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Abstract
Theoretical developments in the law are interesting things: They exist solely as ideals waiting to be actualized, but because the law is one of those fields where academic discourse regularly has a meaningful impact on courtrooms and legislatures, they are not completely academic in that word's most pejorative sense. Model legislation, for example, serves as both a theoretical outline of a specific legal doctrine and a possible model for future legislative and jurisprudential developments; it is never merely a hypothetical model since it is always ready to become living law. Theoretical developments in international criminal law operate similarly, though they have something of a keener edge. Yes, they are made concrete in the legislature and the courtroom, but grotesque harm must have been done for the law to enter the courtroom in the first place. And that is the real horror behind legal developments in international criminal law and crimes against humanity: If they are ever brought into actual courtrooms, they are borne on a red wake. It is precisely because that tide keeps rolling in that books like Atrocity Speech Law are useful.

Book Review

Atrocity Speech Law, by Gregory S. Gordon[1]

SAM ZUCCHI[2]

THEORETICAL DEVELOPMENTS IN THE LAW are interesting things: They exist solely as ideals waiting to be actualized, but because the law is one of those fields where academic discourse regularly has a meaningful impact on courtrooms and legislatures, they are not completely academic in that word's most pejorative sense. Model legislation, for example, serves as both a theoretical outline of a specific legal doctrine *and* a possible model for future legislative and jurisprudential developments; it is never *merely* a hypothetical model since it is always ready to become living law. Theoretical developments in international criminal law operate similarly, though they have something of a keener edge. Yes, they are made concrete in the legislature and the courtroom, but grotesque harm must have been done for the law to enter the courtroom in the first place. And that is the real horror behind legal developments in international criminal law and crimes against humanity: If they are ever brought into actual courtrooms, they are borne on a red wake. It is precisely because that tide keeps rolling in that books like *Atrocity Speech Law* are useful.

Atrocity Speech Law takes as its subject matter the past, present, and future of international hate speech—Gordon's term for the "piecemeal"[3] law that deals with public incitement to commit genocide and verbal persecution as a subset of crimes against humanity. Gordon's main objective is to critique the current

1. (Oxford: Oxford University Press, 2017).
2. BA (University of King's College), JD (Osgoode Hall).
3. Gordon, *supra* note 1 at 3.

legal structure: "international hate speech law" is marked by "its fragmented and haphazard treatment in both the jurisprudence and the scholarship."[4] But, in order to more accurately lay out its failings, Gordon explores the historical legal foundation to explain how we got here in the first place. Yet, this is not a history book—or, at least, not solely a history book. Both its historical narrative and its contemporary criticisms are geared towards outlining and justifying his proposals for a new, unified, and cohesive body of international law. To that end, *Atrocity Speech Law* has a tripartite focus, which is neatly summarized by the labels it uses for its three sections: "Foundation," "Fragmentation," and "Fruition."

"Foundation" covers the legal and historical foundation of international hate speech. First, there is a brief historical summary of the way in which speech has been used to promote and provoke what we would now call crimes against humanity. Here, the starting point is not the Armenian Genocide of 1915–17 or the Holocaust, but Pharaoh Amenemhet I, who "is recorded as having incited against other ethnic groups in his region, whom he would ultimately slaughter and enslave, by describing them as animals."[5] More relevant for readers, perhaps, is the discussion of recent history: The Holocaust, the collapse of Yugoslavia, and the Rwandan Genocide. This historical analysis then leads into an outline of contemporary international and domestic mechanisms for curtailing hate speech: international treaties, various international courts of human rights, the divergent treatment of hate speech domestically, and the foundational decisions of the International Criminal Tribunal for Rwanda.

Out of this narrative, Gordon focuses on the two different strains of international hate speech law. The first is persecution, which falls under the larger umbrella that is crimes against humanity. While persecution covers more actions than just speech, the prosecutions of Julius Streicher and Hans Fritzsche at the Nuremburg Tribunal are the foundational cases regarding hate speech as examples of persecution. The former was the founder and publisher of *Der Stürmer*, a Nazi paper that regularly printed anti-Semitic propaganda; the latter was a minister in the Nazi government and (more importantly for the sake of the prosecution) a radio personality who similarly distributed anti-Semitic propaganda over the airwaves. The former was convicted of crimes against humanity on the basis of political and racial persecution; the latter escaped conviction at Nuremburg "with self-serving statements and naked denials."[6] Fortunately, the West German government later convicted him.

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4. *Ibid* at 5.
5. *Ibid* at 31.
6. *Ibid* at 111.

The development of the second strain—incitement to genocide—did not emerge until the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.[7] Specifically, Article III, which makes "[d]irect and public incitement to commit genocide"[8] a punishable international offence. Left out of this convention, however, was the suggestion made by the Union of Soviet Socialist Republics to include "[a]ll forms of public propaganda (Press, radio, cinema, etc.), aimed at inciting racial, national, or religious enmities or hatreds; or at provoking the commission of acts of genocide."[9] Similarly unsuccessful was the Soviet suggestion to ban preparatory actions, such as issuing orders or instructions with the goal of committing genocide, along with a pledge to "disband and prohibit organizations that incite racial hatred or the commission of genocidal acts."[10] The world would need to wait half a century to see this law developed, with the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda ("ICTR"). Both of these tribunals adopted wholesale the language of the Genocide Convention (therefore incorporating Article III and the incitement offence) while also enumerating specific offences that would comprise crimes against humanity (persecution). The *Rome Statute*,[11] which gave rise to the International Criminal Court ("ICC"), borrowed the language of its own founding statute from that of the two International Tribunals.

The second part covers "Fragmentation," or instances where the case law surrounding international hate speech law has proven lacking or contradictory. Here, *Atrocity Speech Law* shifts from narrative to explicit criticism of the various inconsistencies or gaps in the law. For example, the ICTR set out, in *Prosecutor v Jean-Paul Akayesu*,[12] the four elements of public incitement to genocide:

> (1) "direct" (whether the persons for whom the message was intended immediately grasped the implication thereof—from this one can deduce that the message can be implicit); (2) "public" (a call for criminal action to a number of individuals in a public place or to members of the general public via mass media); (3) incitement

7. 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
8. *Ibid*, art III.
9. *Genocide – Draft Convention and Report of the Economic and Social Council: Union of Soviet Socialist Republics: Amendments to the draft convention (E/794)*, UNGAOR, 3rd Sess, UN Doc A/C.6/215/Rev.1 (1948) at 3 cited in Gordon, *supra* note 1 at 122.
10. Gordon, *supra* note 1 at 122.
11. *Rome Statute of the International Criminal Court*, 17 July 1998, 2178 UNTS 3 (entered into force 1 July 2002).
12. Trial Judgment (2 September 1998) at paras 555-60 (International Criminal Tribunal for Rwanda), online: ICTR-96-4-T, <unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

> (illegal urging to commit genocide parsed by reference to purpose and context); and (4) *mens rea* (the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such).[13]

Important, however, is the fact that "[c]ausation … was not an element of the crime."[14] Gordon proceeds to note issues with all these elements, ranging from the pedantic to the substantial. Regarding the "direct" element—the first one—he asks, "for a speech to be considered direct, is it limited to certain grammatical tenses? Does it have to be in the imperative—for instance, 'Attack the traitors now?'"[15] While his lament that "[n]ot creating a lexicon to classify such categories of speech as techniques of incitement was certainly a lost opportunity"[16] may seem overly fastidious, it nevertheless reflects the level of scrutiny Gordon directs to previous jurisprudence. It also reflects the lack of rigour and consistency that previous courts have shown in the past—including the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*.[17] Similarly, the focus on causation as an element of the offence, as influenced by "*Akayesu*'s partially cloaking it in the mantle of [a] quasi-legal element, has led some experts to speculate whether it constitutes a *de facto* requirement."[18] This despite the fact that the original source is *prima facie* ambiguous in its requirement for causation. Gordon's concern in "Fragmentation" is not that of a pedant's 'tsk-tsk,' nor is this simply disapproval at an instance of an untidy law. His point is more troubling, as he notes that "the resulting confusion has helped give license to repressive regimes to suppress legitimate speech."[19]

But beyond noting flaws and criticisms in the current incitement and persecution model of international hate speech, Gordon also points to a surprisingly substantial gap: "the problem in reference to war crimes is quite different. In effect, the issue is a relative absence of law."[20] There are no laws punishing civilians or military members inciting soldiers to commit genocide or other crimes against humanity. To illustrate why this is necessary, Gordon

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13. Gordon, *supra* note 1 at 185.
14. *Ibid*.
15. *Ibid* at 188.
16. *Ibid*.
17. 2005 SCC 40, [2005] 2 SCR 100. Gordon singles this Canadian case out specifically as a particularly egregious example of how courts fail to apply the extant legal framework for the prosecution of incitement. For a more extended criticism, see Gordon, *supra* note 1 at 201-04.
18. Gordon, *supra* note 1 at 199.
19. *Ibid* at 186.
20. *Ibid* at 253.

cites a number of instances from the historical record. For example, General Jacob Smith's command to make a "howling wilderness" of Samar during the Philippine-American War; and the allegations that General Geoffrey D. Miller told soldiers to treat the prisoners "like dogs" while overseeing Abu Ghraib.[21] These also include civilian orders to the military—consider examples like the Rwandan Genocide, where Rwandan radio and television stations played an important role in alerting soldiers to the location of hiding Tutsis. Gordon even lists Donald Trump's comments on the campaign trail regarding torture and collective punishment as examples of incitement to commit war crimes:

> if it were determined that Trump's words encouraged or gave comfort to soldiers contemplating commission of the crimes he advocated in his public remarks … Trump could not be prosecuted. Such impunity would be the result of a complete absence of law criminalizing incitement to commit war crimes.[22]

The third and final part—titled "Fruition"—is Gordon's real contribution to the field. The kinds of changes he makes are neatly encapsulated by the proposed renaming of a unified body of law: Atrocity speech law. It is a series of proposals designed to build on the groundwork outlined in "Foundation" and remedy the issues noted in "Fragmentation." He makes proposals like removing the causation requirement absolutely from incitement: "the incitement crime is inchoate and geared toward prevention. That means early intervention. Having a causation requirement would be inimical to that goal."[23] Another suggestion entails the passage of an international treaty designed to codify atrocity speech law offences, and he even provides the text of said treaty. And, for good measure, Gordon provides a lexicon that contains all possible variations of "direct" incitement, including: direct calls for destruction, verminization, euphemisms and metaphors, victim-sympathizer conflation, and so on.[24]

In short, in "Fruition" Gordon manages to reckon with nearly every critique previously introduced. This comprehensiveness is necessary, as one of the recurrent criticisms of international hate speech law throughout the book is its incoherent and haphazard conception and implementation. At Nuremberg, for example, the International Military Tribunal's charter lacks any specific language dealing with speech, despite the fact that "hate speech was the focal point of two different prosecutions."[25] Gordon's proposal is centred around not

21. *Ibid* at 254-56.
22. *Ibid* at 264.
23. *Ibid* at 283.
24. *Ibid* at 284-91.
25. *Ibid* at 369.

merely patching discrete issues, but in reimagining the whole legal apparatus via a unified liability theory; the different core crimes would be unified under three distinct—but related—offences: genocide, crimes against humanity, and war crimes. Liability would then occur through incitement, a proposed offence of speech abetting, instigation, and ordering.[26] However, it is here—where the book purports to add to the body of scholarship—where we get to *Atrocity Speech Law*'s major handicap. The proposed changes do not offer suggestions for overcoming the practical obstacles in the way of their implementation. By this, I do not mean that there is no step-by-step plan for the proposed atrocity speech law treaty—rather, I mean that some of the points raised earlier in the book are major obstacles to his proposals, and they are simply not addressed in the third section. The most obvious example would be the United States' approach to freedom of speech: "Foundation" discusses the American jurisprudence on the First Amendment, with an eye to outlining the legal status of freedom of speech in countries that have not incorporated hate speech laws into their domestic legal system. Following Gordon's discussion, it is clear that such regimes would stand almost opposed to the unified theory of liability he proposes. For example, one of the exceptions to the First Amendment's broad guarantee of freedom of speech—so-called "fighting words"—nevertheless did not permit the prosecution of a burning cross placed on a black family's lawn.[27] But there is no thorough engagement with this issue.

Almost in that sense, *Atrocity Speech Law* feels like it was published too soon. This is not to say that it was insufficient or half-baked—the book is a thorough and informative explanation of both how we reached this point, and what we can do to move forward. But in the sense that it feels like events have overtaken it. In texture and tone, it feels like a product of the late '90s and early '00s in its approach to international criminal law, reliant as it is on the model of the liberal international consensus that birthed the United Nations, peacekeeping missions, and international tribunals designed to punish grotesque violations of human rights. But such a model relies upon the existence of a liberal international consensus in the first place; what is it to do when the keystone of that whole apparatus can no longer be relied upon? It is easy to infer that this book's final draft was sent to printers before one of the United States' most prominent white supremacists, Richard Spencer, was profiled in *Mother Jones* and the *Washington Post*—before he said, in response to a question about how the United States

26. For a detailed explanation, see *ibid* at 376-91.
27. *RAV v St Paul (City of)*, 505 US 377 (1992). See also Gordon, *supra* note 1 at 86.

would be made whites only, "maybe it will be horribly bloody and terrible."[28] Before Charlottesville, and the mob that shouted "The Jew will not replace us!" Before 2017's sudden and stark rise in the kind of talk that Gordon labels atrocity speech. And, because the book feels just half a step behind, the suggestions it offers feel less than concrete: Donald Trump is still only a presidential candidate in *Atrocity Speech Law*, and he is cited as "[t]he most prominent recent example of potential liability for incitement to war crimes."[29] From a purely academic perspective, this makes sense—but the notion of finding the President of the United States liable for incitement to commit war crimes is practicably absurd.

This blind spot extends to characters like Richard Spencer or Andrew Anglin, the publisher of *The Daily Stormer* (until recently, the world's largest neo-Nazi website). It is incredibly unlikely that these figures would be subject to the proposed regime regarding persecution. Arguably, they meet the requirements: Under Gordon's unified theory of liability, incitement to crimes against humanity would be captured by atrocity speech law, and both the International Tribunal for the former Yugoslavia and Rwanda have deportation and extermination as specific offences under the crimes against humanity (persecution) umbrella. Yet, it is practically unlikely that Spencer and Anglin would ever face incitement charges, simply because their government has no real interest in pursuing those charges: As Gordon himself notes, the level of protection afforded by the American approach to even the most odious speech is incredibly high, and he offers no real suggestion for overcoming this barrier. Nor does he offer any suggestions for dealing with the notion that international law is viewed, by America, "as an imposition on and a usurpation of" American sovereignty.[30] But it is not just that Gordon has failed to grapple with the problem of American immunity. Perceptions of unfair targeting of non-Western nations have led to countries

28. John Woodrow Cox, "'Let's party like it's 1933': Inside the alt-right world of Richard Spencer," *The Washington Post* (22 November 2016), online: <www.washingtonpost.com/local/lets-party-like-its-1933-inside-the-disturbing-alt-right-world-of-richard-spencer/2016/11/22/cf81dc74-aff7-11e6-840f-e3ebab6bcdd3_story.html?utm_term=.bd1dad328095>.
29. Gordon, *supra* note 1 at 262.
30. Patrick Hagopian, *American Immunity: War Crimes and the Limits of International Law* (Amherst: University of Massachusetts Press, 2013) at 10.

repeatedly threatening to withdraw from the ICC.[31] Expanding speech crimes in the manner proposed—and with the expected American exclusion—would likely further harm the ICC's reputation for impartiality.

In fairness, these are issues that mere theory cannot resolve, and Gordon's thesis is not going to mend the gap between ideal and implementation. Nor can it account for the disturbing changes we have seen over the recent past, even as these changes have made clearer the limitations of the institutions of the liberal international order. Yet, despite recent events, works like Gordon's still have value: Theoretical proposals are often just waiting for the right moment to be implemented. At the very least, books like *Atrocity Speech Law* represent the belief that things will get better. That we will have a more rational, effective way of dealing with some of the gravest crimes known to mankind in—perhaps—a more rational and just world.

31. Norimitsu Onishi, "South Africa Reverses Withdrawal from International Criminal Court," *The New York Times* (8 March 2017), online: <www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>; Jina Moore, "Burundi Quits International Criminal Court," *The New York Times* (27 October 2017), online: <www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>. For a more legalistic analysis of the background of these events, see Manisuli Ssenyonjo, "The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders" (2013) 13:2 Intl Crim L Rev 385.