

SCL Lecture Report

**Fixing the Law Governing  
the Relationship between  
Hate Speech and  
International Crimes**

*by Professor Gregory S. Gordon*

On 12 June 2017, the T.M.C. Asser Instituut, in collaboration with the Coalition for the International Criminal Court (CICC) and the Grotius Centre for International Legal Studies of Leiden University, hosted a lecture entitled *Fixing the Law Governing the Relationship between Hate Speech and International Crimes*. Part of the Supranational Criminal Law (SCL) Lecture Series, this lecture was delivered by Professor Gregory S. Gordon, Associate Dean and Director of the Research Postgraduates Programme at the Chinese University of Hong Kong Faculty of Law, and was based on his book *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, published on 8 June 2017. He was introduced to the audience by Christophe Paulussen, Senior Researcher in international humanitarian law and international criminal law at the T.M.C. Asser Instituut, who gave opening remarks.

Professor Gordon started by presenting the structure of the book, which features both a micro- and a macro-analysis of specific problems associated with hate speech in international criminal law, that culminates in the development of a “Unified Liability Theory for atrocity speech law”. He identified three issues that in his view affect atrocity speech law, namely: it has historically been an unidentified body of law, lacking a distinctive name; it is a fragmented body of law; and it is the object of fragmented scholarship. He underlined that the book tells a story, with the first four chapters laying down the foundations of atrocity speech law, or the law’s **past**; the next three chapters tackling problems of fragmentation, or the law’s **present**; and the last three chapters discussing “fruition”, or the law’s **future**.

The rest of the lecture was structured around the different chapters of the book. After addressing the historical aspects of atrocity speech, from Antiquity to the Armenian Genocide and alluding to examples from the Holocaust, Rwandan Genocide and the Balkans (Chapter 1), Professor Gordon elaborated on the links with international human rights law and domestic law (Chapter 2), where he noted significant differences in the national criminalisation of hate speech: he observed for example that the United States is very protective of free speech, while Germany and Israel, for instance, are rather more protective of minorities and other targets of hate speech. He continued by addressing the foundational components of what he called the “birth of atrocity speech law”, including the statutes of the Nuremberg Tribunal, the ad hoc tribunals and the ICC (Chapter 3) and the cases dealt with by the ad hoc tribunals (the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY)) (Chapter 4), where lie the roots of the four illicit speech modalities that were at the core of the lecture: incitement (to genocide) (Chapter 5); persecution (hate speech); instigation; and ordering (Chapter 6). He went on to analyse the problems associated with each of those four elements in greater detail and offered precise solutions (Chapters 8 and 9). Professor Gordon also discussed Chapters 7 and 10 of his book, which dealt with, respectively, the relative lack of criminal liability in reference to hate speech and war crimes (Chapter 7) as well as a proposal to formulate the crime of incitement to commit war crimes (Chapter 10).

Regarding incitement to genocide, Professor Gordon identified two specific problems, namely the “public element” and “causation” (although he noted that he analyses several other problems in the book). Questioning the relevance of distinguishing between public and private incitement, he suggested explicitly dropping “public” as an element of the crime. Regarding causation, he explained that since incitement is an inchoate crime, causation is not an element. But given confusion regarding “incitement” and “instigation” owing to French

language sources and sloppy jurisprudence, certain decisions have suggested causation is an element. Professor Gordon argued that this is wrong, has created confusion and needs to be cleared up through clear judicial explanation in future decisions.

Secondly, concerning the notion of persecution, Professor Gordon described a split between the ICTR and the ICTY regarding the question of whether hate speech can satisfy the conduct-related elements (i.e., *actus reus* requirements) of crimes against humanity, and underlined that the book answers this question positively. To support his stance, he cited the “chapeau elements” of crimes against humanity as well as the specific characteristics and the precedents regarding the offense of persecution in general. He emphasised that the jurisprudence has taken a wide view of what can constitute persecution, with the exception of the ICTY *Kordić* judgement, which he considers to be deeply flawed. Thirdly, Professor Gordon pointed to inconsistencies in the international jurisprudence with regards to the notion of instigation, citing more specifically the *Ayakesu* and *Šešelj* judgements from the ICTR and the ICTY, respectively. He called for making a clear distinction between incitement and instigation, and eliminating a new “different forms of persuasion” requirement first announced, without legal support, by the *Šešelj* judgement. Professor Gordon also alluded to a confusing string of descriptions of the “contribution” requirement and urged adoption of a “substantial contribution” standard. Fourthly, he argued that inchoate liability should apply to ordering, given that the existence of a superior-subordinate relationship increases the likelihood that the crime will be committed.

Turning to the liability gap in reference to hate speech and war crimes (Chapter 7), Professor Gordon mentioned the example of Donald Trump, who encouraged the US military to torture ISIS soldiers and kill their family members and underlined that this conduct would clearly amount to war crimes under Common Article 3 of the Geneva Conventions (given that the war between the US and ISIS would be considered a non-international armed conflict). However, noting that neither the 1949 Geneva Conventions nor the 1899/1907 Hague Conventions contain a specific provision that would cover speech inciting such crimes, he recommended including in the grave breaches provisions of the Geneva Conventions the crime of “direct incitement to commit war crimes”. He also advised including it in the Rome Statute for the International Criminal Court.

Looking back on the four currently existing illicit speech modalities, Professor Gordon concluded the lecture by explaining how his Unified Liability Theory for atrocity speech law proposes solutions to make those elements co-exist in a more harmonious way and in relation to the core international crimes, namely genocide, crimes against humanity, war crimes and aggression. Currently, not all illicit speech offenses apply to the core international crimes. For example, incitement, at present, only applies to genocide. Pursuant to the Unified Liability Theory, it would also apply to crimes against humanity and war crimes. The Unified Liability Theory also includes adding the offense of “speech abetting”, which would apply in circumstances where the speech is synchronous, but non-catalytic, with acts of atrocity. Under the current law, persecution as a crime against humanity is the only crime that applies to that kind of speech. But it is limited to crimes against humanity and necessarily entails discrimination against a certain protected group based on that group’s identity. Speech abetting would apply to all the core international crimes and not be saddled with the discrimination element. Thus, we could imagine charging speech abetting in relation to war

crimes, where no group discrimination would be involved. At the same time, Professor Gordon explained that hate speech as the crime against humanity of persecution could continue to exist under the Unified Liability Theory – it could still be charged where appropriate in crimes against humanity cases. At the end of the lecture, Professor Gordon answered questions from the public.