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International Criminal Justice in an ‘Age of Misinformation’

Guest Editors’ Introduction

Left running head: JICJ

Short title : Age of Misinformation [AQ2](#)

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1. Introduction

Today’s information landscape is increasingly fragmented. Characterized by an explosion of fast-moving information online — and the accompanying threat of misinformation and disinformation — and coupled with diminishing public trust in expertise, one thing is clear: public opinion is subject to considerable fluctuation.¹ This fluctuation is hardly surprising given that we live amid an ‘infodemic’, in which our opinions are influenced by a flood of febrile assertion, speculation and audio-visual content in our various social media echo chambers.² Against this background, and in light of a so-called ‘marketplace of ideas’ that has seemingly come to devalue ‘truth’,³ the boundaries between argument, interpretation, misrepresentation and falsehood can become blurred. [AQ3](#)

At the outset, it is important to be clear on the use of terminology. Taking the most notable terms, one might make a straightforward distinction between misinformation and disinformation. The former is to be understood as the spread of false and inaccurate information, regardless of the intention of those sending or sharing it, while disinformation refers to deliberate sharing of information with an express intention, often covert, to deceive and is linked to State-led ‘information warfare’.⁴ And yet, focusing on the former, we know that identifying misinformation can be difficult. Beyond claims that are provably false, such as obscure Covid-19 ‘cures’ or that the 2020 US presidential election was won by fraud, the boundary between misinformation and information is often unclear. Indeed, if information is about presenting facts, then information is always arranged, framed and organized to suit a particular (subjective) end, e.g. argument or opinion. In turn, these information flows uphold respect for freedom of expression.⁵ To compound matters, all too often misinformation is associated with pejorative terms

such as ‘fake news’ or ‘alternative facts’, which, to varying degrees, have themselves become vulnerable to being weaponized and deployed in ways that seek to censor criticism.⁶

Of course, it is important to ask whether the threat posed by misinformation is truly new and whether, indeed, the term is useful at all for international (criminal) lawyers. We know propaganda, ‘spin’ and manipulating narratives have long been part of political warfare and the public relations toolbox.⁷ After the release of the Pentagon Papers in 1971, Hannah Arendt wrote of ‘organised lying’ from nations, groups and classes of people as something that had long been a part of history.⁸ Indeed, recent empirical evidence from the Balkans demonstrates that the effects of prevailing myths can be particularly stark in divided societies; once denialism, falsehoods and narratives of victimhood (i.e. winner and losers) become established, popular beliefs are highly resistant to facts and rational proofs that can destabilize such beliefs.⁹ Can it therefore be said that the current misinformation challenge is (merely) the same phenomenon, but with a digital face and on a different magnitude?

In this light, our motivation for this Special Issue arose because we believed that such phenomena — including any underlying assumptions — were not being addressed. Our aim was to target this gap and investigate how international criminal justice — i.e. international(ized) criminal tribunals (ICTs) and the field more widely — responds to communication and misinformation dilemmas that have arisen in recent times and will continue to beset the field in the future. Before turning to the respective articles, we consider it important to make some preliminary remarks about how we arrived at this point.

This Special Issue is the result of a process that began, at the time of writing, more than a year ago. In December 2020, together with the *Journal of International Criminal Justice (JICJ)*, we issued a ‘Call for Abstracts’ on the *Journal’s* website.¹⁰ By the close of the deadline at the end of January 2021 we had received more than 40 abstracts addressing a variety of questions. Cognisant of both merit and diversity of perspectives (e.g. subject matter, geography, methods and disciplines), we undertook a careful selection process and chose 18 abstracts and invited their respective authors to submit drafts. Regrettably, no abstract offered a distinct view from the African continent, let alone from within a ‘Situation’ under scrutiny by the International Criminal Court (ICC). It is worth us ~~to~~ reflecting on whether we could have done more to encourage authors to submit abstracts that offered this crucial perspective (and, indeed, other viewpoints), particularly as — like the field writ large — there are structural communication inequalities within international criminal justice to which this issue speaks.

Amid the peer review process, authors were afforded the opportunity to present their work in a two-day online conference in September 2021, hosted by Northumbria University in association with the Society of Legal Scholars. Of the 18 papers presented, 13 articles that span a range of topics are published in the following pages. It would be remiss not to comment on the breadth and diversity of papers, but we confine ourselves here to just two observations. First, despite the best endeavours of a number of people, it is unfortunate that we have not been able to publish a view from those working within the ICC’s external relations, outreach and public information functions, thereby missing an opportunity to

commence a crucial and much-needed dialogue. We acknowledge that precisely because of the sometimes contested or controversial ‘information space’ in which organizations such as the ICC operate, they need to exercise a measure of control over the public pronouncements of existing staff members. At the same time, however, it is important to recall that our understanding of some aspects of the institutional dynamic when addressing misinformation and disinformation, and its effects, is thus likely to be partial. Similarly, in spite of our best efforts, we were not able to accommodate a direct reply to Kip Hale’s article, which was entirely warranted on the merits of his contribution, not least as, in our view, a reply would capture a significant cohort of readers who would immediately wish to challenge some of the claims he advances. Perhaps we might invite such a response in a future issue?

2. Critical Questions

Taken together, the articles in this Special Issue speak to five critical questions. First, *how do ICTs (best) conduct their public relations?* Such ‘PR’ [AQ4](#) activities are said to be crucial to promote public understanding of decisions, jurisdiction and judgments so that justice is seen to be done. However, whether through outreach, information campaigns and media engagements, public relations helps to ‘market’ international criminal justice and, at its heart, is an enterprise in legitimation designed to preserve organisational reputation.¹¹ Indeed, the 2020 *Independent Expert Review of the ICC and the Rome Statute System* detailed a series of problems in relation to outreach strategy, but also cited the need for coordinated and tailored communications that can defend the Court from political threats and promote its image (or brand) among audiences, including key stakeholders such as governments, affected communities and civil society.¹²

However, in today’s ‘attention economy’,¹³ effective communication requires compelling narratives and styles that engage audiences. For lawyers who might be more accustomed to technical detail and the rationalities of legalism, there are risks attached to entering a more politicized arena of debate and adopting unconventional messaging.¹⁴ More fundamentally, the practice of ‘public relations’ may borrow from a corporate toolkit that includes careful framing of arguments, the use of rhetoric (or ‘spin’) and other messaging ploys which necessarily invite questions about the appropriateness of legal institutions engaging in communications that may pose a risk to their independence, whether perceived or actual.¹⁵ In asking what the potential (and risks) of public communication strategies is, one must critically consider lessons from history as well as examine the very unique challenges presented by communication engagements in a time of social media.¹⁶

Secondly, *how do narratives in international criminal justice become established?* It has long been acknowledged that atrocity trials subtly promote particular narratives, but the question is not what narratives are created but *which* narratives are accepted by the public and why. In other words, one first might need to understand why specific issues regularly animate the field of international criminal justice and, thus, continue to permeate our discourse. This necessarily includes re-examining the revival of the

project of international criminal justice in the 1990s, including the aspirations of the eventual state parties. Addressing such questions is crucial to not only understanding the legitimacy of institutions such as the ICC, but also predicting the agenda priorities for all stakeholders, whether ICTs, policy makers and NGOs.¹⁷ [AQ4](#)

Thirdly, *how does misinformation (not to mention disinformation) threaten the potential of (international) criminal justice and, crucially, what can be done about it?* The effect of the rapid spread of misinformation among particular audiences can undermine the goals of international criminal justice. For instance, readers and recipients in affected communities risk becoming detached from the ICC’s work, making gathering evidence and fostering local support difficult. Likewise, lack of popular legitimacy can impinge on the compliance and cooperation of governments. In this regard, there are situation-specific lessons about how misinformation flows can shape post-conflict transitions and impact the potential of criminal justice interventions, whether domestically, or at the international level.¹⁸

Noting expressly the use of misinformation campaigns, the 2020 *Independent Expert Review of the ICC and the Rome Statute System* recommended integration of communication across the Court’s activities, a recommendation seemingly prioritized by the current Prosecutor who — less than a year into his first term of office — has appointed a Special Adviser on International Criminal Law Discourse, a role designed to assist the Office of the Prosecutor to ‘maximise the effectiveness of its messaging’.¹⁹ Being pragmatic, and recognizing that it cannot do it alone, one might see the Court engage in closer collaboration with other actors such as professional mainstream media and journalists to ensure that misinformation is both identified and challenged.²⁰

Fourthly, *how can, if at all, law and procedure respond to the threat posed by misinformation?* Frustrated by the inability of social media companies to take meaningful action, governments have recently begun to ‘fill the gap’ and regulate ‘harmful’ online content.²¹ However, there is no doubt the law and regulation is a blunt and slow-moving intervention that, in light of the challenges of definition, poses risks to legitimate political speech and freedom of expression more generally. Nonetheless, like mainstream radio and other propaganda channels that have accompanied past atrocities, social media companies are under heightened obligations to ensure they do not facilitate or promote falsehoods that prompt or enable the commission of the most serious crimes. Nor should one underestimate the role of ICTs in challenging and countering misinformation, which demands that new and forensic attention be paid both to trial procedure and how judges admit and manage facts.²²

Finally, *what (and where) are the communication inequalities in international criminal justice and what are their consequences?* Such inequalities reflect structural disparities in power and resources: the Defence potentially unable to compete with the Prosecution in garnering public attention, affected communities unable to participate in dialogue with criminal justice institutions due to linguistic and cultural barriers, and, finally — and more contested — those working ‘on the inside’ of tribunals such as

the ICC who are de facto outnumbered by outside critics and who, shackled by institutional restraints, are not able to influence the course of popular (online) debate about international criminal justice. Before one might consider tackling these issues in an effort to seek greater communication parity, at a minimum, interrogating the existence of such inequalities is the starting point for renewed reflexivity and an examination of what, or who, sets the terms of public conversation, and what, if any, are the real-world consequences.²³

3. Structure

Gregory Gordon opens the issue with a detailed historical exploration of a topic that has been virtually neglected in the literature: ‘the public communications apparatus’ that accompanied the International Military Tribunal at Nuremberg. By focusing on the endeavours of leading American personnel and examining how the Tribunal was received by target audiences, Gordon argues that Nuremberg left a positive legacy for public relations which can offer lessons for present-day ICTs in developing their messaging strategies, media interactions and models of outreach.

Fast-forward to today, Isabella Banks offers an original analysis of how the ICC has sought to use Twitter to facilitate dialogue with its stakeholders, as opposed to the pursuit of one-way information provision. Conducting a quantitative analysis, she finds that despite its stated commitment to two-way communication, the ICC has made minimal efforts to solicit feedback or generate dialogue on Twitter. Of course, social media may only be one novel channel of public communication, but its prevalence invites attention to the traditional suite of activities that comprise outreach. Reflecting on her practical experience as its Head of Outreach for over a decade, Olga Kavran charts the development of the Special Tribunal for Lebanon’s Outreach programme and reiterates a fundamental point: ICTs have a manifest obligation to inform the public about their work, and to do so in ways that are comprehensible. In doing so, she invites readers to reassess the crucial role of outreach and the art of communicating justice more generally, and how it can be done effectively.

Next are two articles that employ qualitative data analysis methods to, in their own respective ways, illuminate the marketplace of ideas in international criminal justice. Using Structural Topic Modelling, Mikkel Jarle Christensen, Zuzanna Godzimirska and Julie Jarland identify and map topics in documents published by central stakeholders, principally, NGOs, academics and ICTs. Zooming in, they reveal the impact of human rights NGOs in placing the topic of sexual violence on the agenda and subsequently exerting an impact on ICTs’ practice and decision-making. Line Engbo Gissel’s article returns to the time before the establishment of the ICC. Using systematic coding of states’ statements at the UN General Assembly between 1993 and 1998, she identifies two competing visions of the (then prospective) Court: (i) a Court with inherent *compulsory* jurisdiction and which preserved sovereignty unless states were unwilling or unable to prosecute and (ii) a Court with concurrent *consensual* jurisdiction that was based on a model of state consent and which acknowledged states’ primacy in

bringing criminal prosecutions. Using the intellectual inspiration of Robert Cover, she explores the meanings and narratives that underpin these two visions and hence enables readers to reflect deeply about the Court’s contemporary relationships with its state parties and non-state parties alike.

Turning to transitional or war-torn settings, Camilo Ramírez-Gutiérrez and Daniel R. Quiroga-Villamarín examine Colombia’s Special Jurisdiction for Peace — created as a result of a fragile peace agreement — and seek to understand strategies that may challenge waves of populist misinformation and backlash that often accompany the establishment of such transitional justice bodies. Moving to Eastern Europe, Sergii Masol asks (and answers) to what extent is the ambivalent or ‘Janus-faced’ attitude of Ukraine — failing to ratify the Rome Statute but simultaneously content to make two ad hoc declarations accepting the Court’s jurisdiction — attributable to the role of information warfare and post-truth politics at the domestic level. From a different vantage point, at the time of writing, and after the Russian invasion in late February 2022, never has there been a more urgent need for the ICC to monitor events on Ukrainian territory and take robust and effective interventions when needed.

Highlighting the example of the *Situation in Kenya* before the ICC, Janet Anderson and Benjamin Duerr consider the challenges faced by journalists and media professionals in tackling the spread of misinformation and disinformation. They recommend that the ICC can do much more to counter its threat, including recalibrating and indeed strengthening its engagement with professional media. Kyra Wigard and Guissou Jahangiri assess the role of the ICC’s decision-making in contributing to the misunderstandings and misinformation that have beset its intervention in Afghanistan. The result of such phenomena, they argue, has led to victims’ interests being undermined, diminished the potential impact of the Court, and otherwise elevated undue attention on the United States and its connection to the alleged crimes and the ICC’s investigation at large.

Moving to institutional and courtroom settings, two articles concentrate on doctrinal and procedural responses to the challenges posed by misinformation and disinformation. Mathias Holvoet sheds light on how disseminating disinformation in the context of atrocity crimes, including, for instance, the alleged role played by Facebook in alleged crimes committed in Myanmar may give rise to substantive liability. His analysis of case law reveals that disinformation may prompt atrocities, enable their continuation, prevent their cessation and even conceal their commission. Whilst acknowledging serious challenges in building a case, he argues there is potential for such conduct to be encompassed by accessory modes of liability, such as aiding and abetting, and common purpose liability. Using the lens of expressivism, Jana Trifunović examines the contemporary potential of the doctrine of ‘judicial notice’, specifically, the means by which a court can admit facts of ‘common knowledge’ without hearing evidence. Beyond the traditional benefits of efficiency, she offers cautious optimism about the novel potential of the doctrine to help ICTs elicit a dialogue with key audiences and to counter misleading narratives in ways that contribute to the wider goals of international criminal justice.

Concluding the special issue are two articles that interrogate the existence of communication inequalities



in international criminal justice. Michael Herz carefully probes the problematic imbalance between prosecution and defence at the ICC, with the former able to amplify its particular public narratives using institutional resources not available to the latter. Whilst acknowledging the possible risks, he recommends providing the defence with an equal platform for public communication, which may ultimately enhance the confidence of affected communities in the conclusions reached by the judges.



Kip Hale argues that a particular community of online commentators has come to exert a disproportionate influence over popular opinions of international criminal justice. Using evidence from Twitter, these commentators, he argues, assert views without the necessary practical background or experience that would substantiate their claims. The result of this echo-chamber highlights the lack of diversity in online conversation marked by the absence of diplomats, practitioners and ‘insiders’ who can offer crucial views that would challenge misleading (or plainly false) critiques and otherwise offer a more well-rounded analysis. He calls for more humility and further self-scrutiny by such commentators, particularly in light of the potential real-world consequences of pronouncements made, or shared, online.

* * *



Taken together, we hope that this Special Issue has renewed reflection on how we talk *about* international criminal justice, whether in academic journals, press coverage, tweets and blogs, and how we talk *within* international criminal justice: prosecution and defence counsel, judges, policy-makers, journalists, academics and campaigners. Far from a routine activity essential to our everyday work — teaching, advocacy, research — communication is a genuine object of academic enquiry, and we hope, in the words of Gregory Gordon, to have laid a foundation to it becoming ‘a genuine sub-field of international criminal justice’.



We thank all the authors for their contributions and are grateful to the peer-reviewers, whose role was crucial to bringing this project to fruition. Most of all, our utmost thanks to the *JICJ*’s editorial team, especially Urmila Dé and members of the Editorial Committee, for their patience, input and guidance throughout.



1 See, indicatively, C. O’Connor, and J.O. Weatherall, *The Misinformation Age: How False Beliefs Spread* (Yale University Press, 2019); T. Nichols, *The Death of Expertise: The Campaign against Established Knowledge and Why it Matters* (Oxford University Press, 2019); M. d’Ancona, *Post-Truth: The New War on Truth and How to Fight Back* (Ebury Press, 2017).  

2 On the term ‘infodemic’ and its origins, see B. Zimmer, ‘Infodemic: When Unreliable Information Spreads Far and Wide’, *The Wall Street Journal*, 5 March 2020, available online at <https://www.wsj.com/articles/infodemic-when-unreliable-information-spreads-far-and-wide-11583430244> (visited 28 February 2022).  



3 As others have recalled, this image has frequently been used to suggest that competing ideas and free



debate lead to better understanding of the world around us: see e.g. S. Ingber, ‘The Marketplace of Ideas: a Legitimizing Myth’, *Duke Law Journal* (1984) 1-91, at 2–3 (quoting, among others, *Abrams v. United States* 250 U.S. 616 (1919), at 630 (Holmes, J., dissenting): ‘the best test of truth is the power of thought to get itself accepted in the competition of the market’).  



4 See R. Stengel, *Information Wars: How We Lost the Global Battle Against Disinformation & What We Can Do About It* (Grove Press, 2019).  



5 See, generally, C.R. Sunstein, *Liars: Falsehoods and Free Speech in An Age of Deception* (Oxford University Press, 2021).  



6 *Ibid.*  



7 See E.L. Bernays, *Propaganda* (H. Liveright, 1928); *idem*, *Public Relations* (University of Oklahoma Press, 1952); D. Miller and W. Dinan, *A Century of Spin: How Public Relations Became the Cutting Edge of Corporate Power* (Pluto Press, 2008).  


8 H. Arendt, ‘Lying in Politics: Reflections on the Pentagon Papers’, *The New York Review*, 18 November 1971, available online at <https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/> (visited 28 February 2022).  


9 M. Milanović, ‘Courting Failure: When Are International Criminal Courts Likely to be Believed by Local Audiences?’, in K.J. Heller et al. (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 261–290.  



10 ‘Call for Abstracts: International Criminal Justice in an “Age of Misinformation”’, *Journal of International Criminal Justice*, available online at <https://academic.oup.com/jicj/pages/call-for-abstracts> (visited 28 February 2022).  



11 J. Tallberg and M. Zürn, ‘The Legitimacy and Legitimation of International Organizations: Introduction and Framework’, 14 *Review of International Organizations* (2019) 581, at 585; W.T. Coombs, ‘Parameters for Crisis Communication’, in W.T. Coombs and S.J. Holladay (eds), *The Handbook of Crisis Communication* (Wiley-Blackwell, 2010) 17–53.  



12 *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report*, 30 September 2020, available online at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (visited 28 February 2022) at 124–130.  



13 See e.g. H.A. Simon, *Designing Organizations for an Information-Rich World* (Johns Hopkins University Press, 1971), at 40–41.  

14 On 1 March 2019, the official Court Twitter account posted a ‘#FakeNews’ hashtag and a ‘direct to camera’ video clip in which ICC Prosecutor Fatou Bensouda defended her Office’s independent mandate from attacks of bias. See @IntlCrimCourt (Twitter, 1 March 2019, 8:53 PM), available online at <https://twitter.com/intlcrimcourt/status/1101420117395673089> (visited 28 February 2022). One might reflect on whether it is desirable for an independent Prosecutor — often termed a minister of justice — to respond in public in this way.  

15 Questions were also raised after an episode in May 2019, when the Court released a public Q&A document on the Appeals Chamber’s judgment on Head of State immunity and, in a rare intervention, the Court’s spokesperson replied to academic criticism of the judgment on the international law blog of the *European Journal of International Law*: EJIL:Talk! The Public Q&A stated that lawyers, including academics, engaging ‘hastily’ in online debate may be acting unethically in misrepresenting the Court’s decisions, especially given the spread of such commentary on social media. See Q&A Regarding Appeals Chamber’s 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal (ICC-PIOS-Q&A-SUD-02-01/19_Eng), May 2019, available online at <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf> (visited 28 February 2022); D. Akande, ‘ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals’, EJIL: Talk!, 6 May 2019, available online at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> (visited 28 February 2022).  



16 See, in this Special Issue, G.S. Gordon, ‘The Nuremberg Trials Communications Apparatus: Propaganda for WWII Healing and Cold War Positioning at the Dawn of PR in ICL’; I. Banks, ‘Facilitating #dialogue or #buildingsupport? An Exploration of the International Criminal Court’s Use of 280 Characters’.  



17 See, in this Special Issue, L.E. Gissel, ‘Nomos and Narrative in International Criminal Justice: Creating the International Criminal Court’; M.J. Christensen, Z. Godzimirska, and J. Jarland, ‘The International Criminal Justice Marketplace of Ideas: Setting the Agenda for Responses to Sexual Violence’.  



18 K. Wigard and G. Jahangiri, ‘The International Criminal Court and Afghanistan: A Tale of Misunderstandings and Misinformation’; C. Ramírez-Gutiérrez and D.R. Quiroga-Villamarín, ‘Shredded: Colombia’s Special Jurisdiction for Peace in an Increasingly Illiberal Context of Backlash and Misinformation’; S. Masol, ‘Ukraine and the International Criminal Court, Between *Realpolitik* and Post-truth Politics’. [AQ5](#)  



19 Australian National University, ‘ANU Law Scholar Appointed Special Adviser to ICC Prosecutor’, 23 September 2021, available online at <https://law.anu.edu.au/news-and-events/news/anu-law-scholar-appointed-special-adviser-icc-prosecutor>

(visited 28 February 2022).  

20 See the recommendations in J. Anderson and B. Duerr, 'In a Storm of Lies and Half-truths: The Role of Media Professional in Spreading and Combatting Misinformation about the International Criminal Court'.  


21 See, indicatively, the Online Safety Bill currently before the UK Parliament. For an overview of the draft legislation, see J. Woodhouse, 'Regulating Online Harms', House of Commons Library Research Briefing, 24 February 2022, available online at <https://researchbriefings.files.parliament.uk/documents/CBP-8743/CBP-8743.pdf> (visited 28 February 2022).  


22 J. Trifunović, 'Established Facts in an "Age of Misinformation": A Contemporary Approach to Judicial Notice in International Criminal Law'; M. Holvoet, 'International Criminal Liability for Spreading Disinformation in the Context of Mass Atrocity'. [AQ5](#)  


23 M. Herz, 'Seeking Balance in How the International Criminal Court Communicates Prosecution and Defence Narratives to the Public'; K. Hale, 'Are We a Bigger Problem Than We Realize? International Criminal Justice and the Need for Self-Scrutiny Among (Online) Commentators'. [AQ5](#)  


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