# International Criminal Liability for Spreading Disinformation in the Context of Mass Atrocity

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# International Criminal Liability for Spreading Disinformation in the Context of Mass Atrocity

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## Abstract

*In the context of international crimes, falsehoods — ranging from selective reporting of facts, deliberate mischaracterization of events and adversaries, or even plain fabrication and lies — constitute a breeding ground in which incitement to commit violence can thrive. While disseminating such falsehoods does not constitute a direct call to commit physical violence, it nevertheless sows the seeds for mass atrocities. This article considers the outer limits of International Criminal Law (ICL) — defined by the principle of culpability — by enquiring whether campaigns of disinformation in the context of mass atrocities could ever give rise to individual responsibility. On the basis of the* Fritzsche, Gvero *and* Mbarushimana *cases, liability for disseminating disinformation might in principle be engaged before, during and even after the commission of such crimes. Recent concerns about the role of Facebook in Myanmar also pose the question whether social media companies or their personnel may be liable for amplifying disinformation campaigns. Yet, overall, these cases show the unease of ICL in criminalizing disinformation contributing to atrocity crimes.*

## 1. Introduction

The 6 January 2021 attack on the United States (US) Capitol amply illustrated how disinformation might be a precursor to political violence. While Donald

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Trump was acquitted by the US Senate during his second impeachment trial, there seems to be a relatively widespread consensus that the former US president could still face criminal responsibility for inciting his supporters to attack the US Capitol.[1] However, it may be even less clear-cut whether Trump crossed the line from political to criminal responsibility for his speech acts only on the sixth of January 2021. What seems sure is that Trump's systematic and intentional campaign of disinformation concerning the outcome of the presidential election increasingly stoked resentment against a 'stolen election'; it might have been said to have been a *conditio sine qua non* without which the attack of the Capitol would arguably not have occurred.[2] In an attempt to halt the detrimental effects of disinformation, countries like Germany, France, Singapore and Russia have criminalized 'the creation and distribution of deliberately false information'.[3]

This begs the question as to whether and how the global phenomenon and challenge of disinformation is to be tackled through International Criminal Law (ICL). In the context of mass atrocity crimes, the employment of 'falsehoods, ranging from a selective omission of facts, a deliberate mischaracterization of events and adversaries to plain fabrication and lies' is often used as a technique of hate and fear propaganda[4] — creating an environment which is at least conducive to incitements to commit violence, even if not amounting to a direct call in its own right. Such conduct could therefore sow the seeds for ensuing mass atrocity crimes. Indeed, according to conflict sociologist Anthony Oberschall, disinformation constitutes an essential element of hate propaganda.[5] In the *Nahimana et al.* trial, expert witness Alison des Forges testified

1 R. Ashby Wilson, 'Op-Ed: The Crime Trump Committed in Stirring up his Mob', *Los Angeles Times*, 11 January 2021, available online at https://www.latimes.com/opinion/story/2021-01-11/donald-trump-incitement-insurrection-capitol-attack (visited 5 June 2021); G.J. Wallance, 'Why Trump could Face Criminal Charges for Inciting Violence and Insurrection', *The Hill*, 12 January 2021, available online at https://thehill.com/opinion/criminal-justice/533819-why-trump-could-face-criminal-charges-for-inciting-violence-and (visited 8 May 2021); J. Zitser, 'Despite his Impeachment Acquittal, Advisers say Trump is Still 'Worried' about Criminal Prosecution', *Business Insider*, 14 February 2021, available online at https://www.businessinsider.com/trump-is-worried-about-criminal-prosecution-cnn-2021-2?r=US&IR=T (visited 8 May 2021).

2 'Democrats Argue Trump Planted Seeds of Attack', *Reuters*, 10 February 2021, available online at https://news.yahoo.com/democrats-argue-trump-planted-seeds-212329608.html (visited 8 May 2021).

3 A. Schetzer, 'Governments are Making Fake News a Crime – but it could Stifle Free Speech', *The Conversation*, 7 July 2019, available online at https://theconversation.com/governments-are-making-fake-news-a-crime-but-it-could-stifle-free-speech-117654 (visited 8 May 2021).

4 M. Badar and P. Florijančič, 'The Prosecutor v. Vojislav Šešelj: A Symptom of the Fragmented International Criminalisation of Hate and Fear Propaganda', 20 *International Criminal Law Review* (2020) 405–491, at 416.

5 A. Oberschall, *Vojislav Šešelj's Nationalist Propaganda: Contents, Techniques, Aims and Impacts, 1990-1994: An Expert Report for the UN International Criminal Tribunal for the former Yugoslavia*, 4 January 2005, available online at https://www.baginst.org/uploads/1/0/4/8/10486668/vojislav_seseljs_nationalist_propaganda-_contents_techniques_aims_and_impacts.pdf (visited 8 May 2021), at 173.

about the practice known as 'accusation in a mirror'[6] — one of the rhetorical methods described in *Note Relative a la Propagande d'Expansion et de Recrutement* (a manual found in Rwanda in the wake of genocide) meant to inflame ordinary people to attack their fellow countrymen.[7] As Badar and Florijančič further specified, 'accusations in a mirror'[8] consist of 'a rhetorical practice in which one falsely accuses one's enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one plans to commit against them'.[9] For instance, to justify their numerous atrocities, the Nazis used this propaganda tool to deceive the public (at home and abroad), by depicting Germany as the victim of Allied and Jewish aggression, in an effort to hide their true goals.[10] This historical example demonstrates that disinformation is used most straightforwardly as a propaganda tool to condition and encourage the future commission of atrocity crimes. However, as this article will further demonstrate, it could also be envisaged to deny, conceal or shift the blame for atrocity crimes — which could either be essential for continuing or furthering those atrocities, or for trying to evade criminal responsibility.

No less today, the claim of 'fake news' — the more colloquial, less neutral term used for disinformation[11] — is often used to dismiss allegations of mass atrocities as false and fictitious.[12] For example, to dismiss alleged ethnic cleansing carried out against Rohingya Muslims by the Myanmar military, an official in Rakhine's state security ministry stated that 'There is no such thing as Rohingya. It is fake news.'[13] Sophisticated digital technologies also give a new dimension to disinformation campaigns occurring after the commission of atrocities, as they facilitate the tampering with evidence by enabling the fabrication, editing or adjustment of content,[14] with the use of 'deep fakes' as the most telling example in this regard.[15] Regardless of the purpose of a disinformation campaign (fuelling, furthering or covering up mass atrocity

6 Judgment, *Nahimana et al.* (ICTR-99-51-T), Trial Chamber I, 3 December 2003, § 111.

7 K.L. Marcus, 'Accusation in a Mirror', 43 *Loyola University Chicago Law Review* (2012) 357–393, at 357.

8 Badar and Florijančič, *supra* note 4.

9 Marcus, *supra* note 7, at 359.

10 US Holocaust Memorial Museum, *Holocaust Encyclopedia*, 'Deceiving the Public', available online at https://encyclopedia.ushmm.org/content/en/article/deceiving-the-public (visited 9 May 2021).

11 E. De Brabandere, 'Propaganda', *Max Plank Encyclopedia of Public International Law*, available online at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e978?prd=OPIL&q=Propaganda (visited 9 May 2021), § 3.

12 B. Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (Oxford University Press, 2021), at 1.

13 H. Beuken, '"No Such Thing as Rohingya", Myanmar Erases a History', *The New York Times*, 2 December 2017, available online at https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html (visited 8 May 2021).

14 R. Ashby Wilson and M. Gillett, 'The Hartford Guidelines on Speech Crimes in International Criminal Law', available online at https://internationalspeechcrimes.org/guidelines.pdf (visited 4 June 2021), at 124.

15 A. Koenig, '"Half the Truth is Often a Great Lie": Deep Fakes, Open Source Information, and International Criminal Law', 113 *AJIL Unbound* (2019) 250–255.

crimes), social media platforms have amplifying effects, allowing disinformation to spread at an unprecedented speed, reaching a wide-ranging and diverse audience.[16]

Historically, ICL has been reluctant to accept international criminal liability for speech acts, for the most part limiting it to direct incitement to violence, and excluding for instance utterances of interrelated hate speech and propaganda.[17] This hesitancy can be explained by free speech concerns, since the criminalization of speech acts falling short of explicitly calling for violence could be viewed as infringing on the freedom of expression.[18] The rationale underpinning the principle of culpability, according to which individuals can only be held criminally responsible for their own participation in a crime,[19] provides another sensible explanation for this reluctance, as it is often challenging to pinpoint how exactly speech acts cause or contribute to atrocity crimes.

To explore these themes, this article will proceed through five main sections. Section 2 aims to bring terminological and conceptual clarity about the notion of 'disinformation', which is often lumped together and used interchangeably with the related (but not identical) concepts of 'misinformation', 'hate speech' and 'propaganda'. Inquiring into the notion of 'disinformation' is essential to understand if, and how, disinformation campaigns could entail international criminal liability. As always, this depends very much on the context, requiring a case-by-case assessment of the facts and circumstances of the case, and the specific role and position of the individual accused.[20] Accordingly, in Sections 3–6, this article will illustrate the various ways disinformation can contribute to mass atrocity crimes by focusing on four emblematic examples — which also expose the unease of ICL with criminalizing disinformation campaigns occurring in the context of mass atrocity, and the complexities which may arise.

Specifically, Section 3 will consider potential criminal responsibility for the spreading of disinformation mainly before the commission of crimes by dissecting the prosecution, trial and ultimate acquittal of Nazi propagandist Hans Fritzsche by the International Military Tribunal (IMT) in Nuremberg. In Section 4, the focus will briefly shift to the prosecution of Milan Gvero for his alleged role in the Srebrenica massacre some 50 years later, as it perfectly illustrates how disinformation might contribute to *ongoing* atrocity crimes.[21] In

16 Ashby Wilson and Gillett, *supra* note 14, at 123.

17 Badar and Florijančič, *supra* note 4.

18 M. Badar and P. Florijančič, 'Assessing Incitement to Hatred as a Crime Against Humanity of Persecution', 24 *The International Journal of Human Rights* (2020) 656–687, at 679.

19 T. de Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law' (DPhil Thesis on file with the author), at 118.

20 M. Cupido, 'Causation in International Criminal Cases: (Re)conceptualizing the Causal Linkage', 32 *Criminal Law Forum* (2021) 1–50, at 34–35 (in conceptualizing normative causality as a theory for the attribution of international crimes, positing that 'we should develop an open-ended concept that can be adjusted to the case-specific context').

21 M. Kearney, 'Any Other Contribution? Ascribing Liability for Cover-Ups of International Crimes', 24 *Criminal Law Forum* (2013) 331–370, at 341.

Section 5, the unsuccessful International Criminal Court (ICC) prosecution of Callixte Mbarushimana will be put under the spotlight, to consider how disinformation may be used to deny or conceal atrocity crimes already committed, and thus contribute to future crimes.[22] Finally, given the amplifying effects of social media platforms, Section 6 will conclude the article by unpacking the possible individual criminal responsibility of social media company employees for spreading disinformation in the context of mass atrocity crimes. The role played by Facebook in Myanmar in spreading disinformation which allegedly contributed to commission of atrocity crimes by the Myanmar military against the Rohingya will be used as a case study in this regard.

## 2. Clarifying the Notion of 'Disinformation'

While the term 'fake news' has become firmly embedded in day-to-day language, in scientific and expert literature it is viewed as 'woefully inadequate to describe the complex phenomena of mis- and disinformation'.[23] The European Commission's High-Level Expert Group on Fake News and Online Disinformation (HLEG) for instance has described the term as 'inadequate to capture the complex problem of disinformation', as it does not necessarily involve 'fake, but fabricated content and practices going beyond the conventional "news"'.[24] Instead, the HLEG proposed the following definition of 'disinformation': 'all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit'.[25] The notion of 'disinformation' and the definition proposed by the HLEG is increasingly favoured over the notion of 'fake news' as being less contentious and less politically charged, and seems to be gaining traction within national and international supranational bodies.[26] On the other hand, the HLEG definition has been criticized as inadequate and misleading, because it presents disinformation as consisting of false information only.[27] Aside from false information, Nagasako asserts that disinformation could also contain 'true information

22 *Ibid.*, at 356, 364–365.

23 C. Wardle and H. Derakhshan, 'Information Disorder: Definitions', Annenberg School for Communication (University of Pennsylvania), *Understanding and Addressing the Disinformation Ecosystem*, available online at https://firstdraftnews.org/wp-content/uploads/2018/03/The-Disinformation-Ecosystem-20180207-v2.pdf (visited 15 May 2021).

24 European Commission, Independent High level Group on Fake News and Online Disinformation, *A Multi-dimensional Approach to Disinformation*, 2018, available online at http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271 (visited 15 May 2021), at 10.

25 *Ibid.*, at 3.

26 European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States*, 2019, available online at https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf (visited 11 May 2021), at 24.

27 T. Nagasako, 'Global Disinformation Campaigns and Legal Challenges', 1 *International Cybersecurity Law Review* (2020) 125–136, at 127.

such as manipulated contents to give a false impression or inconvenient truths to harm someone deliberately'.[28] This specification by Nagasoko is important and entirely sensible. To restate Oberschall, disinformation as a means to conduct hate and fear propaganda in the context of mass atrocity crimes will most straightforwardly and primarily consist of employing falsehoods.[29] Yet it is entirely imaginable that a certain malign political actor publicly disseminates correct but sensitive information belonging to the private sphere — such as the religion or sexual orientation of certain individuals — in order to further a persecutory campaign targeting a particular political, racial, national, ethnic, cultural, religious or gender group. Thus, while disinformation will predominantly involve false information, it is also conceivable that it consists of true information. The decisive criterion to determine whether information constitutes disinformation is whether it is disseminated with an intent to harm.

The notion of 'misinformation' is often used interchangeably with and as a synonym of disinformation.[30] For instance, in its detailed report alleging that the Myanmar military committed genocide, crimes against humanity and war crimes, the Fact-Finding Mission on Myanmar (FFM) used both 'misinformation' and 'disinformation', seemingly treating both notions as analogous.[31] This overlooks the subtle but important distinction that is to be made. While disinformation is information shared with malicious intent, misinformation likewise entails the sharing of information by a poorly informed party but meaning no harm.[32] In this article, the notion of 'disinformation' is therefore employed, as it is the spreading of disinformation which is most prone to give rise to international criminal liability insofar as it entails spreading information with a culpable mental state.

## 3. The *Fritzsche* Case before the IMT: International Criminal Liability for Prior Disinformation Contributing to Atrocity Crimes

### *A. Fritzsche's Indictment Before the IMT*

Since its earliest days, ICL has been uneasy about criminalizing speech acts — and this is demonstrated well by the case of Hans Fritzsche, one of the only three defendants acquitted by the IMT.[33] After joining the Nazi Party in 1933, Fritzsche had worked his way up the Propaganda Ministry ranks to the

28 *Ibid.*, at 128.
29 Oberschall, *supra* note 5, at 173.
30 Policy Department for Citizens' Rights and Constitutional Affairs, *supra* note 26, at 25.
31 See UN Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (18 September 2018) 39th Session (2018) A/HRC/39/CRP.2 (hereinafter, 'FFM Report, Detailed Findings').
32 Policy Department for Citizens' Rights and Constitutional Affairs, *supra* note 26, at 26.
33 R. Ashby Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press, 2017), at 7.

position of chief of the German Press Division.[34] One of his main tasks was to issue Nazi propaganda 'press directives' (*Tagesparolen*) to newspapers, which would define and circumscribe what the press could publish.[35] In 1942, Fritzsche became head of the Radio Division of the Propaganda Department of the Nazi Party, during which he hosted a daily radio program called 'Hans Fritzsche speaks'.[36] At the IMT, he was indicted as a participant in the conspiracy to commit crimes against peace using 'his positions and his personal influence to disseminate and exploit the principal doctrines of the Nazi conspirators'[37] — that is, the consolidation of Nazi control over Germany, and the launching of wars of aggression — and for exploiting his positions 'to advocate, encourage, and incite' the commission of war crimes and crimes against humanity.[38]

The spreading of disinformation certainly was a commonly used technique in Fritzsche's propaganda. For instance, the IMT judgment concerning Fritzsche holds that a 'vigorous propaganda campaign was carried out before each major act of aggression',[39] and disinformation in different manifestations was used to conduct this campaign. At the dawn of the German invasion of Poland, the major German newspapers were instructed to falsely publicize, among other things: that cruelty and terror was inflicted upon Germans in Poland and that Germans were being exterminated; that German men and women were subjected to forced labour in Poland; and that German invasion was necessary and justified because Poland provoked clashes at the German–Polish border, and the Poles had 'a lust to conquer'.[40] Furthermore, in charging him with instigating[41] war crimes and crimes against humanity, the prosecution at Nuremberg asserted that 'that Fritzsche incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of

34 G.S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017), at 110.

35 *Ibid.*, at 111.

36 *Ibid.*, at 110.

37 *Trial of the Major War Criminals before the International Military Tribunal: Volume 1 (Official Documents)*, 1947, available online at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (visited 22 May 2021) (hereinafter, 'IMT Indictment and Judgment'), at 79.

38 *Ibid.*

39 IMT Indictment and Judgment, *supra* note 37, at 337.

40 *Trial of the Major War Criminals before the International Military Tribunal: Volume 32 (Documents and Other Material in Evidence: Numbers 3058-PS to 3728-PS)*, 1948, available online at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXXII.pdf (visited 1 February 2022), at 321 (document 3469-PS, affidavit of Dr Hans Fritzsche, referring for example to '*polnische Eroberungsgelueste*').

41 The final paragraph of Art. 6 of the IMTSt. holds that: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' When choosing from the different modes of liability under this paragraph, it seems logical that the prosecution charged Fritzsche as an instigator: see also A. Coco, 'Instigation', in J. de Hemptinne, R. Roth, E. van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press, 2019) 257–283, at 258, fn. 9.

atrocities'.[42] In his oral pleadings before the IMT, the American prosecutor Drexel Sprecher submitted that Fritzsche's remarks 'helped fashion the psychological atmosphere of utter and complete unreason and hatred'.[43]

### *B. Fritzsche's Acquittal for Crimes Against Peace by the IMT and the Dissenting Opinion of Soviet Judge Nikitchenko*

While the IMT judges acknowledged that Fritzsche's propagandistic broadcasts included disinformation, and that it contributed to the crimes charged, they ultimately acquitted Fritzsche on all charges.[44] The acquittal has been attributed to the poor conduct of the prosecution case, which allowed Fritzsche to deny all damaging facts without being pressed further.[45] One of the prosecutors at Nuremberg, Alexander Hardy, has asserted that evidence that surfaced after the IMT trial would have led to a guilty conviction of Fritzsche before the Nuremberg Military Tribunals (NMTs) conducted pursuant to Allied Control Council Law No. 10 (CCL No. 10).[46] However, while evidentiary matters undoubtedly played a role, it also seems that the legal framework of the IMT Statute was ill-suited to capture and reflect Fritzsche's personal culpability as we might now see it, as further explained in the following paragraphs.

With regard to Fritzsche's alleged contribution to crimes against peace — a forerunner of what today we call the crime of aggression — the IMT judgment states that '[h]is activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war' because he did not 'achieve sufficient stature to attend the planning conferences which led to aggressive war'.[47] Thus, the judges did not explicitly state that Fritzsche did not in any way contribute to crimes against peace, but only that he did not contribute in the particular way that could have justified saying he participated in a common plan or conspiracy to launch a war of aggression. The Soviet Judge, Nikitchenko, dissented, by arguing that:

> The dissemination of provocative lies and the systematic deception of public opinion were as necessary to the Hitlerites for the realisation of their plans as were the production of armaments and the drafting of military plans. Without propaganda, founded on the total eclipse of the freedom of press and of speech, it would not have been possible for German Fascism to realise its aggressive intentions, to lay the groundwork and then to put to practice the war crimes and the crimes against humanity.[48]

Nikitchenko might have been right that Fritzsche's 'dissemination of provocative lies and the systematic deception' were as necessary as the political and military plans for launching and waging the aggressive wars — but it is

42 IMT Indictment and Judgment, *supra* note 37, at 337–338.
43 Ashby Wilson, *supra* note 33, at 31.
44 IMT Indictment and Judgment, *supra* note 37, at 336–338.
45 Gordon, *supra* note 34, at 111–112.
46 *Ibid.*, at 113.
47 IMT Indictment and Judgment, *supra* note 37, at 337.
48 *Ibid.*, at 351.

difficult to see how he could have been found guilty under Article 6(a) IMT Statute, as this provision only inculpated individuals who actually planned, prepared, initiated or waged an aggressive war, or who had participated in a common plan or conspiracy to wage an aggressive war.[49] From trial briefs and memoranda held in the archives of Thomas J. Dodd, Executive Trial Counsel, it can be gleaned how the Nuremberg prosecutors assessed Fritzsche's personal culpability. The pre-trial briefs described Fritzsche as 'a principal conspirator in abetting aggressive wars', whose actions 'create[d] in the German people the requisite psychological and political conditions for aggressive wars'.[50] According to the prosecution, his specific role was 'preparing Nazi Germany for aggressive war and for the barbarities committed by the Nazis both within Germany and abroad'.[51] From this it seems that the prosecution regarded Fritzsche as an aider and abettor to the Nazi wars of aggression — but, as aiding and abetting was not included as a relevant mode of liability, the prosecution was forced (unsuccessfully) to charge Fritzsche as a participant in a common plan.

### *C. Accountability for Perpetrators Like Fritzsche Under the Rome Statute Framework Regarding the Crime of Aggression?*

Fritzsche's case begs the question whether aiders and abettors could be held liable for the crime of aggression under the current definition of the Rome Statute. While the crime of aggression is a leadership crime, as only persons 'in a position effectively to exercise control over or to direct the political or military action of State'[52] may be charged, it is not necessarily a crime only for principals.[53] Accountability is not limited to those on the centre stage when deciding to wage an aggressive war.[54] For example, provided they were still sufficiently senior that they could shape the political or military action of the state, individuals who are more remote from the actual decision-making process to wage war could also be held accountable. Furthermore, all the different modes of liability under Article 25 ICC Statute apply to that group of individuals — as such, individuals may be liable for aiding and abetting the crime of aggression.[55] If we were to apply this framework back to the case of Fritzsche, he was arguably sufficiently high in the hierarchy to shape the political action of Nazi Germany, in his position as Head of the German Press Division, and subordinate to the Minister of Propaganda, Goebbels. As such, it would not be far-fetched to conclude that, today, Fritzsche might have been found to have abetted the crime of aggression by his dissemination of disinformation,

49 Art. 6(a) IMTSt.
50 Ashby Wilson, *supra* note 33, at 28.
51 *Ibid.*, at 29.
52 Arts 8*bis* and 25*bis* ICCSt.
53 V. Nerlich, 'The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?' 58 *Harvard International Law Journal* (2017) 44–47, at 47.
54 *Ibid.*
55 *Ibid.*

which created the necessary political and psychological conditions among the German people to enable and facilitate the actual execution of the wars of aggression.

### *D. Fritzsche's Acquittal by the IMT for War Crimes and Crimes Against Humanity*

Additionally, the IMT judges acquitted Fritzsche for crimes against humanity and war crimes, for several different reasons. First, according to the judges, Fritzsche's 'position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns'.[56] This finding is quite mind-boggling, given Fritzsche's position as Head of the German Press and Radio Divisions. It also seems to contradict the principle that superior orders may not absolve a defendant from criminal liability.[57] The poor conduct of the prosecution case, allowing Fritzsche to minimize his role and knowledge, arguably played an important role in this conclusion.

Second, even though it established that Fritzsche's broadcasts included strong statements that were sometimes of an anti-Semitic nature, the IMT concluded that 'these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East.'[58] While the judges acknowledged that in his broadcasts 'Fritzsche sometimes spread false news', they did not consider that it was 'proved he knew it to be false'.[59] As such, they were not prepared to hold that Fritzsche's broadcasts were 'intended to incite the German people to commit atrocities on conquered peoples', and consequently 'he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.'[60] In other words, Fritzsche lacked the necessary criminal intent, or at least his criminal intent was not proved to the judges' satisfaction.[61] The latter may have been more the case, given the affirmation of Nuremberg prosecutor Hardy that (in his view) Fritzsche not only knew about the Nazi crimes (such as the persecution and extermination of the Jews) but played an important role in bringing them about.[62]

Timmermann has suggested that one of the main reasons for Fritzsche's acquittal was the judges' view that his speeches were insufficiently direct and unequivocal in calling for the commission of atrocities.[63] Instead, they seem to have viewed his rhetoric as conditioning civilians to perpetrate atrocities.[64]

56 IMT Indictment and Judgment, *supra* note 37, at 338.
57 Gordon, *supra* note 34, at 112, fn. 61.
58 IMT Indictment and Judgment, *supra* note 37, at 338.
59 *Ibid.*
60 *Ibid.*
61 W. K. Timmermann, 'Incitement in International Criminal Law', 88 *International Review of the Red Cross* (2006) 823–852, at 829.
62 Gordon, *supra* note 34, at 113.
63 Timmermann, *supra* note 61, at 829; Gordon, *supra* note 34, at 329.
64 Gordon, *supra* note 34, at 329.

From the prosecutorial trial briefs, memoranda and statements mentioned above, it can be gleaned that the prosecution viewed Fritzsche's culpability in a similar way. This perspective was presumably shaped by the IMT Statute, as instigation was the only mode of liability in the IMT Statute under which Fritzsche could sensibly be charged. Confusingly, both the IMT prosecutors and the judges in fact used the (often confused[65]) notion of incitement — which in modern ICL now refers to a particular inchoate crime in the context of genocide[66] — but their argumentation makes clear that instigation (a mode of liability[67]) was what they meant.

Notwithstanding the efforts of the prosecution, it seems that the IMT judges were not convinced that Fritzsche's disinformative propaganda constituted a sufficient contribution to the actual commission of the charged war crimes and crimes against humanity to meet the requirements of instigation, as they then saw it. The judgment's statement positing that Fritzsche's 'speeches did not urge persecution or extermination of Jews' is perhaps most clear in this regard. Again, arguably, the non-inclusion of aiding and abetting as a mode of liability under the IMT Statute may have been fatal in establishing Fritzsche's guilt. From the judgment's conclusion that Fritzsche's 'aim was rather to arouse popular sentiment in *support* of Hitler and the German war effort', one might think that even the IMT judges considered aiding and abetting as a more apt way to conceptualize how a non-military propagandist like Fritzsche could have contributed to the crimes.[68]

### *E. Accountability for Perpetrators Like Fritzsche for Aiding and Abetting War Crimes and Crimes Against Humanity under Current-day ICL?*

Under modern customary ICL, criminal liability for aiding and abetting may be established without proof that the accused's act or omission amounted to a *conditio sine qua non* for the principals' crimes.[69] Instead, a substantial form of assistance is required,[70] which implies that the acts or omissions of the aider

65 J. de Hemptinne, 'Incitement', in de Hemptinne, Roth, and van Sliedregt (eds), *supra* note 41, 388–406, at 392.

66 See Art. 4(3)(c) ICTYSt.; Art. 2(3)(c) ICTRSt.; Art. 25(3)(e) ICCSt.

67 In modern ICL, liability for instigation arises when a person makes a substantial contribution to the commission of a crime (often through a speech act) with the awareness of the substantial likelihood that the crime will be committed. See De Hemptinne, *supra* note 65; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 31; Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, § 480; Judgment, *Gatete* (ICTR-2000-61-T), Trial Chamber, 31 March 2011, § 574; Judgment, *Muvunyi* (ICTR-00-55A-T), Trial Chamber, 12 September 2006, § 464.

68 Ashby Wilson and Gillett, *supra* note 14, at 71.

69 Judgment, *Blagojević and Jokić* (IT-03-60-A), Appeals Chamber, 9 May 2007, § 134, as discussed in G. Sluiter and S.S.M. Yau, 'Aiding and Abetting and Causation in the Commission of International Crimes. The Cases of Dutch Businessman van Anraat and Kouwenhoven', in N.H.B. Jørgensen, *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, 2020) 304–328, at 328.

70 Judgment, *Vasiljević* (ICTY-98-32-T), Trial Chamber, 29 November 2002, § 70.

and abettor create or increase the risk that a crime will be committed.[71] In terms of *mens rea*, it is sufficient to show that the accused knew that his or her acts assisted in the commission of a crime[72] and was aware of the crime's essential elements.[73]

If this form of aiding and abetting had been available to the IMT prosecutors, it would have been a more fitting way to hold Fritzsche liable — and arguably offered a better chance of conviction — as it would have reflected how Fritzsche's disinformative propaganda increased the risk of the commission of war crimes and crimes against humanity by conditioning the German population to perpetrate atrocities. While Fritzsche denied knowledge of atrocities during the trial, such as the extermination of the Jews, these statements later proved to be false. Certainly, the prosecutors would have had an easier case to establish, insofar as knowledge of the crimes and his act of assistance is usually less demanding to prove than intent.

However, the picture might be different if someone like Fritzsche were to be prosecuted for aiding and abetting as formulated in Article 25(3)(c) ICC Statute, which limits aiding and abetting liability to cases in which the individual aids and/or abets 'for the purpose of facilitating the commission of such a crime'.[74] This is a significantly higher *mens rea* standard than the plain requirement of 'knowledge' under customary law. Arguably, out of fear, that this purpose requirement might be a stumbling block for the effective prosecution of individuals complicit in international crimes,[75] certain ICC jurisprudence and scholarship have favoured a normative interpretation which aims to limit its restrictive impact. For instance, in *Bemba et al.*, Trial Chamber VII found that the 'purpose' does not relate to the facilitation of the crime, but only relates to the facilitation itself.[76]

The majority of ICC jurisprudence however has followed the literal, ordinary meaning of the 'for the purpose of' phrase under Article 25(3)(c) ICC Statute. In the *Mbarushimana* Confirmation of Charges Decision, Pre-Trial Chamber I

71 J. Wouters and H. Vandekerckhove, 'A Different Type of Aid: Funders of Wars as Aiders and Abettors under International Criminal Law', in Jørgensen (ed.), *supra* note 69, 281–303, at 302.

72 Judgment, *Blagojević and Jokić* (IT-03-60-A), Appeals Chamber, 9 May 2007, § 127; Judgment, *Vasiljević* (IT-98-32-A), Appeals Chamber, 25 February 2004, § 102; Judgment, *Alekovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, §§ 162–163.

73 Judgment, *Alekovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 162; Judgment, *Blagojević and Jokić* (IT-03-60-A), Appeals Chamber, 9 May 2007, § 222; Judgment, *Krnolejac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 51; Judgment, *Karera* (ICTR-01-74-A), Appeals Chamber, 2 February 2009, § 321.

74 Article 25(3)(c) ICCSt.

75 See R. Cryer, D. Robinson and S. Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn., Cambridge University Press, 2019), at 359 (arguing that the ICC's purpose requirement 'will certainly complicate prosecuting those who sell or otherwise supply arms or other war *materiél* which is used for international crimes').

76 Public Redacted Version of Judgment pursuant to Article 74 of the Statute, *Bemba et al.* (ICC-01/05-01/13-1989-Red), Trial Chamber VII, 19 October 2016, § 97. See also M.J. Ventura, 'Aiding and Abetting', in de Hemptinne, Roth, and van Sliedregt (eds), *supra* note 41, 173–256, at 214–217 (supporting the interpretation in *Bemba et al.*).

held that 'article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article'.[77] The grand majority of ICC chambers has endorsed the literal interpretation of the purpose requirement.[78] I concur with Hamilton that the only sound way to interpret Article 25(3)(c) is to do so according to its literal meaning and that 'there is no coherent way for a lawyer to read the words ''for the purpose of facilitating the commission of the crime' other than in relation to the purpose of bringing about a criminal outcome'''.[79] Consequently, in order to establish aiding and abetting liability under Article 25(3)(c), the accomplice must intend that what she provides will facilitate the principal perpetrator's commission of the crime.[80]

While a literal, ordinary interpretation of the purpose requirement seems to be the only legally sound one, it would definitely raise the bar to hold account propagandists disseminating disinformation similar to Fritzsche as aiders and abettors under Article 25(3)(c) ICC Statute.[81] Indeed, it would require proving that the propagandists spread disinformation intending that the dissemination of disinformation would facilitate the principal perpetrator's commission of atrocity crimes.[82] This might be challenging. However, as the analysis and discussion under Sections 5 and 6 will make clear, an alternative could be to hold individuals liable for spreading disinformation in the context of mass atrocity under Article 25(3)(d) ICC Statute.

## 4. Disinformation Contributing to Ongoing Atrocity Crimes: The *Gvero* Case Before the ICTY

While he was ultimately acquitted, Fritzsche's case demonstrates how disinformation spread *prior* to the actual atrocity crimes might potentially give rise to international criminal liability under modern ICL. The case of Milan Gvero before the ICTY is a great illustration to show that disinformation spread

77 Decision on the confirmation of charges, *Mbarushimana* (ICC-01/04-01/10-465-Red), Pre-Trial Chamber I, 16 December 2011 (hereinafter, '*Mbarushimana* Confirmation Decision'), § 274.

78 See e.g. Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', *Bemba et al.* (ICC-01/05-01/13-2275), Appeals Chamber, 8 March 2018, § 21; Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422), Pre-Trial Chamber II, 23 March 2016, fn. 24; Public Redacted Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, *Al Mahdi* (ICC-01/12-01/15-84-Red), Pre-Trial Chamber I, 24 March 2016, fn 15.

79 T. Hamilton, 'An Arms Trade Case at the International Criminal Court: Would the Article 25(3)(c) 'Purpose' Requirement Really Matter', *Rethinking SLIC*, 23 September 2021, available online at https://rethinkingslic.org/blog/criminal-law/93-an-arms-trade-case-at-the-international-criminal-court-would-the-article-25-3-c-purpose-requirement-really-matter (visited 31 October 2021).

80 *Ibid.*

81 Ashby Wilson and Gillett, *supra* note 14, at 76.

82 Hamilton, *supra* note 79.

during *ongoing* atrocity crimes could also further those crimes, and lead to criminal responsibility. Gvero — who was one of the accused in *Popović et al.* — was ultimately convicted, among other things, for disseminating false information and thus contributing to the commission of several crimes against humanity.[83] In this regard, he was found guilty as a participant in a joint criminal enterprise (JCE).

Gvero was the Assistant Commander for Morale, Legal and Religious Affairs within the Bosnian Serbian Army (VRS),[84] tasked with 'managing the dissemination of information and propaganda for the troops in support of the aims of the war, in the preparation for and during the course of combat operations'.[85] The indictment alleged that Gvero contributed to a JCE which involved a common plan to forcibly remove the Muslim civilian population from the Srebrenica and Zepa enclaves. According to the prosecution, Gvero contributed to the JCE through spreading disinformation, more specifically for having released 'to the public media a false statement concerning the attacks on the enclaves in order to assist in the take-down of the Srebrenica enclave',[86] and for having 'assisted in the attack on Srebrenica, knowing that one of the main objectives was to force the Muslim population to leave Srebrenica, by lying to UNPROFOR about Muslim attacks, in particular on UN OPs, and VRS intentions and actions with respect to the enclave'.[87]

In the Judgment, under the heading 'War Propaganda, Misleading Information and Threats', the Trial Chamber considered Gvero's statement to the media (on the occasion of the VRS' military assault on the Srebrenica enclave) in which he asserted that the VRS' military action was directed towards 'neutralising Muslim terrorists' — and because it was not directed against any civilian or member of UNPROFOR (the UN peacekeeping force), 'there is no reason for the media and foreigners to get involved in the Muslim war propaganda'.[88] In this regard, the Chamber noted that:

> While of course the release of false information to the media and international authorities does not constitute a criminal act, the purpose of the release was not an innocent one. The only reasonable inference as to the goal behind this communique is that it was intended to mislead, in particular the international authorities concerned with protecting the enclave, with a view to delaying any action on their part which might thwart the VRS' military efforts.[89]

The Trial Chamber thus stated that the spreading of disinformation, while not a crime of itself, can be a means of contributing to crimes, including through a JCE which, *in casu*, involved the commission of crimes against humanity.

83 Kearney, *supra* note 21.
84 *Ibid.*
85 Judgment, *Popović et al.* (IT-05-88-T), Trial Chamber, 10 June 2010 (hereinafter, '*Popović et al.* Trial Judgment'), § 1752.
86 Revised Second Consolidated Amended Indictment, *Popović et al.* (IT-05-88-T), 4 August 2006, § 76.a.i.
87 *Ibid.*, § 76.b.i.
88 *Popović et al.* Trial Chamber Judgment, § 1814.
89 *Ibid.*, § 1815.

Together with threats against civilians and UN staff communicated by Gvero to Nicolai, the UNPROFOR commander, this constituted a sufficient basis for the Trial Chamber to convict Gvero. Specifically, it found that Gvero's spreading of disinformation contributed in a limited but important way by delaying and blocking international intervention to prevent the VRS from taking the Srebrenica enclave and forcibly removing the civilian population.[90] Although the Chamber refrained from concluding whether Gvero's actions were 'effective or not in the end', this did not negate the significance of his contribution,[91] or his consequent participation in the JCE to forcibly remove the Bosnian Muslim population from the enclaves.[92] Gvero was thus found guilty of inhumane acts (forcible transfer) and persecutions as crimes against humanity,[93] and sentenced to five years imprisonment.[94]

Perhaps counterintuitively, Gvero's conviction thus demonstrates that disseminating disinformation in the context of ongoing mass atrocities can attract criminal liability as a principal, at least under customary law — even though it requires showing the existence of a common plan and a plurality of two or more co-perpetrators.[95] Once this is established, principal liability under JCE can be relatively easily established, as it requires the proof of a significant contribution to the crimes for which the accused is charged, a lower threshold than the 'substantial contribution' required to enter a conviction for aiding and abetting.[96] Provided that the accused shared the requisite intent to further the JCE's common purpose, the effectiveness of the disinformation need not necessarily be established.[97] That said, a certain caution was suggested by the judges' explicit reflection as to whether Gvero's JCE contribution was 'effective or not in the end', and the unusually low sentence imposed as a result — one of the lowest in the ICTY's history.

## 5. The *Mbarushimana* Confirmation of Charges Decision: the Controversial Failure of a Case Alleging Assistance to Atrocity Crimes, through Disinformation After the Fact

The *Mbarushimana* case — in which, by majority, charges before the ICC were not even confirmed — demonstrates both how disinformation might contribute

90 *Ibid.*, § 1822.
91 *Ibid.*, § 1820.
92 *Ibid.*, § 1820. Concerning Gvero's intent to further this common purpose, see § 1822.
93 *Ibid.*, §§ 1826, 1833–1836.
94 *Ibid.*, Disposition, at 836–837. Gvero's relatively low sentence followed from the nature of his contribution to the JCE (which was not decisive to the common purpose), his deteriorating health condition, and his voluntary surrender to the ICTY: §§ 2203, 2207–2208.
95 L. Yanev, 'Joint Criminal Enterprise', in de Hemptinne, Roth, and van Sliedregt (eds), *supra* note 41, 121–170, at 131.
96 *Ibid.*, at 140.
97 D. Saxon, 'Propaganda as a Crime under International Humanitarian Law: Theories and Strategies for Prosecutors', in P. Dojčinović, *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge, 2012) 118–141, at 129.

after the fact to mass atrocity crimes, and the complex and contested nature of international criminal prosecutions for disseminating disinformation. This was spotlighted by the *Mbarushimana* Confirmation Decision, and Judge Monageng's dissent. This question is highly timely and relevant because, as stated in the introduction, atrocity crimes often go hand in hand with the dismissal and denial of their occurrence, often by asserting that the allegations constitute disinformation or 'fake news' themselves. The digital age adds a new dimension to this phenomenon, as it gives unprecedented possibilities to manufacture or tamper evidence of atrocity crimes. For instance, 'deep fakes', videos generated via algorithms, could potentially be used to modify video content and implicate an innocent person in criminal activity.[98] In his book *Atrocity Speech Law*, Gordon considers whether, from an atrocity speech law perspective, denial of atrocity crimes should be criminalized, but ultimately gives no definitive answer and recommends further research into the matter.[99]

### *A. The Prosecutor's Allegations Against Mbarushimana*

Mbarushimana was the Executive Secretary of the Forces Démocratiques pour la Libération du Rwanda - Forces Combattantes Abacunguzi (FDLR), based in Paris. The Prosecution alleged that he contributed to FDLR troops' crimes in the Kivu provinces in the Democratic Republic of the Congo (DRC):[100] specifically, that with 'full knowledge of the attacks perpetrated by the FDLR against the civilian population', Mbarushimana 'issued several press releases on behalf of the organisation in the aftermath of operations, systematically denying any responsibility of the group' while also engaging 'in international peace talks and negotiations, shrewdly portraying the FDLR as an actor seeking peace and stability in the Kivu area'.[101] Mbarushimana was charged under 'common purpose liability'[102] under Article 25(3)(d) ICC Statute, which punishes an individual who 'in any other way contributes' to the commission of a crime 'by a group of persons acting with a common purpose'.[103]

In response, Mbarushimana's defence denied his responsibility for FDLR crimes, and suggested that he could 'at the most be blamed for having shown sympathy for the FDLR's political goals, which sympathy falls entirely within the scope of his freedom of association'.[104] The Defence relied on the *Fritzsche* case to hold that, 'under international criminal law, no one should be held responsible for denying crimes via propaganda'.[105]

98 Koenig, *supra* note 15, at 251.
99 Gordon, *supra* note 34, at 415–418.
100 Kearney, *supra* note 21, at 356–357.
101 *Mbarushimana* Confirmation Decision, *supra* note 77, § 8.
102 See M. Cupido, 'Group Acting with a Common Purpose', in de Hemptinne, Roth, and van Sliedregt (eds), *supra* note 41, 309–335, at 310.
103 Art. 25(3)(d) ICCSt.
104 *Mbarushimana* Confirmation Decision, *supra* note 77, § 10.
105 *Ibid.*, Dissenting Opinion of Judge Monageng, § 110.

### *B. The Majority Decision Declining to Confirm the Charges Against Mbarushimana*

The Majority declined to confirm the charges against Mbarushimana because it could not identify sufficient evidence to establish substantial grounds to believe that his actions had any impact on the commission of crimes by FDLR forces.[106] The Majority acknowledged that Mbarushimana issued multiple press releases, to deny that 'the FLDR had committed any crimes', 'that FDLR had suffered military losses' and to condemn 'crimes allegedly committed by the Rwandan or Congolese Governments/military forces'.[107] In their view, 'press releases explicitly denying accusations of crimes levelled against the FDLR remain per se neutral unless it is demonstrated (i) that the Suspect knew that he was denying the truth; and (ii) that his denial of the truth was done in furtherance of an FDLR policy'.[108] In the first respect, the Majority found the evidence of Mbarushimana's knowledge of the truth to be contradictory, noting that 'not everything was reported to the leadership, especially when it came to crimes against civilians, which commanders may not have reported'.[109] As to the second requirement, the evidence was considered insufficient as to whether Mbarushimana denied crimes in furtherance of an FDLR policy since the Prosecutor's allegations were 'based on assumptions about Mr Mbarushimana's knowledge of the alleged crimes at the time when distributed his radio communications and press releases'.[110] Accordingly, in the Majority's view, 'Mbarushimana did not make a significant contribution to encouraging the troops'[111] because his statements were aimed at the international community.[112] Furthermore, no purpose could be discerned underlying the press releases 'to encourage the soldiers and, even less, to encourage them to commit crimes against the civilian population in the Kivus'.[113]

### *C. Judge Monageng's Dissent*

In her dissenting opinion, Judge Monageng disagreed with the Majority's analysis of the evidence, and specifically asserted that it overlooked critical details.[114] Judge Monageng followed the prosecution in considering that public media denials aimed at concealing the FDLR's responsibility for criminal attacks could sufficiently contribute to the commission of further crimes, because it allowed the FDLR's criminal campaign to continue unabated.[115] Most pertinently, it was Judge Monageng's conviction that Mbarushimana made

106 *Ibid.*, §§ 295–340; Cupido, *supra* note 20, at 18.
107 *Ibid.*, § 305.
108 *Ibid.*, § 312.
109 *Ibid.*, § 313.
110 *Ibid.*, § 314.
111 *Ibid.*, § 326.
112 *Ibid.*, § 328.
113 *Ibid.*, § 329.
114 *Ibid.*, Dissenting Opinion of Judge Monageng, § 65.
115 *Ibid.*, § 66.

extensive and repeated use of disinformation, in denying the FDLR's crimes, that convinced her that he contributed to the common purpose. For example, Judge Monageng stated that the Majority did not give appropriate weight to the prosecution's allegation that Mbarushimana was using press releases to conceal crimes.[116] With regard to the two-pronged test of the Majority to test when the denial of crimes is not 'neutral', Judge Monageng considered 'that the test is nevertheless met in the present case'.[117] In Judge Monageng's view, Mbarushimana 'denied true statements about the FDLR killing civilians and ... repeated these untrue denials on many separate occasions'.[118]

A critical piece of evidence, which was not addressed by the Majority but extensively discussed by Judge Monageng, consisted of a telephone conversation between Mbarushimana and Murwanashyaka, a senior FDLR leader. During this conversation, Mbarushimana 'explained to Murwanashyaka how to manipulate the language' of a draft press release so that 'the FDLR could avoid accusations of violating international humanitarian law'.[119] For instance, on one occasion when the FDLR was accused of atrocities against civilians in a village in North Kivu, Mbarushimana denied the allegations by fabricating an alternative account of events, alleging that the Rwandan–Congolese coalition forces were to blame for civilian casualties by using them as human shields.[120]

By denying the FDLR crimes through disseminating press releases rife with disinformation, Mbarushimana undoubtedly contributed to the FDLR's political goals — but whether it also contributed to further FDLR themselves is a far more complex and delicate matter. As Cupido has argued, 'since Mbarushimana was relatively far removed from the commission of crimes and played a political role, the causal linkage between his contribution and the crimes charged needed to be assessed with particular care'.[121] The *mens rea* threshold for liability to arise under Article 25(3)(d)(ii) ICC Statute is relatively low, as it is not required that the accused is part of the criminal group or intended the commission of crimes, but merely knew of the group's intention to commit the crimes.[122] Accordingly, since the accused's *actus reus* constitutes the primary basis of criminal liability, Cupido suggests that 'there is reason to bolster causality threshold and analyse the accused's contribution to crimes in a detailed and precise way'.[123] In this regard, it is essential to understand what is exactly entailed by the significant contribution standard — the causality threshold used in some cases to establish whether the accused contributed in 'in any other way' to commission of a crime under Article 25(3)(d) ICC Statute. In *Katanga*, for example, this was interpreted to require that the

116 *Ibid.*, § 76.
117 *Ibid.*
118 *Ibid.*, § 77.
119 *Ibid.*, § 78.
120 *Ibid.*, § 77.
121 Cupido, *supra* note 20, at 19.
122 Art. 25(d)(ii) ICCSt.
123 Cupido, *supra* note 20, at 46.

accused influenced or had a bearing on if or how the crime is committed, but not to require that the commission of the crime depends on the accused's contribution.[124]

It seems obvious that the commission of the FDLR's crimes did not depend on Mbarushimana's contributions. Nonetheless, Judge Monageng made a compelling case that Mbarushimana's contributions, such as his press releases, at least influenced or had a bearing on the commission of further FDLR crimes and their *modus operandi*.[125] In her view, there was sufficient evidence to hold that Mbarushimana's 'efforts to conceal past crimes and encourage future crimes were facilitating the commission of the FDLR's crimes both before and after they were committed'.[126] More specifically, concerning the denial of crimes, Judge Monageng argued 'that when the FDLR leadership, of which the Suspect was a part, issued or consented to the issuance of criminal orders, they must have taken the Suspect's pre-planned assistance into account. Mbarushimana's role also validated the FDLR's actions to their own soldiers, which limited the risk of dissension in their ranks and encouraged the commission of future crimes'.[127]

It can indeed be sensibly argued that the FDLR leadership's prior knowledge that Mbarushimana would take steps to conceal the crimes served to encourage the crimes themselves, and the way in which they were committed. Mbarushimana's past denial of FDLR involvement in crimes in the Kivus arguably encouraged the FDLR to continue on the same unrelenting criminal path. Furthermore, while an accused's *actus reus* constitutes the primary basis of culpability, Mbarushimana's subjective mental state of mind (*mens rea*) could be relevant in assessing whether the crimes could be causally attributed him, as highlighted by Judge Monageng.[128] The fact that Mbarushimana's repeated contributions were 'made with knowledge of the FDLR's criminal activities, shows an intention on his part to further those activities'.[129] The evidence demonstrates that Mbarushimana's contributions were not coincidental, nor were they made by a dispassionate individual. Rather, Judge Monageng rightly asserts that 'the evidence shows his steadfast commitment to maintaining the legitimacy of his organisation and, when crimes were committed, he endeavoured to deny them beyond detection by the international community'.[130] Mbarushimana's state of mind, combined with his contributions to the FDLR crimes through spreading disinformation, should have alleviated the concern of the Majority that Article 25(3)(d) was being over-extended to include so-called

124 Judgment, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, §§ 1632–1633.

125 In support of Judge Monageng's view, see also D. Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law* (Cambridge University Press, 2020), at 53.

126 *Mbarushimana* Confirmation Decision, *supra* note 77, Dissenting Opinion of Judge Monageng, § 104.

127 *Ibid.*

128 Cupido, *supra* note 20, at 45.

129 *Mbarushimana* Confirmation Decision, *supra* note 77, Dissenting Opinion of Judge Monageng, § 107.

130 *Ibid.*

'infinitesimal' contributions.[131] While Mbarushimana operated from a geographically and structurally remote position and contributed to the crimes in the Kivus in an indirect way, his contributions were nonetheless sufficiently significant. In combination with his state of mind, this should have led to the conclusion that there were substantial grounds to believe that Mbarushimana was criminally responsible, leading to the confirmation of charges laid against him.

## 6. Examining International Criminal Liability of Social Media Company Officials for Spreading Disinformation Through the Case of Myanmar

### *A. The FFM Report Concerning Facebook's Role in Atrocity Crimes in Myanmar: The Predominance of the Human Rights Paradigm*

The spreading of disinformation is widely believed to have played an important role in fomenting ethnic hatred in Myanmar, and fuelling and facilitating the alleged commission of genocide, crimes against humanity and war crimes against the Rohingya. The ICC is now exercising jurisdiction over this situation, but only to the extent it implies crimes occurring on the territory of Bangladesh, since Pre-Trial Chamber III authorized the Prosecutor to proceed with an investigation in the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*.[132]

As widely documented, hundreds of Myanmar's military officials allegedly engaged in a massive disinformation and hate propaganda campaign to support ethnic cleansing against the Rohingya — among other means, through 'distributing photos of corpses from faux massacres' and 'sharing fabricated stories of rape'.[133] Stating that 'Facebook is the internet' in Myanmar, the FFM Myanmar has addressed the role of Facebook in fostering 'a climate in which hate speech thrives, human rights violations are legitimized, and incitement to discrimination and violence facilitated'.[134] Describing the role of social media as 'significant', it further noted Facebook had 'been a useful instrument for those seeking to spread hate' and that its response to these allegations had 'been slow and ineffective'.[135] Nonetheless, the FFM stopped short of classifying

131 *Ibid.*, § 277.

132 Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19-27), Pre-Trial Chamber III, 14 November 2019.

133 P. Mozer, 'A Genocide Incited on Facebook, with Posts from Myanmar's Military', *The New York Times*, 15 October 2018, available online at: https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html (visited 5 June 2021).

134 UNGA Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar' (12 September 2018) 39th Session (2018), A/HRC/39/64 (hereinafter, 'FFM Report, Abbreviated Version'), § 73.

135 *Ibid.*, § 74.

Facebook among the entities bearing responsibility for the atrocity crimes committed by the Myanmar military.[136] Instead, the FFM recommended that Facebook and other social media platforms 'should apply international human rights law as [the] basis for content moderation on their platforms'.[137]

Indeed, a human-rights based approach to governing online speech (especially on social media platforms) has increasingly been favoured.[138] Recently, Facebook itself has accepted international human rights law as the (self-)regulatory framework to moderate content on its platforms.[139] The FFM's findings nevertheless raise the question whether — and how — international criminal responsibility might arise for (employees of) social media companies, if their platforms are used to contribute to atrocity crimes. As eloquently articulated by Sander, Facebook cannot be considered a neutral actor which is merely providing goods and services. Instead:

> In practice, Facebook exerts considerable influence over both the permissibility and visibility of online content: first, as a content *gatekeeper*, Facebook determines which categories of content are allowed and prohibited on its platform; and second, as a content *organiser* and *amplifier*, Facebook individualises the experiences of its users, prioritising some content over others, through algorithmic personalisation.[140]

Facebook itself has already acknowledged responsibility, at least of a kind. For instance, after the issuance of the FFM report, Facebook 'admitted it did not do enough to prevent the incitement of violence and hate speech in Myanmar'.[141] This raises the question whether, going beyond human rights law, social media companies or their employees could be held criminally responsible for hosted content which contributes to atrocity crimes. While ideas of corporate criminal responsibility have witnessed a renaissance in recent years,[142] ICL still predominantly operates on the premise of individual responsibility. The following subsections will therefore inquire if and how individuals operating on behalf of social media companies could attract international criminal liability under the individual modes of liability specific to ICL, with a specific focus on how content including disinformation could contribute to atrocity crimes. When

136 *Ibid.*, §§ 90–94.

137 FFM Report, Detailed Findings, *supra* note 31, at § 1718.

138 B. Sander, 'Digital Accountability Symposium: Mass Atrocities in the Age of Facebook — Towards a Human Rights-Based Approach to Platform Responsibility (Part One), *OpinioJuris*, 16 December 2019, available online at http://opiniojuris.org/2019/12/16/mass-atrocities-in-the-age-of-facebook-towards-a-human-rights-based-approach-to-platform-responsibility-part-one/ (visited 5 June 2021).

139 L. Helfer, 'Is the Facebook Oversight Board an International Human Rights Tribunal?' *Lawfare*, 13 May 2021, available online at https://www.lawfareblog.com/facebook-oversight-board-international-human-rights-tribunal (visited 5 June 2021).

140 Sander, *supra* note 138.

141 H. Ellis-Petersen, 'Facebook Admits Failings over Incitement to Violence in Myanmar', *The Guardian*, 6 November 2018, available online at https://www.theguardian.com/technology/2018/nov/06/facebook-admits-it-has-not-done-enough-to-quell-hate-in-myanmar (visited 5 June 2021).

142 C. Stahn, 'Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law', 50 *Case Western Reserve Journal of International Law* (2018) 91–125, at 91.

considering aiding and abetting, the possible liability will be assessed according to both customary international law and the ICC Statute, while common purpose liability will solely be analysed under Article 25(3)(d) ICC Statute. It will become clear that the *mens rea* requirements for both aiding and abetting and common purpose liability will, in particular, make it challenging — if not impossible — to establish liability for social media employees. In contrast, accessorial liability of social media employees for the inchoate crime of direct and public incitement to commit genocide might be more plausible.

### *B. Conceptualizing Disinformation on Social Media Platforms Contributing to Atrocity Crimes as Aiding and Abetting*

Recent scholarly contributions have posited that content on social media platforms which contributes to atrocity crimes, such as disinformation, could amount to aiding and abetting the resulting crimes.[143] By drawing a comparison with the way arms suppliers have been found to be complicit in atrocity crimes, Raj Singh has for instance argued that the 'weaponization of social media' in the context of mass atrocity should be treated similarly.[144] To assess whether the hosting of social media content could amount to complicity, this conduct must first be analysed against the *actus reus* and *mens rea* standards for aiding and abetting under customary international law. As noted above, there is no need to prove that the commission of the crime would have failed but for the assistance.[145] Instead, it should be established how the assistance facilitated or enhanced the risk that the crimes would occur.[146] With regards to *mens rea* under customary law, as stated above, 'the knowing participation' of the accused in the crimes should be established, which entails demonstrating the accused's knowledge of the consequences of his or her acts or conduct.[147]

Concerning both *actus reus* and *mens rea*, it may validly be asked whether Facebook's mere provision of a platform (which allowed members of the Myanmar military or others to foment hate and violence through spreading disinformation) constitutes a sufficient contribution to the atrocity crimes in Myanmar. For example, while the FFM qualified Facebook's role as 'significant' and 'a useful instrument for those seeking to spread hate', it also acknowledged that 'the extent to which Facebook posts and messages have led to real-world discrimination and violence must be independently and thoroughly examined'.[148] With regard to *mens rea*, Raj Singh suggests that Facebook employees must have been sufficiently aware of their role in the commission

143 S. Raj Singh, 'Move Fast and Break Societies: The Weaponization of Social Media and Options for Accountability under International Criminal Law', 8 *Cambridge International Law Journal* (2019) 331–342; N. Hakim, 'How Social Media Companies Could Be Complicit in Incitement to Genocide', 21 *Chicago Journal of International Law* (2020) 83–117, at 110.

144 Raj Singh, *supra* note 143, at 335–336.

145 Sluiter and Yau, *supra* note 69, at 325.

146 *Ibid.*, at 328.

147 Judgment, *Taylor* (SCSL-03-01-A), Appeals Chamber, 26 September 2013, § 436.

148 FFM Report, Abbreviated Version, *supra* note 134, § 74.

of atrocity crimes in Myanmar for liability under aiding and abetting to accrue.[149] In this regard, she notes reports that indicate Facebook had 'plenty of warnings from Myanmar and other countries about how it was being used to shape events on the ground' and 'specific meetings held with the company to articulate the serious problems that had developed with hate speech and disinformation on the platform in Myanmar, and the possibility of consequences on the ground'.[150] Yet, without prejudice to further evidence emerging, it is perhaps doubtful whether 'the possibility of consequences on the ground' is sufficiently precise to establish the knowledge necessary even for aiding and abetting under customary law. While it is not necessary that aiders and abettors know the precise crime intended by the principal(s), they must be aware that one of a number of crimes will probably be committed.[151] Applying this to the case of Myanmar, additional tangible evidence would have to be available demonstrating how Facebook employees could foresee that hosted content, such as disinformation, would contribute to one or more violent crimes against the Rohingya.

Furthermore, the discussion under Section 3.E. above has made clear that, in order to fulfil the specific 'purpose' requirement for aiding and abetting liability under Article 25(3)(c) ICC Statute, the accomplice must also provide their contribution with the purpose of facilitating the principal's crime(s). Applying this requirement to the role of Facebook in Myanmar, it seems plain that it would exclude the conduct of Facebook employees, because it cannot sensibly argued that they intended to facilitate the commission of atrocity crimes even through hosting content amounting to disinformation.

### *C. Conceptualizing Disinformation on Social Media Platforms Contributing to Atrocity Crimes under Common Purpose Liability*

Alternatively, one could consider whether the Facebook scenario fits better into the legal framework of 'common purpose' liability, whereby an individual who 'in any other way contributes' to the commission of a crime 'by a group of persons acting with a common purpose' may be found responsible. As previously explained, while Article 25(3)(d) refers to a person contributing 'in any other way' to commission of a crime by the group of persons acting with a common purpose, this paper argues that the significant contribution standard is the relevant causality threshold. This requires showing at least that the contribution influenced or had a bearing on the commission of the crimes. As such, it would suffice to show 'that the perpetration of the crime would not have occurred in the way that it did, *but for* the existence of the contribution'.[152] In this context, it does not seem far-fetched to argue that the atrocity

149 Raj Singh, *supra* note 143, at 336.

150 *Ibid.*

151 See Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 246.

152 T. Hamilton, 'Arms Transfer Complicity Under the Rome Statute', in Jørgensen (ed.), *supra* note 69, 148–186, at 182.

crimes against the Rohingya would not have occurred in the way they did if Facebook — as *the* internet is Facebook — had not allowed disinformation dehumanizing the Rohingya to be amplified and circulated on its platforms.

Again, however, the requisite *mens rea* seems more problematic to establish. A social media company employee could not be held liable under Article 25(3)(d)(ii) ICC Statute — a knowledge standard, similar to the *mens rea* for aiding and abetting under customary law — unless they possess sufficient information about the link between the use of their platform and the impending crime(s) committed by a group, including the basic factual contours.[153] Thus, in the context of Myanmar, Facebook employees could only be held responsible if they knew about the common purpose to commit atrocity crimes against the Rohingya, and the contribution which they provided. While perhaps not impossible, this might be very challenging to establish.

### *D. Accessorial Liability of Social Media Employees for Disinformation Contributing to Direct and Public Incitement to Commit Genocide*

Notwithstanding the above, the liability of social media employees under aiding and abetting or common purpose liability might be more easily envisaged for one particular crime: the inchoate crime of direct and public incitement to commit genocide, as enshrined under Article III(c) of the Genocide Convention[154] and Article 25(3)(e) ICC Statute.[155]

Discussion of this crime has mostly focused on the exact meaning of the requirement that the incitement is 'direct' and 'public'.[156] For the 'public' element, 'it should be interpreted to mean that an inciter must deliver messages addressed to a number of individuals in a public space or to members of the general public at large'.[157] The direct element has been interpreted 'as meaning more than a mere vague or indirect suggestion, such that the inciter knows that the intended audience will understand his/her call as one to commit genocide'.[158] The incitement need not constitute an explicit call for genocide.[159] Scholars like Hakim have argued that in the case of Myanmar, *prima facie*, the disinformation and hate propaganda campaign carried out by the Myanmar military would seem to incite genocide against the Rohingya.[160] As detailed above, the FFM has established that Facebook was used for this purpose, and therefore the 'public' element seems to have been straightforwardly fulfilled. While the dissemination of disinformation dehumanizing the Rohingya does not constitute an explicit call to commit genocide, the fact that it reinforced the 'narrative of the whole Rohingya population being ''terrorists''

153 *Ibid.*, at 183.
154 Art. III(c), Convention on the Prevention and Punishment of the Crime of Genocide.
155 Art. 25(3)(e) ICCSt.
156 De Hemptinne, *supra* note 65, at 399.
157 *Ibid.*, at 403.
158 *Ibid.*
159 Hakim, *supra* note 143, at 107–108.
160 *Ibid.*, at 109.

and inherently violent'[161] arguably suffices to establish the 'direct' criterion.[162] It constitutes a textbook example of accusation in a mirror, touched upon in the introduction to this article, and which Gordon has classified among the genocidal speech techniques constituting a direct incitement to commit genocide.[163]

Assuming that direct and public incitement to commit genocide was thus made out, and if corroborated by additional evidence, then it is possible that the conduct of Facebook employees might constitute aiding and abetting as defined under customary international law. Complicity in incitement has been recognized in principle by the ICTR Appeals Chamber in the *Nyiramasuhuko et al.* case, in which the Appeals Chamber held that it would have to be established that the accused substantially contributed to the inciting speeches.[164] As previously clarified, 'substantial' assistance implies that the acts or omissions of the aider and abettor facilitated the crime, or creates or increases the risk that it would be committed. In terms of *mens rea*, it suffices to show that the accused knew that his or her acts would assist in the commission of a crime and was aware of the crime's essential elements.

It seems that both the *actus reus* and *mens rea* elements for aiding and abetting under customary international law could have been fulfilled by Facebook employees with regard to atrocity crimes in Myanmar. Already in 2015, Facebook officials were alerted that their platform was being abused by the Myanmar military to incite hatred and violence against the Rohingya through a widespread hate and disinformation campaign. This was years before Facebook began taking down accounts of senior Myanmar military figures in 2018, when the alleged genocide against the Rohingya had in fact materialized.[165] A compelling argument could be made that certain Facebook officials are liable under the customary international law definition of aiding and abetting direct and public incitement to commit genocide. It could be argued that the Myanmar military possessed the requisite intent to destroy for the crime of genocide, which for the crime direct and public incitement to commit genocide is manifested in the intent to directly prompt or provoke another to commit genocide.[166] As held by the *Akayesu* Trial Chamber, it 'implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging'.[167] The disinformation and hate propaganda campaign as further detailed above arguably aimed to incite a genocide against the Rohingya and demonstrates that the Myanmar military possessed the requisite genocidal intent. As the disinformation and hate propaganda campaign occurred on their

161 FFM Report, Detailed Findings, *supra* note 31, § 1334.
162 Hakim, *supra* note 143, at 109.
163 Gordon, *supra* note 34, at 287–289.
164 Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, § 3345.
165 Hakim, *supra* note 143, at 114–115.
166 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 560.
167 *Ibid.*

platforms, Facebook employees could be said to have knowingly contributed to the incitement through continuing to provide Facebook's services to the Myanmar military for several years after they had been alerted that their platforms were being used to foment hatred and violence against the Rohingya.

It is yet to be established in the ICCs judicial practice whether the modes of liability in Article 25(3)(a)–(d) can even be applied to Article 25(3)(e) criminalizing direct and public incitement to genocide. In any event, the 'purpose' requirement for aiding and abetting under Article 25(3)(c) ICC Statute would seem to preclude this form of accessorial liability for direct and public incitement. It cannot be convincingly argued that Facebook employees acted with the purpose of facilitating direct and public incitement to commit genocide by the Myanmar military. On the other hand, if accessorial liability for the crime in Article 25(3)(e) is possible at all, common purpose liability might again be the fallback option. Under Article 25(3)(d)(ii) ICC Statute, Facebook employees could be held responsible on the basis that they knew that their platform significantly contributed to the common purpose of members of the Myanmar military to directly and publicly incite a genocide against the Rohingya.

## 7. Concluding Thoughts: Explaining ICL's Reluctance to Impose International Criminal Liability for the Speech Act of Spreading Disinformation

This article aimed to shed light on how disseminating disinformation in the context of mass atrocity crimes could give rise to international criminal liability. The discussion of three cases adjudicated before different international criminal tribunals has illustrated that the spreading of disinformation could contribute to atrocity crimes in three different ways: prompting them or making them more likely to occur beforehand (*Fritzsche*); enabling their continuation, including preventing their interruption, as they occur (*Gvero*), and; concealing or denying them afterwards, and thus contributing to further crimes in the future (*Mbarushimana*). Considering these cases, and the more immediate challenge presented by the alleged role of Facebook in crimes apparently committed in Myanmar, this article suggests that, *in se*, disinformation could constitute a contribution to atrocity crimes which may be most accurately conceptualized and labelled through accessorial modes of liability such as aiding and abetting and common purpose liability.

Nonetheless, the acquittal of Fritzsche, the termination of the case against Mbarushimana, and the low sentence imposed upon Gvero also suggest that ICL may be reluctant to impose liability for spreading disinformation since it is a speech act, even if allegedly contributing to atrocity crimes. For all three cases, the reluctance might be explained by the constraints derived from the fundamental ICL principle of personal culpability, according to which persons

can only be held responsible for their own conduct.[168] Since all three cases related to the spread of disinformation which was only indirectly and remotely related to the charged crimes, this left the judges with the challenging task of considering the sufficiency of the accused persons' contribution (objective aspect of the culpability principle) and/or mental state (subjective aspect of the culpability principle).[169] Their conclusions seem to have reflected some hesitation, irrespective of the legal standards in question.

Thus, for Fritzsche, the IMT's observations reflect doubt that he sufficiently contributed to the Nazi crimes, with the requisite mental state, even if his acquittal might also partly be explained by the technicality of the only mode of liability (instigation) with which he could then be charged. Similarly, even in the much more recent *Mbarushimana* case — where the charged mode arguably reflected lower requirements — the Majority's reasoning and conclusion suggests that they were no less very wary in accepting that speech acts (such as disseminating disinformation) could justify culpability. The fact that Gvero *was* convicted might be largely ascribed to the specific nature of JCE culpability, yet an appreciation at least of the lesser culpability seems to be reflected in Gvero's very low sentence of five years.

It seems especially to be the subjective aspect of the culpability principle which, in most instances, may preclude international criminal liability for spreading disinformation — including by social media employees hosting such material on their platforms. In many instances, it would be challenging to establish that social media employees possessed necessary *mens rea*, with one possible (but still limited) exception being accessorial liability for the inchoate crime of public and direct incitement to commit genocide. This certainly raises the question whether corporate criminal liability, civil liability or the use of administrative fines are not better-suited legal responses to remedy wrongs such as those caused by Facebook in Myanmar.[170]

Overall, however, it would be wrong simply to attribute the reluctance to recognize international criminality liability for disseminating disinformation only to limits posed by the principle of culpability. In addition, as shown by the *Fritzsche* and *Mbarushimana* cases, it remains that compelling evidence — and the accurate evaluation of that evidence — is essential to establishing criminal liability, for the dissemination of disinformation no less than any other form of participation in a crime. Furthermore, since disinformation often constitutes an indirect, remote and/or indeterminate contribution to the physical

168 Robinson, *supra* note 125, at 9. See also Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 186 (personal culpability is 'the foundation of criminal responsibility' and entails that 'nobody may be held criminally responsible for acts or transactions in which [they have] not personally engaged or in some other way participated'). See also IMT Indictment and Judgment, *supra* note 37, at 256 ('[C]riminal guilt is personal').

169 Robinson, *supra* note 125, at 149.

170 See e.g. S. Koloßa, 'International Crimes in the Age of Social Media: Why Corporate Criminal Liability is Unsuitable to Combat Impunity', *Völkerrechtsblog*, 3 February 2021, available online at https://voelkerrechtsblog.org/international-crimes-in-the-age-of-social-media/ (visited 9 June 2021).

commission of the crimes, this may be particularly challenging, and require innovation. Relying largely on witness evidence to establish international criminal liability is often fraught with difficulties and limitations.[171] In this increasingly digital age, more extensive reliance on documentary evidence — including social media posts, and reactions to such posts — might be the way to go in proving if and how disinformation contributed to atrocity crimes.[172] Scholars such as Wilson have likewise made very valuable proposals to include social science expertise in speech crime trials, which 'could assist international tribunals in distinguishing more meticulously between types of speech that may be repugnant but minimal in their effects, and types of speech that are known to elevate the risk of criminal acts in a statistically significant manner'.[173]

171 C. Lawson and R. Bartels, 'Prosecuting Speech Acts: An Examination of the Trial of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*', in P. Dojčinović (ed.), *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, 2020) 124–142, at 137.

172 See e.g. Human Rights Center and OHCHR, *Berkeley Protocol on Digital Open Source Investigations* (2020), available online at https://www.ohchr.org/Documents/Publications/OHCHR_BerkeleyProtocol.pdf (visited 8 June 2021), at v, 60.

173 Ashby Wilson and Gillett, *supra* note 14, at 300–301.