

Social Media, The Truth and War Crimes

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by: Terry Beitner

On June 2, 2020, the Royal Canadian Mounted Police (RCMP) National Security Tip line received a call from an individual who said that a video calling for the killing of people in the Democratic Republic of Congo (DRC) was being distributed online. The following day an analyst at the Department of Justice Crimes Against Humanity and War Crimes Section (CAHWCS) called the RCMP Sensitive and International Investigation Unit (SII) to report that he too received information from a contact at the DRC National Police who reported that an individual in Canada was spreading genocidal messages on WhatsApp.

The SII is the RCMP's dedicated unit that operates under the aegis of Canada's Crimes Against Humanity and War Crimes Program (Program) to enforce Canada's *no safe haven* policy. Established

in 1998, Canada's Crimes Against Humanity and War Crimes Program brings together the RCMP, the Department of Justice CAHWCS, Canada Border Services Agency (CBSA) and Immigration Refugees and Citizenship Canada (IRCC) to operate in a coordinated fashion to address allegations of the presence of war criminals in Canada.

The 64 year-old suspect who was the object of the complaints, Mr Kibwe NGOIE-NTOMBE had an Australian passport, and resided in Kelowna, British Columbia with his family. He was arrested by the RCMP on June 12, 2020 at his residence. Time was of the essence because in one undated video shared on WhatsApp, NTOMBE issued an ultimatum to the Kasaian people (a minority group who mostly reside in the south-central portion of the DRC) to leave the Katanga province of the DRC by June 20, 2020. NTOMBE further declared that "Operation Dragon" would be initiated on June 30, 2020, to clean the Katanga Province of the Kasaians.

This was the first allegation received by the Program that involved a social media campaign originating in Canada, inciting hate overseas and most significantly, an allegation about a crime that was about to happen.

Typically, the Program receives allegations about atrocities that have occurred around the world and requests to investigate the situations. Ordinarily, the Program exercises jurisdiction over allegations concerning war crimes, crimes against humanity and genocide when the suspect resides in Canada after the commission of the offence. The Program also has jurisdiction in other circumstances as described in section 8 of the *Crimes against Humanity and War Crimes Act*. Any prosecution under the Act requires the consent of the Attorney General of Canada as exercised by the Public Prosecution Service of Canada (PPSC). PPSC prosecutors and counsel from the CAHWCS cooperatively provide legal and strategic support to RCMP investigators during investigations.

The RCMP conducted an investigation and discovered that NTOMBE had a vast social media presence that dated back to the early 2000's. They also discovered that NTOMBE produced 27 videos relevant to this allegation commencing in November of 2019. The videos threatened the Kasaians and contained language reminiscent of other dehumanization campaigns that preceded previous genocides. For example he referred to the Kasaians as "insects" that had to be cleaned. In another video he says "Shut your mouth we will strangle you very well/seriously…"

Officials in the DRC and members of the Congolese community in Canada felt that the threats should be taken seriously.

When the RCMP took NTOMBE into custody, they advised him that he was being arrested for uttering threats against the Kasaian population of the Katanga Region of the DRC pursuant to section 264.1(1) of the Criminal Code. He was also advised that he was under investigation for persecution as well as attempt and conspiracy to commit persecution of the Kasaian population in the Katanga region of the DRC as a crime against humanity pursuant to sections 4(1) and 4(1.1) of the Crimes Against Humanity and War Crimes Act.

NTOMBE gave a series of statements after his arrest. He indicated that he was acting in support of the independence of his home Province of Katanga. He also said that he wanted to become president of the independent state of Katanga. He described his ties to a militia leader in Katanga who promised to turn his forces over to him. He added that the Kasaians in Katanga who came to this province from the region of Kasai were stealing minerals that belonged to the Katanga people and that they would oppose a planned declaration of independence for Katanga from the DRC. He added that his plan was designed to make the Kasaians leave the province of Katanga.

On December 16, 2021, NTOMBE pled guilty to one count of uttering threats contrary to section 264.1 and one count of willful promotion of hatred contrary to section 319(2) of the *Criminal Code*. He was sentenced to 12 months jail, 12 months probation with a DNA order (see here for an explanation) and a firearms prohibition. The judge agreed with the Crown submission that "jail" is always mandated in this type of offence but, in this case she exceptionally accepted that the sentence be served in the community principally because NTOMBE has children and will be eventually be deported.

This was an important case for the Program because the efforts of the RCMP, the Department of Justice, the Public Prosecution Service of Canada and the British Columbia Prosecution Service may have prevented a disaster for the Kasaian people in the Katanga Province of the DRC. It is indeed a rare occurrence in the area of international criminal law where the efforts of a dedicated group of public servants can contribute to the international struggle against impunity for core crimes in a preventative fashion. However, the story does not end here. This case also brings home the need for an important discussion about social media, the truth and new technologies. Of course such a discussion is beyond the scope of this short post however, I hope that the following is enough to encourage further thought and dialogue about the impact of emerging technologies on popular discourse and the need for vigilance when trying to ascertain the truth.

The NTOMBE matter is one example of several recent cases where social media involving war crimes played a central role in a criminal prosecution involving atrocities. For example, on July 16, 2021, a Dutch court convicted a Syrian national for the war crime of unlawful killing of a protected person (a captured Syrian military officer) under international humanitarian law. The underlying event took place during the armed conflict in Syria in 2012. The unlawful killing was recorded and the video of the event was posted on YouTube. In fact, Dutch investigators located several YouTube videos of the execution. The execution was considered to be a war crime because the Syrian military officer was a captured prisoner no longer taking part in the hostilities and was not tried by a proper court. International humanitarian law requires that prisoners be treated in a humane fashion and not be summarily executed. The accused was sentenced to 20 years in prison for the unlawful killing (for more details, see here)

In another Dutch case, also in the Syrian context, an individual was convicted of the war crime of outrage upon personal dignity on April 21, 2021. The events took place in 2015 while the accused was involved with Ahrar al-Sham, a jihadist-Salafist armed group. Again, the case was based on videos uploaded to YouTube. The videos depicted the accused kicking and spitting on the dead bodies of

opposing forces. The court stated that the publication of the videos on a public YouTube channel continued the humiliation and dishonour by allowing a wide audience to learn about it. The accused was sentenced to six years imprisonment (for more details, see here).There have been other cases involving fighters posing with dead enemy forces that led to prosecutions and convictions, for the war crime of outrage upon personal dignity (see here). These cases involved either videos or photographs that were discovered on cell phones, tablets, digital storage media (CD-ROMS) or found on social media.

The recent Dutch cases show that posting photos and videos on social media can be an aggravating circumstance in the assessment of blameworthiness in addition to providing inculpatory evidence of war crimes offences.

Social media have played an outsized role in recent history. For example, the Trump administration demonstrated the power of instantaneous communications through Twitter. Additionally, Twitter, YouTube, Instagram, Telegram and other platforms are the current battlegrounds of propaganda wars and these powerful tools are in the hands of anyone with a smartphone or a laptop. Social media can also provide us with almost instantaneous reporting of significant world and local events. The ongoing conflict in Ukraine is an excellent example of the power of social media to convey images and commentary in almost real time.

However, I would add an obvious cautionary note. You can't believe everything you see and hear. We should remember that under our rule of law order, conclusions about the guilt of specific individuals for crimes is left to the courts where the fruits of independent investigations are presented to a judge who determines whether an accused is responsible for the commission of a crime and imposes punishment after a fair trial. Lawyers introducing video evidence at trial are mindful of the need to authenticate evidence through an increased reliance on technological expertise. Deepfakes is one area of technology that presents a relatively new challenge for people that care about truth and for anybody who is trying to understand the world presented to them on social media.

Deepfakes are realistic videos that depict people saying and doing things that they did not actually say or do. These videos are created using a new type of artificial intelligence called machine learning; technology that can also be used to create fake photographs. Machine learning allows software applications to become more accurate at predicting outcomes without being explicitly programmed to do so. One can almost say that the computer teaches itself. The use of fake videos to spread falsehood is not new, especially during wartime. Don Falllis, in his article titled The Epistemically Threat of Deep Fakes, reminds us of the use of realistic fake videos created by Nazi Germany depicting how well Jews were treated under Nazi Rule. Again, this technology is available to anyone with a smart phone or a laptop.

The BBC recently demonstrated this technology with a fake video of President Obama. The tech is presented and explained by journalist Ian Hislop here. As well, a recently faked video of President Zelenskyy of Ukraine during the war with Russia is discussed in the following article on NPR. The

video shows a rendering of the Ukrainian President appearing to tell his soldiers to lay down their arms and surrender to Russia.

The NTOMBE case discussed above in addition to the Dutch and other similar cases demonstrate how social media has become a significant factor in the investigation of war crimes cases. Social media has also brought the war in Ukraine to our smartphones and laptops. Twitter and other applications have provided platforms to citizens and states that no longer need to rely on traditional media to get their messages out. We now all have a voice that can move across the world instantaneously and in some cases spread truth and in others incite hatred.

In the immortal words of Sgt. Phil Esterhaus, from the American television police drama *Hill Street Blues*, “let’s be careful out there”.

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