



Untapped Potential: Examining the Role of Open Source Intelligence Through the Lense of
Sexual and Gender-Based Cases at the International Criminal Court

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ABSTRACT

The continual rise of technology, digital tools, and the internet, has made it possible to share and access information from all over the world. Legal investigators are now utilizing information derived from digital open sources as a means of gathering evidence or intelligence (OSINT). The adoption and application of digital investigation methods in recent cases at the International Criminal Court (ICC), along with the special attention of conflict-related sexual violence as specified in the Rome Statute, provides a potentially progressive legal framework for successful prosecution of cases pertaining to sexual and gender-based violence (SGBV). However, such types of cases continue to struggle to be adjudicated and properly investigated through digital open source methods. This research utilizes interviews with international lawyers, legal researchers, digital investigators, and gender specialists alike, in order to better explore the challenges that exist for the prosecution of sexual and gender-based crimes (SGBC) at the ICC concerning the introduction of digital open source investigation methods. The article aims to contribute to the discussion of how digital open sources utilized in international criminal investigations of sexual violence, and the impact on cases of this nature at the ICC.

INTRODUCTION

The modern landscape has become increasingly more digital, and the recent pandemic has only helped to accelerate the transition to more virtual platforms. During this time, much of everyday activities which were not already transitioning to online platforms, were forced to integrate some digital aspect in order to maintain functionality amidst the global health crisis. This transfer also caused more people than ever to engage with the internet and other digital platforms in ways they normally would not, as a way to participate and compensate in daily life. For example, 90% of Americans report that the internet has been essential to them during the pandemic, and 40% used technology in new ways as a result.¹ This same digital shift can be seen within the international criminal and human rights violations investigations in terms of data collection. The introduction of using digital open sources as a means to enhance legal investigations continues to be a topic of discussion in the international law community, especially with regards to establishing a uniformity and standard of protocols, procedure, and ethics. ‘The Wild West’ is a term often used to describe investigations conducted through digital open sources due to the seemingly limitless potential for access to information, coupled with discretionary regulations and a lack of uniformity regarding these methods and ethics.

Special effort has been given to regulate this relatively new digital means of data collection for criminal and human rights investigators. At the time of this paper, the most comprehensive guidelines come from the ICC electronic protocol, which was developed especially for the Lubanga proceedings.² Additionally, ‘The Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law’ which is co-published by the United Nations, on behalf of the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the Human Rights Center at the University of California, Berkeley, School of Law also serves as a thorough guide to

¹ McClain, C., Vogels, E. A., Perrin, A., Sechopoulos, S., & Rainie, L. *The Internet and the Pandemic*. Pew Research Center: Internet, Science & Technology, COVID-19 and Technology, (2021, September 1). <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/>.

² International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1263-Anx1, Annex 1: Technical protocol for the provision of evidence, material witness and victims information in electronic form for their presentation during Trial (Apr. 4, 2008) [CR2008_01599.PDF \(icc-cpi.int\)](https://www.icc-cpi.int/CR2008_01599.PDF).

utilizing digital open sources in legal investigations.³ The North Atlantic Treaty Organization (NATO) has also published three standard references for the public which detail how to harness the power of digital OSINT.⁴ Newly established protocols and values such as those mentioned above, help to clarify the role of human rights researchers using open source intelligence. Despite the advancements in regulations for digital open source investigations in human rights violations, OSINT in legal investigations for gender and sexual-based crimes continues to be an issue for investigators, lawyers, and in the courts.

On one hand, there is a recognized strength and potential for how digital open source investigations can positively contribute to legal investigations.⁵ However, on the other hand, there is an acknowledgement of unique challenges these methods bring to investigating cases of a sexual or gender-based manner.⁶ These shortcomings then go on to impact the corroborating evidence being presented in support of SGBV cases and ultimately affect the outcome of such cases. Evidence and other intelligence that is derived from digital open sources is also being utilized exponentially by the ICC as the court recognizes the value of OSINT. In previous cases, the ICC has issued arrest warrants solely based on evidence derived from digital open sources. The first example of this being the case of Al-Werfalli in which all evidence cited in the arrest warrant came from videos that were publicly posted on Facebook.⁷ From the establishment of this court, the ICC was seen as a promising step towards SGBV cases to be addressed and adjudicated. There was careful consideration of acknowledging conflict-related sexual violence

³ UC Berkeley Human Rights Center and Office of the High Commissioner of Human Rights (OHCHR), *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* (2020), available online at https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf.

⁴ North Atlantic Treaty Organization, *The North Atlantic Treaty Organization Open Source Intelligence Handbook* Vol 1.2 (2001) <https://archive.org/details/NATOOSINTHandbookV1.2/page/n19/mode/2up>. See also; *NATO Intelligence Exploitation of the Internet* (2002) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB436/docs/EBB-005.pdf>, see also; *NATO Open Source Reader* (February, 2002) <https://archive.org/details/nato-open-source-intelligence-reader/NATO-OSINT-Reader>.

⁵ Bochert, F., “OSINT – The Untapped Treasure Trove of United Nations Organizations.” *Harvard International Review*, November 19, 2021. <https://hir.harvard.edu/osint-the-untapped-treasure-trove-of-united-nations-organizations/>.

⁶ Koenig, K., Egan, U., “Power and Privilege: Investigating Sexual Violence with Digital Open Source Information,” *Journal of International Criminal Justice*, Volume 19, Issue 1, March 2021, Pages 55–84, <https://doi.org/10.1093/jicj/mqab014>.

⁷ International Criminal Court, *Prosecutor v. Al-Werfalli*, ICC-01/11-01/17, Warrant of Arrest (Aug. 15, 2017) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05031.PDF.

when the court's founding document, the Rome Statute, was drafted and put into effect. Additionally, ICC is renowned for its progressive approach to its special victim participation at multiple stages of the criminal proceedings.⁸ Despite the reputation of the court and the advancements made in open source investigation methods for human rights offenses, to date, the ICC has seen just two final convictions of sexual crimes.⁹

There seems to be a disconnect in the ability for digital open source research methods to aid in final convictions of SGBV in criminal cases. The first section is an analysis of the ICC's track record with respect to the prosecution of SGBC. The second section examines the ever evolving role of digital open source intelligence at the ICC. Finally, the third and final section of this article features insights from interviews of professionals who work in the field of human rights, criminal law, or digital open source intelligence. These exchanges aim to discuss the developments as well as the challenges with regards to the intersection of OSINT and sexual and gender-based crimes.

BACKGROUND

The utilization of open source information for legal investigations or intelligence gathering is not a new practice. The United States Department of Defense defines OSINT as: "intelligence that is produced from publicly available information and is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement."¹⁰ Such open resources are inclusive of newspapers, the radio, books, magazines,

⁸ Safferling, C., Petrossian, G. (2021). Victims' Participation Under the Rome Statute. In: *Victims Before the International Criminal Court*. Springer, Cham. https://doi.org/10.1007/978-3-030-80177-9_3.

⁹ International Criminal Court, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A 2, Appeals Judgment (Mar. 30, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF. See also International Criminal Court, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Judgment (4 February 2021), [Trial Judgment | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF); See also International Criminal Court, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-2023 (15 December 2022) [Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence" | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/CourtRecords/CR2023_03027.PDF).

¹⁰ United States Government Printing Office (GPO) National Defense Authorization Act For Fiscal Year 2006, "Public Law 109-163 109th Congress" July 11, 2006, 2017. <https://www.govinfo.gov/content/pkg/PLAW-109publ163/html/PLAW-109publ163.htm>.

television, and all other publicly available information or mass media. Before digital open sources, OSINT has been a successful and popular resource especially during the Cold War era.

Open sources helped fill gaps in intelligence assessments, provided context to classified information, and offered alternative perspectives. Many government organizations on both sides of the Iron Curtain, including the United States Central Intelligence Agency (CIA) and the Soviet Union Komitet Gosudarstvennoy Bezopasnosti (KGB) utilized various OSINT techniques to monitor and analyze each other's activities.¹¹ During this time, the Ministry for State Security (Ministerium für Staatssicherheit), commonly known as the Stasi, became particularly notorious for its intrusive investigation methods and the sheer depth of its operations, which aimed to maintain absolute control and suppress dissent over the population by any means available and necessary.¹² Established in 1950, the Stasi was an illegitimate state security and surveillance group that operated in East Germany. While their primary focus was on domestic surveillance and maintaining control within East Germany, it also conducted international investigations utilizing open sources for information. The Stasi recognized the importance of gathering intelligence from external sources to further their interests and advance their agenda.¹³ Open sources such as newspapers, magazines, books, academic journals, and public records provided valuable insights into political developments, diplomatic relations, and strategic information from around the world.¹⁴ The Stasi meticulously monitored and analyzed these sources to gain a comprehensive understanding of international affairs, identify potential threats, and gather information on foreign individuals and organizations of interest. For example, the Stasi closely monitored Dutch newspaper articles, which contained detailed information on the Dutch military and secret services. They would subsequently collect these articles which exposed semblances of

¹¹ Sulick, M.J., *Spying in America: Espionage from the Revolutionary War to the Dawn of the Cold War*. Georgetown University Press, 2012. <http://www.jstor.org/stable/j.ctt3fgtvh>.

¹² Ministry for State Security, *Das Stasi Unterlagen Archiv, Bundesarchiv Deutschland*. Accessed March 7, 2023. <https://www.stasi-unterlagen-archiv.de/the-stasi/introduction/>.

¹³ Amnesty International, "Lessons from the Stasi – A Cautionary Tale on Mass Surveillance," March 31, 2015, <https://www.amnesty.org/en/latest/news/2015/03/lessons-from-the-stasi/>.

¹⁴ Müller-Enbergs, H., *Inoffizielle Mitarbeiter des Ministeriums für Staatssicherheit. Teil 2: Anleitungen für Arbeiten mit Agenten, Kundschaftern und Spionen in der Bundesrepublik Deutschland* (Berlin, 1998) and Joachim Lampe, *Juristische Aufarbeitung der Westspionage des MfS. Eine vorläufige Bilanz*. BF informiert Nr. 24 (BStU, Berlin, 1999).

the Dutch structure or activities, for their archives along with extensive other open source data which was useful for their agenda.¹⁵

Government agencies are just one of the many examples of groups throughout history that have been known to utilize the power of OSINT for investigations, others include: law enforcement agencies, journalists, nonprofit organizations, and now, international criminal law.¹⁶ The techniques for using open source information for gathering intelligence and conducting international investigations have since evolved in order to meet the changing demands of such organizations and the ever expanding opportunities that digital open source platforms provide.¹⁷ Recent projections show that by the year 2025 there will be over 80 billion devices that have access to the internet.¹⁸ It is important to note that the Internet itself is not a source; rather a vehicle to transport information digitally. However, without the creation of the internet and the world wide web, digital open source intelligence as a method of legal investigations altogether would be in a very different place. It has become an invaluable tool in legal investigations, providing access to a vast amount of information and evidence.¹⁹ The upward trajectory of the internet in general, coupled with the proliferation of information on digital platforms, are some of the primary reasons behind why there is much needed attention and urgency on the topic of how to harness this potential with regards to international criminal law.

The history of digital open source investigation methods in legal investigations is a story of continuous evolution and adaptation. In the context of legal investigations, using digital open sources involves leveraging publicly shared data, namely online platforms such as the internet and other digital sources, to gather evidence or information relevant to a legal case. Due to the

¹⁵ “Vorgangsanalyse zum Vorgang Aorta,” 15 July 1986; “Aufgabenstellung AA 1986. Fortschreibung der Sicherheitsanalyse ‘Haupt,’” 1 March 1986; “Information über die ndl. Sicherheitsdienste. Auswertung der Broschüre “De BVD en de Inlichtingendiensten, Hrsg. by PSP, Amsterdam 1983,” 1984. BStU MfS HA I 1682, 25–28; 90–94; 127–29.

¹⁶ Staniforth, A. “Police Use of Open Source Intelligence: The Longer Arm of Law.” In: Akhgar, B., Bayerl, P., Sampson, F. (eds) *Open Source Intelligence Investigation. Advanced Sciences and Technologies for Security Applications*. Springer, Cham. (2016). https://doi.org/10.1007/978-3-319-47671-1_3.

¹⁷ Hassan, N.A, and Hijazi, R., *Open Source Intelligence Methods and Tools*, (2018) https://doi.org/10.1007/978-1-4842-3213-2_1.

¹⁸ Comsoc, “IDC Directions 2016: IoT (Internet of Things) Outlook vs Current Market Assessment” August 25, 2017.

¹⁹ Glassman, M., and Kang, M.J., *Intelligence in the Internet Age: The emergence and evolution of Open Source Intelligence (OSINT)*, *Computers in Human Behavior*, Volume 28, Issue 2, 2012. Pages 673-682, ISSN 0747-5632, <https://doi.org/10.1016/j.chb.2011.11.014>.

ever-increasing accessibility of the internet, social media platforms, satellite imagery, and other digital open source tools, the avenues in which human rights activists and legal organizations have for uncovering crucial evidence and identifying key actors is unprecedented.²⁰ Digital open source investigation methods have gained recognition within domestic and international legal systems as more legal professionals and researchers around the world acknowledge the legitimacy and admissibility of evidence gathered through these methods. To keep up with the constantly changing digital landscape, legal, technical, and forensic professionals must continue to adapt and refine strategies for how to best navigate and regulate digital open source investigation methods in legal investigations.

I. SEXUAL AND GENDER-BASED VIOLENCE CRIMES AT THE ICC

In order to understand why sexual and gender-based violence crimes at the International Criminal Court struggle to be adjudicated to the point of final convictions, one can look to the “birthplace of modern international criminal law” for an introduction, or lack thereof, regarding how crimes of this nature were originally regarded. Courtroom 600 in the Palace of Justice of Nuremberg, Germany hosted the Nuremberg Trials, the first ever international criminal tribunals after World War II. This was a significant step in establishing the principles of individual criminal responsibility for war crimes, crimes against humanity, and genocide, and setting the foundation for the development of international criminal law.²¹

At this time, there were unfortunately many people who experienced war crimes and other atrocities that wanted to see their perpetrators face legal ramifications for the suffering they caused. On top of the other logistic concerns the international law community had to contemplate in order to conduct an international criminal law tribunal, in which there was no precedent for, they also had to consider how to best incorporate the victims into the legal

²⁰ Appel, E.J., *Cybervetting: Internet Searches for Vetting, Investigations, and Open-Source Intelligence*, Second Edition (2nd ed.). CRC Press.(2014). <https://doi.org/10.1201/b17651>.

²¹ “Geschichte von Internationale Akademie Nürnberger Prinzipien.” International Nuremberg Principles Academy. (2023). <https://www.nurembergacademy.org/about-us/history/>.

process.²² Inclusive of the victims eager for justice were those who suffered the experience of mass rape and extreme sexual violence, including forced sterilization and forced prostitution, in the face of World War II. The systematic use of rape and sexual violence as weapons of war, further exacerbated the trauma and suffering experienced by countless individuals, mainly women, during this dark period in history.²³

Despite the high frequency and severity of these crimes, there was not a mention of the word “rape” in the entirety of the final judgment of the Nuremberg International Military Tribunal.²⁴ These trials neither formally charged nor prosecuted for rape or any other sexual and gender-based violent crime whatsoever; rather these crimes fell under a general category of human rights abuses, and were not specifically addressed. The primary focus instead resided with prosecuting war crimes, crimes against humanity, and genocide. In contrast to this, in other trials and tribunals in Germany occurring at the same time rape was explicitly listed as a crime against humanity; however, no further prosecutions followed as a result of the inclusion.²⁵ Many of these tribunals in Germany which did attempt to address rape and other sexual-based crimes, “one can only guess that logistical challenges in gathering evidence and establishing individual culpability for acts of sexual violence amidst the vast scope of other atrocities committed during the war was a major hurdle and ultimately a deterrent factor.”²⁶

From a sheer numbers perspective in the infamous Courtroom 600, there was an imbalance between women and men in the room. Women were seen taking a backseat or less visible role to their male counterparts, both as victims and as key players within the court itself, for example being lawyers or judges. The absence of women in these roles reflects the prevailing gender dynamics and limited opportunities that existed for women in legal and political spheres during that time.²⁷ Visibility matters in a courtroom because it ensures a diverse range of

²² Safferling, C., Petrossian, G. *supra* note 8.

²³ Wullweber, H., *Vergewaltigung als Waffe und das Kriegsvölkerrecht*. Kritische Justiz, 26(2), 179–193. (1993). <http://www.jstor.org/stable/23998478>

²⁴ International Military Tribunal of Nuremberg, *Judgment of the Nuremberg International Military Tribunal 1946* (1 October 1947) Vol. 41. The American Journal of International Law, 172-333.

²⁵ Altunjan, T., “The International Criminal Court and Sexual Violence: Between Aspirations and Reality.” *German Law Journal*, 22(5), 878-893. (2021). [doi:10.1017/glj.2021.45](https://doi.org/10.1017/glj.2021.45).

²⁶ Interview A1.

²⁷ D’Addario, R., and Kastner, K., *Der Nürnberger Prozess: Das Verfahren gegen die Hauptkriegsverbrecher 1945-1946 Mit 200 Abbildungen*(2000).

perspectives, experiences, and expertise are present in the decision-making process. Inclusion of underrepresented groups, such as women, can help prevent biases and promote fairness, ultimately leading to more just outcomes.²⁸ This point is not to speculate whether more women holding roles in the Nuremberg trials would have certainly changed the handling or outcome of cases of SGBC at this time. It is important to note the disproportionate amount of women to men that physically played a part in these historic Nuremberg trials which shaped the Nuremberg Principles. To this day, such principles are credited with holding a great deal of influence and “extends to other international, internationalized, regional and domestic practices” of criminal law, including the establishment of the ICC.²⁹

The acknowledgement and prosecution of sexual and gender-based violence crimes to follow, up until the final drafting stages of the Rome Statute, was an ever evolving struggle. There was never a “uniform-unspoken intention to include women, or crimes that especially pertained to women, like sexual violence, into international criminal law, especially compared to other crimes.”³⁰ At early stages of international criminal law, the effort was there to integrate a gendered perspective, but it was an up-hill battle. In 1949 the codification of Article 27 which explicitly included women and rape at the landmark Geneva Convention: “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”³¹ However this was still a highly debated provision, as rape was regarded in this language as an act against a woman’s honor, and not weighted the same as a crime against humanity. There was still a perception that crimes of this nature were more of a ‘private’ issue, and less of a serious concern that did not require the intervention of international legal jurisdiction. Less than fifty years later in the early 1990’s, the international criminal law community intervened in a similar fashion in response to other atrocities around the world, creating the International Criminal Tribunal for the former

²⁸ Gender Equality Unit of the Suprema Corte de Justicia de la Nación. (2013). “Judicial Decision- Making with a Gender Perspective: A Protocol, Making Equal Rights Real.” https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf.

²⁹ International Nuremberg Principles Academy, *supra* note 21.

³⁰ Interview A2.

³¹ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Unlike the Nuremberg Tribunals, these two tribunals did include rape as a crime against humanity and prosecuted accordingly.³² Both the ICTY and the ICTR further developed coherent jurisprudence and helped set a precedent regarding sexual and gender-based violence at the stage of international criminal law. However there was still no uniform protection of such crimes at the time of the conclusion of all three of the international criminal tribunals.

The final push for crimes of sexual and gender-based nature to be explicitly and uniformly included in the international criminal law community came at the opportunity of the drafting of the Rome Statute, the founding treaty document of the International Criminal Court. The incorporation of rape and sexual and gender-based crimes into this integral legal statute was a means to change the equivocal historical path to a more protected and finite one for the future of international criminal law.³³ At this time, many women's rights activists groups unified with the Women's Caucus for Gender Justice in the International Criminal Court and lobbied for the expansion of protection for more gender-inclusive language and gender-specific crimes in the proposed statute.³⁴ After careful consideration, the Rome Statute was adopted on 17 July 1998 by 120 member States and entered into effect when the ICC became officially operational, on 1 July 2002. It was clear that acknowledging conflict-related sexual violence went into the creation of this treaty, and subsequently the foundation of the ICC. The following SGBV conducts are included in the Rome Statute: "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" under the Article on crimes against humanity, as well as "rape, sexual slavery, enforced prostitution, forced pregnancy [...], enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" (or "a serious violation of Article 3 common to the four Geneva Conventions") under its Articles on war crimes. It also includes crimes against humanity to persecution based on gender alone, and settles the debate of rape

³² Kuo, P., *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W. Res. J. Int'l L. 305 (2002) <https://scholarlycommons.law.case.edu/jil/vol34/iss3/8>.

³³ Grey, R., & Chappell, L. Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court: Inching Towards Gender Justice. In S. Mouthaan & O. Jurasz (Eds.), *Gender and War: International and Transitional Justice Perspectives* (pp. 209-234). (2019).

³⁴ Women's Caucus for Gender Justice, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters December 1–12, 1997, at 31 (1997), <https://4genderjustice.org/wp-content/uploads/2021/12/wcgj-prepcom-paper.pdf>.

being a private manner, to one that is officially falling under international criminal law.³⁵ All efforts made by the ICC from its establishment was seen as a promising step towards SGBV cases to be addressed and adjudicated moving forward.

Beyond the court's foundation, the Office of the Prosecutor (OTP) at the ICC holds significant discretion in prioritizing and pursuing cases based on the gravity of crimes and available evidence. As one of the three main organs of the ICC, the OTP is entrusted with the authority to investigate and prosecute individuals. This power is derived from the Rome Statute, which grants the OTP autonomy and independence in its decision-making processes. The OTP's power lies in its ability to initiate investigations proprio motu (on its own initiative), based on referrals from states parties, or through the United Nations Security Council.³⁶ Its power also encompasses the discretion to determine which cases to prioritize, the charges to bring against suspects, and the evidence to present before the Court. Fatou Bensouda, the former Chief Prosecutor, demonstrated a strong commitment to addressing sexual and gender-based crimes during her tenure. Shortly after beginning this role, the OTP under her guidance released a policy paper on sexual and gender-based crimes.³⁷ This paper set the tone of Bensouda's tenure, as she further demonstrated her priorities by actively pursuing cases involving sexual and gender-based crimes.³⁸ The actions and decisions of the OTP play a pivotal role in shaping the ICC's impact and reputation as a critical instrument for ensuring accountability and upholding human rights.

Despite the careful consideration of sexual and gender-based crimes in the creation of the legal genesis of the ICC, and the recent attention these crimes were given by the OTP, cases still struggle to be adjudicated. Establishing the criminal responsibility of the accused continues to be one of the biggest challenges the OTP faces in advancing accountability for sexual and gender-based crimes, even with the adoption of the SGBC Policy. To date, the ICC has seen just

³⁵ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, at arts. 7(1)(g), 8(2)(b)(xxii), & 8(2)(e)(vi) (Jul. 17, 1998).

³⁶ Ibid, Article 42.

³⁷ Office of the Prosecutor of the International Criminal Court. *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

³⁸ Notable examples during Bensouda's tenure include the cases against *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 and *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-2023, which included charges related to sexual violence and forced marriage.

two final convictions of sexual crimes.³⁹ Against this fact, there have been convictions of SGBC at the ICC in the past, however only two cases have landed in final convictions with reparations (namely; Prosecutor v. Ntaganda, ICC-01/04-02/06 and Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2023). For example in the previous case of The Prosecutor v. Jean-Pierre Bemba Gombo, the defendant was charged with two counts of crimes against humanity of murder and rape; and three counts of war crimes: murder, rape and pillaging. The proceedings ended with the defendant being acquitted from all charges.⁴⁰ Currently the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud is underway at the ICC, and although no final convictions have been issued at the time of this paper, this is a notable case to watch regarding SGBV. Currently, Al Hassan is the first to be accused and prosecuted for crimes against humanity of gender-based persecution in international criminal law.⁴¹

There are a myriad of components contributing to the low conviction rate of crimes at this nature both in general and at the ICC; one notably large reason seems to be lack of corroborating evidence.⁴² Because testimony alone is not enough to land a final conviction, the evidentiary component is paramount to the outcome of a criminal case; such is not a new phenomenon, nor is the notion that sexual and gender-based crimes present a unique subset of challenges for gathering sufficient evidence.⁴³ This has been the ‘golden question’ since the beginning of the criminalization and prosecution of these crimes: “Where and how do we look for evidence of sexual and gender-based violence crimes? This question is then only enhanced by the

³⁹ International Criminal Court, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment (July 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Appeals Chamber Judgment (30 March 2021), https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF. See also International Criminal Court, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Judgment (4 February 2021), [Trial Judgment | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF); ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-2023 Appeals Judgment (15 December 2022) [Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence” | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/CourtRecords/CR2022_03027.PDF).

⁴⁰ International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber Judgment (8 June 2018) [CR2018_02984.PDF \(icc-cpi.int\)](https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF); See also ‘Figure 1 The Procedural History of SGBC at the ICC’ on page 25 for an outline of each case.

⁴¹ International Criminal Court, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-2-tENG, Warrant of Arrest, Pre-Trial Chamber 1 (27 March 2018) <https://www.icc-cpi.int/court-record/icc-01/12-01/18-2-teng-0>.

⁴² Irving, E. *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* Edited by Sam Dubberley, Alexa Koenig and Daragh Murray. International Review of the Red Cross, 102(913), 445-449. (2020). [doi:10.1017/S1816383120000405](https://doi.org/10.1017/S1816383120000405).

⁴³ Wiley, W.H., ‘The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals’, in M. Bergsmo, A. Butenschøn Skre, and E.J. Wood (eds), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic E-Publisher, 2012).

international stage.”⁴⁴ This places an emphasis on the evidentiary standards and investigation processes for sexual and gender-based crimes, specifically at the international level. With unprecedented access to information via digital platforms, and the introduction of digital methods as a legitimized means for gathering evidence at the ICC, it is important to examine the role of digital OSINT as it pertains to SGBV to help try and answer the ‘golden question’ that appears to be plaguing these cases.

II. DIGITAL OPEN SOURCE INTELLIGENCE AT THE ICC

Early cases at the ICC relied on primarily witness testimony. However, both the proliferation of information on digital platforms and the continual advancement of modern technology have increased the court’s reliance on digital evidence in criminal proceedings.⁴⁵ Utilizing new technologies to produce digital evidence has the opportunity to supplement, strengthen, and ultimately corroborate victim testimony. The Rome Statute outlines evidence submission standards as well as the Rules of Procedure and Evidence. The ICC’s general approach to the admission of evidence follows a three-part test where the evidence must: “(i) be relevant to the case; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause.”⁴⁶ But just like many aspects of a young and constantly adapting court, evidence submission standards have evolved throughout the years to keep pace with new technology and handle the influx of digital evidence. The ICC regards digital open source intelligence in an ad hoc manner.⁴⁷

In the trial of *Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga*”), social media posts, online videos, and other pieces of digital evidence from digital open sources were crucial in

⁴⁴ Interview A3.

⁴⁵ Freeman, L., “Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials,” 41 *Fordham International Law Journal*. 283 (2018).

⁴⁶ International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute,” para. 9, 120, 122 (Oct. 8, 2012).

⁴⁷ Interview A4.

demonstrating the recruitment of child soldiers. This case marked a significant milestone in international criminal justice with regards to digital open source intelligence, as it was the first of its kind to utilize digital evidence that was derived from open sources. In order to properly process the evidence presented in the Lubanga proceedings, the ICC had to first establish an e-protocol to outline the standards for handling evidence of this nature.⁴⁸ Such innovative research approaches showcased the evolving nature of evidence collection and its potential to enhance the credibility and comprehensiveness of legal proceedings. The utilization of digital open source evidence serves as a pivotal example of how modern technologies can bolster international justice mechanisms.⁴⁹ Additionally, the case of Lubanga demonstrated the flexibility and adaptability of the court by creating e-protocol that was necessary to digest the digital evidence presented.

The ICC continues to use digital methods within the investigative framework. It's important to note that the ICC, like other organizations, must ensure the authenticity and credibility of the digital open source evidence it gathers. Verification processes are in place to assess the reliability of the information and ensure its admissibility in legal proceedings. The multifactor authentication process of potential evidence at the ICC not only enhances the efficiency of the court's operations but also upholds the confidentiality of sensitive information and maintains the credibility of its digital records. Above all, the process aims to confirm that the digital evidence in question promotes the integrity of the processes.⁵⁰ One danger with digital evidence, is due to the increasing capabilities of technology, the possibility for which the evidence can be manipulated is high. For example a video or its metadata may be easily altered prior to ICC submission in order to depict a less accurate or false image. "A perfect piece of evidence is not the standard, but seeing can not be believing. Just because something is captured online and appears one way on the surface, does not necessarily mean it is true."⁵¹ Both the ICC

⁴⁸ Koenig, A., & Mehandru, N., "Open Source Evidence and the International Criminal Court." (2019). *Harvard Human Rights Journal*, 36. Also see; International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1263-Anx1, Annex 1: Technical protocol for the provision of evidence, material witness and victims information in electronic form for their presentation during Trial (April 4, 2008) [CR2008_01599.PDF \(icc-cpi.int\)](#).

⁴⁹ Interview A5.

⁵⁰ The International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Popovic, and others*, IT-05-88-T, "Decision on Admissibility of Intercepted Communications in Trial Chamber II," para. 22-26, -35 (December 7, 2007.)

⁵¹ Interview A3.

and international criminal investigators are trained and vigilant for spotting “deep-fakes:” pictures, videos, metadata that has been manipulated through digital means in order to alter and falsify potential evidence or intelligence.⁵²

Judges at the ICC are not required to rule individually on the authenticity of digital evidence. Rather, once evidence is deemed authentic, judges may treat it as such. In the case of *Prosecutor v. Jean Pierre Bemba Gombo*, reports from non-governmental organizations (NGOs) “in general provide sufficient indica of authenticity.”⁵³ Although there is no list of automatically admissible sources when it comes to authentication of digital evidence from open sources, the ICC tends to have a hierarchy of open sources depending on perceived legitimacy: first, United Nations commissions of inquiry reports at the top, followed by United Nations agency reports, then well established NGO reports, lesser known NGO reports, reputable news outlets, and lastly, other more local outlets.⁵⁴ Regardless of the digital open sources which were utilized to extract the potential evidence, the ICC in general requests for all digital evidentiary submissions the identity and organization associated with the source, along with metadata, and documentation which indicates proper chain of custody was followed in obtaining a source in accordance with privacy laws and guidelines.⁵⁵

The ICC does not outline a protocol for how to properly, ethically, efficiently scour digital open sources for evidence of international crimes. This work is left largely up to international NGOs, credible academic institutions or other well established organizations. Several prominent organizations have contributed to the development of OSINT protocols for human rights investigations, aiming to enhance the credibility and effectiveness of evidence collection. Organizational efforts include protocols for verifying digital content, documenting human rights abuses, and ensuring the ethical use of OSINT techniques. Entities such as Amnesty

⁵² Koenig, A., “Half the Truth is Often a Great Lie”: Deep Fakes, Open Source Information, and International Criminal Law. *American Journal of International Law (AJIL) Unbound*. 113. 250-255. (2019). 10.1017/aju.2019.47.

⁵³ International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 46.

⁵⁴ Irving *supra* note 42.

⁵⁵ Ashouri, A., Bowers, C., & Warden, C., “An Overview of the Use of Digital Evidence in International Criminal Courts,” 11 *Digital Evidence and Electronic Signature Law Review* 115, 117. (2014).

International, Human Rights Watch, and the United Nations Office of the High Commissioner for Human Rights (OHCHR) have been at the forefront of producing guidelines and protocols that outline best practices for incorporating digital open source evidence into human rights investigations.⁵⁶ Larger intergovernmental organizations such as NATO also have contributed to the establishment of OSINT guidelines for international investigators.⁵⁷ The ICC does not explicitly indicate its endorsement of one protocol over another, however it is implied that due to the thoroughness of the Berkeley Protocol on Digital Open Source Investigations, which was published from University of California Berkeley and OHCHR, the court does adhere to much of this specific protocol while investigating international crimes.⁵⁸

These protocols not only emphasize the importance of digital evidence authenticity and accuracy, but also the pivotal role that technology plays in shedding light on human rights violations and promoting legal accountability on a global scale. With any process, there are drawbacks and limitations as it pertains to using digital open sources for human rights violations, especially those of a SGBV nature; some of these will be discussed in the next section of this article. Despite these weaknesses, there is a recognized power and potential with digital open source investigation methods for human rights violations. The ICC's utilization of OSINT underscores its commitment to leveraging advanced technological tools to strengthen the evidentiary foundation of its cases, thereby contributing to more effective and comprehensive justice on the global stage.

⁵⁶ This is not a complete list of all OSINT protocols created to help international investigators, as there are many. Please see the following examples of well established OSINT protocol by prominent organizations: Amnesty International. *Amnesty International and Advocacy Assembly launch new online courses on Open source human rights investigations*. (2021, January 15). Available to view online [here](#); UC Berkeley Human Rights Center and Office of the High Commissioner of Human Rights (OHCHR), *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* (2020), available online at https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf; The Public International Law & Policy Group. *Field Guide for Civil Society Documentation of Serious Human Rights Violations: Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles*. (2016). Available online [here](#).

⁵⁷ NATO *supra* note 4.

⁵⁸ Interview A6.

III. NOTABLE INSIGHTS FROM FIELD INTERVIEWS

This section highlights notable insights, main themes, or commonalities from interviews conducted between December 2022 - June 2023. Interviewees are individuals of varying backgrounds, those who work in the field of human rights, criminal law, or digital open source intelligence. The dialogue aims to further discuss the developments as well as the challenges with regards to the intersection of OSINT and sexual and gender-based crimes.

The increasing reliance of the international legal community on OSINT for corroborating victim testimony marks a significant shift in investigative practices. While OSINT has undeniably enriched the evidentiary pool by providing digital evidence that aligns with witness accounts, solely depending on it may not be fair. As cases are adjudicated at the ICC with evidence derived from digital open sources, more investigators, lawyers, and judges alike, may be inclined to look to this evidence as opposed to other sources. Coincidentally, many interviewees cautioned the reliance on digital evidence. Especially in instances in which the evidence encapsulates the entirety of the crime or human rights violation. Although ideal on the surface, this type of evidence may not be an entirely truthful depiction of the events due to technological modifications: “seeing can not be believing.”⁵⁹ Additionally, many interviewees also cautioned the legal community’s reliance on OSINT and how this may be less feasible for SGBV cases.

“It’s not that we as investigators are out here looking for that ‘smoking gun’ piece of digital evidence when we are mining digital open sources. But it is really difficult to train your eyes away from that mindset of looking for something that explicitly captures the crime or human rights violation or whatever we are looking for.”⁶⁰

“In general, I would not go as far as to say that we certainly are accustomed to this type of succinct evidence from digital open sources. Of course that level of certainty is the best possible scenario when you are compiling evidence...But I do see the trend of the

⁵⁹ Interview A3.

⁶⁰ Interview A5.

legal community looking towards that, and I think it is unfair especially for SGBV cases. Because these types of cases yield evidence that tends to be more nuanced and discreet.”⁶¹

Much of the discussion pertaining to the type of evidence that is normally available to SGBV cases, pertained to the notion that these cases naturally present themselves with a particularly challenging subset of issues. Due to the sensitivity and stigma surrounding SGBV crimes, survivors of sexual and gender-based violence crimes may feel the need to use high levels of discretion when discussing and connecting with one another. For example potentially using a coded language or words with double meanings to avoid explicit terms, disguising the conversation from those who are not part of the victim's trusted network.⁶² There is no all encompassing list of coded terms that may be used, however it is natural for survivors to go to great lengths in order to protect their safety and privacy, especially online. Therefore, it is paramount that investigators are mindful and diligent when analyzing digital open sources for evidence of SGBV in order to avoid screening bias. Without specialized training and a careful attention to this point, certain codes that would otherwise be utilized as evidence may go unnoticed. This does not go understated when discussing the type of digital material that is usually available for these crimes, and how difficult that may be to extract into digital evidence.

“Coded language we see commonly being used by survivors of sexual crimes. From an investigator point of view, it is difficult to pick up on at first glance. What we believe is best, is to have a deep understanding of both the language being used and the context in which it is presented. Familiarity with online platforms where these discussions might occur is also crucial.”⁶³

“There are many OSINT softwares that have language algorithms and can sometimes help pick out patterns in coded language. But it is not fool proof of course. Both our systems and our researchers have to be constantly trained and adapted due to both the evolving nature of these codes, and the technology.”⁶⁴

⁶¹ Interview A7.

⁶² Koenig, A., Egan, U., “Hiding in Plain Site: Using Online Open Source Information to Investigate Sexual Violence and Gender-Based Crimes” in *Technologies of Human Rights Representation*, (2021) in J. Dawes and A.S. Moore (eds), SUNY Press.

⁶³ Interview B1.

⁶⁴ Interview A7.

Digital software can be extremely helpful with regards to scouring tedious information. However, software alone can not be responsible for the bulk of digital investigations for international crimes, especially due to the fact that most of it was not originally tailored to accommodate SGBC. For example, in 2010 the most commonly used software for digital investigation crime analysis, the i2 Analyst's Notebook, did not have an option for the crime rape in the menu of crimes that a researcher could select to be analysed.⁶⁵ Although the process is digitized, the importance of the personnel and training of the investigators themselves can not be overstated in order to compensate for software deficits such as the former version of i2 Analyst's Notebook. Diversity of OSINT investigators enriches the investigative process by enabling a more nuanced understanding of the issues at hand, the ability to recognize subtle contextual clues, and the capacity to engage with affected communities more effectively.

“Our lab speaks around 30 different languages and we pull from individuals with different professional backgrounds when expanding our personnel. Diversity of researchers is very important and it is what helps us be so successful.”⁶⁶

“Software is only as good as the people who are using it. When two people use the same digital tools to analyze a situation, their findings may not be the same. Different perspectives ultimately help to strengthen the quality of an investigation.”⁶⁷

Regardless of the potential evidence that is available on digital open sources, it is also important to consider who is producing the material and circulating it online. Although more people around the world have access to technology than ever before, not everyone has access to digital platforms in order to circulate information pertaining to human rights violations or crimes in general. Women historically have had less access to technology and social media than men.⁶⁸ Certain communities, particularly those with limited technological infrastructure or marginalized populations, might not have equal access to the internet or digital devices. Socioeconomic limitations as well can significantly impact access to technology, creating what is commonly

⁶⁵ Aranburu, Xabier Agirre. “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases.” *Law & Social Inquiry*, vol. 35, no. 4, 2010, pp. 855–79.

⁶⁶ Interview B2.

⁶⁷ Interview A3.

⁶⁸ Petrosyan, Ani, *Internet and Social Media Users in the World 2023: The Digital Population of the World*. Statista (2023, August). <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

known as the ‘digital divide.’⁶⁹ This divide refers to the unequal distribution of access to digital resources such as computers, smartphones, internet connectivity, and digital literacy skills. This can result in a lack of representation in the digital space and potentially skew the data available for OSINT investigations. Human rights investigators must be mindful of these disparities and not solely rely on OSINT as the primary means of evidence collection, especially in cases where certain communities are digitally marginalized to begin with.

“This is why it's crucial to adopt a multifaceted approach that involves other forms of evidence gathering, like on-the-ground interviews or collaboration with local organizations for survivors that can provide insights into human rights abuses.”⁷⁰

“A part of our job as human rights investigations using OSINT involves recognizing its limitations and combining it with other methods to ensure a comprehensive and accurate representation of the situation. Access to digital platforms is certainly a limitation in any case. It can be taken even a step further when gender and region of the crime is considered.”⁷¹

Above all considerations for digital investigations or submissions, the evidence must be collected in a timely manner. This is a particular challenge for SGBV crimes for many factors such as underreporting, the relatively small window of documenting physical evidence, and the challenge of connecting high-level officers to lower-level perpetrators.⁷² By acknowledging the unique vulnerabilities and challenges survivors SGBV face and integrating a gendered perspective into the proceedings, the court can hope to remedy the disparities that exist for cases of this nature: “Adopting a more gendered approach as a part of the equation can only add to a deeper understanding of the crimes and more accurate legal proceedings.”⁷³ For example, the Special Court for Sierra Leone helped show the importance of gender sensitivity during evidence

⁶⁹ Cullen, R., "Addressing the Digital Divide," *Online Information Review*, Vol. 25 No. 5, pp. 311-320. (2001). <https://doi.org/10.1108/14684520110410517>.

⁷⁰ Interview A5.

⁷¹ Interview B2.

⁷² International Criminal Tribunal for Rwanda, “Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda” (2014) [ICTR].

⁷³ Interview B3.

consideration.⁷⁴ This court analyzed evidence through a gender-sensitive lens, the court demonstrated that such crimes were not only gross violations of human rights but also key indicators of the complex relationship that exists between gender inequality, power dynamics, and armed conflict. Notably, in the case of *Prosecutor v. Momina Fofana and Allieu Kondewa*, the court recognized that SGBV were not isolated incidents but rather integral to the broader pattern of gender-specific violence during the Sierra Leonean conflict.⁷⁵ A gender-sensitive approach may not only enhance the accuracy and fairness of legal proceedings, but also may contribute to addressing the root causes of gender-based violence and inequality.

“Recognition is the least we can give to sexual and gender-based crimes. I would like to see us [the international criminal law community] move beyond acknowledgement and more towards action, gender-specific action.”⁷⁶

“If something is repeatedly struggling compared to other things, it would not make sense to repeatedly treat it the same way and expect different results. The same goes for sexual and gender-based crimes.”⁷⁷

Lastly, each interviewee expressed the sensitivity of investigations of SGBV. These cases often involve the sensitive and traumatic experiences of survivors and witnesses, making it crucial to approach the process with utmost care and respect for their privacy and dignity. Key ethical considerations include obtaining informed consent, ensuring data security, avoiding retraumatization, and avoiding the dissemination of explicit content. The absence of standardized regulations for ethical OSINT practices in SGBV cases only complicates the process. Currently existing protocols do address ethical concerns and outline ways for OSINT investigators to integrate ethics and the duty of care to survivors into the investigative process.⁷⁸

⁷⁴ Oosterveld, V., “Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes” (2009) 17 *Journal of Gender, Social Policy & the Law* 5 at 12.

⁷⁵ The Special Court for Sierra Leone, *Prosecutor v. Momina Fofana and Allieu Kondewa* (Case No.SCSL-04-14-A) pp 15, 85, 444 (May 2008) <https://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>.

⁷⁶ Interview A5.

⁷⁷ Interview B4.

⁷⁸ UC Berkeley *supra* note 3. The protocol mentions the following ethical concerns: adhering to legal and ethical compliance including international human rights law and data protection regulations, informed consent of personal information, data protection and privacy, do no harm, accuracy and verification, respect for cultural sensitivity, minimize harassment and harm, and personal investigator accountability.

However, challenges still arise from the need to strike a balance between collecting essential evidence and safeguarding the well-being of those involved in a digital open source investigation of SGBV.

“Sexual and gender-based cases are always sensitive, always nuanced, and always so personal.”⁷⁹

“The times change and so does technology. That is why it is so salient that the protocols we have should also evolve over time to keep pace with technological advancements and changing ethical considerations.”⁸⁰

CONCLUSION

From the early exploration of online open sources to the incorporation and development of specialized OSINT techniques for international criminal investigations, these methods have transformed the legal landscape. Digital open source investigation methods and the overall validity of digital evidence, has successfully gained recognition within domestic and international legal systems, with the ICC acknowledging the legitimacy and admissibility of evidence gathered through these methods. Evidence derived from digital open sources have helped to strengthen cases and eliminate some of the traditional barriers to international legal investigations. While OSINT has undeniably transformed modern investigations, its potential in addressing SGBV cases at the ICC has not been fully realized, with just two final convictions of sexual crimes.⁸¹ Before the introduction of this investigative technique, in international criminal law, there existed a tendency for SGBV cases to be held to higher or different evidentiary standards than other crimes.⁸² And before that, it was an uphill battle to include SGBC at all in the establishment of the International Criminal Court. The emergence of investigating

⁷⁹ Interview B1.

⁸⁰ Interview A4.

⁸¹ International Criminal Court *supra* note 9.

⁸² SaCouto, S. and Cleary, K., ‘The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the ICC’, (2009) 17 American University Journal of Gender, Social Policy and the Law 338, at 354.

international crimes using digital open sources, while offering promising investigative avenues, has also added layers of complexity to SGBCs, particularly in terms of safeguarding the privacy and dignity of survivors, addressing the digital divide, decoding coded language, working in a gender-sensitive manner, and navigating the ethical intricacies of digital evidence collection. More must be done specifically with regards to protocols tailored towards investigating SGBC, which already has its own set of traditional challenges, so that the integration of using digital open sources does not complicate this further. Looking ahead, it is imperative that the international criminal law community continues to harness the potential of OSINT as an investigative tool, while at the same time, trying to bridge the gaps created by the disparities that this technique has on crimes of a sexual and gender-based nature. Beyond digital open sources and the protocols themselves, there is an increased need for a more diverse investigator profile in hopes to yield a diverse analysis of digital evidence. This would better aid in recognition of subtle contextual clues of SGBV, and the ability to interact with survivors more effectively.

The interviews conducted with professionals who work in the field of human rights, criminal law, or digital open source intelligence, aim to help critically examine the role of utilizing digital open source intelligence within the framework of the ICC, with a particular focus on its impact on cases of sexual and gender-based nature. Although the purpose of the interviews in this article was to discuss the developments and challenges, the tones of the conversations were just as critical as it was hopeful. There exists a great potential for digital open source intelligence to help advance the pursuit of justice for SGBV survivors, as it has done for victims of other crimes. Further developments and attention are incumbent upon the ICC and the broader international legal community to ensure that this powerful tool can be better suited to aiding sexual and gender-based cases.

FIGURE 1: THE PROCEDURAL HISTORY OF SGBC AT THE ICC

Case	Arrest Warrant	Decision on the Confirmation of Charges	Judgment	Appeal	Current Status
The Prosecutor v. Germain Katanga 1 ICC-01/04-01/07	2 out of 9 counts: sexual slavery as a crime against humanity and as a war crime. Issued under seal on 2 July 2007.	4 out of 10 counts: sexual slavery as crime against humanity and as a war crime; rape as crime against humanity and a war crime. Issued 26 September 2008.	Found not guilty for all SGBC charges on 7 March 2014.	Appeals Chamber reviewed the sentence and decided to reduce it, decision date 13 November 2015.	Closed
The Prosecutor v. Mathieu Ngudjolo Chui 2 ICC-01/04-02/12	2 out of 9 counts: sexual slavery as a crime against humanity and as a war crime. Issued under seal 6 July 2007.	5 out of 10 counts: sexual slavery as crime against humanity and as a war crime; rape as crime against humanity and a war crime. Issued 26 September 2008.	Acquitted of all charges on 18 December 2012.	Acquittal confirmed in appeals on 27 February 2015. Case also involved charges against Germain Katanga (see row above).	Closed
The Prosecutor v. Bosco Ntaganda 3 ICC-01/04-02/06	0 out of 3 counts in the first warrant issued 22 August 2006. 3 out of 7 counts in the second warrant: rape as a war crime and as a crime against humanity; sexual slavery as a crime against humanity and as a war crime; and persecution as a crime against humanity (which included rape and sexual slavery on ethnic grounds). Issued 13 July 2012.	7 out of 18 counts: rape of civilians as crime against humanity and as a war crime; sexual slavery of civilians as crime against humanity and as a war crime; persecution as crime against humanity; rape of child soldiers as war crime; and sexual slavery of child soldiers as war crime. Issued 9 June 2014.	Convicted on all 7 of 18 counts.	Appeals chamber confirmed charges on 30 March 2021.	Closed
The Prosecutor v. Callixte Mbarushimana 4 ICC-01/04-01/10	7 out of 11 counts: torture as crime against humanity and as a war crime; rape as crime against humanity and a war crime; other inhumane acts as crime against humanity; - persecution as crime against humanity; and inhuman treatment as a war crime. Issued under seal on 28 September 2010.	*Not confirmed, just issued charges on 8 out of 13 counts: torture as crime against humanity and as a war crime; rape as crime against humanity and a war crime; other inhumane acts as crime against humanity; persecution as crime against humanity; cruel treatment as a war crime; and mutilation as a war crime. Issued 16 December 2011.	The Court declined to confirm the charges and to released Mr. Mbarushimana from custody, on the completion of the necessary arrangements.		Closed unless new evidence is submitted.
The Prosecutor v. Sylvestre Mudacumura 5 ICC-01/04-01/12	3 out of 9 counts: rape as a war crime; torture as a war crime; and mutilation as a war crime. Issued 13 July 2012.				Pre-Trial. The suspect is still at large, pending execution of the arrest warrant.
The Prosecutor v. Joseph Kony and Vincent Otti 6 ICC-02/04-01/05	12 counts of crimes against humanity: murder, enslavement, sexual enslavement, rape, inhumane acts of inflicting serious bodily injury and suffering; and 21 counts of war crimes: murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlistment of children. Issued 8 July 2005.				Pre-Trial. The suspects are still at large, pending execution of the arrest warrant. Originally the case involved Raska Lukwiya and Okot Odhiambo, but the case was dropped with these two men upon their death.

7	The Prosecutor v. Dominic Ongwen ICC-02/04-01/15	0 out of 7 counts. Issued under seal on 8 July 2005, then unsealed on 13 October 2005.	19 out of 70 counts (11 out of 23 charges, all charges confirmed); forced marriage as crime against humanity (2 counts); torture as crime against humanity (2 counts); rape as crime against humanity (2 counts); sexual slavery as crime against humanity (2 counts); enslavement as crime against humanity (2 counts); forced pregnancy as crime against humanity (1 count); - rape as war crime (2 counts); sexual slavery as war crime (2 counts); forced pregnancy as war crime (1 count); and outrages upon personal dignity as war crime (1 count).	19 out of 61 counts: forced marriage as crime against humanity (2 counts); torture as crime against humanity (2 counts); rape as crime against humanity (2 counts); sexual slavery as crime against humanity (2 counts); enslavement as crime against humanity (2 counts); forced pregnancy as crime against humanity (1 count); rape as war crime (2 counts); torture as war crime (2 counts); sexual slavery as war crime (2 counts); - forced pregnancy as war crime (1 count); and outrages upon personal dignity as war crime (1 count).	The Appeals Chamber confirmed the decisions of Trial Chamber IX on Dominic Ongwen's guilt and sentence on 15 December 2022.	The conviction and sentence are both final. Mr. Ongwen is currently serving his sentence, while the victims reparations phase is still underway.
8	The Prosecutor v. Jean-Pierre Bemba Gombo ICC-01/05-01/08	5 out of 8 counts: rape as a crime against humanity and as a war crime; torture as a crime against humanity and as a war crime; outrages upon personal dignity as a war crime. Issued 10 June 2008.	2 out of 5 counts: rape as a crime against humanity and as a war crime	2 out of 5 counts: rape as a crime against humanity and as a war crime	On 8 June 2018, the Appeals Chamber acquitted of all charges of war crimes and crimes against humanity.	Closed.

9	The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") ICC-02/05-01/07	4 out of 13 charges (7 out of 42 counts): rape as a crime against humanity (2 counts); rape as a war crime (2 counts); persecution as a crime against humanity (2 counts); and outrages against personal dignity (1 count). Issued 27 April 2007.				Pre-Trial. The suspect is still at large, pending arrest warrant.
10	The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC-02/05-01/20	4 out of 13 charges (8 out of 50 counts): rape as a crime against humanity (2 counts); rape as a war crime (2 counts); persecution as a crime against humanity (2 counts); and outrages against personal dignity (2 counts). First warrant of arrest issued 27 April 2007 and second warrant of arrest made public on 11 June 2020.	5 out of 31 counts: rape as a crime against humanity and as a war crime; persecution as a crime against humanity (2 counts); and outrages against personal dignity (1 count).			The Defence is scheduled to make opening statements and start presenting its case on 28 August 2023.
11	The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09	First Warrant of arrest issued 4 March 2009. 1 out of 7 counts rape as a crime against humanity. Second warrant of arrest issued 12 July 2010. 1 out of 3 counts causing serious or bodily or mental harm as genocide.				Pre-Trial. The suspect is still at large, pending execution of the arrest warrant.
12	The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11-1005	Summons to appear before the court issued 8 March 2011. 3 out of 5 counts (4 out of 6 charges) rape, other inhumane acts, and persecution as a crime against humanity	3 out of 5 counts: rape, other inhumane acts, and persecution as a crime against humanity	Charges were withdrawn on 5 December 2014.		Proceedings were terminated on 13 March 2015.

13	The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé ICC-02/11-01/15	Gbagbo: Issued under seal on 23 November 2011, and unsealed on 30 November 2011. Blé Goudé: Issued under seal on 21 December 2011, and unsealed on 30 September 2013. Both charged with 3 out of 5 counts of rape, other forms of sexual violence, and persecution as a crime against humanity.	2 out of 4 counts: rape and persecution as crime against humanity.	Acquitted of all charges on 15 January 2019.		Closed.
14	The Prosecutor v. Simone Gbagbo ICC-02/11-01/12	Issued under seal 29 February 2012, and unsealed on 22 November 2012. 2 out of 5 counts (1 out of 4 charges): rape and other forms of sexual violence as a crime against humanity. On 19 July 2021, Pre-Trial Chamber II vacated the warrant due to an unsatisfactory evidentiary threshold.				Not in ICC custody.
15	The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ICC-01/12-01/18	Issued on 27 March 2018. 6 out of 11 counts: rape, persecution on gender and religious grounds, and other inhumane acts (forced marriage) as a crime against humanity, and rape and sexual slavery as a war crime.	6 out of 13 counts: rape, persecution on gender and religious grounds, and other inhumane acts (forced marriage) as a crime against humanity, and rape and sexual slavery as a war crime.			Closure of submission of evidence on 8 February 2023. Judges deliberations ongoing. In ICC custody.
16	The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona ICC-01/14-01/18	Issued on 11 November 2018 and unsealed on 17 November 2018. Yekatom 0 out of 15 counts and Ngaïssona 0 out of 16 counts.	Yekatom 0 out of 20 counts and Ngaïssona 2 out of 30 counts: rape as a crime against humanity and as a war crime.			Ongoing presentation of evidence, both in ICC custody.

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