Incendiary rhetoric and mass slaughter go together. The Islamic State’s propaganda campaign against the Yazidis set the stage for its brutal, genocidal campaign of rape, murder and torture. An Ottoman campaign of hate speech helped pave the way for the Turkish population’s support of the Armenian genocide. Dehumanization is necessary for mass atrocities to be committed; this occurs through speech. Should such speech be individually, criminally punished? And how, particularly on the international stage? When should loathsome tweets about a particular group be viewed as criminally contributory to mass atrocities, rather than as protected individual expression? These are among the questions that Gregory S. Gordon, a professor at the Chinese University of Hong Kong Faculty of Law and a former prosecutor with the International Criminal Tribunal for Rwanda (ICTR), takes up in his outstanding new book, “Atrocity Speech Law: Foundation, Fragmentation, Fruition.”

Complex causal connections between speech and ensuing acts of violence and persecution, on the one hand, and fundamental tensions between freedom of expression and prevention of speech harms, on the other, have created difficulties for domestic criminal law across nations for decades. The difficulties are magnified on the international criminal plane, given the uneasy amalgam of various legal approaches that undergirds international criminal law’s attempts to penalize the speech surrounding mass violence.

Speech crime complexities are further exacerbated in international criminal law, “Atrocity Speech Law” notes, because of the law’s particular ad hoc development. It has grown in “fits and starts” from the conviction of Julius Streicher at Nuremberg, through the Genocide Convention, then the tribunals for Rwanda and the former Yugoslavia and the creation of the Rome Statute and International Criminal Court, on through to today. This piecemeal trajectory in international law has produced “disjointed groups of crimes” whose applications have been neither systematic nor coherent. Their disjointedness contributes, Gordon says, to
why they have not been effective in atrocity prevention.

The first major contribution this book makes to international criminal law is one of appellation. What’s in a name? Plenty, though in this instance there are no roses. International criminal law’s treatment of speech as crime has never enjoyed an appropriate formal label, a failure that, as Gordon persuasively argues, has contributed to its incoherencies. Referring to it as “international incitement law” merely compounds a narrow focus on incitement to genocide at the expense of other critical speech liability modalities. “International hate speech law” fails to capture the nexus to mass violence that is core to international criminal law. Furthermore, such a monolithic label ignores the nuances needed to distinguish between speech needing protection from speech needing prosecution: Does hate speech invite specific violence, or are its words geared to provoke group animus, and when are either criminal? Appellations matter for signaling what a field of law is conceived to be, and Gordon suggests that “atrocity speech law” more holistically characterizes the entire body of international law and jurisprudence dealing with the criminalization of speech related to mass violence. “Atrocity speech law,” furthermore, directly highlights the underlying issue justifying legal liability.

Atrocity speech law is about mass atrocities and their prevention; the role of speech in fomenting mass atrocities; and the justification for imposing legal liability, whether civil, criminal or both; and whether such liability should be under domestic law, international law, or both. Pointing to mass atrocities as the underlying social evil at stake provides a common basis by which to examine distinct speech crime modalities and their interrelationships, and also relationships between each mode of legal liability and the three core atrocity crimes of genocide, crimes against humanity, and war crimes. A leading achievement of this book is to offer a unified, coherent legal theory of mass atrocity and speech, and its first step is to identify mass atrocities as the common core of the disparate legal doctrines establishing legal liability for speech.

Existing scholarship up to now has separately examined the primary speech crime modalities and substantive crimes, but it has not offered a legal theory that brings them all together. The modality of incitement to genocide has taken center stage, dominating legal and scholarly debate — while persecution, instigation, and giving orders have all been insufficiently and inconsistently addressed. Prior to “Atrocity Speech Law,” Wibke Timmermann’s “Incitement In International Law,” offered the most thorough account of international criminal law’s treatment of speech; yet it focuses particularly on incitement, rather than other modalities, and moreover it focuses on international human rights law, rather than international criminal law. Nor does it offer much in the way of proposals for holistic legal reform and reconceptualization.

Reform and reconceptualization are needed, however, to address the current intellectual confusion regarding elements of the distinct body of international criminal law of speech crimes and various modes of liability. While “Atrocity Speech Law” urges improvements in the law of discrete speech crimes and modalities, its more important insight is that such piecemeal prescitions are insufficient. Gordon (the former ICTR Media Case prosecutor) thus proposes an analytical, yet unifying, reform of the entire body of atrocity speech law—one that is intellectually persuasive, in my view, though practical success would require willing partners on the international stage.

The book undertakes this analysis by breaking the subject into the three parts identified by the book’s subtitle—“Foundation, Fragmentation, Fruition.” The chapters of the Foundation section lay
out the origins of the international criminalization of speech. There is a dark past described here about propaganda and its role; Hitler, the book notes, on the eve of World War II boasted that he would provide a “propagandistic causis belli. Its credibility doesn’t matter. The victor will not be asked whether he told the truth.”

This section uses this account of origins to show historical, empirical links between hate speech and mass atrocity, drawing on a diverse group of leading scholars to make this link (which, after all, has to be made if it is to stand as a premise in an argument leading from speech to mass atrocity and thence to justifications for imposing liability). The “Foundation” section also surveys how international human rights law treats the dissemination of hate speech, while also making legal comparisons between the domestic law approaches taken by the speech-protective United States, on one extreme, and victim-protective States such as Denmark and the Netherlands, on the other. Gordon’s emphasis here and throughout the book, and the reason for the comparative analysis of domestic law, is to identify and justify a balance in international criminal law between suppressing “atrocity-friendly rhetoric” and protecting expressive liberty. Finally, this section chronologically traces, in erudite detail, the birth and development of international criminal law’s actual speech crimes and modalities, from Nuremberg through the International Criminal Court’s specific provisions. It is careful to note the absence of particular speech crimes from existing international criminal law instruments—for example, the absence of inchoate liability for ordering, or public incitement of war crimes and crimes against humanity. The need to address such gaps as a matter of reform comes in the book’s “Fruition” section.

“Fragmentation,” the second section, moves from origins and history to analysis of the case law developed by the contemporary ad hoc international tribunals—ICTR and the International Criminal Tribunal for the Former Yugoslavia (ICTY). The analytic theme is exactly as the title says—intellectual and legal fragmentation of legal doctrines applied to speech and mass atrocity, both across international tribunals and within their individual tribunal jurisprudence. The operationalization of legal principle, this section explains, creates case law on a piecemeal basis that, at times, deviates uncomfortably from what the drafters of these tribunals’ charters likely envisioned. This section does more than chronologically trace the law’s development—it shows how each crime fits with one another or, more accurately, fails to do so—and in this analytic way makes the point of the law’s fragmentation.

Analysis of legal fragmentation in this section leads to detailed, specific analyses of the four primary international criminal law speech penal modalities (public and direct incitement to genocide, instigation, persecution, and ordering) as a function of the international tribunals’ case law. “Atrocity Speech Law” thus puts flesh on the ICTY’s and ICTR’s statutory bones regarding speech by dissecting their foundational case law, explaining how the elements of each offense have been interpreted by each body. Cases such as Prosecutor v. Akayesu (1998), Prosecutor v. Kambanda (1998), Prosecutor v. Ruggiu (2000), Prosecutor v. Kupreskic (2000), Prosecutor v Blaskic (2000), the Media Case (2003), Prosecutor v. Bikindi (2008)—and even the domestic law case of Mugesera v. Canada (2005), are thoroughly examined. This amounts to showing the weaknesses in the ways in which each of these cases addresses different speech and atrocity questions and how they contribute to the fragmentation of international criminal law on these matters.

So, for example, it is clear that incitement to genocide lacks adequate definition and that hate speech as persecution receives different treatment from the ICTY versus the ICTR. This leads to confusion
regarding the gravamen of harm and requisite elements. The ICTR and ICTY have taken opposite positions, for example, with respect to whether persecution can be based on hate speech that does not call for violence: The ICTR says yes; the ICTY, no.

Readers could quibble with this section’s strong criticism of the tribunals on these issues; Gordon’s disappointment with their failure to develop “doctrinal heft” is palpable. He criticizes the tribunals, for being under-inclusive; failing, for example, to “provide a well-defined glossary of incitement techniques.” The tribunals, he observes, recognize only explicit exhortations as incitement, while failing to list other, more nuanced incitement techniques, such as “accusation in the mirror” and others.

Expanding liability for incitement techniques seems normatively justified in this context, thus buttressing Gordon’s criticism of the jurisprudential timidity of the tribunals. Nevertheless, one might want to ask whether the facts in the specific cases at issue actually implicated these techniques, given the strength of the direct exhortations in their facts. That is, is it fair to criticize the tribunals for choosing the strongest, most clear examples of incitement on which to rest their opinions, as they made what was, after all, new law? Surely it is understandable why such ad hoc bodies chose to walk a relatively conservative path.

The book’s final section, “Fruition,” makes proposals for reform. Tailored remedies are proposed for the individual discrepancies and inconsistencies identified in all the particular speech modalities; these are fixes for flaws identified under “Fragmentation.” Among the substantive reform proposals, several stand out; they go beyond fixing the substance of individual crimes to draw them together in an analytically unitary framework. Thus, for example, incitement must not remain relegated to genocide; it should also be available to punish those who incite war crimes and crimes against humanity. Ordering should include inchoate liability. Such particular examples are drawn into a multi-element framework for determining when hate speech is incitement. The section proposes a typology of incitement techniques in response to the under-inclusivity problem; this typology rests on the proposition that less-than-overt or express calls for violence can constitute incitement’s actus reus.

The “Fruition” section outlines specifics of proposed new crimes, recommending, for example, a crime addressing speech in the context of armed conflict. The author fills in the international humanitarian law speech crime gap by recommending creation of a new offense of incitement to commit war crimes; this offense would punish “atrocity-conditioning and atrocity-persuading commanders before their troops commit war crimes, even if they never commit such offenses.” Gordon proposes allowing this offense to include liability for civilians who incite soldiers as well. This new crime warrants further exploration but also caution, particularly given that at least some dehumanization of the enemy might be thought legitimately required in order for commanders to overcome their soldiers’ natural disinclination to kill.

Finally, the “Fruition” section sets out the comprehensive reform proposal promised in the book’s introduction. It takes the form of what Gordon calls the “Unified Liability Theory” of atrocity speech law. It draws under one analytic framework the three existing international criminal law speech categories (and contemplates adding a fourth, aggression), together with the four primary penal speech modes of liability explored in the book’s first two sections. As an international law drafting matter, this is packaged as either a new Article 25(bis) to the ICC’s Rome Statute or as its own treaty; the “pre-packaging,” as it were, allows these terms to be imported into the next ad hoc international criminal tribunal’s charter, if the time comes.
The substantive core of the book’s Unified Liability Theory is that the central atrocity offenses (adding aggression at some point) should each systematically include the speech crime modalities of inciting, speech-abetting (a type of speech-specific accomplice liability), instigating, and ordering. Criminalization of hate speech should grow beyond genocide and crimes against humanity to include punishment, perhaps, of such speech that is an integral part not only of the crime of aggression, but of terrorism as well. (The latter remains the subject of controversy, but its debates would benefit from the analytic theory offered in “Atrocity Speech Law.”)

There is room for skepticism of this book’s underlying belief in the deterrence value of international criminal law—that it actually helps prevent future atrocities. Though Gordon is far from being the only scholar or policymaker to believe in such a benefit, international criminal law has simply yet to show its deterrent value; it sporadically meets other objectives such as retribution, incapacitation, reconciliation, and delegitimization. But it does bear saying that, since modern international criminal law’s birth at Nuremberg, those contemplating the commission of genocide and war crimes haven’t seem overly concerned by the possibility of being dragged to The Hague or elsewhere to stand trial for their crimes—be they atrocity speech crimes or the atrocities themselves.

Hence the claim by “Atrocity Speech Law” that fixing the broken relationship between speech and international crimes will contribute to atrocity prevention strikes this reviewer, at least, as unrealistic. To be sure, Gordon is not without available replies; perhaps one reason international criminal law has seemingly had such little deterrent effect at least with respect to atrocity speech crimes is because the law criminalizing such behavior is, in a word, a mess. Notice, and clear notice at that, is integral to the criminal law’s mission, in international as well as domestic law.

If the specific speech crime reforms of this book were somehow incorporated into the Rome Statute, or into charters of future war crimes tribunals such as a tribunal for Syria, and if these crimes were actually prosecuted, and the jurists interpreting them were to follow this book’s advice—then there is some hope for greater legal clarity and hence improved legal notice. That would allow for some optimism that the atrocities arising from such speech crimes would, in some measure, be deterred.

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