370–71.
\item \textsuperscript{42} \textit{See id.}
\item \textsuperscript{43} Goldsmith, \textit{supra} note 39, at 1250 (arguing that cyberspace transactions are no different from “real-space” transnational transactions).
\item \textsuperscript{44} \textit{Id.} at 1239–40.
\item \textsuperscript{45} \textit{See Mody, supra} note 10, at 367–68 (discussing Jack Goldsmith, \textit{Regulation of the Internet: Three Persistent Fallacies}, 73 CHI.-KENT L. REV. 1119, 1121 (1998)).
\item \textsuperscript{47} Goldsmith, \textit{supra} note 39, at 1200.
\item \textsuperscript{48} \textit{See, e.g.,} Johnson & Post, \textit{supra} note 9.
\end{itemize}
jurisdiction embody notions of equity. An individual should not be hauled into court unless she has, in some manner, committed an affirmative act that gives the forum state the right to exert jurisdiction. Likewise, there is an equitable argument that a website or an ISP in compliance with the laws of the nation where they are physically present should not be subjected to the laws of another nation. “[T]he Internet’s architecture does not enable a content provider . . . to select where precisely its information will flow.”

Cyberspace transmissions are indifferent to national boundaries. Furthermore, current software technology designed to block certain users from accessing particular sites is unimpressive. The experts empanelled by the French court in the Yahoo! case “estimated that 70% of the IP addresses assigned to French surfers can be matched with certainty to a service provider located in France, and therefore can be filtered” by blocking software. This means that 30% of IP addresses cannot be filtered by existing software programs.

Despite these equitable and technological difficulties, many Internet legal scholars such as Jack L. Goldsmith would argue at the very minimum that a nation has the right to regulate those cyberspace transmissions that occur within its borders. The right of a nation to exert jurisdiction over its internal affairs is embodied in the universally accepted tenet known as the territorial principle of jurisdiction. According to the territorial principle of jurisdiction, since a state is sovereign within its own borders, it can exert jurisdiction over individuals or entities located on its territory. Therefore, an ISP that conducts business within the forum state and whose servers are physically present in the forum state is subject to the laws of that state and can be tried in its courts. The corollary to the territorial principle is that “a state’s

50 Id.
51 Mody, supra note 10, at 369.
52 Id.
53 Akdeniz, supra note 29, ¶ 9.
54 Professor Jack L. Goldsmith is a Professor of Law at the University of Chicago.
55 See Goldsmith, supra note 39, at 1207–08.
56 See Mody, supra note 10, at 371.
57 See id. at 304.
legal authority to regulate conduct on its own territory precludes it, by definition, from regulating conduct taking place outside its territory.\footnote{\textit{Id.} at 372. See also IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303, 289–94 (5th ed. 1998) (discussing principles of sovereignty).}

c) Objective Territorial Principle of Jurisdiction

Nations seeking to exert jurisdiction beyond their borders are not bound by jurisdictional limitations inherent in the territorial principle of jurisdiction because international law, since 1927, has recognized the right of a nation, in certain circumstances, to exert jurisdiction over actions that originate abroad but whose effects are felt within the forum nation.\footnote{See S.S. "Lotus," (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (1927).} The right of a nation to exercise extraterritorial jurisdiction over an individual or entity whose actions cause local harm is known as the objective territorial principle.\footnote{BROWNLE, supra note 59, at 304.}

The objective territorial principle was first introduced as a theory of extraterritorial jurisdiction by the Permanent Court of International Justice (PCIJ) in \textit{The Case of the S.S. "Lotus."} The "\textit{Lotus}" case involved a collision on the high seas between a French steamer and a Turkish vessel in which the latter sank and Turkish sailors and passengers lost their lives.\footnote{S.S. "Lotus."} After the French steamer was forced to dock in a Turkish port, the ship's officers were tried and convicted of involuntary manslaughter.\footnote{\textit{Id.} at 10.} "[T]he Court held that the state of Turkey could apply its criminal laws to any foreigner who committed an offense abroad to the prejudice of Turkey or a Turkish subject, provided the foreigner was arrested within Turkish territory."\footnote{\textit{Id.} at 13.} The Court stated that there was no absolute prohibition against a nation from exercising the jurisdiction of its courts to persons, property and acts outside its territory, and that international law gave nations discretion in certain limited instances to adopt the most suitable jurisdictional
principle. More importantly, the PCIJ explicitly recognized the objective territorial principle when it stated that:

[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

In the aftermath of the "Lotus" case, American courts began recognizing the objective territorial principle as a basis for exerting jurisdiction in antitrust cases. The United States Second Circuit Court of Appeals in United States v. Aluminum Co. of Am. "considered whether the United States government could apply the Sherman Act antitrust provisions to a Canadian company whose conduct, though wholly extraterritorial, had anticompetitive effects within the United States." The court held that even though a state could not assert jurisdiction over an activity having no relationship with the forum state, it could exert jurisdiction over activities that originated abroad but whose effects were felt within the forum state.

Within the last decade, the United States Supreme Court, in Hartford Fire Insurance Company Co. v. California, held that the Sherman Act extended to alleged antitrust activity on the part of a reinsurance company that occurred within the territory of Great Britain. Despite the fact that the reinsurance company's conduct complied with British law, the Supreme Court found that the United States was well within its rights under international law to

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66 Id. (discussing S.S. "Lotus," (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 19 (1927)).
68 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
70 Mody, supra note 10, at 376 (discussing United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945)).
71 Id. (discussing United States v. Aluminum Co. of Am., 148 F.2d. 416, 443 (2d Cir. 1945)).
regulate activity that "produced substantial effect[s]" within its territory.\textsuperscript{74}

Courts outside the United States have also adopted the objective territorial principle. The European Court of Justice (ECJ) in \textit{Åhlström Osakeyhitö & Others v. Commission} (Wood Pulp Case) had to decide the extraterritorial reach of the European Community's (EC) anti-competition law.\textsuperscript{75} The ECJ decided that the defendants, Swedish and Finnish wood pulp producers and their trade associations, fell within the jurisdiction scope of the European Community's anticompetition rules despite the fact that these entities had no offices or facilities located within the Community.\textsuperscript{76} The ECJ held that the defendants had violated the Community's anticompetitive rules by engaging in a price fixing scheme.\textsuperscript{77} The ECJ considered it immaterial for jurisdictional purposes whether the defendants had any substantial contacts with producers within the EC through the defendant's agents or subsidiaries.\textsuperscript{78} All that mattered for the ECJ was that these wood pulp producers and their trade associations had committed acts, although originating outside the EC, whose effects were felt within the European Community.\textsuperscript{79}

Outside of the United States and the European Community, other jurisdictions have accepted the objective territorial principle as a legitimate basis for jurisdiction in antitrust cases.\textsuperscript{80} The Restatement (Third) of the Foreign Relations Law of the United States, section 403,\textsuperscript{81} notes that most states in Western Europe, including Austria, Denmark, Finland, Greece, Norway, Portugal, Spain, Sweden, and Switzerland, as well as Canada and Japan, have accepted the objective territorial principle as a basis for

\textsuperscript{74} Mody, \textit{supra} note 10, at 376 (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)).


\textsuperscript{76} \textit{Id.} at 5240–247.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} Mody, \textit{supra} note 10, at 378.

\textsuperscript{81} Restatement (Third) of Foreign Relations Law of the United States § 403, no. 3 (1987).
extraterritorial jurisdiction in antitrust cases.\textsuperscript{82}

Still, if the objective territorial principle as a basis for extraterritorial jurisdiction were recognized only in the context of antitrust litigation, then it would be of doubtful utility as a means of legitimizing the assertion of extraterritorial jurisdiction in freedom of expression cases. With regard to the Internet, one could apply the objective territorial principle, given its wide acceptance in antitrust matters, to regulate Internet commerce involving instances where a nation’s or a community’s anticompetitive rules are being violated. However, there have been several cases where the objective territorial principle has been recognized outside of the sphere of antitrust litigation. The first case worth mentioning, SS. “Lotus,” discussed previously,\textsuperscript{83} involved a criminal prosecution of an admiralty matter.\textsuperscript{84} Another seminal case, the Trail Smelter Case,\textsuperscript{85} involved a dispute between the United States and Canada over the emissions from an iron ore smelter located only seven miles from the United States border in Trail, British Columbia.\textsuperscript{86} The United States alleged that the sulfur dioxide emissions from the Canadian smelter had caused crop damage in the State of Washington.\textsuperscript{87} The Tribunal found that under principles of international law that “no State has the right to use or permit the use of its territory... to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”\textsuperscript{88}

From the holding in the Trail Smelter Case, one can analogize that no state has the right, under international law, to permit its territory to pollute the minds and souls of another nation’s citizens.\textsuperscript{89} Instead of environmental pollution, as in the Trail

\textsuperscript{82} Mody, \textit{supra} note 10, at 378 (discussing \textsc{Restatement (Third) of Foreign Relations Law of the United States} § 403, no. 3 (1987)).

\textsuperscript{83} See \textit{supra} notes 61–67 and accompanying text.

\textsuperscript{84} S.S. “Lotus,” (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (1927).


\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 1907.

\textsuperscript{88} \textit{Id.} at 1965 (The tribunal in this case was formed by joint cooperation of the governments of the United States and Canada).

\textsuperscript{89} See \textit{id.}
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Smelter Case, what one has in cases of Internet pornography and hate speech is cultural pollution. Granted that environmental pollution is much more easily measured and verified than cultural pollution, however, there is a considerable amount of research from legal scholars and social scientists to support the idea that hate speech and pornography cause real societal and cultural harm, despite the absence of exactitude that one supposedly finds in the “hard” physical sciences.

Support for the idea that the objective territorial principle is appropriate in cases of cultural pollution can be found where the objective territorial principle was invoked to legitimize the exercise of extraterritorial jurisdiction in narcotics smuggling cases. For instance, a United States District Court for the Southern District of Florida in United States v. Noriega invoked the objective territorial principle as the court’s basis for asserting jurisdiction over the Panamanian dictator, Manuel Noriega, on charges that he allegedly provided a safe haven for international narcotics traffickers who used Panama as a base to manufacture and ship cocaine into the United States. Noriega tried to argue that the court had no jurisdiction over him because the alleged acts occurred outside of United States territory. However, the District Court noted that “[a]ll the nations of the world recognize ‘the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done.’” For example, the court stated “the United States would unquestionably have authority to prosecute a person standing in Canada who fires a bullet across the border which strikes a second person standing in the United States.”

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92 See sources cited supra note 44.
94 Id.
95 Id. at 1513 (quoting Rivard v. United States, 375 F. 2d. 882, 887 (5th Cir.) (citations omitted), cert. denied, 389 U.S. 884 (1967)).
96 Id. at 1512–13.
Moreover, the District Court noted that “international law principles have expanded to permit jurisdiction upon a mere showing of intent to produce effects in this country, without requiring proof of an overt act or effect within the United States.” Therefore, the court in this case found plenty of support in international law for its assertion of extraterritorial jurisdiction.

In assessing whether extraterritorial jurisdiction can be exercised in a freedom of expression case, the above cases are useful in illuminating the basic principles of extraterritorial jurisdiction; however, they do not explain the rationale behind these principles. In Principles of Public International Law, Ian Brownlie attempts to bring some coherence to the field of extraterritorial jurisdiction. Brownlie states that extraterritorial acts can only be the object of jurisdiction if specific principles are followed:

(i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
(ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
(iii) that a principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals residing abroad should not be constrained to violate the law of the place of residence.

Brownlie’s three general principles embody the notion that the test as to whether the exercise of extraterritorial jurisdiction is legitimate is one of reasonableness.

Michael Geist, in his article on Internet jurisdiction, noted that in American courts the reasonableness standard is in terms of “minimum contacts,” while in Canada the courts speak of a

97 Id. at 1513.
98 Id.
99 BROWNLIE, supra note 59, at 312–13. Professor Ian Brownlie is a professor of international law at the University of Oxford and a member of the International Law Commission.
100 Id. at 313.
101 See id.
102 Professor Michael Geist is a law professor at the University of Ottawa Law School specializing in Internet and electronic commerce law.
103 Michael Geist, Is There a There There? Toward Greater Certainty for Internet
"real and substantial connection." According to Geist, at the crux of the term "reasonableness" within the context of jurisdiction law is the notion of foreseeability, "which dictates that a party should only be hauled into a foreign court where it was foreseeable that such an eventuality might occur." The traditional view of what constitutes reasonableness/foreseeability is highlighted by an Illinois federal court's holding in *Euromarket Designs Inc. v. Crate & Barrel Ltd.* In that case, the court had to decide whether an Illinois-based company could sue an Irish retailer in a local court for trademark infringement. From the retailer's interactive Web site, Illinois residents could order goods and have them shipped to Illinois addresses. The court noted that the crux of the case was whether the corporate defendant had purposefully and deliberately availed itself of the forum and whether the defendant's conduct rose to the level that the defendant should have been reasonably aware of the possibility that it might be forced to appear in front of a court in the forum state. The court concluded that the defendant had established sufficient minimum contacts to establish the court's jurisdiction under the objective territorial principle because (1) the injury would be felt primarily in Illinois, (2) the defendant intentionally and purposefully directed its actions towards Illinois and the plaintiff, an Illinois corporation, and (3) the defendant knew that the harm would likely be suffered in Illinois.

**d) Targeting-Based Analysis**

There is something unsatisfactory about the reasonableness/foreseeability standard of the objective territorial principle in cases where the website or Internet Service Provider is a passive actor.

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*Jurisdiction, Fifth Annual Internet Law Institute, 561, 572 (2001) (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945)).

104 *Id.* at 572 (quoting Morguard Invs. Ltd. v. DeSavoye, 3 S.C.R. 1077 (1990)).

105 *Id.* at 572–73.

106 *Id.* at 591 (discussing Euromarket Designs Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000)).


108 *Id.* at 829.

109 *Id.* at 834–35.

110 *Id.*
With worldwide Internet availability, foreseeability is much more difficult to gauge because content and service providers have limited ability to control who accesses what particular types of information without being overly broad in their restrictions.\textsuperscript{111} As Geist notes, where the application of the objective territorial principle "raises few concerns when it involves activity such as securities fraud where global rules are relatively uniform, the application of an effects-based [objective territorial principle] standard to issues such as free speech is likely to prove highly contentious."\textsuperscript{112} Geist notes that a local court may assert jurisdiction even in the absence of evidence that the harm was directed at the jurisdiction, if the local harm was too great for the court to ignore.\textsuperscript{113}

In response to these shortcomings, Geist suggests that the objective territorial principle should be refined to include the concept of targeting.\textsuperscript{114} A targeting-based analysis would lessen a court's sole reliance on the objective territorial principle by seeking to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction.\textsuperscript{115} American courts have recently begun to factor targeting considerations into their analysis of whether they can assert jurisdiction over Internet activity.\textsuperscript{116} For example, the Ninth Circuit Court of Appeals noted in \textit{Bancroft & Masters, Inc. v. Augusta Nat'l Inc.},\textsuperscript{117} a dispute over the masters.com domain name, the relationship between the objective territorial principle and a targeting based analysis of jurisdiction.\textsuperscript{118} The court noted:

To meet the effects test [objective territorial principle], the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state. Subsequent cases have struggled somewhat with Calder's import, recognizing that the

\textsuperscript{111} Geist, \textit{supra} note 103, at 591–93.
\textsuperscript{112} Id. at 575.
\textsuperscript{113} Id. (referring to the Yahoo! Inc. case).
\textsuperscript{114} See id. at 598.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} 223 F.3d 1082, 1087 (9th Cir. 2000).
\textsuperscript{118} Id. See also Geist, \textit{supra} note 103, at 598.
case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be.\textsuperscript{119}

The court went on further to conclude, ""something more’ is what the Supreme Court described as ‘express aiming’ at the forum state."\textsuperscript{120} Although the Ninth Circuit noted that express aiming is a concept that hardly defines itself, it deduced that "the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."\textsuperscript{121}

The targeting-based analysis has also been used by American courts in cases involving online gambling where offshore Internet sites were characterized as targeting local residents.\textsuperscript{122} In People v. World Interactive Gaming, a New York state court considered the targeting implications of online gambling and stated that "[w]ide range implications would arise if this Court adopted respondents’ argument that activities or transactions which may be targeted at New York residents are beyond the state’s jurisdiction."\textsuperscript{123} The court went on further to state that "[n]ot only would such an approach severely undermine this state’s deep-rooted policy against unauthorized gambling, it also would immunize from liability anyone who engages in any activity over the Internet which is otherwise illegal in this state."\textsuperscript{124} Finally, the court declared, "[a] computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents actively targeted New York as the location where they conducted many of their allegedly illegal activities."\textsuperscript{125}

Targeting provisions have also been assimilated into a recent

\textsuperscript{119} Bancroft & Masters, Inc., 223 F.3d at 1087 (citations omitted) (referring to Calder v. Jones, 465 U.S. 783 (1984), the first case where the United States Supreme Court recognized the effects doctrine, alternatively known as the “objective territorial principle”).

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Geist, supra note 103, at 599.

\textsuperscript{123} People v. World Interactive Gaming, 714 N.Y.S.2d 844, 850 (1999).

\textsuperscript{124} Id.

\textsuperscript{125} Id.
draft of the Hague Conference on Jurisdiction and Foreign Judgments. In the course of negotiations, delegates focused on targeting as an appropriate litmus test for when Internet consumers should be entitled to sue in their home jurisdiction. The American Bar Association (ABA) Internet Jurisdiction Project also considered a targeting approach in its report released in 2000. The Internet study noted that:

Today, entities seeking a relationship with residents of a foreign forum need not maintain a physical presence in the forum. A forum can be “targeted” by those outside it and desirous of benefiting from a connection with it via the Internet. Such a chosen relationship will subject the foreign actor to both personal and prescriptive jurisdiction, so a clear understanding of what constitutes targeting is critical.

According to Geist, the litmus test as to what constitutes targeting is the “core jurisdictional principle—foreseeability.” In this test, foreseeability is not based on whether the content or service provider takes an active or passive role in disseminating Internet content like hate speech and pornography, but is based on three factors none of which by themselves are determinative: contracts, technology and actual or implied knowledge.

Contracts are important in assessing the reasonableness/foreseeability of extraterritorial jurisdiction because contracts in the form of licensing and user agreement specifying a choice of forum or choice of law can help limit the content and/or service provider’s exposure to being forced to defend itself in far-flung jurisdictions. North American courts have been willing to enforce the terms of an online contract, commonly referred to as a

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127 Id.


129 Id. at 1827–28.

130 Geist, supra note 103, at 602.

131 Id.

132 Id. at 603.
clickwrap agreement, especially when the terms of the online contract are reasonable and the user has assented to the contract.

Progressively, technology plays a more important role in assessing reasonableness/foreseeability because of the development of increasingly sophisticated software designed to limit a business' exposure to legal risk by blocking access to users in cases where such access would be illegal. Of course, there is the problem that existing blocking software is not 100% effective. As noted earlier, a group of experts empanelled by the French court in the Yahoo! case estimated that existing technology could only filter about 70% of French Internet Protocol (IP) addresses. The panel noted that "this finding was not without numerous exceptions as a large number of these, in the order of 20%, stem from the multinational character of the access provider or from the fact that they use the services of an international ISP or a private communication network."

However, in many instances, the ISP or content provider does not need to install perfect blocking software, just software reasonably calculated to block illegal access, to reap the benefits under a targeting analysis test. If a content or service provider has employed contractual agreements and the best available blocking software to limit its legal risk, then the violation may have to be of great import in order to render the foreign court's assertion of jurisdiction reasonable. A good faith attempt by the content or service provider to comply with the laws of a foreign state serves to negate the reasonableness of an assertion of extraterritorial jurisdiction for any violation except one of great importance.

The final factor in a targeting-based analysis is actual or

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133 Id. at 604.
134 Id. In a Canadian case, an Ontario court stated that a forum selection clause in a clickwrap agreement was not analogous to fine print in a written contract and that neither the form of the contract nor its terms were unconscionable. Rudder v. Microsoft Corp. (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.). In the United States, a court upheld a forum selection clause found in a clickwrap contract. Kilgallen v. Network Solutions, Inc., 99 F. Supp. 2d 125, 128–30 (D. Mass. 2000).
135 Geist, supra note 103, at 610.
136 Akdeniz, supra note 29, ¶ 9.
137 Id.
138 Geist, supra note 103, at 611.
implied knowledge.\textsuperscript{139} In assessing reasonableness/foreseeability, this factor seeks to ensure that content and service providers cannot avoid extraterritorial jurisdiction by "hid[ing] behind contracts and/or technology by claiming a lack of targeting knowledge when the evidence suggests otherwise."\textsuperscript{140} An unwillingness to dismiss willful blindness was evident in the Supreme Court of New York's finding in \textit{People v. World Interactive Gaming}.\textsuperscript{141} The respondent, an offshore online gaming casino, claimed that it was able to limit access to its Internet site to users in places where online gambling was legal by requiring Internet users to enter their home address.\textsuperscript{142} If the Internet user entered an address where online gambling was not legal, then access would be denied; but of course, as the court noted in its decision, there was nothing to prevent an Internet user from entering a false address.\textsuperscript{143} The New York court found that the respondent had persisted in activity in violation of state law directed at New York residents by creating and maintaining a site dedicated to unauthorized gambling.\textsuperscript{144} In essence, the respondent's attempt to limit access was not reasonably calculated to prevent unauthorized access, but merely a sham to avoid an assertion of extraterritorial jurisdiction.\textsuperscript{145}

In applying a targeting-based analysis, which is essentially a more refined version of the objective territorial principle, to the principal cases involving the Internet and free expression, it seems that there should be a jurisdictional demarcation between commercial Internet providers who have foreign subsidies and individual websites. As noted in a recent article, many commentators, including an American Bar Association panel, believe that extraterritorial jurisdiction is best viewed "using a sliding scale focusing on the degree to which an alien purposely invokes the benefits and protections of the forum. . . ."\textsuperscript{146} The ABA panel stated that:

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.} at 620.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} 714 N.Y.S.2d 844, 851 (1999).
  \item \textsuperscript{142} \textit{Id.} at 847.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 851.
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} Bratt & Kugele, \textit{supra} note 19, at 46.
\end{itemize}
[a]t one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions.\footnote{147}

In the middle area, such as interactive websites involving the exchange of information between the user and host computer, proper jurisdiction would be determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.\footnote{148} In the case of Licra et Uejf v. Yahoo!,\footnote{149} the sliding scale of reasonableness favors the French court assertion of jurisdiction over Yahoo! Inc.\footnote{150} After all, Yahoo! Inc. chose to have some contact with France when it established its subsidiary, Yahoo France, to better serve French Internet users.\footnote{151} Furthermore, under the targeting-based analysis, the French court was justified in asserting jurisdiction over Yahoo! Inc.\footnote{152}

In examining the contract prong of Geist’s test,\footnote{153} Yahoo! Inc. did attempt to argue that its liability was limited by “its charter that warns all surfers against using the service for purposes worthy of reprobation for whatsoever motive (incitement to hatred, racial or ethnic discrimination . . . ).”\footnote{154} Moreover, Yahoo! Inc. utilized a terms and condition page containing a choice of law clause stating that American law governs; however, in all of these contractual relationships there was a missing element - the consent


\footnote{148} Bratt & Kugele, \textit{supra} note 19, at 46. (citing A.B.A. Jurisdiction in Cyberspace Project at 1851, which in turn cites Zippo Mfg. Co. v. Zippo Dot Com, Inc. 952 F. Supp 1119 (W.D. Pa 1997)).

\footnote{149} Akdeniz, \textit{supra} note 29.

\footnote{150} But see Bratt & Kugele, \textit{supra} note 19, at 46 (asserting that a French court should defer to a United States court because of the strong public policy in the United States protecting speech).

\footnote{151} Akdeniz, \textit{supra} note 29.

\footnote{152} See Geist, \textit{supra} note 103, at 623.

\footnote{153} \textit{Id.} at 603.

\footnote{154} Akdeniz, \textit{supra} note 29.
of the user.155

With regard to the technology prong,156 there was no merit in Yahoo! Inc.'s argument that it was technologically impossible to identify surfers who visit its auction site.157 As mentioned previously, a group of Internet experts found that blocking software could block about 70% of French Internet users from accessing Yahoo! Inc.'s auction site.158 Also, given the fact that Yahoo! Inc. operates a French subsidiary, Yahoo France, Yahoo! Inc. most likely knew that French residents were accessing its auction sites. Therefore, on the sliding scale of reasonableness, the French court's jurisdiction was proper in the Yahoo! case given the fact that Yahoo! Inc. only attempted to minimize its legal risks through a choice of forum clause, which did not require the user to give his consent before entering, while ignoring available technical solutions.159

However, in the case involving the prosecution of CompuServe USA, CompuServe Deutschland and its managing director, Mr. Felix Somm, (the Somm case)160 the sliding scale of reasonableness does not help answer the question whether the assertion of exterritorial jurisdiction was legitimate. As previously stated, German authorities charged CompuServe USA, its German subsidiary, and the subsidiary's managing director of violating Germany's penal code by making accessible to the public "pornographic writings containing acts of violence, sexual abuse of children and sex acts between human beings and animals."161 The defendants were also charged with making available to the public three violent computer games banned under German law.162

The Somm case differs in significant ways from the Yahoo! case. First, while Yahoo! Inc. hosts a website that produces and

155 Geist, supra note 103, at 623.
156 Id. at 610.
157 Akdeniz, supra note 29.
158 Id. ¶ 9.
159 Geist, supra note 103, at 623.
161 Id.
162 See id. at IV.2.
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disseminates its own content, CompuServe is an Internet Service Provider whose business is not to produce content but merely to enable Internet users to access sites on the world wide web. As Somm noted in his defense, the illegal content was not created or distributed by him or his corporate employer, but by third parties whose actions over which he had no control. Furthermore, Somm asserted that these illegal images and data in many instances were not stored on CompuServe's servers, but on third party servers accessible via the Internet. Whereas Yahoo! Inc.'s violation of French law was limited to its auction sites, the German court demanded that CompuServe and Felix Somm patrol numerous newsgroups whose content was controlled, not by CompuServe, but the Internet users themselves.

 Additional differences between the two cases are highlighted especially in regards to the technology prong of the targeting based analysis. Unlike the Yahoo! case, where reasonably effective blocking software existed, there was no such blocking software available in 1997 to CompuServe. Furthermore, CompuServe's blocking software would have had to monitor access not just to one site located on its server, as in the case of Yahoo!, but to a multitude of newsgroups that resided on third party servers. Nevertheless, CompuServe and Somm did, in good faith, attempt to comply with German law first by blocking everyone's access to the newsgroups. However, this all-or-nothing approach was commercially unviable because CompuServe's users in America and elsewhere were threatening to take their business

163 Akdeniz, supra note 29.
165 See id.
166 Id.
167 Akdeniz, supra note 29.
168 See Judgment of the Local court Munich in the Criminal Case versus Somm, Felix Bruno, at IV.2.A.5, V.A.
169 See Akdeniz, supra note 29.
170 See Konkel, supra note 20, at 459–60.
171 See Judgment of the Local court Munich in the Criminal Case versus Somm, Felix Bruno, at V.A.
172 Id. at II.1.
to other ISPs if CompuServe did not restore access to what was legal material in their jurisdiction.\textsuperscript{173} As a compromise intended to placate both German authorities and its non-German customers, CompuServe, in the absence of server-based blocking software, offered its German customers individual blocking software designed to block their own as well as their children’s access to the illegal content.\textsuperscript{174} In contrast to Yahoo! Inc. which did not even attempt to limit access to its offending auction website,\textsuperscript{175} CompuServe made a reasonable attempt to comply with German law. In light of this reasonable attempt, the German court’s assertion of jurisdiction over CompuServe and its subsidiary was unreasonable.\textsuperscript{176} Although CompuServe did have actual knowledge that its German customers were accessing illegal content using CompuServe as a conduit, the element of intent is missing in the Somm case as opposed to People v. Worldwide Gaming,\textsuperscript{177} which involved an offshore online casino claiming it unknowingly allowed New York residents to gamble on its site.\textsuperscript{178} Whereas the online casino was hiding behind its sham verification procedures as means to avoid being hauled into a foreign court while at the same time facilitating illegal gambling,\textsuperscript{179} CompuServe was acting in good faith in trying to find an acceptable solution to its quandary.\textsuperscript{180}

Evidence supporting the assertion that the German court’s exercise of extraterritorial jurisdiction was illegitimate in the Somm case can be derived from the fact that the German legislature in the midst of the Somm/CompuServe prosecution passed an amendment to the Information and Communications Services Act (ICSA)\textsuperscript{181} “designed to shield service providers like


\textsuperscript{174} Id. at 459–61.

\textsuperscript{175} Akdeniz, supra note 29.

\textsuperscript{176} See Judgment of the Local court Munich in the Criminal Case versus Somm, Felix Bruno, at V.A.

\textsuperscript{177} 714 N.Y.S.2d 844 (1999).

\textsuperscript{178} Id. at 851.

\textsuperscript{179} See id. at 847, 851.

\textsuperscript{180} See Judgment of the Local court Munich in the Criminal Case versus Somm, Felix Bruno, at V.A.

\textsuperscript{181} Informations-und Kommunikationsdienste-Gesetz – IuKDG (Teledienstegesetz
CompuServe and corporate officers like Somm from criminal or civil liability for the act taken independently by their users.\textsuperscript{182} The ICSA, however, in accordance with a targeting-based analysis, "subjects online providers to criminal prosecution for acting as a conduit for illegal content if they do so knowingly and it is technically possible and reasonable to prevent [the illegal content's dissemination]."\textsuperscript{183}

Finally, along the sliding scale of reasonableness, one encounters situations where a court attempts to assert extraterritorial jurisdiction over a defendant who has simply posted information on an accessible Internet website in violation of the prosecuting state's laws.\textsuperscript{184} In these types of cases, a targeting-based analysis should not be applied because it is very doubtful that an individual, as opposed to a corporation, will have the necessary expertise and resources to be able to limit risk of liability through contract and technology. Rather, the reasonableness of a court's assertion of extraterritorial jurisdiction over individuals can best be judged according to the general tenets of the objective territorial principle. And under the objective territorial principle, a court cannot assert extraterritorial jurisdiction over a foreign national simply on the basis that the foreign national's website contains images or data that violate the forum state's laws and that are accessible to users within the forum state.\textsuperscript{185} The reasonableness of asserting extraterritorial jurisdiction depends in large part on whether there is a substantial and bona fide connection between the subject matter and the source of the jurisdiction and whether the assertion of extraterritorial jurisdiction offends notions of accommodation and mutuality as well as nonintervention.\textsuperscript{186}

Where individuals and free expression are involved, it is unlikely that extraterritorial jurisdiction will be reasonable given the lack of contacts between the foreign national and the forum,


\textsuperscript{183} Rappaport, \textit{supra} note 27, at 793.

\textsuperscript{184} \textit{See} Razavi & Samman, \textit{supra} note 33, at 28.

\textsuperscript{185} \textit{See} Brownlie, \textit{supra} note 59, at 313.

\textsuperscript{186} \textit{Id.} at 312–13.
the nature of the rights involved, and the intrusiveness inherent when one nation attempts to exert jurisdiction over another nation's citizen. For example, the German judge who issued an arrest warrant for Frederick Toben, an Australian citizen, for posting his Holocaust revisionist opinions on his Australian-based website acted unreasonably under the objective territorial principle.\textsuperscript{187} Toben, aside from the fact that he was born in Germany, had only a very tenuous connection with the forum state.\textsuperscript{188} Moreover, in Toben's case, the issue did not involve commercial gain or loss, but the highly revered right under international law to freely express one's opinion.\textsuperscript{189} Finally, the German judge's arrest warrant was an unreasonable assertion of extraterritorial jurisdiction because it was overly intrusive in that the German court failed to consider the fact that such an exercise would impinge on Australia's sovereign authority over its own citizens.\textsuperscript{190}

In assessing the legitimacy of extraterritorial jurisdiction over Internet content under the objective territorial principle, it appears that international law does recognize the right of states to regulate Internet content provided that the jurisdiction is reasonable.\textsuperscript{191} As long as there is a substantial and bona fide connection between the subject matter and the source of the jurisdiction, and the principles of accommodation, mutuality, and nonintervention are observed, international law will recognize the assertion of extraterritorial jurisdiction as being legitimate.\textsuperscript{192} From the various cases examined, one can confidently assert that the objective territorial principle is widely accepted, as one would expect, in the realm of commercial transactions where only a pecuniary gain or loss is involved. Certainly, commercial transactions over the web would fall into this category rendering extraterritorial jurisdiction reasonable. Commercial e-retailers expect to enjoy the benefits and privileges provided by the forum state, especially with the

\textsuperscript{187} See Razavi & Samman, supra note 33, at 28–29 (discussing the Dec. 12, 2000 decision of Germany's highest court, the Bundesgerichtshof, regarding Frederick Toben).

\textsuperscript{188} See id.

\textsuperscript{189} Id. at 28.

\textsuperscript{190} See Browning, supra note 59, at 313.

\textsuperscript{191} See Restatement (Third) of Foreign Relations Law of the United States § 403 and Comment (a) (1987).

\textsuperscript{192} Id.
enforcement of contracts entered into by a resident of the forum state. In freedom of expression cases, however, the reasonableness of extraterritorial jurisdiction is more problematic. What is reasonable in an Internet freedom of expression case depends in large part on balancing the rights of two competing jurisdictions. On the one hand, one needs to consider the severity of the harm suffered and the right of a state to seek redress. On the other hand, one has to consider how severely the exercise of extraterritorial jurisdiction impinges on another state's sovereignty. The objective territorial principle would find the assertion of extraterritorial jurisdiction reasonable in the Yahoo! case but not in the Somm and Toben cases. However, given the fear that courts might focus on the fact that the local harm was felt in the forum state to the exclusion of other considerations, a targeting-based analysis where applicable is preferable, especially in cases involving commercial websites and service providers who can limit their risk through contract and technology.

e) Universality Principle of Jurisdiction

Aside from the objective territorial principle and its prodigy, there is another viable basis for allowing extraterritorial jurisdiction over Internet content and access; this additional basis is known as the "universality principle." A considerable number of states have adopted, usually with limitations, this principle. The universality principle allows jurisdiction over non-nationals where circumstances, including the nature of the crime, justify state action as a matter of international public policy. With regards to the Internet, there is an international consensus as to the evil posed by the sexual exploitation of children. Every nation has criminalized the sexual abuse of children, and the vast majority of states have enacted legislation against child pornography.

193 Id. at 307.
194 Id.
195 Id.
196 See Razavi & Samman, supra note 33, at 30.
197 Id.
Moreover, international conventions on the rights of children favor the strict enforcement of such laws and lend support to the assertion of extraterritorial jurisdiction in these types of cases. Over a ten-year period beginning in 1979, the United Nations drafted the Convention of the Rights of the Child (Convention) with the participation of over forty nations. The Convention was unanimously adopted by the General Assembly on November 20, 1989, and entered into force on September 2, 1990. Currently, 187 nations have signed and ratified the Convention. The Convention requires all state parties to “take all appropriate national, bilateral and multilateral measures to prevent... [t]he exploitative use of children in pornographic performance and materials.” Also, in its Convention on Cybercrime, the Council of Europe specifically singled out child pornography as being the one content-related offense that demands a common criminal policy among the states.

This international consensus against the sexual abuse of children allowed Italian courts to charge 1,491 people for child pornography on the Internet and to begin dismantling the infrastructure of a well-developed child pornography ring in Russia. This consensus against child pornography also enabled law enforcement authorities from the United States and thirteen other countries to act decisively as a coordinated unit in dismantling a multinational child pornography ring known as the Wonderland Club.

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199 See Razavi & Samman, supra note 33, at 30.


202 Id.

203 Id.

204 Child Convention, supra note 200, at 171.


206 Razavi & Samman, supra note 33, at 30.

The Wonderland Club was a U.S.-based child pornography ring with more than 200 members scattered throughout at least thirty-three different nations. The investigation began with the 1996 arrest of two members of a child pornography ring in California by U.S. Customs, who then alerted British authorities that another member of this ring was living in England. Based on this tip, British authorities arrested the individual and seized his computer, finding evidence of the Wonderland Club. Given this international consensus against child pornography as evidenced by the Convention and the Wonderland prosecution, nations under the universality principle can exercise extraterritorial jurisdiction in combating this crime.

**f) Crimes Under International Law**

Extraterritorial jurisdiction over Internet content and access may be exercised when the Internet is used as an instrument to facilitate crimes under international law. According to Brownlie, crimes under international law refer to breaches of the law of war, otherwise known as war crimes and crimes against humanity. Brownlie argues that international treaty obligations criminalizing violations of the law of war have empowered all states to punish war criminals who happen to come into their custody, regardless of nationality.

Beginning with the end of World War II, the international community started actively pursuing and punishing war criminals. In response to the Holocaust, the United Nations

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208 *Id.* at 462.
209 *Id.* at 463–64.
210 *Id.* at 464.
211 Child Convention, *supra* note 200.
212 Graham, Jr., *supra* note 198, at 478–79.
213 Crimes under international law as a basis for extraterritorial jurisdiction can be easily confused with the universality principle. Although similar, the universality principle is not based on any breach of international law; rather, its theoretical underpinnings are based upon international law giving states permission to pursue violations of their domestic laws beyond their respective states’ boundaries. BROWNLE, *supra* note 59, at 308.
215 *Id.*
216 Elizabeth F. DeFeis, *Freedom of Speech and International Norms: A Response to*
General Assembly adopted the Nuremberg Charter.\textsuperscript{217} In creating an ad hoc international court at Nuremberg, Germany, the Charter established the criminal responsibility of states and individuals engaged in war crimes, crimes against humanity, and crimes against peace.\textsuperscript{218} The United Nations unanimously adopted Resolution 96(I) in 1946 declaring genocide a crime under international law.\textsuperscript{219} Furthermore, Resolution 96(I) urged member states to adopt a legally binding Convention on the matter.\textsuperscript{220}

The efforts of the United Nations to draft such a Convention culminated in the unanimous adoption in 1948 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)\textsuperscript{221} by the General Assembly.\textsuperscript{222} The Genocide Convention defines genocide as any "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups' regardless of whether such acts are undertaken in peacetime or in wartime."\textsuperscript{223} Parties to the Genocide Convention recognize that anyone who commits or conspires to commit genocide can be held criminally liable for his or her acts.\textsuperscript{224} Furthermore, Article III of the Genocide Convention provides that '[d]irect and public incitement to commit genocide shall be punishable.'\textsuperscript{225} The Genocide Convention, which entered into force in 1951, has been ratified or acceded to by over 100 nations.\textsuperscript{226}

\textit{Hate Speech}, 29 STAN. J. INT'L L. 57, 91 (1992) (noting that it was not until the end of World War II that the international community recognized genocide as a crime).

\textsuperscript{217} Id. (citing Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279).

\textsuperscript{218} Id. at 90.

\textsuperscript{219} U.N. Res. 96(I), U.N. Doc. A/64/Add.1, at 188 (1946).

\textsuperscript{220} Id.


\textsuperscript{223} Id.

\textsuperscript{224} Id.

\textsuperscript{225} Id.

\textsuperscript{226} Id. at 92 (noting that the United States, despite being one of the original signatories to the Genocide Convention, did not ratify it until 1986, in large part due to
Within the last decade, there has been a growing international consensus on the need to vigorously prosecute people who are guilty of war crimes and crimes against humanity. In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia to prosecute those responsible for international crimes in the former Yugoslavia. In December 1995, the Security Council adopted Security Council Resolution 1031 that authorized the use of force on the part of a NATO-led contingent in arresting war criminals. Also, in 1994 the Security Council established an ad hoc tribunal to prosecute those individuals responsible for the genocide in Rwanda. In July 1998, 120 nations approved the text of a treaty known as the Rome Treaty that created a permanent International Criminal Court (ICC) with responsibility of prosecuting individuals around the globe who are accused of war crimes, genocide, and crimes against humanity. The Rome Treaty came into force in July 2002.

Even though the Internet has not played a major role in facilitating war crimes or crimes against humanity, the Rwandan genocide of 1994, where the now-deposed Hutu government used radio transmissions to incite and carry out the mass murder of some 800,000 Tutsis, illustrates how a means of mass free speech concerns involving Article III's prohibition against "incitement to commit genocide".

230 Id. at 951–52.
231 Id. at 927.
communication can be used for evil purposes. Despite an inadequate information infrastructure, Hutu extremists were able to use radio broadcasts, especially a semiprivate station to organize roadblocks and to read lists of names of “enemies” who were then tracked down and murdered by Hutu militias. The station’s transmissions helped incite the mass murder of Tutsis by calling them “cockroaches” and urging the militias to step up the killing of civilians. In a similar vein, the Internet could be used to incite genocide in violation of international law. Under generally accepted jurisdictional principles, every nation would have the right to assert jurisdiction over any individual in its custody who was accused of using the Internet to incite war crimes, crimes against humanity, or genocide.

Thus, various principles of jurisdiction recognized by international law would allow a state to assert extraterritorial jurisdiction over foreign nations in cases involving crimes against humanity, child pornography, or where the foreign national specifically targets the forum state. However, not all Internet content should be subject to extraterritorial jurisdiction. There are instances when the assertion of extraterritorial jurisdiction would not be reasonable, such as in the case of a non-commercial website espousing an individual’s political opinion.

IV. International Guarantees of Freedom of Expression

Although an assertion of extraterritorial jurisdiction can be justified by internationally recognized principles of jurisdiction, other factors need to be considered. For transnational Internet regulation to be a legitimate exercise of state power, it should conform to international norms protecting free expression.

Even though the right to free expression had been embodied on the national level by various laws and constitutions for centuries, it was not until after World War II and the formation of the United Nations that the right to freedom of expression found its voice in the international arena. At its first session, the United Nations

236 Id. at 631–32.
237 Id. at 633.
238 See BROWNLIE, supra note 59, at 308.
239 See Defeis, supra note 216, at 75.
General Assembly declared "[f]reedom of information is a fundamental right and is the touchstone of all freedoms to which the United Nations is consecrated; freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse." The first task of the Human Rights Commission of the United Nations was drafting a bill of rights designed to protect such basic human rights as the freedom of expression.

These efforts culminated in 1948 with the unanimous adoption of the Universal Declaration of Human Rights (UDHR) by the General Assembly that establishes "specific inalienable rights and freedoms that cannot be abridged by any nation." Although the UDHR is not a treaty and thus technically is a non-binding source of international law, there are legal scholars who will argue that the UDHR, given its long history and wide acceptance, has become customary international law "creating certain limited legal obligations for member states." In Article 19, the UDHR specifically addresses the rights of individuals to freely express their opinions. Article 19 states 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." Given this language, the UDHR seems to prohibit any governmental interference with an individual's right to impart and receive information through the media, including the Internet. Moreover, the phrase "regardless of frontiers" would seem to prohibit any extraterritorial jurisdiction in freedom of

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241 Defeis, supra note 216, at 76.


244 Konkel, supra note 20, at 472–473.

245 Universal Declaration, supra note 242, at art. 19.

246 Id.

247 Id.

248 Id.
expression cases. However, the UDHR does place some limits on an individual’s right to freely express his or her opinions. In particular, Article 29 (2) of the UDHR states that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.\(^{249}\)

Therefore, an individual’s right to free expression under the UDHR is subordinate to a state’s prerogative to exercise its police powers in order to protect the morality, public safety, and general welfare of its citizens.\(^{250}\)

Following the adoption of the UDHR, the United Nations Commission on Human Rights began drafting several legally binding covenants designed to implement the guarantees of the UDHR. Among the first, adopted by the General Assembly in 1965, was the Convention on the Elimination of all Forms of Racial Discrimination (Discrimination Convention).\(^{251}\) With regards to freedom of expression issues, Article 4 of the Discrimination Convention addressed the dangers of racist propaganda and speech.\(^{252}\) Article 4 states:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination... inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial dissemination...;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote

\(^{249}\) \textit{Id.} at art. 29(2).

\(^{250}\) Konkel, \textit{supra} note 20, at 472.


\(^{252}\) Discrimination Convention, \textit{supra} note 251, at art. 4.
and incite racial discrimination . . ;

c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.\textsuperscript{253}

The Discrimination Convention requires that states not only punish incitement, “but also the dissemination of ideas based on racial superiority or hatred.”\textsuperscript{254} Therefore, under the terms of the Discrimination Convention, international law appears to require that states monitor and regulate the Internet in order to prevent the dissemination of racist ideas and arrest individuals guilty of spreading such ideas.

However, many states expressed reservations over this language in Article 4 because they feared that it compromised the right to free expression.\textsuperscript{255} In an effort to alleviate these concerns, Article 4 was modified to include a provision that any legislation designed to implement the Discrimination Convention be enacted “with due regard to the principles embodied in the Universal Declaration of Human Rights.”\textsuperscript{256} In short, the far-reaching language of the Discrimination Convention with regards to free expression is constrained by Articles 19 and 29 of the UDHR. Therefore, the Discrimination Convention places the same limits on free expression as does the UDHR, which amounts to free expression being limited in instances where a nation’s morals, general welfare, and public safety are threatened.\textsuperscript{257} Many states such as France, Italy, and the United Kingdom, when ratifying the Discrimination Convention, made declarations to the effect that they interpreted Article 4 as complying with the UDHR’s guarantee of free expression.\textsuperscript{258} Furthermore, the Discrimination Convention’s utility as a source of international law is hampered by the fact the United States has refused to act on this treaty.\textsuperscript{259}

Both the Universal Declaration of Human Rights and the

\begin{itemize}
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Defeis, supra note 216, at 86.
\item \textsuperscript{256} Id. at 88.
\item \textsuperscript{257} See Universal Declaration, supra note 242, at art. 29(2).
\item \textsuperscript{258} Defeis, supra note 216, at 88 n. 153 (noting that Belgium, France, Italy, United Kingdom, Malta, Papua New Guinea, and Tonga all made declarations that they would interpret Article 4 in accordance with the principles of the Universal Declaration of Human Rights).
\item \textsuperscript{259} Id. at 90.
\end{itemize}
Discrimination Convention allow states to curtail freedom of speech in the name of broad and vague terms such as general welfare, public safety, and morality. For example, the UDHR establishes an international norm of free expression that is constrained only in scope by a limitation designed to protect general welfare, public safety, and morals.\textsuperscript{260} Also, the Discrimination Convention's provision concerning free expression is interpreted by many states in a manner that conforms to the norm established by the UDHR.\textsuperscript{261} Regarding Internet pornography and hate speech, there is a danger that a nation could limit access to a wide array of scientific, cultural, and political information in the name of protecting the general welfare, public safety, and/or morals of its citizens. Thus, the UDHR and the Discrimination Convention are not helpful because they fail to provide any mechanism through which terms can be defined and standards established. Therefore, to discover the limits international law places on nations attempting to restrict freedom of expression, one must look to the terms of the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{262} and how they have been interpreted by the ICCPR's adjudicatory branch, the Human Rights Committee.\textsuperscript{263}

The ICCPR is a legally binding treaty that embodies "the basic minimum set of civil and political rights recognized by the world community."\textsuperscript{264} The ICCPR is a universally recognized document, having been signed by more than 100 nations upon its adoption by the General Assembly in 1966.\textsuperscript{265} Also, there is an argument that because of this wide international acceptance, at least some provisions of the ICCPR "reflect norms of customary international

\textsuperscript{260} See supra notes 245–50 and accompanying text.
\textsuperscript{261} Defeis, supra note 216, at 87–88.
\textsuperscript{265} Id. As of September 1993, 122 nations including Brazil, South Korea, Iran, Russia, United States, Germany, Kenya and India are State Parties to the Covenant. Id. at xlv.
law and are therefore binding on” non-party nations.266 The status of the ICCPR as a source of international law also has had an impact on the domestic legal system of nations like Canada, Germany, and India, where litigants have been able to “invoke the ICCPR as directly applicable superior law or as persuasive authority” in domestic constitutional cases.267

Regarding the right to free expression, there are two articles of the ICCPR that are of particular importance. The first is Article 19 that states:

1) Everyone shall have the right to hold opinions without interference.

2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3) 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:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.268

Basically, Article 19 codified the provisions in the Universal Declaration of Human Rights protecting the rights of individuals to freely express their opinions.269 Like the UDHR, the ICCPR in Article 19(3) has provisions allowing state parties to limit an individual’s right to free expression to protect the general welfare, public safety, morals, and reputation of their respective citizens.270

The other article that impacts the right of free expression is Article 20.271 Article 20 states that: (1) “[a]ny propaganda for war shall be prohibited by law,” and (2) “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to

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266 Id. at 21.
267 Id.
268 ICCPR, supra note 262, at art. 19.
269 See id.
270 See id.
271 See id. at art. 20.
discrimination, hostility or violence shall be prohibited by law."

However, unlike the UDHR and the Discrimination Convention, the ICCPR established in Article 28 a body named the Human Rights Committee (HRC), designed to implement the Covenant's provisions and adjudicate any disputes. The Human Rights Committee is an important institution because it has established through its adjudications international standards governing how the ICCPR's provisions are to be applied in cases dealing with pornography and hate speech.

Responding to pornography, the leading Article 19 case adjudicated by the HRC is *Hertzberg and Others v. Finland*. In *Hertzberg*, the plaintiffs, authors, brought suit against Finnish authorities, including the state controlled Finnish Broadcasting Company (FBC), for violating their Article 19 right to freedom of expression by censoring television and radio programs addressing homosexuality. Finland argued that these television and radio programs violated paragraph 9 of Chapter 20 of the Finnish Penal Code, which states that "[a]nyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1." Finland further argued that a majority of its citizens supported this criminal code provision designed to protect the morals of Finnish citizens. The HRC agreed that, in the case of the two programs that were censored, the plaintiffs' rights to self-expression were restricted, as defined by Article 19(2). Although the HRC noted that in a majority of cases it would not find that an individual has a right to express himself through television, a medium whose available time is limited, the HRC noted that in cases where programming has been produced for television broadcasting with the initial approval of the responsible authorities - only to be later

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272 See id.

273 See id. at art. 28.

274 McGOLDRICK, supra note 264, at 459–92.


276 Id.

277 Id.

278 Id. at 125.

279 Id. at 126.
censored - there might exist an Article 19(2) violation.\textsuperscript{280}

However, the HRC noted that, in defense of these restrictions, the Finnish Government had specifically invoked Article 19(3), allowing a nation to censor content that threatened public morals.\textsuperscript{281} The HRC held that the Finnish Government was within its rights under Article 19(3) to censor the offending programs, and thus, there was no violation under Article 19(2).\textsuperscript{282} In explaining its holding, the HRC stated the following rationale:

It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

The Committee [HRC] finds that it cannot question the decisions of the responsible organs of the Finnish Broadcasting Company that radio and TV are not appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19(3), the exercise of the rights provided for in article 19(2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.\textsuperscript{283}

Of particular importance, the HRC in Hertzberg established a “margin of discretion” standard.\textsuperscript{284} According to the HRC, when it comes to pornography, national authorities are to be afforded a certain margin of discretion in deciding whether to censor the offending material.\textsuperscript{285} Unfortunately, this “margin of discretion” standard is not very helpful because the HRC in announcing its decision did not provide any guidance as to how it planned to apply this standard in future cases.\textsuperscript{286} While it is true that there is “no universally applicable” common standard of morality,\textsuperscript{287} the HRC’s margin of discretion standard is so vague and deferential to

\textsuperscript{280} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id.
national authority that a wide range of topics could be censored. If the HRC censored radio and TV programs that merely "encouraged" homosexuality (i.e. portrayed homosexuality in a positive manner), then certainly the HRC would hold that a state under Article 19 (3) could censor websites that discussed issues relating to human sexuality and health that would not be considered pornographic by Western standards.288

Regarding hate speech, the Human Rights Committee has upheld a state’s right to curtail racist speech. In M.A. v. Italy, the HRC held that Italian authorities did not violate speech and association rights guaranteed by the ICCPR when they prosecuted individuals attempting to reorganize the dissolved Fascist Party.289 The HRC stated that the reorganization of the Italian Fascist Party was not the type of activity that the ICCPR was designed to protect.290

The HRC went even further in J.R.T. and W.G. Party v. Canada in upholding a state’s right to curtail hate speech.291 In this case, the plaintiffs used tape-recorded messages linked to the Bell Telephone system in Toronto to attract new members and promote the Party’s policies.292 The general public could call up and listen to a message warning "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles."293 Canadian authorities responded by severely curtailing the telephone service of the Party.294 The Party and Mr. T. argued that these restrictions violated their right under Article 19(1) to hold and maintain opinions without interference and violated their right under Article 19(2) to receive and impart ideas of all kinds through the media of their choice.295 In response to these allegations, Canadian authorities stated that their actions

288 See id.
290 Id.
292 Id. at 25.
293 Id.
294 Id.
295 Id.
were in compliance with Article 20(2)’s prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.296

After hearing both sides of the argument, the HRC ruled in favor of the defendant, Canada.297 In its decision, the HRC stated that “[t]he opinions which Mr. T seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit.”298 Furthermore, the HRC declared that “[i]n the Committee’s opinion... the communication is, in respect of this claim, incompatible with the provisions of the Covenant...”299 In short, the HRC held that racist hate speech is not the type of communication that the ICCPR was designed to protect.300 Article 20(2) of the ICCPR, much like Article 19(3), should be read as a limitation on an individual’s right under Article 19(1) and (2) of the ICCPR to hold and exchange opinions and ideas.

Thus, the UDHR, the Discrimination Convention, and the ICCPR place few, if any, restrictions on states to curtail individual freedom of expression in cases of pornography and hate speech. The margin of discretion standard expounded by the HRC in Hertzberg and Others v. Finland is so deferential to state authority that states can censor almost any kind of communications that they label to be pornographic.301 Likewise, in the case of hate speech, the UDHR’s public safety, morals and general welfare exception plus the HRC’s holdings in cases like M.A. v. Italy and J.R.T. and W.G. Party v. Canada, proves that hate speech is outside the realm of expression to be protected by these international agreements.302

V. Conclusion

The Internet is not some otherworldly creation immune to national regulation. Internet servers, computers, and users all exist

296 Id. at 27.
297 Id. at 28.
298 Id.
299 Id.
300 See id.
301 See McGOLDRICK, supra note 264, at 467.
302 See id. at 490–91.
in real time and in a real place. International declarations and covenants such as the UDHR, the Discrimination Convention and the ICCPR which deal with freedom of expression issues essentially give state actors a blank check to curtail freedom of expression.

The only real limits to national regulation of the Internet are found in the internationally accepted principles of extraterritorial jurisdiction. Here, the overriding limitation on whether a state can regulate a foreign Internet service or content provider is reasonableness. Whether a state asserts extraterritorial jurisdiction under the objective territorial principle or under a more refined targeting analysis, states are within their rights to assert reasonable jurisdiction over an actor who commits an offense on foreign soil, if the harmful effects of the offense are felt in the forum state. Reasonableness is essentially a balancing test weighing the seriousness of the local harm versus the individual rights that are being impinged on. Furthermore, for extraterritorial jurisdiction to be considered reasonable there should be a substantial connection between the foreign actor and the forum state.

In dealing with commercial Internet content and service providers, reasonableness under a targeting-based analysis can be measured in terms of contracts, technology and implied knowledge. Commercial content and service providers like Yahoo! Inc. and CompuServe can insulate themselves from being subjected to the jurisdiction of a foreign court by using forum selection clauses and choice of law clauses, by requiring affirmative consumer responses to such contract limitations, and by employing the latest blocking software. If a commercial site does everything within its powers to limit the offensive material, then the assertion of extraterritorial jurisdiction lacks the element of reasonableness required to make such an assertion a legitimate exercise of state power.

The one area where extraterritorial jurisdiction should be

303 See supra Part III.
304 See supra notes 100–01 and accompanying text.
305 See supra Part III (c).
306 See supra Part III (d).
307 See BROWNLIE, supra note 59, at 312.
308 Geist, supra note 103, at 602.
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presumably impermissible involves non-commercial websites maintained by individuals. While their domestic jurisdictions are, of course, free to regulate the content of their sites, it is unreasonable for a nation to assert extraterritorial jurisdiction over a non-citizen residing outside of its borders. First, such an exercise of extraterritorial jurisdiction offends the internationally recognized principle that states should not intervene in the affairs of other nations. Second, such an assertion is unreasonable because private individuals, unlike commercial content and service providers, do not have the resources and sophistication to employ contracts and technology to limit their liability.

However, there are instances where extraterritorial jurisdiction over private websites would be permissible under either international law or the universality principle, primarily in the cases of child pornography and incitement of war crimes and genocide. Under the universality principle, any website or service provider engaged in child pornography would be subject to extraterritorial jurisdiction, regardless of whether such an assertion of jurisdiction was reasonable in terms of substantial contacts. The universally recognized consensus that child pornography is an evil that should be eliminated enables states to prosecute offenders outside of its borders such as in the case where Italian officials prosecuted Russian citizens for running a child pornography ring. Also, international laws criminalizing war crimes and genocide allow nations to assert extraterritorial jurisdiction over any website that incites these crimes.

Thus, the Internet can be regulated at the national level under internationally recognized principles of extraterritorial jurisdiction and international agreements addressing freedom of expression issues. Even though many scholars worry that national regulation of transnational phenomena like the Internet will hinder its growth, these worries are overblown. The right to regulate does not equal the ability to enforce a judgment. Furthermore, advancements in blocking software technology plus international movement towards a common Internet regime as exemplified by the Draft

309 See BROWNLIE, supra note 59, at 313.
310 See supra Part III (e) and (f).
311 See BROWNLIE, supra note 59, at 307–08.
312 Graham, Jr., supra note 198, at 458–59.
313 See BROWNLIE, supra note 59, at 307–08.
Treaty on Cybercrime\textsuperscript{314} mean that the Internet will not be held hostage to the community standards of some 180 different nations. Despite nations' attempts to maximize the benefits of the Internet while minimizing the dangers of hate speech and pornography with regulations, the Internet will continue to grow and thrive.

\textbf{WALTER C. DAUTERMAN, JR.}

\textsuperscript{314} See supra note 205.