

Holding War Criminals to Account: The Challenges Presented by Information Warfare

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The physical battlefield of the ongoing war between Ukraine and Russia is being closely scrutinised by the global community: each day, media platforms present their audience with maps, speckled with shading and arrows, depicting the land lost or gained and troop movements of recent days. Behind the scenes, however, a shadowy battlefield of disinformation and political warfare rages just as strongly.

The history of disinformation and political warfare

Russia and the West are no strangers to information warfare and its potential to shift the balance of power in a conflict, turn the tide of an election, or destabilise a political regime.

The most obvious recent example of this was Russian interference in the US Presidential Elections in 2016. Less well documented are the multitude of cyber-attacks perpetrated against Ukraine during the course of the past eight years. In 2014, Ukraine fell victim to Russian interference in its election as the Russian army simultaneously invaded and annexed Crimea. In 2015, suspected Russian cyber-operatives caused blackouts across the country. In 2017, a swathe of Ukrainian businesses and public services fell victim to Russian ransomware attacks, with hackers sharing the chilling message 'We Do Not Forgive. We Do Not Forget. Expect Us.'

Colonel Rolf Wagenbreth, head of the East German Secret Police Active Measures Department X, described the significance of disinformation in warfare. He explained that 'a powerful adversary can only be defeated through...a sophisticated, methodical, careful and shrewd effort to exploit even the smallest "cracks" between our

enemies...and within their elites.' This is precisely what we saw in the rhetoric adopted by Russia in the run up to its annexation of Crimea and more recently in its justification for the invasion into Ukraine. The more polarised a country is, the more vulnerable it is to attack. Today, Russia seeks to pit Ukrainian against Ukrainian by defining the current war as a 'special military operation' to 'protect people who... have been facing humiliation and genocide perpetrated by the Kiev regime.' By characterising the current Ukrainian leadership as 'far right nationalists and neo-Nazis' perpetrating crimes against humanity on their own people, President Putin plays on existing national division.

Ukraine is waging its own form of information warfare. It is of note that media coverage, particularly in Western outlets, has picked up Ukraine's messaging and sought to amplify the success of Ukraine's military forces whilst depicting the Russians as ill-prepared and Russian soldiers as disenchanted, reluctant to turn on Ukrainians whom they regard as their brothers.

A significant challenge arises, however, sorting facts from the propaganda of either side. Whilst the Kremlin has been widely criticised for blocking access to pro-West media in Russia—thereby allegedly restricting the flow of accurate reporting of the war to the Russian population—it is equally clear that Western media sources are not impartial. Indeed, Western officials have conceded that 'while they cannot independently verify information that Kyiv puts out about the evolving battlefield situation, including casualty figures for both sides, it nonetheless represents highly effective stratcom.'¹

¹ Missy Ryan, Ellen Nakashima, Michael Birnbaum, and David L. Stern, 'Outmatched in military might, Ukraine has excelled in the information war' *The Washington Post* (Washington, 16 March 2022).

According to Sean McFate, a senior fellow at the Atlantic Council, the Ukrainian communication strategy highlights ‘a shift taking place in modern conflicts, from a focus on munitions dropped to one centred in large part on messaging, media and persuasion.’²

There are regular reports from both sides of the conflict of disinformation, including allegedly falsified records or accounts of incidents. An early example of this was reports of the attack on Snake Island.³ More recently, a falsified BBC news report published by Russian News outlets asserted that the deadly attack on the train station in Kramatorsk was, in fact, perpetrated by the Ukrainian military.⁴

In circumstances where nuggets of truth are disguised by layers of disinformation, the challenge of identifying and proving facts is clearly exacerbated. Establishing the facts is essential if we are to effectively hold perpetrators of war crimes to account.

The International Criminal Court (the ‘ICC’)—prosecuting war crimes

The ICC has a long—and somewhat chequered—history of prosecuting war crimes. Founded in 2002, it is governed by the Rome Statute and boasts 123 member states. Whilst its objectives are laudable, its practical success at holding perpetrators of war crimes to account is underwhelming. A key reason cited for this is limitations experienced by the court’s investigators when it comes to evidence gathering, often rendering it impossible to secure convictions. The ICC’s Prosecutor, Karim AA Khan QC, acknowledged this issue in his first speech to the Court when he took office in June 2021. He noted that ‘We cannot invest so much, we cannot raise expectations so high and achieve so little, so often in the courtroom. As an office, we need a greater realisation of what is required by the burden of proof and the obligation to prove the case beyond reasonable doubt.’⁵

Historically, the ICC’s investigators have faced difficulties arising out of the Court’s relatively low funding for investigations, the unreliability of witness evidence, and the inaccessibility of areas in which the alleged crimes took place.⁶

Article 61 of the Rome Statute requires that ‘the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence...’⁷ It is here that the ICC has historically fallen short. Indeed, on a number of occasions, the Prosecutor has failed to clear the evidentiary threshold set out above that there is ‘substantial grounds to believe’ that the individual is responsible for the crimes for which they are charged.⁸ It has been widely acknowledged by the

² *ibid*.

³ Zoya Sheftalovich, ‘Go fuck yourself,’ Ukrainian soldiers on Snake Island tell Russian ship before being killed’ *Politico* (Arlington, 25 February 2022).

⁴ Pip Cook, ‘Putin hijacks BBC: Russia spreads terrifying video blaming Ukraine for missile attack’ *Daily Express* (London, 13 April 2022).

⁵ Susan Kendi, ‘Karim Khan’s first speech as ICC Prosecutor’ (*Journalists for Justice*, 16 June 2021) <jfjustice.net/karim-khans-first-speech-as-icc-prosecutor/>.

⁶ Christian M De Vos, ‘Investigating from Afar: The ICC’s Evidence Problem’ (2013) 26 *Leiden Journal of International Law* 1009.

⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute) art 51.

⁸ Patryk Labuda, ‘The ICC’s “evidence problem”: The future of

ICC’s Pre-Trial Chamber that the evidentiary burden of ‘substantial grounds to believe’ requires the Prosecutor to ‘offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations.’⁹ Further, in cases that have proceeded beyond the decision to charge an individual, judges have on several occasions dropped—or the Prosecutor has withdrawn—charges due to insufficient evidence.¹⁰

The recent case against Laurent Gbagbo and Charles Blé Goudé

On 31 March 2021, the Appeals Chamber of the ICC upheld the acquittal of the former Ivorian President Laurent Gbagbo (who held office from 2000 until his arrest in April 2011) and a former student union leader and minister of youth in Gbagbo’s government, Charles Blé Goudé.¹¹ It is of note that the Pre-Trial Chamber originally adjourned the case in 2013 so as to give the Prosecutor more time to gather evidence.

In its decision to adjourn, the Pre-Trial Chamber provided a helpful explanation of its role:

... it is the Chamber’s duty to evaluate whether there is sufficient evidence for each of the “facts and circumstances” advanced by the Prosecutor in order to satisfy all of the legal elements of the crime(s) and mode(s) of liability charged. The standard by which the Chamber scrutinizes the evidence is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect.¹²

The Chamber explained that, at each stage of proceedings, there is higher evidentiary threshold that needs to be met. The Pre-Trial Chamber went on to clarify the ICC’s expectations when it comes to the quality of evidence gathered:

...the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence. As a general matter, it is preferable for the Chamber to have as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody. Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witnesses.¹³

⁹ international criminal investigations after the Gbagbo acquittal’ (*Völkerrechtsblog*, 18 January 2019) <voelkerrechtsblog.org/the-iccs-evidence-problem/>.

¹⁰ *Prosecutor v Laurent Gbagbo* (Pre-Trial Chamber, Decision adjourning the hearing on confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11 (3 June 2013).

¹¹ International Criminal Court, Cases <www.icc-cpi.int/cases?%5B0%5D=accused_states_cases%3A356>.

¹² ‘ICC Appeals Chamber confirms Trial Chamber I’s decision acquitting Laurent Gbagbo and Charles Blé Goudé of all charges of crime against humanity’ (International Criminal Court, 31 March 2021) <www.icc-cpi.int/news/icc-appeals-chamber-confirms-trial-chamber-decision-acquitting-laurent-gbagbo-and-charles-ble>.

¹³ *ibid* [26–27].

The Prosecutor in this case was criticised by the Chamber for their heavy reliance on NGO reports and press articles when seeking to establish key elements of the case. The Court was clear that whilst reports and articles can provide valuable historical context, they are not a valid substitute for the type of evidence required to meet the evidentiary threshold for the confirmation of charges.¹⁴

What does this mean for the current conflict?

On 2 March 2022, Mr Khan QC announced that he was opening an investigation into the situation in Ukraine. Under Article 53 of the Rome Statute, prior to opening an investigation, a Prosecutor must consider whether the information available provides reasonable grounds to believe a crime is being, or has been, perpetrated within the jurisdiction and whether an investigation would serve the interest of the victims.¹⁵ Mr Khan QC confirmed that the court had received referrals from 39 ICC member states and that the investigation would encompass events from 21 November 2013 onwards, including allegations of war crimes, crimes against humanity, and genocide committed on any part of the territory of Ukraine by any person. It is of note that the scope of the investigation is sufficiently broad to cover aggression perpetrated by the Ukrainian military or Ukrainian civilians as well as Russian forces.¹⁶

Mr Khan QC is evidently aware of the ICC's reputation and appears determined to ensure that the failings of previous prosecutions do not apply to the current conflict.

Whilst visiting Bucha, Ukraine on 13 April 2022, Mr Khan noted that 'Truth is very often the first casualty of war.' With this in mind, the ICC has already installed an investigation team on the ground in Ukraine, including forensic scientists, forensic anthropologists, analysts, investigators, and lawyers, 'so that [the ICC] can really make sure that we separate truth from fiction and go forward to insist on the rights of every individual, every child, every woman and every man to have their lives protected and not wantonly targeted.' Mr Khan QC has promised that 'a truth [will emerge] in the end... in the courtroom, there is no place to hide and the truth ultimately emerges, whatever the tactics that may be employed or whatever the difficulties and hurdles that exist.'¹⁷

Documenting war crimes

The international community, cognisant of the historic failures of the ICC to secure convictions as a result of insufficiently robust evidence, has established various services to assist with the collection and storage of evidence. By way of example, the Ukrainian Office of the Prosecutor General has created a site facilitating the proper documentation of war crimes and crimes against humanity perpetrated by the Russian army in Ukraine. Evidence uploaded to the site 'will be used to prosecute those involved in crimes in accordance with Ukrainian law, as well as in the International Criminal Court in the Hague and in a special tribunal after its creation.'¹⁸ In addition, tech giants such as Google have created apps,

¹⁴ *ibid* [35].

¹⁵ Rome Statute (n 7) art 53.

¹⁶ 'Statement of ICC Prosecutor, Karim AA Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (International Criminal Court, 2 March 2022) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>>.

¹⁷ Catherine Philp, 'Truth will out about Russian war crimes in Ukraine, says British prosecutor' *The Times* (London, 13 April 2022).

¹⁸ 'Criminal liability for #RussianWarCrimes!' <<https://warcrimes.gov>>.

such as the eyeWitness to Atrocities App, aimed at humanitarian organisations, investigators, and journalists documenting atrocities in conflict zones or other troubled regions around the world. The app's software enables users to encrypt and anonymously report incidents.

Under the ICC's Rules of Procedure and Evidence it is within the Chamber's discretion to 'assess freely all evidence in order to determine its relevance or admissibility'; further, either party can make an application to challenge the admissibility of evidence submitted by the other side. The Chamber has broad powers in determining whether evidence meets the standards required to be admissible in Court. That said, it is not permitted to "impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court."¹⁹

The impact of disinformation on prosecution

The ultimate impact of disinformation warfare on the prosecution of war criminals—or indeed, the outcome of the current war in Ukraine—will remain unknown for the foreseeable future. That said, it is of serious concern that the expansion of disinformation warfare (and technical prowess with which it is perpetrated) creates real difficulties for reaching safe prosecutions. Mr Khan QC has noted that 'We have to pierce the fog of war to get to the truth', however, with increasingly sophisticated modes of deception this challenge should not be overlooked.²⁰

Recent reports from the Russian Ministry of Finance indicate that Russia has tripled its 'mass media' budget over the past year. Between January and March this year, the Russian government spent 17.4 billion roubles on 'mass media' in comparison with only 5.4 billion roubles during the same period last year, with reports suggesting this has been directed towards propaganda efforts.²¹

Research indicates that repeated exposure to online falsehoods, even if those falsehoods have low levels of credibility, increases perceptions of veracity over time.²² A concerning example of this is that a survey in the US revealed that almost one in five Americans believe in QAnon conspiracy theories, including that 'the government, media and financial worlds in the US are controlled by a group of Satan-worshipping paedophiles who run a global child sex-trafficking operation.'²³

Disinformation warfare is inconspicuous but insidious. It is clear, however, that the international community must recognise that a parallel war is underway and that it must arm itself to guard against disinformation in order to ensure proper and fair administration of justice in the years to come.

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¹⁹ 'Rules of Procedure and Evidence', Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A (Rules 63-64).

²⁰ Philp (n 17).

²¹ Tom Ball, 'Russians create fake BBC news video to blame Ukraine for bombing' *The Times* (London, 13 April 2022).

²² Gordon Pennycook, Tyrone D Cannon, and David G Rand, 'Prior exposure increases perceived accuracy of fake news' (2018) 147 *Journal of Experimental Psychology* 1865.

²³ 'The Persistence of QAnon in the Post-Trump Era: An Analysis of Who Believes the Conspiracies' (PRRI, 24 February 2022) <www.prri.org/research/the-persistence-of-qanon-in-the-post-trump-era-an-analysis-of-who-believes-the-conspiracies/>.