

Book Review – Atrocity Speech Law: Foundation, Fragmentation, Fruition

Gregory S Gordon

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Gregory S Gordon's *Atrocity Speech Law* examines the role of rhetoric and media in crimes of international concern.¹ The photograph of Joseph Goebbels at a rally adorning the book's cover is a chilling and effective reminder of the power of public speech as a catalyst for unspeakable atrocities. The work has particular relevance at a time when hate speech, and atrocities, are ongoing around the world. This has been appallingly demonstrated by the role of social media platforms in atrocities against the Rohingya in Myanmar.² The book builds upon Gordon's experience as part of the prosecution team in the *Media Case* before the International Criminal Tribunal for Rwanda.³

Atrocity Speech Law critiques the current law for inadequately proscribing rhetoric encouraging genocide, war crimes and crimes against humanity. Gordon proposes to reform the law into a new liability framework – 'Unified Liability Theory' – which targets this rhetoric more effectively. By the term 'atrocity speech', Gordon means rhetoric encouraging atrocity.⁴ He coins the term 'atrocity speech law' to describe the International Criminal Law ('ICL') touching upon atrocity speech, particularly in two areas: directly and publicly inciting others to commit genocide ('incitement'),⁵ and hate speech as persecution - a crime against humanity ('persecution').⁶ Previous literature has examined these two areas of ICL.⁷ However, Gordon goes further than these authors in three respects: he details the history of this body of law, proposes ideas for reform and examines the failure of the Law of Armed Conflict to address atrocity speech. The book therefore forms an original contribution to the literature.

¹ Gregory S Gordon, *Atrocity Speech Law* (Oxford University Press, 2017).

² See, eg, Libby Hogan and Michael Safi, 'Revealed: Facebook Hate Speech Exploded in Myanmar During Rohingya Crises', *The Guardian* (online), 3 April 2018 <<https://www.theguardian.com/world/2018/apr/03/revealed-facebook-hate-speech-exploded-in-myanmar-during-rohingya-crisis>>.

³ *Prosecutor v Nahimana (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Case No ICTR-99-52-T, 3 December 2003) ('*Media Case*').

⁴ Gordon, above n 1, 5.

⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25(3)(e) ('*Rome Statute*').

⁶ *Rome Statute* art 7(1)(h).

⁷ See, eg, Wibke Timmermann, *Incitement in International Law* (Routledge, 2014); Predrag Dojčinović (ed) *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge, 2012).

The book follows a three-part structure. Part A ('Foundation') discusses the history of atrocity speech law, Part B ('Fragmentation') discusses its flaws and inconsistencies, and Part C ('Fruition') proposes reform and outlines Gordon's Unified Liability Theory. While attractively simple, this structure is in fact problematic. Three key issues are addressed across Parts B and C, in corresponding chapters: incitement, persecution and the failure of war crimes law to criminalise hate speech. This bifurcates Gordon's analysis of these issues, requiring the reader to flick between the two Parts. A more convenient and persuasive structure would combine Parts B and C, dealing conclusively with these three key issues in one section each before addressing Unified Liability Theory.

Part A gives a compelling account of atrocities throughout history. From ancient Egypt to present South Sudan, Gordon illuminates the techniques of atrocity speech: the singling out of an 'other', dehumanisation, inciting feelings of retribution and manufacturing a perceived threat.⁸ This historical survey usefully informs the subsequent analysis. Gordon then considers how to balance prohibiting atrocity speech and protecting freedom of expression, surveying the approaches of international courts applying international human rights treaties and municipal courts dealing with this question.

As indicated earlier, Parts B and C contain corresponding chapters addressing three key issues: incitement, persecution and the gap in liability for atrocity speech with respect to war crimes. On the issue of incitement, Gordon's dissection of the ICTR's framework of the elements of the crime,⁹ and the subsequent non-application of this framework by courts and tribunals, is rigorous.¹⁰ He proposes that future courts should focus on the content of the inciting speech, and in particular rhetorical techniques such as verminization, euphemisms and congratulating past violence. This links persuasively with his earlier historical analysis of the content of atrocity speech.¹¹

Gordon then considers persecution. He outlines the differing approaches of international tribunals to the question of whether hate speech can be characterised as persecution, before resolving this question in the affirmative. He strongly criticises any argument to the contrary based on protecting freedom of speech and political dissent.¹² While accepting that there needs to be a limitation on the scope of the crime, Gordon proposes that only more targeted forms of hate speech, namely harassing and inciting, could constitute persecution as part of a widespread and systemic

⁸ Gordon, above n 1, 30.

⁹ Ibid 186-99.

¹⁰ Ibid 201-5.

¹¹ Ibid 291.

¹² Ibid 318-20.

attack against a civilian population.¹³ This, again, is eruditely informed by the earlier historical analysis.¹⁴

Finally, Gordon addresses war crimes law. He validly criticises international humanitarian law's lack of inchoate liability for speech-based offences, and their non-application to civilian incitement of war crimes by armed forces.¹⁵ He also proposes reform of the enforcement provisions of the *Geneva Conventions* and the *First Additional Protocol* to allow for this new form of individual liability in international humanitarian law.

The conclusion of Part C outlines Gordon's ultimate proposal for reform: Unified Liability Theory. Essentially, this proposal applies speech-based modes of liability to all crimes of international concern, through a new 'Convention on the Classification and Criminalization of Atrocity Speech Offences', and amendment of the *Rome Statute*.¹⁶ Under Unified Liability Theory, speakers who overtly or subtly incited *any* international crime could be charged with that international crime provided that they have the *mens rea* for it.¹⁷ This would be so regardless of whether the crime was actually committed. Currently, this is only the case for genocide. Unified Liability Theory also allows a commander or civilian to be charged with war crimes if they instigated or incited them.

The book's exposition and defence of Unified Liability Theory has much to commend it. However, it is introduced late in the book and makes the preceding chapters proposing discrete reform proposals for incitement, persecution and war crimes seem redundant. The book would have been stronger if the Theory had been Gordon's central thesis, and he had devoted more time to defending its coherence with existing international law.

Atrocity Speech Law is at its strongest when analysing the author's principal areas of expertise: the law of genocide and crimes against humanity as they relate to atrocity speech. It is weaker in its discussion of human rights law and international humanitarian law. There are two examples of this. First, the comparative historical survey of legal consideration of the right to free expression is at times cursory, and contains an over-emphasis on English-speaking jurisdictions: the United States in particular.¹⁸ Secondly, Gordon's reform proposal for international humanitarian law would create a lacuna in liability for atrocity speech in non-international armed conflict. Gordon proposes to amend the *Geneva Conventions*, but fails to recognise that under this proposal inciting certain

¹³ *Ibid*, 339.

¹⁴ *Ibid* 310-13, 346-7.

¹⁵ *Ibid* 359-60.

¹⁶ *Ibid* 378.

¹⁷ *Ibid* 377, 388.

¹⁸ *Ibid* 76-101.

crimes in non-international armed conflicts would not be prohibited. This undermines Gordon's aim of eliminating impunity for all atrocity speech.¹⁹

An additional issue is that throughout the book there is a heavy focus on the jurisprudence of the *ad hoc* Tribunals, and North American courts. The book would be stronger if there was more reference to the recent law and practice of the International Criminal Court.

Ultimately, however, *Atrocity Speech Law* overcomes these shortcomings. In coining the term 'genocide' and conceptualising the legal elements of the crime which would be prohibited by the *Genocide Convention*, Raphael Lemkin was acquainted with examples of the phenomenon of the targeted killing of groups – the Armenians, the pogroms – throughout history.²⁰ In a similar vein, in coining the term 'atrocity speech' and proposing his own Convention, Gordon demonstrates great skill as a litigator and scholar. In the current international political climate, it is difficult to see his proposals becoming a reality. Nonetheless, Gordon's achievement in diagnosing the problem of atrocity speech and prescribing a solution is admirable. While the book is predominately legal in nature, it references historical and philosophical analysis. It will therefore be valuable to scholars and international policymakers, particularly for future multidisciplinary analysis in this area.

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¹⁹ Ibid 350-1.

²⁰ Donna-Lee Frieze (ed), *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press, 2013).

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