

## BOOK NOTE

*Atrocity Speech Law: Foundation, Fragmentation, Fruition*, by Gregory S. Gordon. Oxford Univ. Press, 2017. Pp. 436. \$55.26 (hardcover).

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“Atrocity Speech Law” is a new term coined by Gregory S. Gordon to address the current fragmented and ineffective approach under international law to deal with hate speech. Gordon demonstrates in his discussions clearly and persuasively that the current international hate speech law is a messy and disjointed body riddled with gaps. But speech is so crucial in terms of fomenting mass violence or human rights violations that it has to be regulated in a holistic and unified way. By connecting the terms “atrocity” and “speech,” Gordon makes an important contribution to the literature by conveying the idea, for the first time, that there is a full scope of atrocity offenses that can be connected with speech. In this regard, terms and concepts people have used in the past to capture this kind of offense such as “hate speech law” or “incitement” are insufficient. As Gordon argues, “international hate speech law” does not capture the connection between speech and mass violence, and the concept of “incitement” leaves out a variety of other kinds of offenses that should be considered, such as instigation, ordering, and persecution as a crime against humanity. “Atrocity Speech Law,” on the other hand, covers both the breadth of the law and its connection with mass atrocity, thus becoming an important umbrella term. With this non-fragmented and holistic definition coined, Gordon’s analysis then leads to a comprehensive proposal of “Unified Liability Theory,” linking the core crimes of genocide, crimes against humanity, and war crimes with four illicit speech modalities: incitement, speech abetting, instigation, and ordering. It attaches individual’s speech offenses to all the international crimes, thus making it clear to scholars, jurists, and practitioners that speech is often integral to persecution and mass atrocity campaigns and that we need to think of these offenses together and understand how they work in relation to each other. This is a groundbreaking proposal, allowing prose-

cutors and practitioners to approach the issue in a more systematic and coherent manner.

The book is organized in a clear and engaging way, divided into three parts: foundation, fragmentation, and fruition. In the “foundation” part, Gordon starts with a historical sketch of the connection between speech and atrocity, recalling a series of horrific historical events including the Armenian Genocide, the Holocaust, Post-Cold War Balkan Atrocities, the Rwandan Genocide, and other recent cases. In each episode, Gordon describes the forms and content of the hate speech campaigns accompanying the mass violence, clearly demonstrating the important role that communications campaigns have played in instances of mass atrocity to “demonize the intended victims and inflame the passions of would-be perpetrators.” Gordon also discusses in this part the current international hate speech regulation framework. He describes the international human rights treaties that touch upon hate speech and conducts case studies of several states, including the United States, which protects the right to free expression robustly and is hesitant to regulate hate speech. He also discusses existing international atrocity speech crimes under international criminal law (Nuremberg and the foundational statutes) and the relevant cases at different ad hoc tribunals. Gordon shows that current regulation of speech that encourages violence remains scattered in different parts of statutes addressing various specific crimes such as incitement to genocide, hate speech, ordering, instigation, and persecution as a crime against humanity. He lays out the elements of each crime through a detailed analysis of the relevant jurisprudence.

This groundwork leads to the second part of the book, fragmentation, which points out the problems with the current legal framework on atrocity speech. Although the foundational statutes and cases have provided a rudimentary template, a closer examination of their texts shows that much of their pronouncements remain ambiguous and incomplete. Furthermore, their subsequent application has been unsystematic and disconnected, demonstrating the fragmentation problem. Gordon notes that for incitement to genocide, there are problems of ambiguity and inconsistency in terms of all its elements (direct, public, incitement, and causation). The incitement decisions are also decidedly under-inclusive because of the absence of a well-defined glossary of incitement techniques. The approaches to persecution, instigation, and ordering are likewise fragmented, with the International Criminal

Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia even adopting polar opposite positions at times. Gordon also expresses concern that the crime of ordering carries no inchoate liability and suggests that where there is a superior-subordinate relationship, liability should attach to the superior by the mere act of order issuance. Finally, Gordon points out a significant gap in international speech regulation: the detachment of war crimes, one core constituent component of atrocity offenses, from the main corpus atrocity speech law. There is no crime of “incitement to war crimes” in international humanitarian law, which is a serious problem. Gordon shows in this part that it is common in modern history that a commander does not give an order but makes subtle suggestions of violence that lead to commission of atrocities. But this is not covered by the international humanitarian law.

Having noted the seriously fragmented and disjointed framework of current atrocity speech law, the “fruiting” part of the book proposes remedies for these problems. Gordon proposes adding certain elements (context, relationship, channel of communication, temporality, and instrumentality) to the analytic criteria of incitement to genocide, as well as a typology of incitement techniques. He also proposes elimination of the phantom element of “causation” and the “public” element. These proposals make sense in that they provide more specific guidance in determination of incitement while also necessarily broadening the reach of the crime by making it clear that resulting violence is irrelevant and that incitement can be just as effective if undertaken at a large “private gathering.” Gordon also provides proposals to resolve the issues with respect to persecution, instigation, and ordering. To harmonize the conflicting threads of persecution law, Gordon persuasively argues that hate speech alone, without explicitly calling for violence, should qualify as persecution because hate speech as persecution must be legally tied to contemporaneous violence and hate speech even not urging violence could lead to significant harm. However, Gordon also notes that the right to freedom of expression is important and should be protected to the greatest extent possible. He tries to strike the balance by categorizing hate speech along a spectrum in determining whether it should be criminalized. Another major proposal that Gordon makes is the creation of a new offense: incitement to commit war crimes. This proposal focuses on speech in the context of armed conflicts and

allows prosecution of atrocity-conditioning and atrocity-persuading commanders before the troops commit the war crimes.

After suggesting these discrete proposals to fix the different segments of current international hate speech law, Gordon's discussion culminates in its proposal of a "Unified Liability Theory." Currently, different speech offenses are like scattered fragments buried in different treaties and statutes. Gordon thus proposes that there should be speech-specific offenses because speech plays an important role in catalyzing and fueling atrocity. The theory is to create a separate speech-crime provision instead of the existing ancillary rules, folding all speech-related offenses into one single provision and linking the different modalities of illicit speech to all core crimes. It is, in essence, a matrix with four types of liability along the horizontal axis and three types of liability along the vertical axis. The three core crimes are genocide, crimes against humanity, and war crimes, and the four modalities of atrocity speech are incitement (speech seeking but not resulting in atrocity), speech abetting (non-catalytic speech synchronous with atrocity commission), instigation (speech seeking and resulting in atrocity), and ordering (instigation or incitement within a superior-subordinate relationship). Among these four modalities, speech abetting is a new category created by Gordon to capture the scenarios in which, although not causing the violence, the speaker is acting as a chorus to encourage the mass violence as it is going on. With this "Unified Liability Theory," practitioners can more easily identify what the speech is at issue, properly define it, and deal with it more effectively. For implementation of this theory, Gordon suggests drafting a treaty that will classify these speech offenses and amending the Rome Statute of the International Criminal Court to have one speech provision in article 25 or 25*bis*. As Gordon argues, this consolidated approach will allow prosecutors to see how the speech offenses fit together and make more logical and efficient charging decisions.

Gordon's proposal of the "Unified Liability Theory" is a revolutionary suggestion to conduct a holistic and global reform of current atrocity speech law. It is rigorous and ambitious, envisioning a new treaty ("Convention on the Classification and Criminalization of Atrocity Speech Offense") and even putting forward some texts of the treaty. Such boldness is admirable, and with its abundant information, clear analysis, and compelling arguments, the book will serve as a valuable guide or even blueprint for any future attempts to restructure international atrocity speech law. At the

end of the book, Gordon suggests some future areas of exploration such as expansion of target crimes, historical research, sentencing, speech after atrocity, empirical research, and further multidisciplinary inquiries. There are also some questions left unanswered such as the design of actual prosecution procedures and implementation infrastructure, political obstacles in adopting this approach, and tribunals' general reluctance to *ex ante* intercession. Nevertheless, Gordon's book still serves as a milestone in holistically analyzing the current international hate speech law, providing a systematic framework to address the issue in a coherent manner, and making suggestions of unification and codification. The book is also well-written and digestible to lawyers, legal experts, and non-lawyers alike, making it recommendable to all people with an interest in international atrocity speech regulation.

Professor Gregory S. Gordon is Associate Dean for Development/External Affairs, and Director of the Research Postgraduates Program at The Chinese University of Hong Kong Faculty of Law. Before academia, he served as a prosecutor with both the U.S. Department of Justice and the International Criminal Tribunal for Rwanda. As a prolific expert on international criminal law, he has appeared on CNN, the BBC, and NPR, and has lectured at the U.N., the International Criminal Court, and the U.S. Holocaust Memorial Museum. He also serves as a hate speech project consultant for the International Nuremberg Principles Academy.