NOTE

THE DISSEMINATION AND EXPORTATION OF HATE:
LEGAL ACCOUNTABILITY FOR ANTI-LGBT HATE
SPEECH ABROAD

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Abstract

There is a recent and growing trend of primarily American conservative and religious leaders travelling internationally to propagate and incite anti-LGBT animus, hatred, and in many cases, state sanctioned or tolerated violence. As it currently stands, the human rights framework is inadequate in holding these anti-LGBT extremists accountable for their actions. This Note will detail the deficiencies of the current legal avenues: hate speech and incitement in international, regional, and domestic venues, and litigation in the United States under the Alien Tort Statute. Ultimately finding the current regime inapplicable to the circumstances, this Note will propose a new framework designed to hold these and other actors legally accountable through a convention on hate speech, including the extraterritorial application of existing human rights laws to private actors, and a requirement that states provide civil remedies for international victims domestically.

I. Introduction

On January 26, 2011, Uganda’s first openly gay man1 and LGBT2 rights activist, David Kato, was bludgeoned to death with a hammer in his home.3 His murder occurred less than a month after win-

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2. LGBT is an umbrella term for the Lesbian, Gay, Bisexual and Transgender community, and is used as a shorthand for the more-inclusive LGBTQI+2SA, which includes Queer, Questioning, Intersex, Pansexual, 2-Spirit, and Asexual individuals, as well.

ning an injunction preventing a Ugandan tabloid, *Rolling Stone*, from further identifying and exposing, or outing, LGBT individuals.\(^4\) In October of 2010, the tabloid featured Kato and others’ pictures under the words “Hang Them,” on the cover.\(^5\)

While some have connected his death to the injunction or the tabloid outing,\(^6\) Sexual Minorities Uganda (SMUG), a gay rights group that Kato helped establish, places the blame on another source. According to fellow SMUG founder, Val Kalende, “David’s death is a result of the hatred planted in Uganda by U.S. evangelicals in 2009. . . . The Ugandan government and the so-called U.S. evangelicals must take responsibility for David’s blood.”\(^7\) She refers specifically to the work of American evangelicals, most notably Scott Lively.\(^8\)

While most would find a man who believes that “[h]omosexuality gave us Adolph Hitler”\(^9\) to be extreme, pastor Scott Lively has incited hatred, legislation, and vigilante violence against LGBT individuals in multiple African and Eastern European Countries. Almost fifteen years ago, in 2002, Lively first targeted Uganda as ripe for his anti-LGBT message at an anti-pornography conference, where his warning that Western culture was eroding Ugandan independence through the infiltration of homosexuals was well received.\(^10\) Later, in March 2009, Lively directed a three-day conference attended by Ugandan cabinet members and religious leaders on “the ‘hidden and dark’ gay agenda,” which culminated in a five-hour presentation that was broadcast on televi-


\(^6\) See Rice, supra note 4.

\(^7\) Gettleman, supra note 3.


\(^10\) See id.
“We need public policy that discourages homosexuality,” he said.12 A month later, the first drafts of a bill that mandated the death penalty for LGBT individuals began circulating in the Ugandan Parliament.13 On December 20, 2013, Uganda was given a “Christmas gift”14 in the form of the Anti-Homosexuality Act, which had been revised prior to enactment to provide the punishment of life imprisonment instead of death for “aggravated homosexuality,” which includes “serial offenders” of homosexual conduct.15

After passage of the bill, persecutions of and violence against members of the LGBT community in Uganda increased from 19 cases in 2012, and 8 cases in 2013, to 162 cases between December 20, 2013 and May 1, 2014,16 an increase of 750 percent and 1900 percent, respectively. This rise in violence following the passage of anti-LGBT legislation is not a trend specific to Uganda; rather, it is seen where states have criminalized homosexuality and prohibited LGBT advocacy, association, and assembly.17

The rise in violence after the passage of anti-LGBT legislation based specifically on Scott Lively’s speech is also not specific to Uganda. In June of 2013, Russia passed a ban on the “propa-

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11. Id.
12. Id.
13. See id.
15. The Anti-Homosexuality Act of 2014 § 3(1)(f) (Uganda), http://www.ulii.org/ug/legislation/act/2013/2014/Anti-Homosexuality-Act-2014.pdf. However, because a person can be convicted of the “offence of homosexuality” if “he or she touches another person with the intention of committing the act of homosexuality,” under § 2(1)(c), and also includes punishment for a person who “aids, abets, counsels or procures another to engage in acts of homosexuality,” under § 7, the bill still has an extensive scope because it criminalizes touching and applies to activists. Id. §§ 2(1)(c), 7.
17. Id.
18. See U.N. High Comm’r for Human Rights, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the U.N. High Comm’r for Human Rights, ¶¶ 42, 64, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011); see also Asma Jahangir (Special Rapporteur of the Comm’n on Human Rights), Interim Report on Extrajudicial, Summary or Arbitrary Executions, ¶ 37, U.N. Doc. A/57/138 (July 2, 2002) (“[C]ontinuing prejudice against members of sexual minorities and, especially, criminalization of matters of sexual orientation increase the social stigmatization of these persons. This in turn makes them more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.”).
“ganda” of homosexuality, which has resulted in a rise of homophobic violence.\(^{19}\) Most of the violence and persecution—including beatings, sexual assaults, and even the use of social media to lure gay teenagers and humiliate them on camera—have no repercussions for perpetrators.\(^{20}\) Scott Lively unapologetically declared in response to media criticism that he was “proud to say that [he] advocated for the Russian ban on advocacy of LGBT propaganda to children and that [he] want[ed] other nations to follow suit.”\(^{21}\) In fact, in eight of the nine countries he has visited, nationwide bans on homosexual propaganda were discussed, and a majority of countries either passed the measures, or the measures are still pending.\(^{22}\)

Lively is not alone in his endeavor to spread anti-LGBT hatred and legislation internationally. In its report, “The Export of Hate,” the Human Rights Campaign highlights fourteen American extremists, their organizations, and their activities across five continents in over twenty-six countries, including well-known organizations such as Alliance Defending Freedom, American Center for Law & Justice, and Scott Lively’s organization, Abiding Truth Ministries.\(^{23}\) Their activities range from legal advocacy (including promoting and defending sodomy laws, gay propaganda laws, and same-sex marriage bans, as well as providing legal services for individuals), advising governmental and individual agencies, constitution drafting, and addressing parliaments, to hosting conferences,


\(^{21}\) Scott Lively, Harvard, Mother Jones and the “Gay” Bullies, \(\text{SCOTT LIVELY MINISTRIES}\) (Mar. 20, 2014), http://www.scottlively.net/2014/03/20/harvard-mother-jones-and-the-gay-bullies/.

\(^{22}\) Blake, supra note 9. Currently, the propaganda ban is still in place in Russia (as well as Crimea), and bans are still pending in Belarus, Kyrgyzstan, and Kazakhstan. The proposed bans and other efforts in Armenia, Latvia, Lithuania, and Ukraine either failed or were removed from consideration. Factsheet: Spread of Russian-Style Propaganda Laws, \(\text{HUMAN RIGHTS FIRST}\) (Jan. 13, 2016), http://www.humanrightsfist.org/resource/spread-russian-style-anti-propaganda-laws.

organizing rallies, distributing materials, and addressing students.\textsuperscript{24}

All of the current potential legal avenues for holding these actors accountable suffer from multiple defects. Therefore, as the international human rights regime is incapable of holding these foreign conservative and religious leaders\textsuperscript{25} accountable for spreading anti-LGBT hatred and inciting vigilante and state-sanctioned violence internationally, a new convention is required to hold these private actors responsible. This Note’s proposed Convention—based on existing international LGBT protections, human rights principles, and limitations on the freedom of expression, as well as incorporating the European and South African standards regarding hate speech—would strive to apply areas of human rights law to private actors extraterritorially, as well as require states to provide civil remedies for international victims in the state of the perpetrator.

As a foundation for this Convention, Part II describes the current legal avenues and their deficiencies. Part III establishes the new Convention for addressing this problem, and its practical implications.

II. CURRENT LEGAL AVENUES

This Part will discuss the inadequacies of the current available legal avenues, which have led to a lack of actor accountability and justice for victims. Section A examines the deficiencies of the legal remedies for incitement and hate speech under international, regional, and relevant domestic standards. Section B examines the deficiencies of the legal remedy under the United States Alien Tort Statute

A. Hate Speech

Overall, the problems arising under hate speech standards fall into similar categories, whether based on international, regional, or state standards. The first such problem deals with defining the violation and lack of consistent or coherent standards depending on the forum.\textsuperscript{26} Even when there is a standard applicable to the

\textsuperscript{24} HRC, supra note 23.

\textsuperscript{25} The terms “American conservative and religious leaders/extremists” and “anti-LGBT extremists” are used to describe the group of actors, primarily the leaders of American self-identified conservative and religious groups, who use dangerous anti-LGBT hate speech abroad.

\textsuperscript{26} See infra Part I.A.1 (discussing lack of applicable international criminal standards); Part I.A.3(a)–(b) (comparing standards of Uganda to South Africa, and U.S. to other West-
conduct of these anti-LGBT extremists, such as in the European regional system or South African domestic system, the regional and state protection systems have as many jurisdictional problems as the international standards, relating to jurisdiction over private individuals,\textsuperscript{27} as well as over American citizens.\textsuperscript{28}

1. International Standards

Criminal prosecution in the International Criminal Court (ICC) and legal accountability under an international speech standard, are unlikely to provide accountability for two reasons: the conduct of anti-LGBT extremists does not readily fit the standards of international crimes, and there would not be jurisdiction over a majority of the actors, as private U.S. citizens.

The first problem with prosecution under international standards is that the conduct of American conservative and religious extremists does not readily fit into international categories of the Rome Statute of the International Criminal Court,\textsuperscript{29} nor the applicable international treaties.\textsuperscript{30} The conduct at issue here does not readily fit liability for incitement to genocide,\textsuperscript{31} or accomplice liability for any crime in the ICC’s jurisdiction.\textsuperscript{32} While the conduct

\textsuperscript{ern countries); Part I.B (discussing new higher standards in U.S. litigation, under the Alien Tort Statute).

27. See infra notes 46–47, 56, 64, 100–101 and accompanying text (discussing jurisdictional problems over private individuals).


30. See International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, 218–20 (restricting hate speech on racial grounds only); see also infra notes 37–38 (describing the U.S. reservations to the speech provisions of international human rights treaties to which it is a party; the individual complaints procedure that allows cases against states, but not against individuals; and the lack of U.S participation in the individual complaints procedure)

31. See Rome Statute of the International Criminal Court art. 25(3)(e), July 17, 1998, 2187 U.N.T.S 3, 105 [hereinafter Rome Statute]; see also Timmermann, supra note 29, at 834, 843–44 (indicating that “direct and public” requirement under Rome Statute is similar to Genocide Convention thereby requiring speech which calls to genocide, rather than speech that may result in genocide).

32. See Rome Statute, supra note 31, art. 25(3)(b), at 105 (including criminal responsibility for an individual who “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted”). Here, the actors are not necessarily ordering, soliciting or inducing violence against LGBT people, and in some cases, harms may not come from the attempted or actual commission of crimes, but other psychological and social
of the anti-LGBT extremists may technically qualify under the definition of “crimes against humanity,” it may not satisfy the considerably high standard for crimes against humanity, and may not satisfy the state action requirement.

Second, legal accountability cannot be found in international treaty bodies or in the ICC, as both lack jurisdiction over the majority of the conservative and religious extremists because they are primarily U.S. citizens. Under the international treaties, the U.S. has reservations to the provisions that require States to adopt hate speech restrictions in the human rights treaties it has ratified, and even if the standards applied, they would only apply to the

harm connected to discrimination. See generally HRC, supra note 23 (describing the various activities of these American conservative and religious extremists); Blake, supra note 9 (providing the example of Scott Lively, who does not order, or solicit specific crimes against LGBT individuals). See also U.N. High Comm’r of Human Rights, supra note 18, ¶ 66 (“discrimination [in families and communities] manifests itself in various ways, including through individuals being excluded from family homes, disinherited, prevented from going to school, sent to psychiatric institutions, forced to marry, forced to relinquish children, punished for activist work and subjected to attacks on personal reputation. In many cases, lesbians, bisexual women and transgender people are especially at risk owing to entrenched gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life.”).

33. See Rome Statute, supra note 31, art. 7(1)(h), at 93 (“Persecution against any identifiable group . . . on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act [under Article 7, Crimes against humanity] or any crime within the jurisdiction of the Court.”); see also id. art. 7(2)(g), at 94 (defining persecution as “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”). The conduct of the religious and conservative leaders may potentially fall within these lines, as they intend to deprive LGBT individuals of fundamental rights—free speech, free association, right to life and human dignity, to name a few—based solely on their sexual orientation or gender identity. See infra Part III for further discussion of the rights being violated and the current international prohibition on discrimination against LGBT individuals.

34. See Rome Statute, supra note 31, art. 7(1), at 93 (requiring a crime against humanity to be “committed as a part of a widespread and systematic attack directed against any civilian population,” by an individual “with knowledge of the attack”).

35. See id. art. 7(2)(a), at 93 (defining “attack directed against any civilian population” as “a course of conduct . . . pursuant to or in furtherance of a State or organizational policy,” thereby requiring state action for crimes against humanity).

36. See infra notes 37–39 and accompanying text.

United States, and not the individual actors.\footnote{38} Similarly, jurisdiction over U.S. citizens in the ICC is unlikely due to the United States’ failure to ratify, and subsequent removal of intent to sign, the Rome Statute, as well as other techniques used by the United States to avoid the ICC’s jurisdiction.\footnote{39} Thus, even if these international human rights standards applied to this type of conduct, they would not apply to a majority of the actors, precisely because they are U.S. citizens. Ultimately, due to the conduct not fitting the standards and the lack of jurisdiction, international criminal standards are inadequate to hold these actors accountable.

2. Regional Standards

This sub-section explores the various regional protections of human rights as possible legal avenues for victims of harms associated with speech of conservative and religious leaders extraterritorially. Sub-section a describes the deficiencies of the African human rights system; sub-section b describes the deficiencies of the Inter-American human rights system; and sub-section c describes the deficiencies and standard of the European human rights system. Regional claims in the African, Inter-American, and European human rights systems for hate speech or incitement, while providing applicable standards,\footnote{40} also suffer jurisdictional problems,\footnote{41} as they lack jurisdiction over the conservative and religious leaders because they are individual private actors and U.S. citizens.\footnote{42}

\footnote{38. \textit{See} U.N. Office of the High Comm’r of Human Rights, \textit{Human Rights Bodies: Complaints Procedures}, \url{http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx} (describing the complaints procedure of treaty bodies, in which individuals allege human rights violations against states, but only those that have accepted the jurisdiction of the treaty bodies to hear the complaints, and how states accept jurisdiction); \textit{see also supra} note 37 (noting that the U.S. has not allowed individual complaints against it under either treaty, either by making the necessary declaration under art. 14 of CERD, or ratifying the first Optional Protocol of the ICCPR).}

\footnote{39. \textit{See} Rome Statute, \textit{supra} note 31, art. 12(2)(a)–(b), at 99 (providing jurisdiction if the State where the crime was committed has ratified the Rome Statute or if the State of the perpetrator has ratified the Rome Statute); \textit{Philip Alston & Ryan Goodman, International Human Rights 1336–37} (2013) (describing the U.S. signature, and revocation of signature of the Rome Statute); Dapo Akande, \textit{The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits}, 1 J. INT’L CRIM. JUST. 618, 618–19 (2003) (detailing the jurisdiction of the International Criminal Court (ICC) over non-State Parties, and the methods used by the United States to avoid jurisdiction over its nationals).}

\footnote{40. \textit{See infra} pp. 864–866 (discussing the European standard).}

\footnote{41. \textit{See infra} notes 46–47 and accompanying text.}

\footnote{42. \textit{See infra} note 64 and accompanying text.}
a. African Human Rights System

Claims brought against the individual extremists in Africa, under either the regional system43 or the sub-regional courts,44 would most likely face multiple problems, including a lack of jurisdiction over individuals and American citizens, a general lack of jurisprudence and testing, a lack of effectiveness, as well as certain practical and historical concerns.45 Although these courts each have different bases of jurisdiction, even in those forums that allow individual human rights claims, typically cases are only brought by an individual against a state, or by a state against another state in both the regional system,46 and the sub-regional courts.47 As a result, no claims can be brought against individual anti-LGBT extremists in these forums. Further, both the regional and sub-regional court systems have been critiqued for their lack of effectiveness48 and

43. Such as those submitted to the African Commission or Court of Human and People’s Rights in the African Union (AU).
44. Such as those submitted to the East African Court of Justice, the Economic Organization of West African States (ECOWAS) Community Court of Justice, and the South African Development Community (SADC) Tribunal.
45. See infra notes 46–53 and accompanying text.
48. See Stacy-Ann Elvy, Theories of State Compliance with International Law: Assessing the African Union’s Ability to Ensure State Compliance with the African Charter and Constitutive Act, 41 GA. J. INT’L & COMP. L. 75, 77, 151–54 (2012) (noting the general problems with the African continental system, including: “limited political will, failure to timely and uniformly impose sanctions, state reporting failures, and inadequately drafted governing instruments,” describing the jurisdictional challenges of individuals and NGOs trying to bring claims before the Court, and suggesting an amendment to the protocol establishing the Human Rights Court that would remove the requirement that states make a special declaration allowing jurisdiction over claims of individuals and NGOs); Lucylne Nkatha Murungi & Jacqui Gallinetti, The Role of Sub-Regional Courts in the African Human Rights System, 13 SUR INT’L J. HUM. RTS. 119, 120 (2010) (questioning the sub-regional courts’ “capacity to effectively exercise the new [human rights] competence in light of the economic focus of their founding treaties.”).
general lack of jurisprudence and testing, including regarding free speech. Additionally, practical concerns alongside the cultural remnants of colonialism may lead to unpredictable results depending on the sub-region. While these concerns apply to cases brought against individual extremists, there is particular hope for cases brought against African states in the African regional system, as the African Commission on Human and People’s Rights called on member states in 2014 to prohibit and punish all forms of violence committed against the LGBT community, to investigate and prosecute state and non-state perpetrators, and to provide judicial redress for victims.


50. Practical concerns include the need for willing and courageous plaintiffs to come forward and subject themselves to a greater likelihood of violence, and the variation of results based on the social attitudes and willingness of courts to hear LGBT claims. See generally Miz Cracker, Do They Hide Their Faces? Searching for Gay Life in West Africa, SLATE (Feb. 10, 2015), http://www.slate.com/blogs/outward/2015/02/10/gay_life_in_west_africa_is_it_possible_to_be_out_in_countries_like_senegal.html (describing the recent decline of the LGBT community in Senegal on the ground after visiting just a year prior—"Where I once saw a gay community more or less surviving on the margins, I now saw a community that was being pressed completely underground. Its advocates have been silenced, and official scrutiny has become unbearable,"—and recounting: ‘The first time you came, it was different,’ my friend Moussa said, ‘Now there are government cameras, and if you do man-to-man, they come to your door and kill you.’ I looked out over the crumbling highway near Moussa’s apartment, doubting that the government could have installed such cameras. ‘There was a boy like that up the road, maybe 25 years old,’ Moussa said, seeing my skepticism. ‘They took him and killed him, and I was happy, because he was not good.’ This story made my heart lurch. A gay boy had been killed and Moussa—who once claimed to be gay—was happy about it? ‘No, not me,’ he backpedalled, ‘But everybody else.’ Suddenly feeling threatened, I made some vague pronouncement about the continued existence of gays in Senegal. ‘Where?’ Moussa asked. ‘Do they hide their faces?’


52. See id. at 679–80 (detailing the complications of the varying residual effects of colonialism between regions, including Sub-Saharan and Muslim Northern Africa).

b. The Inter-American Human Rights System

Though the Inter-American human rights system, composed of both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, has not directly addressed the hate speech provision of the American Convention on Human Rights, it has been suggested that if it were to take up the issue, based on its similarity to provisions in the ICCPR and European Convention, “the Commission might well interpret [the provision] in a manner consistent with the relevant decisions of the European Commission and the Human Rights Committee.” Ultimately, while this system’s standards could apply to the conduct of the American anti-LGBT extremists, the jurisdictional and political problems of the Inter-American system would ultimately result in a lack of direct accountability and enforcement.

Bringing a claim to the Inter-American Commission, despite having workable standards, will still be problematic, due to lack of jurisdiction over both private individuals, as well as U.S. citizens. The Inter-American system, similar to the African systems, lacks jurisdiction over individuals and only allows claims against states. Thus, even if individual LGBT plaintiffs might theoretically be able to hold the United States accountable, the individual conservative and religious extremists would still escape liability. In addition, because the United States has signed but not ratified the Convention, there is no jurisdiction for claims brought against the United States before the Inter-American Court of Human Rights. While this has not stopped the Inter-American Commission from analyzing the United States’ human rights record, the United States questions whether the decisions of the Commission are even binding. Thus, even in the event of a favorable ruling by the Commission that somehow attributes the conduct of the private actors to the United States, the United States most likely still would not rec-

56. See Buergenthal, supra note 46, at 796–97 (describing procedure of individual petition system of Commission and Court).
57. ALSTON & GOODMAN, supra note 39, at 980.
58. Id.
c. The European Human Rights System

The European human rights system is considered the most judicially developed system in the world pertaining to human rights, and yet it still provides minimal accountability for most actors that are U.S. citizens. While the European Commission on Human Rights determined “that prohibitions on hate propaganda are entirely consistent with the obligations of states parties under the [European] Convention,” similar to the African and Inter-American systems, the European Court of Human Rights (ECtHR) may only hear cases brought against state parties to the Convention. Though it might cover the few French extremists who are engaged in anti-LGBT advocacy in foreign countries alongside their American counterparts, pursuing this legal avenue would still leave out a majority of the actors who are U.S. citizens.

Despite the lack of jurisdiction, the hate speech standard in the European system provides the greatest opportunity for holding these conservative and religious leaders accountable for their conduct. Hate speech cases in the European system balance the rights of the speaker against the rights of society, with greater weight given to the latter, and afford the government more control over private actors as compared to the American standard. Hate speech has recently risen to prominence as an issue due to a number of high profile cases.

60. Id. at 11–12.
61. ALSTON & GOODMAN, supra note 39, at 891.
63. Farrior, supra note 54, at 64.
65. See HRC, supra note 23, at 18 (describing French extremists working alongside American citizen and president of the National Organization for Marriage (NOM), Brian Brown).
66. Farrior, supra note 54, at 75-77.
Vejdeland v. Sweden illustrates the strength of protection against hate speech in the ECtHR.\textsuperscript{68} In this case, the ECtHR unanimously held that there was no violation of the right to free expression in a criminal conviction for hate speech against homosexuals when defendants distributed anti-gay pamphlets at a school in Sweden.\textsuperscript{69} The leaflets in question, similar to the speech of American extremists abroad, described homosexuality as a “deviant sexual proclivity” that had “a morally destructive effect on the substance of society,” blamed HIV and AIDS on the “promiscuous lifestyle,” connected homosexuality to pedophilia, and directed students to say these things if their teachers “put it forward as something normal and good.”\textsuperscript{70} The Court emphasized that while the particular speech in question “did not directly recommend individuals to commit hateful acts,” the comments were nevertheless “serious and prejudicial allegations.”\textsuperscript{71} More importantly, the Court iterated a broad standard when it stated the following:

\begin{quote}
[I]nciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour.’
\end{quote}

This broad standard would certainly encompass the actions of the American conservative and religious leaders, such as Lively, who slander the LGBT community with insulting and seriously prejudicial allegations, such as pedophilia, child recruitment, and genocide abroad.\textsuperscript{73}

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\textsuperscript{69} Id. ¶ 60.
\textsuperscript{70} Id. ¶ 8 (citing the full wording of the leaflet, “Homosexual Propaganda”: “In the course of a few decades, society has swung from rejection of homosexuality and other sexual deviances to embracing this deviant sexual proclivity. Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society and will willingly try to put it forward as something normal and good. Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold. Tell them that homosexual lobby organisations are also trying to play down paedophilia, and ask if this sexual deviation should be legalised.”).
\textsuperscript{71} Id. ¶ 54.
\textsuperscript{72} Id. ¶ 55.
\textsuperscript{73} See Blake, supra note 9; see also HRC, supra note 23.
Ultimately, while the regional systems provide a standard for the conduct of anti-LGBT extremists under the European system, the regional human rights systems suffer from the same jurisdictional problems as the international criminal standards.

3. Domestic Standards

This section reviews the relevant state standards regarding speech and highlights how location determines the applicable standard and resulting amount of protection for victims of hate speech. Sub-section a examines Uganda and South Africa as a comparison case study to demonstrate the variation among African standards. Sub-section b then compares the American standard, and its protection of the hate speech of conservative and religious leaders under the First Amendment, to other Western standards. Ultimately, because the favorability of the standard depends so much on location, and because jurisdictional issues remain, domestic state standards relating to speech do not lead to legal accountability for the majority of actors.

a. Comparison of Uganda and South Africa

Uganda and South Africa have very different responses to incitement and hate speech, especially concerning sexual orientation. While Uganda has virtually no constitutional or legislative protections for LGBT individuals, South Africa can be seen as a model in regard to de jure LGBT legal equality, providing both constitutional and legislative protections for sexual orientation. Uganda’s rather limited case law seems to prefer freedom of expression to any limitation, as Ugandan courts have struck down Penal Code statutes that restricted freedom of expression.

74. *See, e.g., Uganda Const.* ch. 4, art. 21, cl. 2; Penal Code Act 1950 ch. 6 § 51, ch. 8 § 83 (Uganda).
75. *See infra* notes 77–82, 87–99 (comparing the lower standards of Uganda to South Africa, and the United States to other Western states, respectively).
76. *See infra* notes 83–86, 100–101 and accompanying text.
77. *See Uganda Const.* ch. 4, art. 21, cl. 2 (non-discrimination clause does not include sexual orientation as a protected status); Penal Code Act 1950, ch. 6, § 51, ch. 8, § 83 (Uganda) (incitement to violence generally or based on the victim’s status requires direct incitement of a specific crime, and does not include sexual orientation, respectively).
78. *S. Afr. Const.*, 1996, ch. 2, art. 9, cl. 3 (prohibiting discrimination on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”).
whereas South African Courts have narrowly defined what constitutes protected speech.\textsuperscript{81} The hate speech regimes of Uganda and South Africa demonstrate the large difference location can make in asserting claims and receiving a remedy. Though South Africa’s jurisprudence is well-developed, jurisprudence on incitement and hate speech remains limited, rarely investigated, and under-litigated Africa, resulting in inconsistent standards throughout the continent.\textsuperscript{82}

In addition to inconsistent standards, there are practical problems to finding accountability in African domestic courts. While these states may have the territorial jurisdiction to prescribe rules,\textsuperscript{83} they might not necessarily have the jurisdiction to enforce,\textsuperscript{84} and African law enforcement officials would have to

context of a statement made by a press member against the President); \textit{Charles Onyango Obbo v. Attorney General}, [2004] UGSC 1, Constitutional Appeal No. 2/2002 (Uganda) (relating to the publication of false news).

81. \textit{See Afri-Forum v. Malema}, 2011 (6) SA 240 (EqC) at 62 (S. Afr.) (holding that singing a song translated to mean “shoot the [B]oer [white] farmer, they rape us, they are scared the cowards, they rob these dogs,” constituted hate speech); \textit{Sonke Gender Justice Network v. Malema}, 2010 (7) BCLR 729 (EqC) at ¶ 2 (S. Afr.) (holding statements, “[w]hen a woman didn’t enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don’t ask for taxi money from somebody who raped you,” constituted hate speech).


83. Under the territoriality principle, the most common and readily accepted principle, a state has the ability to prescribe rules regarding actions that take place in its territory. \textit{See Alston & Goodman, supra note 39, at 1123 (citing Restatement (Third) of Foreign Relations Law § 402 (Am. Law Inst. 1987)). See generally Case of the S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–19, ¶435 (Sept. 7).}

84. \textit{Restatement (Second) of Foreign Relations Law § 7(1) (Am. Law Inst. 1965) (“A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases.”)}; \textit{Restatement (Third) of Foreign Relations Law § 401 (Am. Law Inst. 1987) (differentiating between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce)}; \textit{Restatement (Third) of Foreign Relations Law § 405(1)–(3) (Am. Law Inst. 1987) (“(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, . . . . (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state’s interest is clearly greater”). African domestic courts may still find reason to deny jurisdiction for hate speech convictions sought against American citizens, either under the reasonableness test of § 405(1) and based on the eight factors in § 403(2), or under 403(3) by asserting that the U.S. may also reasonably prescribe rules about its citizens, even abroad, under
attempt to arrest and prosecute these violators during their oftentimes short stays within the states. But even assuming a state had an applicable effective standard and the jurisdiction to enforce, there is the added practical problem of states actually wanting to enforce, especially in light of political consequences with the state of the accused, namely the United States, or their own citizens.

b. A Comparison of the United States and Other Western Countries

In the west, the United States is similar to Uganda in its lack of protection for victims of hate speech, while other Western countries are similar to South Africa, which have put limitations on and imposed standards on free speech by prohibiting hate speech. Considered an absolutist view of the right to free speech, based on the language of the First Amendment that “Congress shall make no law . . . abridging the freedom of speech” — the standard for incitement in the United States is quite high, as it generally does not allow for any exceptions or prohibitions on speech.

In *Brandenburg v. Ohio*, the Supreme Court held that a state may not punish advocacy of violent action unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” The Court even noted the difference between “mere abstract teaching of moral propriety “or necessity to resort to violence, and “preparing a group for violent action and steeling it to such action.” Hence, a speaker may

§ 402(2). *See also* Timothy Zick, *Territoriality and the First Amendment: Free Speech At—And Beyond—Our Borders*, 85 Notre Dame L. Rev. 1543, 1549 (2010) (“With regard to citizens, although First Amendment rights have not frequently been enforced extraterritorially the assumption is that the First Amendment formally applies to expressive activities beyond U.S. borders.”).

85. *See Blake*, *supra* note 9; HRC, *supra* note 23 (describing the general practice of American conservative and religious leaders to visit countries for conferences, or specific instances of anti-LGBT advocacy, or as in the case of Scott Lively in Europe, as part of a tour of many countries).


88. U.S. Const. amend. I (emphasis added).


90. *Id.* at 448.
The Dissemination and Exportation of Hate

only be punished when the speaker: “(1) advocates imminent illegal conduct; (2) intends to incite either the use of force or illegal conduct; and (3) is highly likely to incite such conduct.”

Hate speech against particular groups is permissible, even if, as “fighting words,” it will lead to imminent violence or inflict injury. Further, the Court has also held that the use of anti-LGBT epithets at a gay service-member’s funeral was protected under the First Amendment and that the First Amendment is a defense to tort suits. Under the U.S. standard, the speech of the conservative and religious extremists, such as Lively, most likely would be protected under the First Amendment.

In comparison to the American standard, the free speech jurisprudence of other Western countries, such as Britain and Canada, is based more on balancing free expression and dignity. Canada, Germany, France, and others, permit sanctions against Holocaust deniers, while France frequently imposes fines on public speech that promotes racial or religious inferiority, or exclusion from France based on group status. Racial defamation in France results in higher penalties than ordinary defamation, while public “provocation of discrimination, hatred, or violence” on the basis of national origin, ethnicity, race, religion, gender, sexual orienta-

92. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (defining “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” and upholding the conviction a man that called a police officer a “damned racketeer” and a “damned Fascist” in based on a New Hampshire statute which penalized “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place.”); R.A.V. v. City of St. Paul, 505 U.S. 377, 377, 391–94 (1992) (striking down the Minn. law which “prohibited the display of a symbol which one knows or has reason to know ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,’” and overturning the conviction of a man who burned a cross on a black family’s lawn, by reasoning that speech restrictions based on content are unconstitutional even for the categories of speech that are not protected by the First Amendment, such as obscenity, defamation, and “fighting words.”).
94. Id. at 459.
96. Boland, supra note 87, at 2.
tion, or disability, is a criminal offense. The Netherlands bans racial, religious, or sexual orientation-based public insults, while all Scandinavian countries, South Africa, New Zealand, Australia, Canada, and the United Kingdom follow the International Covenant on Civil and Political Rights (ICCPR) and Convention on the Elimination of All Forms of Racial Discrimination (CERD) and criminalize inciting speech based on racial and religious hatred. But while this standard allowing hate speech prohibitions is favorable to LGBT victims as compared to the American standard, just like in African domestic courts, European domestic courts may face the same jurisdictional problems of either an asserted lack of jurisdiction to enforce or a lack of political will to enforce.

While in theory hate speech claims could potentially be brought under State domestic court standards, the standards are unlikely to provide accountability, both due to jurisdictional issues, as well as differing domestic standards, which depending on the State, may not provide any redress for victims of hate speech. The problems of the state standards—lack of consistent or applicable standards, and lack of jurisdiction—mirror the problems under international and regional standards. Overall, the problems arising under hate speech standards are universally similar, whether in an international, regional or state context: a fluctuating standard depending on the forum and/or a lack of jurisdiction over private actors as individuals or as U.S. citizens.

B. Alien Tort Statute

This section details the deficiencies of the Alien Tort Statute (ATS) in U.S. law and uses a recent case brought by Ugandan citizens against Scott Lively as a case study. In 2012, the Center for

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99. Schauer, supra note 97, at 8.
100. See supra note 84 and accompanying text.
101. See Blake, supra note 9 (detailing the success of Scott Lively’s anti-LGBT rhetoric in Eastern Europe); Human Rights First Factsheet supra note 22 (detailing the rise of anti-LGBT laws in Eastern Europe); HRC, supra note 23 (detailing the success of anti-LGBT activists all over the world).
102. See supra notes 83–86, 100–101 and accompanying text.
103. See supra notes 77–82, 87–99 (comparing the lower standards of Uganda to South Africa, and the United States to other Western states, respectively).
104. See supra Part I.A.1–3.
105. See supra Part I.A.1.
106. See supra Part I.A.2.
Constitutional Rights filed a civil claim under the ATS, *Sexual Minorities Uganda v. Lively*, which has been the first and only legal avenue used in attempt to hold American conservative and religious leaders accountable for anti-LGBT hate speech abroad.

The ATS, a single provision of U.S. Code dating back to 1789, provides district courts with original jurisdiction over civil actions by non-U.S. citizens for torts in violation of international law. Utilizing this legal avenue is subject to multiple problems, as evidenced by recent Supreme Court cases, which limit the international norms that count as “the law of nations” and create a presumption against extraterritoriality, as well as practical and jurisdictional problems of available defenses, (namely the First Amendment), and physically bringing a case in the United States.

As applied to the *SMUG* case, under the new limitations on international norms and extraterritoriality, it is not clear whether LGBT plaintiffs will ultimately succeed. In *Sosa v. Alvarez-Machain*, the Supreme Court limited the international norms by which claims can be brought under the ATS, and required such norms to be sufficiently specific, universal, and obligatory to be included as customary international law. In *SMUG*, the plaintiffs brought claims alleging “crimes against humanity,” but the issue of whether crimes

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109. The ATS was enacted in 1789, but was rarely used until 1980, when a Second Circuit decision, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), allowed jurisdiction over claims against a Paraguayan official by a Paraguayan doctor and his daughter for the torture of the doctor’s son in Paraguay. This case set a precedent that has allowed non-U.S. citizens to file civil actions for human rights violations committed outside the United States. *See generally Alston & Goodman, supra* note 39, at 1144–45.

110. Alien Tort Statute, 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).


113. *See infra* notes 120–122 and accompanying text (explaining that the First Amendment may be a defense to the ATS, and noting that the requirement for personal jurisdiction requires certain practical problems for foreign plaintiffs).

114. *Sosa*, 542 U.S. 692, 725 (2004) (concluding that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”). The list of 18th-century paradigms was limited to: offenses against ambassadors, violations of safe conduct, and “individual actions arising out of prize captures.” *Id.* The Court noted that “the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, “‘offences against this law [of nations] are principally incident to whole states or nations,’ and not individuals seeking relief in court.” *Id.* at 720 (citations omitted).
against humanity are included under the ATS has not yet been decided.\textsuperscript{115} Therefore, it is unclear whether the norm against crimes against humanity will be interpreted broadly or narrowly, whether it will qualify under \textit{Sosa}, and ultimately, whether \textit{SMUG} will succeed.

In \textit{Kiobel et al. v. Royal Dutch Petroleum}, the Court established a presumption that cases under the ATS do not extend to extraterritorial conduct.\textsuperscript{116} Further, the Court held that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”\textsuperscript{117} While in \textit{SMUG} the District Court ruled that the \textit{Kiobel} restriction on extraterritorial application did not apply to the facts of this case, because Lively is a U.S. citizen and his conduct substantially occurred within the United States,\textsuperscript{118} there is a circuit split among lower courts on whether Americans qualify as proper defendants under the ATS.\textsuperscript{119} Whether \textit{SMUG} satisfies the \textit{Kiobel} presumption of extraterritoriality and the \textit{Sosa} requirement for international norms remains unclear. Either way, suits brought under the ATS demonstrate the recurring problem of defining and applying standards to the conduct of the conservative and religious extremists.

There are practical problems in addition to these standard problems. The main practical problem with the ATS litigation is that because the First Amendment serves as a defense to torts,\textsuperscript{120} ultimately hate speech, even abroad, could be protected under the First Amendment, considering the absolute nature of the U.S. hate speech standard.\textsuperscript{121} Another concern is the general jurisdictional requirement that plaintiffs and defendants be located in the United States in order to bring suit and establish personal jurisdiction.\textsuperscript{122} These practical and jurisdictional problems, in concert with the recent standard changes relating to international norms and the presumption against extraterritoriality, indicate that litiga-

\begin{footnotesize}
\begin{enumerate}
\item SMUG, 960 F. Supp. 2d at 310 (“[I]t is fairer and more prudent to address the \textit{Sosa} issue on a fully developed record, following discovery.”).
\item Kiobel, 133 S. Ct., at 1665.
\item Id. at 1669.
\item SMUG, 960 F. Supp. 2d at 310.
\item Snyder, 562 U.S. at 451.
\item See supra Part I.A.3(b) (describing U.S. First Amendment jurisprudence regarding hate speech)
\item See Fed. R. Civ. P. 4(k) (establishing the territorial limits on personal jurisdiction for commencing cases and serving process in U.S. federal courts).
\end{enumerate}
\end{footnotesize}
tion under the ATS may not be effective in holding conservative and religious leaders accountable for the human rights violations committed as a result of their hate speech.

III. ANALYSIS

All existing legal avenues pose significant obstacles and problems for LGBT litigants seeking to hold anti-LGBT extremists accountable for their hate speech and incitement of LGBT hatred abroad. The three major recurring problems are: defining the rights being violated,\(^\text{123}\) criminal and jurisdictional enforcement of U.S. citizens,\(^\text{124}\) and the application of human rights to state-actors only.\(^\text{125}\) The solution to these problems is a convention, which: (1) is based on existing international LGBT protections, human rights principles, and limitations on the freedom of expression\(^\text{126}\); (2) includes elements of applying a compilation of hate speech standards to private actors extraterritorially\(^\text{127}\); and (3) requires states to provide civil remedies for international victims in the state of the perpetrator.\(^\text{128}\)

The combination of these elements is most likely to produce legal accountability, as existing rights are more likely to be accepted than the creation of new rights, and civil remedies are more likely to be accepted by states with strong free speech norms, primarily the United States, all while overcoming jurisdictional restraints.\(^\text{129}\) However, as with all human rights, it is necessary to make sure this proposed Convention is not abused or overused, especially with the intent to limit speech that is unpopular but not dangerous. There is an important distinction between speech that merely expresses an unpopular opinion and speech that leads to violence. While these American conservative and religious extremists may be using legal avenues to affect change, their speech may still rise to the level of dangerous hate speech.\(^\text{130}\) Accordingly, these and other extremists that use dangerous hate speech should

\(^{123}\) See supra Part I.A.1 (discussing the lack of applicable international criminal standards); Part I.A.3 (comparing the standards of Uganda to South Africa, and the United States to other Western countries); and Part I.B (discussing the new higher standards of the ATS).


\(^{125}\) See supra notes 46–47, 56, 64, 100–101 and accompanying text.

\(^{126}\) See infra notes 149–173 and accompanying text.

\(^{127}\) See infra note 138 and accompanying text.

\(^{128}\) See infra note 136 and accompanying text.

\(^{129}\) See infra note 136 and accompanying text.

\(^{130}\) See infra Part II.B.3 (detailing the danger of conduct like that of Scott Lively).
be held directly accountable to their victims for the damages their hate speech has caused.

A. New Convention

This proposal provides sample language for a new convention on hate speech and LGBT protection by combining existing standards and a policy proposal. States should negotiate as to the acceptable international limits on freedom of expression as it relates to hate speech, to effectively universalize the standard and thereby provide universal protection.

The language and standards here, have been used, combined, and drafted with the object and purpose of protecting a broad range of victims of dangerous hate speech, and in particular, members of the LGBT community. Thus, the proposal includes recognition of the Yogyakarta principles as a binding statement on existing international law. The aim of the proposed language is to compensate victims of violence committed in the name of dangerous hate speech, recognizing that the broad jurisdictional grant for the standard proposed here—allowing both foreign and domestic victims of harms attributable to dangerous hate speech to bring civil cases against speakers—would most likely be controversial for some states and would still pose a rather high burden on foreign plaintiffs to bring cases in the states of the perpetrators.

The International Convention on Hate Speech, Equality, and Non-Discrimination

Preamble

The Parties to the present Convention,

Recalling the principles of equality and non-discrimination in Article 2 of the Universal Declaration of Human Rights, Art. 2 of the ICCPR, and Art. 2 (2) of the ICESCR,

Recognizing the Yogyakarta Principles as a summary of the obligations of states in existing human rights law to LGBT individuals,\textsuperscript{131}


\textsuperscript{132} U.N. General Assembly, Letter dated Dec. 18, 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands, and Nor-
Recalling the free expression provisions in the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights,

Affirming the principle that free expression may be limited to respect the rights and reputations of others,

Concerned with the current level of violence to groups in situations of vulnerability, especially based on sexual orientation and gender identity, as a result of extraterritorial hate speech, and

Affirming the need to prevent violence, provide universal protection, and to provide access to justice for victims of human rights violations,

Agree upon the following articles:

Article 1: Objectives

In order to codify and universalize existing standards of hate speech, and for the universal protection of groups in vulnerable situations, each Party shall guarantee the rights to equality and non-discrimination, in accordance with the provisions of this Convention.

Article 2: Definitions

For the purposes of this Convention,

1) “equality” means, “the full and equal enjoyment of rights and freedoms,” including legal and factual equality and “equality in terms of outcomes,”

2) “discrimination” means, any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
   a) imposes burdens, obligations or disadvantage on; or
   b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;

3) “injury/harm” means, any proven physical or property damage, financial loss, including future loss, or impairment of dignity, pain and suffering, emotional or psychological suffering;

4) “Party” means, a contracting party to this Convention;

5) “person” means, one or more natural or legal persons; “natural person” means one or more human persons;

6) “prohibited grounds”/ “protected groups” are based on:


133. Equality Act, supra note 79, art. 1 (defining “equality”).
134. Id. (defining “discrimination”).
a) “race, gender, gender identity, sexual orientation sex, pregnancy, marital status, ethnic, or social origin, color, age, disability, religion, conscience, belief, culture, language and birth; or
b) any other ground where discrimination based on that other ground—
   i) causes or perpetuates systemic disadvantage;
   ii) undermines human dignity; or
   iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph a).”

**Article 3: General Obligations**

1) Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between domestic law and the provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2) Within the scope of the relevant provisions of this Convention, any person meeting the requirements of standing under Article 8 shall have access to civil remedies against perpetrators, without discrimination as to citizenship, nationality or domicile.

3) Recognizing the “enforcement burden” on protected groups, parties shall take the necessary measures to:
   a) Protect the privacy of the individuals of the protected groups;
   b) Ensure access to, and in some cases, provide legal and other services for the protected groups; and
   c) Enact any other measures designed to lessen the burden on protected groups.

**Article 4: Prohibition of Dangerous Hate Speech**

1) Any person who publically “publishes, propagates, advocates or communicates words or pictures based on one or more of the prohibited grounds,” which poses a danger to the collective rights and reputations of a protected group or groups, “against

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135. Id. (defining “prohibited grounds”).
any person, that could reasonably be construed to demonstrate
a clear intention to
a) be hurtful;
 b) be harmful or to incite harm; or
 c) promote or propagate hatred,"\textsuperscript{139}
shall be civilly liable to any natural person who can show
standing.

2) Inciting harm or propagating hate does not require a call for
an act of violence, or other criminal acts.\textsuperscript{140}

3) “Attacks on persons, committed by insulting, holding up to
ridicule or slandering specific groups of the population can be
sufficient” to weigh rectifying the harms committed as a result of
hate speech in favor of freedom of expression exercised in an
irresponsible and dangerous manner.\textsuperscript{141}

4) Sincere and “[b]ona fide engagement in artistic creativity,
academic and scientific inquiry, fair and accurate reporting in
the public interest, or publication of any information, advertise-
ment or notice in accordance with [free expression], is not pre-
cluded by this section.”\textsuperscript{142}

Article 5: Variables Heightening the Danger of Speech
1) Variables that heighten the danger of speech, include:
 a) “a powerful speaker with a high degree of influence over
the audience,
 b) an audience with grievances and fear that the speaker can
cultivate,
 c) a speech act that is clearly understood as a call to violence,
d) a social or historical context that is [ripe] for violence, for
any of a variety of reasons, including [but not unlimited to]
longstanding competition between groups for resources, lack
of efforts to solve grievances, or previous episodes of violence,
and
e) a means of dissemination that is influential in itself, for
example because it is the sole or primary source of news for the
relevant audience.”\textsuperscript{143}

Article 6: Speech Act Clearly Understood as a Call to Violence
1) A speech act clearly understood as a call to violence, is based
on the factors:

\textsuperscript{139} Id. § 10.
\textsuperscript{141} See id.
\textsuperscript{142} Equality Act, supra note 79, § 12.
a) how the intended or targeted audience understood the speech;\textsuperscript{144} 
b) name-calling victims, including but not limited to describing groups as something other than human;\textsuperscript{145} 
c) asserting collective self-defense and claiming the audience is in danger;\textsuperscript{146} and 
d) the use of coded phrases, and language that has special meaning.\textsuperscript{147}

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\textbf{Article 7: Special Obligation with Respect to Sexual Orientation and Gender Identity}
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Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between domestic law and the provisions of the Yogyakarta Principles, to establish and maintain a clear, transparent and consistent framework to assure equality and non discrimination on the basis of sexual orientation and gender identity.

\begin{flushleft}
\textbf{Article 8: Standing\textsuperscript{148}}
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1) A person has standing, if:
\begin{itemize}
    \item a) they have suffered an actual, or will suffer an imminent, concrete and particularized harm,
    \item b) which is traceable to the defendant, and
    \item c) a favorable ruling by a court is likely to remedy the harm.
\end{itemize}

\begin{center}
\textbf{B. New Convention Elements}
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This section will outline the features of the proposed Convention, defining the rights of hate speech victims and liability for uses of hate speech. The Convention’s framework is a combination of existing standards and a requirement that states must provide civil remedies in the state of the perpetrator against private actors. This section will propose guidelines for evaluating the danger of the speech in question and other limitations to protect unpopular speech or opinion by distinguishing it from dangerous hate speech.

\textsuperscript{144} Id. at 4 (stating that the variable can only be analyzed in “the way in which the speech was understood by the audience most likely to react, at the time when it was made or disseminated,” due to the fact that “[j]nflammatory speech is often expressed in elliptical, indirect language, which can be variously interpreted.”).

\textsuperscript{145} Id. (defining the “rhetorical hallmark of incitement to genocide, and to violence” used to dehumanize the victim by name-calling something other than human, such as vermin, insects, or animals).

\textsuperscript{146} Id. at 5.

\textsuperscript{147} Id. (citing the example of the Rwandan word for cockroach used to refer to Tutsi in the Rwandan genocide).

1. Defining the Rights and Violations Through Existing Standards

This section explains the existing standards for freedom of expression and hate speech under international law, which prove: sexual orientation and gender identity are prohibited grounds for discrimination; the conservative and religious extremists are violating the rights of LGBT individuals; and the right to freedom of expression can be restricted for the protection of the reputation of others.

The first step towards granting full international protection for the LGBT community begins with the recognition that international law currently identifies and establishes protections based on the vulnerability of the LGBT community. To this end, there are several guiding indications that demonstrate, as a matter of international law, that the LGBT community is already a protected group under non-discrimination principles. A number of international treaty bodies have stated that sexual orientation and gender identity are included among prohibited grounds of discrimination, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women. Further, in 2008, sixty-six states of the United Nations General Assembly signed a statement affirming that human rights principles and obligations extend to sexual orientation and gender identity.

Perhaps the most detailed expression of international human rights encompassing protections for sexual orientation and gender identity is found in the Yogyakarta Principles. Put forth by a group of human rights experts, the Yogyakarta Principles consist of twenty-nine nonbinding, interpretive principles of international human rights law, which affirm existing binding and obligatory

149. See infra notes 153–157.
150. See infra notes 158–167 and accompanying text.
151. See infra note 170 and accompanying text.
152. See infra notes 153–157.
154. Id.
156. YOGYAKARTA PRINCIPLES, supra note 131.
international legal standards in relation to sexual orientation and gender identity. The Convention proposed by this Note would adopt the obligations of the Yogyakarta Principles as binding.

Under international law, LGBT victims of violence can, in theory, assert violations of numerous human rights in existing human rights treaties against the states in which they live, based on either the state’s legal actions to harm, or the state’s lack of protection of the LGBT community arising from the hate speech and actions of anti-LGBT extremists. Under the ICCPR and before the Human Rights Committee, LGBT individuals could assert violations of the right to equal protection and non-discrimination, the right to life, the right to be free of torture, cruel, inhumane, and degrading treatment, the right to liberty and security of person, the right to equality before courts, the right to privacy, freedom of expression, the right to peaceful assembly, and freedom of association. These rights were violated in the cases of David Kato and other LGBT Ugandans, and they continue to be violated for millions of LGBT individuals globally. Because LGBT individuals may be able to find redress for these human rights viola-

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157. Id.
158. See HRC, supra note 23 (noting the activities, conduct, and speech of the conservative and religious leaders); U.N. High Comm’r Human Rights, supra note 18, ¶¶ 5–19 (discussing the applicable international human rights standards for violence and legal restrictions against the LGBT community); U.N. High Comm’r Human Rights, Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity: Report of the U.N. High Comm’r for Human Rights, ¶ 5, U.N. Doc. A/HRC/29/23 (May 4, 2015) (noting that while numerous advances taken by states in reducing violence against the LGBT community “are welcome, they are overshadowed by continuing, serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity. Since 2011, hundreds of people have been killed and thousands more injured in brutal, violent attacks . . . Other documented violations include torture, arbitrary detention, denial of rights to assembly and expression, and discrimination in health care, education, employment and housing. These and related abuses warrant a concerted response from Governments, legislatures, regional organizations, national human rights institutions and civil society, as well as from United Nations bodies—the Human Rights Council included.”) [hereinafter 2015 U.N. High Comm’r Human Rights].
160. Id. art. 6.
161. Id. art. 7.
162. Id. art. 10.
163. Id. art. 14.
164. Id. art. 17.
165. Id. art. 19.
166. Id. art. 21.
167. Id. art. 22.
168. See sources cited supra note 158.
tions against their home states when they are parties to human rights treaties and allow individual petitions, accountability should also be found where the violence and discrimination truly began—with the hate speech and incitement to hatred committed by American conservative and religious extremists.

Finally, under existing international freedom of expression standards, the right to freedom of expression may be restricted for the protection of the reputation of others. Speech can be restricted for incitement and espousing hatred as well, though the standards differ depending on venue. A clear standard is necessary for the equal application and protection for human beings, regardless of sexual orientation. This standard can be enunciated by a combination of the European and South African models that explicitly protect LGBT individuals from hate speech that intends to cause harm to both a group and to individuals.

169. See supra Part I.A.1–2 (discussing the jurisdictional problems of the international and regional human rights systems as applied to non-state actors, including that cases may only be brought against states that have accepted the jurisdiction of the international or regional bodies to hear individual petitions).


171. See ICCPR, supra note 170, art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”); American Convention, supra note 170, art. 13(5) (“Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any ground including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”); see also European Convention, supra note 170, art. 10 (allowing for any “formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary,” on the right to free expression) (emphasis added).

172. See supra notes 29–35, 77–82, 87–99 and accompanying text (comparing international standards, and the standards of Uganda to South Africa, and the United States to other Western States, respectively).

2. Civil Remedies for the Extraterritorial Violations of Private Actors in the State of the Perpetrator

Due to the differences in the international standards for hate speech and the desire to achieve a standard of universal protection, under the proposed Convention, states will be obligated to provide civil remedies for victims of hate speech violations perpetrated by their citizens. Thus, because a majority of the identified extremists inciting LGBT hatred are U.S. citizens, if the United States became a party to the proposed Convention, it would be obligated to allow Ugandan victims to sue Scott Lively for civil damages relating to his conduct in Uganda. As the world and speech become globalized with easier travel and the Internet, the United States must recognize the “imminent” nature of dangerous hate speech and extremism, as either incitement or under the “fighting words” doctrine, and provide remedies and justice for its victims. Ultimately this would provide the best compromise for the United States—allowing protections but not criminal prosecutions, and thereby allowing for a greater chance of ratification by other states.

Civil remedies, in particular, provide the basis of the compromise, because they are less restrictive than criminal laws, as it has been shown that civil laws do not have a “chilling effect” on political speech and do not create political martyrs, thereby refuting two main criticisms of hate speech laws. An important lesson comes from Australia, where in response to racist hate speech in the 1980s and 1990s and homophobic hate speech in 1990s and 2000s, the states enacted both civil and criminal hate speech laws. Still, though, while both are enacted, the criminal laws are rarely, if ever, invoked, which indicates that states are willing to award

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174. See Blake, supra note 9; HRC, supra note 23.

175. See supra Part II.A (proposing in article 3, section 2 of the International Convention on Hate Speech, Equality, and Non-Discrimination that “any person meeting the requirements of standing under Article 8 shall have access to civil remedies against perpetrators, without discrimination as to citizenship, nationality or domicile.”).

176. See supra notes 87–94 (discussing the U.S. hate speech standards).

177. Opponents of hate speech laws argue that regulation will create a “chilling effect” on “legitimate political debate [because of] fear of falling foul of legislation that proscribes hate speech,” and also argue that hate speech laws create martyrs of those who incite hatred, are punished, then claim that they are being treated unfairly, and otherwise draw more attention to the offensive speech. Gelber & McNamara, supra note 137, at 640, 656–57 (finding no evidence of a chilling effect and a marginal risk of creating martyrs, thereby rebutting two arguments of opponents of hate speech laws).

178. Id. at 634–35.

179. Id. at 635.
civil penalties against hate speech, but more hesitant to pursue criminal charges.

The civil laws in Australia generally require the lodging of a complaint with a human rights authority, which then investigates and may provide remedies, including an “agreement to desist, apologise, or publish a retraction, or to conduct an educational campaign in a workplace.” Civil proceedings can also be commenced in a state tribunal or federal court, which upon a finding of hate speech, has the power to order an apology, an order to desist, or for the publication of a corrective notice, and most importantly, require the payment of damages up to $100,000.

A study of the effects of the Australian civil hate speech laws from 1989 to 2010 found no evidence of a “chilling” or silencing effect on political discourse, and found only a few instances of the martyr effect, which ultimately became a “powerful illustration of precisely why hate speech laws were enacted in the first place.”

While there were still “ongoing and significant levels” of hate speech, the study found that the laws have a direct educational function, and importantly, “targeted communities expressed overwhelming support for the value and retention of the laws, as a symbol of their protection and the government’s opposition to discrimination.” The Australian case, as well as the logical extension that civil penalties are less punitive than criminal penalties, demonstrate that civil penalties would likely provide an effective compromise between a complete lack of protections and full criminal prosecutions for the United States.

Still, the Australian case study also revealed a significant and heavy burden on the targets of hate speech seeking to bring cases. This issue would also be a significant problem in this proposed Convention, especially with foreign plaintiffs. Because the standard allows for some flexibility in implementation, yet still imposes a definition of hate speech, it is both an assertion of, and intrusion upon state sovereignty, which requires implementing legislation by each state involved. This purposed Convention thus calls on states to take the necessary measures to protect the privacy

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180. Id. at 637.
181. Id. at 637, 637 n.18.
182. Id. at 636–57.
183. Id. at 657–58.
184. Id. at 649.
and provide legal services, as well as take other measures, which might lessen the burden on the plaintiffs in these cases.\textsuperscript{185}

This proposed Convention ultimately provides the greatest compromise toward achieving legal accountability for these conservative and religious extremists. As a majority, if not most, of the reported extremists engaging in anti-LGBT hate speech and incitement abroad are U.S. citizens, the United States is the most important ratifying party to the Convention.\textsuperscript{186} Because enforcement of international human rights norms in U.S. domestic courts is limited to civil lawsuits,\textsuperscript{187} and the proposed Convention’s main obligation requires states to provide civil remedies, the proposed Convention offers further compromise between the absolutist nature of U.S. standards and the balancing act of other Western Standards.

3. Limitations: Guidelines for Evaluating the Danger of Speech and Standing

In order to protect freedom of expression, there must be guidelines for evaluating the danger of the speech, as well as limitations on claims being brought, such as standing requirements of injury, causation, and the ability of a court to provide a remedy. The World Policy Institute has created guidelines for evaluating the danger of speech based on five factors.\textsuperscript{188} The most dangerous speech is characterized by a maximum level of the following five variables:

1. A powerful speaker with a high degree of influence over the audience;
2. The audience has grievances and fear that the speaker can cultivate;
3. A speech act that is clearly understood as a call to violence;
4. A social or historical context that is propitious for violence, for any of a variety of reasons, including longstanding competition between groups for resources, lack of efforts to solve grievances, or previous episodes of violence; and

\textsuperscript{185} See supra Part II.A, proposed art. 3, § 2.
\textsuperscript{186} See generally Blake, supra note 9; HRC, supra note 23; see also supra note 65 and accompanying text (describing a few French extremists involved alongside American counterparts who engage in dangerous hate speech in foreign countries, and their theoretical accountability in Europe).
\textsuperscript{188} Benesch, supra note 143, at 2.
5. A means of dissemination that is influential in itself, for example because it is the sole or primary source of news for the relevant audience[.].

These five factors weigh heavily on the facts at issue here.

The first two variables, a powerful speaker, and a fearful and resentful audience, are in full effect with regard to American conservative and religious extremists spreading anti-LGBT hate. The conservative and religious leaders at issue here, most of whom have large ministries, organizations, and financial resources are powerful; while their messages may not have as much traction in their home countries, particularly the United States, their messages are being heard in places where there is strong disapproval of homosexuality. According to a 2013 Pew Research Center report on attitudes toward homosexuality based on polling in thirty-nine countries from every region of the world, African and predominantly Muslim countries are the least accepting of homosexuality, corresponding with a high degree of religiosity and less wealth. This polling data highlights both the speakers’ high degree of influence as American religious leaders, but also that the religious audience has grievances and fears on which these religious leaders can cultivate anti-LGBT hatred. Lively, in particular, has warned Ugandans of the erosion of family values by “Western cultural Marxists,” liberals and homosexuals, which in Uganda was “a message that played on lingering colonial-era resentments.” Thus, the first two variables, that of a powerful speaker and a fearful and resentful audience, are in full effect when it comes to American religious leaders inciting LGBT hatred internationally.

189. Id.

190. See HRC, supra note 23, at 3, 5, 7, 9, 11, 13, 17, 19 (noting the million dollar budgets of, and thousands of dollars of contributions received by, the various conservative and religious leaders and their ministries and organizations).

191. Id. at 2.

192. Pew Research Ctr., supra note 86, at 2 (“[I]n poorer countries with high levels of religiosity, few believe homosexuality should be accepted by society.”). Specifically, the report indicated a high percentage of disapproval of homosexuality in the African countries polled, even in South Africa. Id. at 3. When polled, 98% of people in Nigeria, 96% in Senegal, 96% in Ghana, 96% in Uganda, 90% in Kenya, and 61% in South Africa believed homosexuality should not be accepted by society. Id. In Latin America and the Caribbean, where foreign anti-LGBT extremists are also active, the percentages of disapproval were much lower: 21% in Argentina, 24% in Chile, 30% in Mexico, 36% in Brazil, 42% in Venezuela, 49% in Bolivia, and 62% in El Salvador. Id. at 23. Three Eastern European countries were polled and showed a range of disapproval: 16% in the Czech Republic, 46% in Poland, and 74% in Russia. Id. at 22.

The third variable, a speech act understood as a call to violence, is also on display with regard to the speech of American conservative and religious leaders internationally, based both on the definitional facets and actual evidence of violence. The conduct of Scott Lively, for example, demonstrates all four facets of this variable: how the speech was understood by the audience most likely to react; name-calling victims as something other than human; asserting collective self-defense and claiming the audience is in danger; and the use of coded phrases and language with special meaning.

The first characteristic, how the speech was understood by the audience most likely to react, is highlighted in the way Uganda interpreted Lively’s message—by prescribing the death penalty for LGBT individuals, despite the fact that Lively claims he never called for the death penalty and instead advocated lighter punishments. For the second facet, comparisons to, and name-calling of something other than human, Lively uses comparisons to “monsters,” “sociopaths,” the “brutish” and “animalistic,” “serial killers” and “mass murderers.” For the third facet of asserting danger and self-defense, the “homosexual agenda,” as a tool for indoctrinating children and mass pedophilia, is the main danger Lively often espouses to justify collective self-defense. And finally, Lively also uses language with special meaning, the fourth facet, because pointing to homosexuality as the cause of the Holocaust and the genocide in Rwanda, can act as a signal to bond the speaker and audience, on top of the existing religious connection between the speakers and the audiences.

These four definitional facets, while helpful to understanding whether speech is understood as a call to violence, are only as relevant as the actual violence that results from the speech. In Uganda

195. Id. (noting that a “rhetorical hallmark” of incitement is speech that dehumanizes the victim by describing the victim “as other than human, e.g., vermin, pests, insects, or animals[].”).
196. Id. at 5.
197. Id. (citing the example of the Rwandan word for cockroach used to refer to Tutsi in the Rwandan genocide).
198. Blake, supra note 9.
199. Id.
200. HRC, supra note 23, at 2; Blake, supra note 9 (listing other dangers posed by accepting homosexuality, according to anti-LGBT conservative and religious leaders, as: the spread of HIV/AIDS, genocide such as the Holocaust or the Rwandan genocide, and the destruction of the family).
201. See HRC, supra note 23, at 2; Blake, supra note 9.
alone, persecutions of and violence against members of the LGBT community in Uganda has increased 750% and 1900%, from the passage of the Anti-Homosexuality Act in 2012 to 2014, respectively. But the increase in violence is also hard to quantify. There is a lack of state monitoring, recording, and reporting mechanisms, as well as a problem of under-reporting, due to mistrust of the police, fear of threats and reprisals, reluctance to identify as LGBT, and the lack of recognition of the perpetrators motives. Either way, the third variable of a speech act understood as a call to violence is demonstrated through both the facets and actual violence in relation to the anti-LGBT extremists’ conduct abroad.

The fourth variable of the guidelines, a social or historical context that is ripe for violence, is based on the history of violence against the group, and matches the current social circumstances of LGBT individuals. Characterized by other recent outbreaks of violence, underlying conflicts between groups, and the presence of other risk factors for violence, (including “weak democratic structures and rule of law, and structural inequalities and discrimination” between other groups), the circumstances outlined by the fourth variable are also applicable to the situation here. Violence against the LGBT community has been recorded in every region of the world, and often “show[s] a high degree of cruelty and brutality and include beatings, torture, mutilation, castration and sexual assault.” The target countries are also generally more religious and poorer, leading to conflicts between the religious and the LGBT community, which correspond to less structural equality, a weak rule of law regime, and weak governmental protection mechanisms for LGBT individuals.

The fifth guideline relates to the mode of dissemination, namely whether the means of dissemination is influential or persuasive in itself. In this case, this variable is particularly strong based on the range of activities and power of the audiences, namely lawmakers,
and domestic religious leaders, as well as individuals incited to commit hate crimes. Scott Lively addressed the Ugandan Parliament, met with Latvian lawmakers, and has addressed Ugandan, Latvian, and Russian congregations and universities, oftentimes introducing the concept of “gay propaganda” to the audience. Lively has been broadcast on live television, speaking alongside Ugandan religious leaders to Ugandan parliamentary and cabinet members, thereby heightening his credibility and visibility. Other anti-LGBT extremists’ activities include legal advocacy (such as defending sodomy laws, gay propaganda laws, and same-sex marriage bans, as well as representing individuals), advising governmental and individual agencies, constitution drafting, addressing parliaments, hosting conferences, organizing rallies, distributing materials, and addressing students. This wide range and types of audiences, as well as the various modes of dissemination, heighten the danger of American conservative and religious extremists’ hate speech.

The conduct of the anti-LGBT extremists has high levels of all five variables, thereby making it the most dangerous kind of speech. Ultimately, these five variables, though not ranked, nor “weighted equally across cases,” are fact specific and can be used to evaluate the danger of individual claims and even limit the application of hate speech laws to only the most serious cases.

A clear rule of standing, based on injury, causality, and redressability, is also necessary to protect freedom of expression and limit the number of cases to only the most egregious. Comporting with U.S. law, a plaintiff only has standing if he or she has an imminent injury, which is traceable to the defendant and can be remedied by the Court. The use of U.S. standing requirements in the proposed Convention adds another requirement for Plaintiffs, and limits the number of potential claims to only the most serious, thereby providing for further compromise between the

211. Id.
212. See HRC, supra note 23, at 2.
213. See Benesch, supra note 143, at 2
216. Nicol, supra note 214, at 1144–45.
absolutist nature of U.S. speech standards, and the balancing act employed by other Western states.\(^{217}\)

Ultimately, a convention that is based on existing standards of international, regional, and domestic law, which provides civil remedies in the states of the perpetrators and includes limits for evaluating the danger of speech and a requirement of standing, can provide a workable standard of redress for vulnerable groups, in particular the LGBT community. Such a convention could simultaneously provide a workable compromise for the United States to hold its anti-LGBT extremists accountable for their international conduct, as well as deal with dangerous hate speech in the United States.

C. Potential Obstacles for Implementation

It could be argued that the principle of sexual orientation and gender identity as prohibited grounds for discrimination has not yet reached the level of customary international law.\(^{218}\) However, despite the continued prosecution and persecution of LGBT individuals,\(^{219}\) LGBT individuals are protected under international human rights law, if only by virtue of their humanity.\(^{220}\) More concretely, under international and regional case law and “soft law” principles, sexual orientation and gender identity are included as prohibited grounds for discrimination.\(^{221}\) The UN General Assembly released a statement signed by over seventy countries, including the United States,\(^{222}\) that international human rights law applies to sexual orientation, and the Yogyakarta Principles provide an excellent summary as to how LGBT rights are already obligatory and

\(^{217}\) See supra Part II.A.

\(^{218}\) Kerstin Braun, *Do Ask, Do Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 29 Am. U. Int’l L. Rev. 871, 875, 889 (2014) (arguing that “due to a lack of consensus on the international level,” and to prevent polarization, a legally binding LGBT convention should not be pursued and noting, that although, “[t]he application of international human rights law to LGBT people in general has continuously been reaffirmed on the U.N. level . . . protection gaps exist in international human rights law where jurisprudence, authoritative commentary, resolutions, and other statements on the international level establish no specific obligations and rights of LGBT people.”).


universal in the existing human rights regime. Additionally, violence against LGBT individuals could constitute gender-based violence against those who defy gender norms. Ultimately, even if sexual orientation is not yet a prohibited ground under customary international law, the trend is towards inclusion.

Some individuals may argue that because the United States consistently reserves regarding restrictions on free speech, it would never ratify this Convention, and even if it did, it would contradict the First Amendment. Admittedly, the balancing standard in this proposed Convention would certainly come into conflict with the jurisprudence of the First Amendment, and to be constitutional, the Supreme Court might have to reverse its holding in *R.A.V. v. St. Paul*, and carve out an exception for a single content-based prescription in the “fighting words” category of unprotected speech. However, in light of recent events in the United States, including the rise of anti-Muslim and Hispanic violence explicitly and implicitly associated with the dangerous hate speech of Donald Trump,

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223. *See generally Yogyakarta Principles, supra* note 131 (affirming that international human rights law prohibits discrimination based on gender identity and sexual orientation, and that states are obligated to respect all human rights, including those pertaining to sexual orientation and gender identity).


225. *See Alston & Goodman, supra* note 39, at 220–23 (detailing the movement and trend of progression towards LGBT rights).

226. *See R.A.V., 505 U.S. at 377, 391–94 (1992)* (striking down the Minn. law which “prohibited the display of a symbol which one knows or has reason to know ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,’ “ and overturning the conviction of a man who burned a cross on a black family’s lawn, by reasoning that speech restrictions based on content are unconstitutional even for the categories of speech that are not protected by the First Amendment, such as obscenity, defamation, and “fighting words.”); *see also supra* notes 87–94 (discussing the U.S. hate speech standards). Alternately, because the proposed standard has a mechanism for determining new “prohibited grounds/protected groups,” the proposed standard may be seen as content-neutral, in which case, the Supreme Court would likely still have to expand the “fighting words” doctrine.

or mass-shootings explicitly connected to dangerous hate speech by white-supremacists and nationalists,\textsuperscript{228} perhaps the United States will begin to evaluate its absolutist standard with regards to dangerous hate speech. Finally, the proposed standard, while written to protect a broad range of groups, is still a high bar, as the requirements for standing and a determination that the speech is dangerous are intentionally meant to limit the application of the standard to only a few serious cases, and thus limit the burden on courts.

Further, while the United States has reserved with regard to the First Amendment to every human rights treaty restricting speech,\textsuperscript{229} perhaps the focus on civil rather than criminal liability will propel the United States towards ratification. Civil penalties may provide the United States a compromise in that compared to criminal sanctions, they both compensate victims while still holding perpetrators accountable, and at least practically lessen the chance of creating martyrs because no one is imprisoned for their speech.\textsuperscript{230} Further, the United States already has a standard for civil liability for speech in its torts regime, which could be adapted for the hate speech Convention.

Finally, while it could be argued that the human rights system should only apply to state actors, the current human rights system has applied human right laws to individual actors since its inception. From the trials of Nuremburg, the genesis of the modern international human rights regime, certain norms have applied to individuals, resulting in individual culpability.\textsuperscript{231} Similarly, as the conduct of these conservative and religious extremists potentially qualifies as a “crime against humanity,”\textsuperscript{232} there could arguably be individual culpability under international criminal statutes. However, based on the lack of general state or regional practice and

\textsuperscript{228} See Richard Cohen, Charleston Shooter’s Manifesto Reveals Hate Group Helped to Radicalize Him, SOUTHERN POVERTY LAW CENTER, (June 19, 2016), https://www.splcenter.org/news/2015/06/20/charleston-shooter%E2%80%99s-manifesto-reveals-hate-group-helped-radicalize-him (describing the connection between Charleston, South Carolina mass-shooter Dylann Roof and the online propaganda of the Council of Conservative Citizens, a white supremacist organization, which “pushes a ‘white genocide’ narrative, the idea that white people are under attack by people of color across the world.”).

\textsuperscript{229} Status of Ratification, supra note 37.

\textsuperscript{230} See generally Gelber & McNamara, supra note 137, at 640, 656-57 (describing the lack of political martyrs under both criminal and civil sanctions in their study of Australian hate speech laws).

\textsuperscript{231} ALSTON & GOODMAN, supra note 39, at 120.

\textsuperscript{232} See Part II.B on the Alien Tort Statute and Sexual Minorities Uganda v. Lively.
unpredictable results regarding this norm, civil penalties are truly the best option and most likely to be accepted.

IV. Conclusion

The current human rights regime is unable to hold anti-LGBT conservative and religious leaders accountable for inciting hatred against the LGBT community internationally. As a result of their conduct, violence based on sexual orientation, often sanctioned or tolerated by the state, is rising around the globe, while recourse for victims remains stagnant. To combat this practice, a convention regarding hate speech towards LGBT individuals, is necessary to ensure universal protections and substantive and procedural standards. The Convention should be based on existing standards of international, regional, and state law; encompass a mechanism whereby the states of the perpetrators create civil judicial remedies for victims; and include limits for evaluating the danger of speech and standing. The proposed Convention on hate speech would seek to prevent violence, compensate victims, and hold actors accountable for inciting hatred extraterritorially based on sexual orientation and gender identity.

Finally, the new hate speech Convention, while providing legal accountability for anti-LGBT extremists who incite LGBT hatred abroad, could also clarify standards relating to Internet conduct. Potentially, Internet conduct that results in harm, including cyber bullying, revenge porn, and “doxxing,” could also result in civil penalties. Similar to hate speech punishment, the imposition of civil penalties for Internet conduct could serve as a compromise to the competing interests of individual free expression, and the rights and reputations of victims.