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Article

OXFORD

Law's capture of human rights focused open-source investigation

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ABSTRACT

With new protocols emerging to regulate the field of open-source investigation, this article critiques their widespread deference to the requirements of legal processes that exclude alternative horizons of justice and accountability. We argue that OSI may still compile evidence to support advocacy against systemic and structural violence, but in professionalising OSI, legally centred frameworks give little allowance to speculative or creative forms of advocacy which seek to address forms of violence not yet accepted in law. We therefore propose tactics to counter such epistemic injustice aimed at fostering pluralistic, decentralised, and solidarity-based OSI practices beyond legal constraints.

INTRODUCTION

Open-source investigation (OSI) is a multi-media process involving the collection, examination, and presentation of publicly accessible information. It has been promoted as an effective form of 'counter forensics' that allows marginalised groups to challenge narratives presented by state and corporate actors who are alleged to have committed violence. International human rights and humanitarian law actors have also adopted OSI techniques as effective tools for 'verifying' violations and identifying those responsible. Recently, however, these actors have focused increasingly on how OSI evidence should be collected and presented to be admissible in national and international courts. A growing number of protocols and methodologies have been developed to guide the way in which OSI is conducted.

In this article we argue that this development (which we term 'protocolisation') threatens to undermine rather than fulfil OSI's promise. By privileging law and legal process, a form of legal deference is evolving that may restrict and exclude accounts of people's suffering to

satisfy legal norms, structures, and practices. This, we propose, is a form of epistemic injustice in its own right.

To chart the phenomenon and develop our argument, we first consider the context, developmental promise, and already recognised broad limitations of OSI, in light of what we term 'protocolised practises'. We then substantiate the fundamental claim concerning the danger of an over-servility to law and its requirements across these protocols. Finally, we consider how such problems might be countered, offering an alternative set of tactics to foster a pluralistic, decentralised, and solidarity-based approach to OSI.

THE PROTOCOLISATION OF OPEN-SOURCE INVESTIGATION

Although OSI practices have a long history, stretching back to the 19th century, they have been rapidly transformed in the digitally mediated, networked, and platformed present.[1] Increasing quantities of publicly accessible information, facilitated chiefly by the rise of the Internet and proliferating technologies for digital recording and storage, have made OSI practices both more ubiquitous and strategically important. In the international human rights and criminal sphere, OSI has supported the work of the 'UN human rights fact-finding missions, commissions of inquiry and other official human rights investigations'.[2] Evidence of state and corporate violence appears across a range of digital spaces, uploaded by multiple actors through information sharing platforms, providing new mechanisms for investigators to track and corroborate infractions.

OSI praxes supplement and augment traditional modes of human rights investigations, using a range of emerging methods and techniques, including geolocation, chronolocation, web scraping, data mining, image analysis, fluid dynamics, pattern analysis, and 3D modelling, amongst others. These techniques harness digital capacities to collect, synthesise, store, and distribute ever-increasing amounts of openly accessible data.[3] These 'new technological and aesthetic strategies … are radically reshaping investigatory methodologies and collaborative practices'.[4] In emerging media landscapes, digital media artefacts and evidentiary fragments are integrated into broader networks and environments, serving the dual purpose of investigating and opposing structures of violence and injustice.

Many practitioners and commentators have highlighted OSI's democratising potential in the fields of human rights and international criminal law, emphasising that digital methods can radically expand access to the means of evidentiary production. Yvonne McDermott, Alexa Koenig, and Daragh Murray point to OSI as providing 'an avenue through which ordinary people in affected regions can tell their stories and directly influence international

[1] Ludo Block, 'The Long History of OSINT' (2024) 23 *Journal of Intelligence History* 95.

[2] Daragh Murray, Yvonne McDermott and K Alexa Koenig, 'Mapping the Use of Open Source Research in UN Human Rights Investigations' (2022) 14 *Journal of Human Rights Practice* 554, 555.

[3] For a more detailed explanation of how these techniques work and are applied, see: Bellingcat, 'Online Open Source Investigation Toolkit' (Bellingcat, 22 January 2025) <https://bellingcat.gitbook.io/toolkit>; Forensic Architecture, 'Osint' (Forensic Architecture) <https://forensic-architecture.org/methodology/osint>; Giancarlo Fiorella, 'First Steps to Getting Started in Open Source Research' (Bellingcat, 9 November 2021) <https://www.bellingcat.com/resources/2021/11/09/first-steps-to-getting-started-in-open-source-research/>. All URLs last accessed 28 January 2025. It is also important to note that these methods and techniques operate across different scales and sites of analysis. For example, there are significant differences between using predictive analytics from scraped online data at a global scale to using practices of 3D modelling to reconstruct an event from victim testimony. Whilst different OSI methods afford different political and counter-hegemonic possibilities, our focus in this article remains squarely on the protocolisation of the OSI field as a whole, the structural risks of such legal deference, and how we might mitigate or push back against such protocolisation.

[4] Patrick Brian Smith and Ryan Watson, 'Mediated Forensics and Militant Evidence: Rethinking the Camera as Weapon' (2023) 45 *Media, Culture & Society* 36, 36.

fact-finding processes'.[5] For Molly K Land, 'those who were formerly the "subjects" of human rights investigations now have the potential to be agents in their own right'.[6] She notes the value of a participatory fact-finding approach, where 'ordinary individuals' can 'investigate the human rights issues that affect them' and contribute to 'mobilisation and constituency building'.[7] By moving away from the elite outsider as the primary, expert, and often exclusive investigator, OSI is presented as an accessible alternative for local organisations and a means by which 'ordinary citizens' can be involved in mapping violations of their rights, dignity, and well-being. People impacted by alleged abuses can use new media to chart occurrences and contribute to a collective production of evidence of wrongdoing. Local video teams and mappers can employ technology to record both individual incidents and patterns of violations. Land, in particular, sees this as community participation. Grassroots choices about the nature of 'facts' sought and the means by which they should be uncovered make it easier to reveal 'the underlying political nature of those choices and could open up democratic accountability rather than shutting it down'.[8] This form of activism can empower communities by documenting forms of structural oppression that violate their economic and social rights, accumulating evidence that can lend credence and context to individual testimonies. Specifically, Land argues participatory mapping in the slums in Kenya is a positive way 'to map social equity' and '[to] document the location of economic resources within a community, to understand the distribution of these resources, to identify differences in mobility and access to resources, to resolve conflicting claims to those resources, and to identify areas of risk'.[9] Similarly, Miren Gutiérrez argues that OSI practices 'mark the expansion of the platforms for political engagement … and the emergence of new democratic practices to campaign, generate evidence, and sustain alternative stories for humanitarianism and activism'.[10] Rather than simply registering wrongdoing for legal adjudication by outsiders, OSI can foster democratic deliberation and decision-making among those impacted by violence.

OSI also enables communities to challenge state monopolies on evidence gathering, investigation, and analysis. Often, OSI practices employ techniques and technologies created (either knowingly or unknowingly) by state and corporate actors, using them subversively to develop archives of accountability against those same formations of power. This inversion of state and corporate modes of surveillance, monitoring, and investigation has been identified as OSI's 'counter forensic' potential.[11] As Eyal Weizman argues, 'turning forensics against the state is essential because of the intertwined nature of state violence which … is both violence against people and things and also against the evidence that violence has taken place at all'.[12] OSI is 'not only the technical, neutral domain of expert specialists, nor is [it] the application of empirical science within a well-established court system' but rather an 'engaged civil practice that seeks to articulate public claims'.[13] Groups such as the Syrian

[5] Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations' (2021) 19 *Journal of International Criminal Justice* 87.

[6] Molly K Land, 'Democratizing Human Rights Fact-Finding' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) 399.

[7] ibid 399–400.

[8] ibid 408.

[9] ibid.

[10] Miren Gutiérrez, 'Democratic Practice in the Era of Platforms: From Clicktivism to Open-Source Intelligence' in Juan José Gómez Gutiérrez, José Abdelnour-Nocera and Esteban Anchústegui Igartua (eds), *Democratic Institutions and Practices: A Debate on Governments, Parties, Theories and Movements in Today's World* (Springer International Publishing 2022) 197.

[11] Allan Sekula, 'Photography and the Limits of National Identity' (2014) 55 *Grey Room* 28; Thomas Keenan, 'Counter-Forensics and Photography' (2014) 55 *Grey Room* 58.

[12] Eyal Weizman, *Forensic Architecture: Violence at the Threshold of Detectability* (MIT Press 2017) 64.

[13] ibid.

Archive, Al Haq, and Mnemonic, amongst others, also have strong track records of harnessing such forms of top-down evidence to corroborate claims of political violence.

On a practical level, OSI further affords investigators (whether journalists, civil society organisations, activists, academic teams or a collective of such actors) the advantage of working from a distance, potentially circumventing national or local restrictions on investigative processes, such as internet blackouts, information suppression, or constraints on movement or freedom of expression. OSI's remote nature also facilitates interdisciplinary partnerships and knowledge sharing across borders, thus improving the effectiveness of anti-oppression activism.[14] OSI democratises and often radicalises investigative practices by involving actors and geographies typically marginalised by law enforcement and other entrenched authorities.

Consider the aftermath of the explosion outside the al-Ahli Arab Hospital in Gaza City on 17 October 2023. The blast killed hundreds of Palestinians, and outraged millions globally who were witnessing one of the first mass killings in a military campaign that would soon systematically target Gaza's other hospitals and be deemed a genocide.[15] By denying journalists and investigators access to the scene (and, indeed, to the entire territory), Israeli authorities have thrown doubt on the exact causes of the explosion. Yet techniques of OSI enabled investigators to launch inquiries remotely, seeking to identify the responsible party. Separate investigations conducted by the Human Rights Watch, Forensic Architecture, the New York Times, the Associated Press, the Washington Post, Al Jazeera, as well as numerous state agencies and countless other organisations, analysed video footage, satellite imagery, acoustic evidence, and other data to produce competing interpretations of the event as resulting either from an Israeli attack or from a misfired rocket from Gaza.[16]

As the sheer number of investigations into this incident illustrates, OSI has become a hegemonic mode of truth-seeking. However, this response to the explosion also begins to indicate why serious critiques have emerged. For although OSI facilitates challenges (and counter-challenges) to official narratives in conditions of evidentiary scarcity, its institutionalisation has also begun to relinquish OSI's democratic potentials. In this case, the race to prove the explosion's proximate cause imposed a narrowly legalistic frame of analysis that arguably distracted from the real issue: a necropolitical structure of violence both fast and slow that produced the conditions in which such mass death could even occur. This interpretive frame was demarcated not through a democratic process led by those impacted, but by the professionalised outsiders whose monopolies over fact-finding OSI has been praised

[14] Nina C Müller and Jenny Wiik, 'From Gatekeeper to Gate-Opener: Open-Source Spaces in Investigative Journalism' (2023) 17 *Journalism Practice* 189.

[15] See Amnesty International, '"You Feel Like You Are Subhuman": Israel's Genocide Against Palestinians in Gaza' (2024) <https://www.amnesty.org/en/documents/mde15/8668/2024/en/>; 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories' (UN, 20 September 2024) <https://www.ohchr.org/en/documents/thematic-reports/a79363-report-special-committee-investigate-israeli-practices-affecting>; 'Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water' (Human Rights Watch, 19 December 2024) <https://www.hrw.org/report/2024/12/19/extermination-and-acts-genocide/israel-deliberately-depriving-palestinians-gaza>.

[16] 'Gaza: Findings on October 17 al-Ahli Hospital Explosion' (Human Rights Watch, 26 November 2023) <https://www.hrw.org/news/2023/11/26/gaza-findings-october-17-al-ahli-hospital-explosion>; 'Israeli Disinformation: Al-Ahli Hospital' (Forensic Architecture, 15 February 2024) <https://forensic-architecture.org/investigation/israeli-disinformation-al-ahli-hospital>; 'A Close Look at Some Key Evidence in the Gaza Hospital Blast' *New York Times* (24 October 2023) <https://www.nytimes.com/2023/10/24/world/middleeast/gaza-hospital-israel-hamas-video.html>; Michael Biesecker, 'New AP analysis of last month's deadly Gaza hospital explosion rules out widely cited video' *Associated Press* (22 November 2023) <https://apnews.com/article/israel-palestinians-hamas-war-hospital-rocket-gaza-8bc239d2efe0cff3998b2154d9220a83>; Evan Hill, Meg Kelly, and Imogen Piper, 'What visual evidence shows about the Gaza hospital blast' *Washington Post* (26 October 2023) <https://www.washingtonpost.com/investigations/2023/10/26/gaza-hospital-blast-evidence-israel-hamas/>; 'Video investigation: What hit al-Ahli Hospital in Gaza?' *Al Jazeera* (19 October 2023) <https://www.aljazeera.com/news/2023/10/19/what-hit-ahli-hospital-in-gaza>.

for overturning. While the investigations in the al-Ahli Arab Hospital explosion reached varying conclusions that supported divergent political agendas, they all posed the same forensic question—one that, in our view, obscured the explosion's deeper, more structural causes.

Prior to such acute examples, critics warned that the considerable agency possessed by investigators relative to victims being investigated can lead to asymmetrical power dynamics. Zara Rahman and Gabriela Ivens note that OSI practitioners often receive 'accolades for their valuable investigative work, while the people who made that work possible remain unacknowledged, perhaps even unaware that the video or image that they recorded was even used'.[17] Similarly, Libby McAvoy expresses concern that 'it is overwhelmingly the investigators who own the analysis and narrative moving forward, not the people at the core of the footage or the incident under examination'.[18] Moreover, such practices risk 'reproducing the logics they aim to subvert' with their 'aesthetic, epistemic, and moral commitments to transparency and certainty'.[19] Human rights OSI frequently privileges technoscientific and criminological modes of investigation over alternative methods of identifying or tracking violence and harm.

In the shadow of this dichotomy of promise and critique, an increasing number of guidelines, methodologies, and protocols have been produced in recent years with the goal of regulating and standardising OSI practices. These include the Public International Law & Policy Group's 'Handbook on Civil Society Documentation of Serious Human Rights Violations',[20] the Berkeley Human Rights Center and UN Office of the High Commissioner for Human Rights' *Berkeley Protocol on Digital Open Source Investigations* ('Berkeley Protocol'),[21] Bellingcat and Global Legal Action Network's 'Methodology for Online Open Source Investigations',[22] the Kalshoven-Giekes Forum's 'Leiden Guidelines on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals',[23] the National Centre for Research Methods' 'Investigative Methods: An NCRM Innovation Collection',[24] and the Engine Room and the Human Rights, Big Data and Technology Project's 'Outlining a Human-Rights Based Approach to Digital Open Source Investigations'.[25]

The most widely-read and cited of these documents is the 'Berkeley Protocol', which 'identifies international standards for conducting online research of alleged violations of international criminal, human rights, and humanitarian law'.[26] It explicitly delineates a set of 'professional norms' for the recognition, gathering, safeguarding, analysis, and presentation

[17] Zara Rahman and Gabriela Ivens, 'Ethics in Open Source Investigations' in Sam Dubberley, Alexa Koenig and Daragh Murray (eds), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (Oxford University Press 2020) 255.

[18] Libby McAvoy, 'Centering the "Source" in Open Source Investigation' (Open Global Rights, 21 January 2021) <https://www.openglobalrights.org/centering-the-source-in-open-source-investigation/>.

[19] Sasha Crawford-Holland and Patrick Brian Smith, 'Forensics' in Darren Wershler, Jussi Parikka and Lori Emerson *The Lab Book: Situated Practices in Media Studies* (University of Minnesota Press 2022).

[20] Federica d'Alessandra et al (eds), 'Handbook on Civil Society Documentation of Serious Human Rights Violations' (Public International Law & Policy Group 2016).

[21] Berkeley Human Rights Center and OHCHR, *Berkeley Protocol on Digital Open Source Investigations* (UN 2022) (*Berkeley Protocol*).

[22] Bellingcat and GLAN, 'Methodology for Online Open Source Investigations' (2022).

[23] Sofia Aalto-Setälä et al, 'Leiden Guidelines on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals' (Kalshoven-Giekes Forum and Universiteit Leiden Grotius Centre 2022).

[24] Michael Mair et al (eds), *Investigative Methods: An NCRM Innovation Collection* (National Centre for Research Methods 2022).

[25] Sam Dubberley and Gabriela Ivens, 'Outlining a Human-Rights Based Approach to Digital Open Source Investigations' (Human Rights Centre, University of Essex 2022).

[26] *Berkeley Protocol* (n 21) vi.

of digital open-source information, emphasising its application in international criminal and human rights inquiries. Bellingcat and Global Legal Action Network (GLAN) have noted the Protocol's influence, identifying it as 'high-level guidance on the effective use of open-source information' and an expression of 'standard operating procedures'.[27] Others have claimed that it is 'the most frequently consulted publication on OSINT ethics'.[28]

Together these documents, with the Berkeley Protocol at the forefront, represent what we term as a move towards 'protocolised practices' (or 'protocolisation') whereby the ways things are (or should be) done are increasingly regulated by widely publicised and adopted protocols and other quasi-formal and official documents. As we will show, protocolisation aims to resolve what the Berkeley Protocol identifies as a perceived lack of 'universal references, guidelines, or standards for open-source investigations' and to fulfil the 'need for common standards' with particular reference to (and preference for) the law and the demands of legal systems.[29] These protocols are promoted by a variety of 'human rights actors': a category of professionals whose broader tendency to legal deference often lends credibility to their work. Further, this protocolisaation can be seen as part of a long trend towards civil society's use of 'soft' or informal law to develop standards, codes of conduct or other guidance that subtly entrenches certain investigative processes and attitudes in the absence of harder, internationally mandated rules and procedures.[30]

This development begs a number of questions: to what extent do these protocols advance or imperil OSI's political promises of democratisation and decentralisation? What are the implications of privileging law and legal processes above other considerations if indeed such legal capture is demonstrated? Has a form of legal deference arisen to the detriment of OSI and its use as a tool to address and respond to violence? Ultimately, we find that law and legal process have commandeered the practice and application of OSI so that what is deemed legitimate and acceptable is determined predominantly by reference—and deference—to systems of law.

AN ANALYSIS OF OSI PROTOCOLS

To explore the charge of legal deference further, this section provides a closer examination of the aforementioned protocols, with particular focus on the Berkeley Protocol (due to its prominence in the field). We focus on three key aspects of the growing corpus of OSI guidance: their (a) investigative aims; (b) epistemological bases; and (c) promoted methodologies. Although undoubtedly overlapping, we nonetheless address each in turn.

Investigative aims

From the outset, the Berkeley Protocol proclaims that it intends 'to provide international standards and guidance' to support 'investigations conducted for the purposes of ensuring international justice and accountability'.[31] It defines these latter terms broadly, as encompassing both 'judicial and non-judicial processes'.[32] Such efforts are recognised to be intrinsically 'multidisciplinary', arising not only from prosecutorial offices but also from news

[27] Bellingcat and GLAN (n 22) 2.

[28] Stanley Center for Peace and Security and Melissa Hanham, 'Setting Your Moral Compass: A Workbook for Applied Ethics in OSINT' (Stanley Center for Peace and Security 2022) 6.

[29] *Berkeley Protocol* (n 21) 3, v.

[30] There is a deep history of legal analysis to this effect. For a recent example, see Rene Ure-a and Rafael Tamayo-çlvarez, 'Beyond norm entrepreneurs: civil society and the framing of the "legal" through soft law' in Mariolina Eliantonio, Emilia Korkea-aho and Ulrika Mörth (eds) *Research Handbook on Soft Law* (Elgar 2023) 272–87.

[31] ibid vii, 3.

[32] ibid 23.

agencies, civil society groups, non-governmental organisations, and other actors invested in pursuing justice and accountability in its many forms.[33]

And yet, while apparently agnostic to investigatory aims, OSI guidance consistently reduces justice and accountability to its juridical forms. These underlying assumptions about the purpose of OSI dictate prescribed methods. So, even though the Berkeley Protocol defines accountability capaciously, as resulting from legal or 'non-legally binding processes, such as … commissions of inquiry and fact-finding missions, and other transitional justice mechanisms', it undermines this flexible outlook by prioritising methods that satisfy the demands of specifically *legal* accountability while negating its other forms.[34] Similarly, Bellingcat and GLAN's methodology operates according to 'rules on admissibility of evidence so as to make it suitable for use in future legal proceedings and other accountability processes'.[35] It guides their so-called Justice and Accountability Unit as a 'separate unit from the rest of Bellingcat' which is 'firewalled from the rest of the organisation' so as to 'mitigate real or perceived bias' which may be associated with those who write public pieces.[36] It institutionalises a presumptive opposition between legal authority and journalistic partiality.

When it comes to the question of the investigators' own accountability, these protocols also tend to maintain a legal focus. For example, the Berkeley Protocol characterises accountability as a professional principle akin to transparency, 'ensured through clear documentation, record-keeping, and oversight'.[37] The assumption appears to be that maintaining the openness of open-source methods will render them available to 'professional' scrutiny. If so, then such a nominally open vision of accountability is restrictively legalistic in the procedures and institutions to which it anticipates being accountable. It enshrines a technical regime of verification alert to the 'possibility of being called to testify at trial' and the importance of methods being 'explainable in court'.[38] But for many communities, especially those who have historically been targeted by surveillance and data extraction, information preservation (for whatever purpose) can itself be a violent practice when not conducted in consultation and collaboration with those from whom the data originates. For instance, proponents of Indigenous data sovereignty advocate methods of data governance that are guided by principles such as collective benefit and authority to control. This is to ensure that Indigenous Peoples—not courts or laws—determine the 'data governance protocols' according to which information about them is collected, stored, and utilised.[39]

We can see similar problems in other OSI protocols. The 'Investigative Methods: An NCRM Innovation Collection,' discusses how 'human rights practitioners' are turning to OSI in 'their pursuits of accountability, whether raising public awareness or as evidence in legal contexts'.[40] Again, accountability to those harmed by the violence being investigated is either not considered or appears of minimal importance. Though protocological guidance claims to defer the identification of investigatory aims in service of adaptability, recommended methods repeatedly presume and recursively enshrine legal processes as the endpoint to which they are teleologically oriented.

[33] ibid vii.
[34] ibid 23.
[35] Bellingcat and GLAN (n 22) 1.
[36] Bellingcat, 'What Is Bellingcat's Justice and Accountability Unit?' (15 December 2022) <https://www.bellingcat.com/what-is-bellingcats-ja-unit-december-2022/>.
[37] *Berkeley Protocol* (n 21) 11.
[38] ibid 11.
[39] Stephanie Russo Carroll and others, 'The CARE Principles for Indigenous Data Governance' (2020) 19 *Data Science Journal* 1, 6.
[40] Mair et al (n 24) 10.

The priority accorded to legal forms of justice and accountability may, of course, be attributable to the constituencies identified as these protocols' main stakeholders—namely, professional human rights investigators and criminal courts of one form or another. For instance, the Berkeley Protocol consolidates an incipient professional common sense aggregated from 'more than 150 consultations with experts and input from key stakeholders,' nearly all of whom are legal scholars or human rights professionals.[41] Adherence to the Protocol is meant to enable stakeholders to conduct investigations whose reliability may be easily assessed by 'judges and other fact-finders'.[42] Those most affected by the violence in question—those with the most to gain, or lose, from an investigation—are largely erased from consideration. They appear as instruments of concern but not interlocutors defining those concerns for themselves. At a perhaps more extreme level, the 'Public International Law & Policy Group Handbook' aims 'to provide guidelines and best practices for the collection and management of information on serious human rights situations for those that are not professionally trained in such documentation practices'.[43] Even then it 'strongly emphasises the need to refrain from investigating human rights abuses' by civil society actors except as a 'last resort' 'and to include professionals when and where possible'. It 'explicitly advises individuals to refer and defer to medical, forensic, legal and otherwise qualified professionals to the extent circumstances so permit'.[44]

The imperative to standardise OSI methods and channel through law emerges from this professional milieu and risks entrenching a division already present in the mediatic structure of OSI. As McAvoy observes, 'open source tools make it technically possible, and, arguably, easier than ever before to conduct a form of rigorous investigation without a clear, methodological need to foster personal relationships between content-creators and content-analysers—or, in other settings, between witnesses and fact-finders'.[45] In its near exclusive concern for the interests of content-analysers and fact-finders, professionalised OSI guidance often excludes content-creators and witnesses from shaping investigatory aims and methods. This exclusion directly contravenes 'the radical, democratising potential' of OSI: its capacity to center the interests of 'marginalised or underrepresented populations typically underserved or excluded from judicial forms of justice and accountability'.[46] To be sure, some protocols urge investigators to 'ensure that a range of perspectives and experiences are incorporated into investigations'.[47] However, this very logic of incorporation implies a hierarchical approach to collaboration as assimilation, not genuine or well-constructed partnership. The Berkeley Protocol does not include consultation as a formal step of the investigative process.[48] We therefore concur with McAvoy that an investigation grounded in solidarity between content-creators and content-analysers must pursue 'a mutually established purpose'—one whose endpoint may or may not be juridical.[49] We will return to this question of solidarity-based OSI in the coming pages.

[41] *Berkeley Protocol* (n 21) v–vi.
[42] ibid vii.
[43] d'Alessandra et al (n 20) 11.
[44] ibid 13.
[45] McAvoy (n 18).
[46] Sophie Dyer and Gabriela Ivens, 'What Would a Feminist Open Source Investigation Look Like?' (2020) 1 *Digital War* 5, 7.
[47] *Berkeley Protocol* (n 21) 15.
[48] ibid 55.
[49] McAvoy (n 18).

Epistemology

By aiming OSI toward legal ends, professionalised guidance outlined in frameworks including the Berkeley Protocol, the Leiden Guidelines, and the NCRM report juridifies not only the purpose but also the epistemology of investigation. For instance, the Berkeley Protocol's goal of investigating 'violations of International Criminal, Human Rights and Humanitarian Law' privileges knowledge of 'the substantive laws applicable to the investigations' so as to 'increase the likelihood that the information collected and any analytical conclusions drawn will be helpful in efforts to ensure justice and accountability'.[50] But does this legal capture of purpose constrain the forms of knowledge that are relevant to its pursuit? Does it fall foul of Weizman's warning that '[d]efending rights from within existing social, political, and legal frameworks can be counterproductive if the struggle is to replace the powers that have established these frameworks in the first place'?[51]

Throughout many of these documents, knowledge of harm and wrongdoing is recognised and mediated through the prism of three separate domains: legal norms, legal structures, and legal practices. Little, if any, assessment of the restrictions and exclusions this can impose on the identification and representation of people's suffering is considered. Law provides the exclusive lens through which harm and wrongdoing are identified and it is privileged as a mode through which resolution may be achieved. Examining each of these domains (legal norms, legal structures, and legal practices), we argue, reveals this to be a form of epistemic injustice in its own right.

First, across many of these documents, adherence to international legal norms is presented as both unproblematic and unquestionably desirable. It ignores decades of critical analysis that casts doubt on the coherence of these intersecting and overlapping norms as adequate expressions of what may be seen as just or unjust. No attention is given to critiques of international law as a product of Eurocentric, colonial, and patriarchal worldviews that legitimise imperial forms of violence whilst disavowing others.[52] The same is true of critics who have demonstrated how human rights law favours a global and national economic model, one that privileges the accumulation of capital and a liberal market system at the expense of any (other) form of distributive justice.[53] Those who also argue that law's capture of human rights tends to unjustly exclude many forms of suffering from law's view, or to legitimate human suffering, are similarly ignored.[54] Consequently, the pain of others is only recognised as worthy of justice and accountability if it conforms to the legal rubrics recognised in contemporary international law. For example, in 'Outlining a human-rights based approach to digital open source investigations', the authors argue that open-source information can convince 'policymakers, or judicial bodies to hold perpetrators accountable for crimes covered by international law, ranging from criminal processes against individuals to proceedings against the state'.[55] Harms that lie outside these norms, such as structural or systemic violence, remain beyond legalistic investigation. This form of OSI guidance thus narrows the scope of recognition of both the harm experienced *and* those who might be identified as harmed as well as those who might be perpetrators.

[50] *Berkeley Protocol* (n 21) 19.

[51] Weizman (n 12) 69.

[52] Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

[53] Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2002).

[54] Andrew Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 *The Law Quarterly Review* 133; Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007).

[55] Dubberley and Ivens (n 55) 5–6.

Ironically, these approaches to OSI totalise the law as a coherent, internally consistent system, overlooking the pluralism and considerable contradictions among legal epistemologies. For example, frameworks including the Berkeley Protocol conflate international humanitarian law (IHL) and international human rights law (IHRL). Characterising these regimes as 'mutually reinforcing'[56] ignores their 'very different philosophical roots'.[57] Whereas IHRL is forged in a conception of universal, inalienable rights, IHL understands such rights to be contingent on the legally defined context of war or armed conflict. Though some critics wish to see the two legal domains operate in conjunction, the fundamental precept of IHL is the legitimation of utmost violence, not its suppression.[58] The taking of life is not outlawed in war (save for the deliberate killing of civilians, those who have surrendered or those considered *hors de combat* for instance). The killing of civilians, the destruction of their homes and the devastation of their lives can be justified as militarily necessary.[59] Those harms attract the attention of IHL if, and only if, attacks against them are deliberate or 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[60]

This principle of proportionality enshrined in IHL measures harm not in terms of an inherent right to life or dignity but against military necessity. The objectives of military action outweigh all other considerations, regardless of the moral (or indeed the human rights) dimension of violence. The Berkeley Protocol's suggestion that an OSI investigation should follow this legal framework serves to justify rather than oppose harms (as grave as the mass killing of civilians which is often legitimated through the rhetoric of 'collateral damage') that are effectively sanctioned by IHL.

Beyond the extreme context of war, preference for legal norms also obscures harms not formally categorised within legal modes of apprehension. This is perhaps most apparent in suffering that is chronic rather than acute. Elizabeth Povinelli describes chronic forms of suffering as 'quasi-events' because they are 'cruddy rather than catastrophic, crisis-laden, and sublime,' and thereby escape institutional recognition.[61] Acute harms inflicted through direct or personal violence lend themselves to OSI examination much more easily than the indirect or structural violence that may arise because of, say, the poverty of life chances inflicted by an unfair economic system or the slow violence of ecocide.[62] Law, however, is very poor at addressing structural or systemic violence even though it can be, and is, evidenced through social science research and meta-data collection. These possibilities are predominantly ignored in the OSI guidance.

Second, legal structures further narrow the investigative gaze. Even where broader conceptions of harm are recognised, deference to legal parameters of jurisdiction and accountability means that another form of epistemic exclusion is perpetrated. Invariably economic,

[56] *Berkeley Protocol* (n 21) 20.

[57] David Luban, 'Human Rights Pragmatism and Human Dignity' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 270.

[58] Allen Buchanan, 'Why International Legal Human Rights?' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015); Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.

[59] Andrew Williams, 'Atrocity and the Pain in Law' in Berenike Jung and Stella Bruzzi (eds), *Beyond the Rhetoric of Pain* (Routledge 2019) 51.

[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979).

[61] Elizabeth A Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Duke University Press 2011) 13.

[62] Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167; Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011).

social, and cultural rights are treated as aspirational and only exceptionally subject to direct legal enforcement mechanisms. For example, struggles to end poverty, eradicate discrimination, or provide adequate healthcare and housing are deemed to fall within the political realm of economic distribution, construed as separate from the human rights that courts enforce. Though some legal systems have made strides in this direction, legal jurisdiction generally overlooks those rights associated with structural and systemic harm. Impoverishment, inequality, resource distribution are denied recognition as justiciable claims unless discrete victims and perpetrators can be identified.[63] Protological documents largely reinforce rather than challenge the restrictions of legal forms of justice by requiring investigators to, for example, 'identify the accountability mechanisms that may be relevant to their work and the potential venues where the evidence collected could or might be admitted to establish facts'.[64] The implication is that there is no point in collecting evidence of harm in the absence of an identified victim and/or party responsible. This reinforces the idea that some rights are not 'real' rights, undermining the international rhetoric of their indivisibility.

This is not to say that OSI cannot compile evidence to support advocacy against systemic and structural violence. But in professionalising OSI, legally centred frameworks give little allowance to speculative or creative forms of advocacy which seek to address forms of violence not yet accepted in law. They do not explore OSI's potential to gather information that *tests* the law rather than comply with it, or to reveal the law to be ineffectual. Those who seek to show how international law fails to respond to structural violence are effectively redirected into the realm of legal acceptability. Criminal justice takes precedence over social justice. This presents a problem if the aim is to advocate for the interests of the politically and socially marginalised, who often struggle at the most fundamental level to have their experiences and interests recognised in law. Miranda Fricker contextualises this as a 'hermeneutical injustice' where 'a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experience'.[65] Indeed, intersections among gender, race, and disability that aggravate social and economic harms tend to remain invisible within law;[66] this has already been identified as a significant gap in the practice of human rights fact finding.[67] Likewise, environmental and nonhuman rights fall beyond consideration.

Third, legal practices impose further restrictions on the epistemology of OSI. The preference for knowledge that is mediated through the law requires consideration of evidential rules and rules of procedure. Some commentators are already plotting how OSI should be managed as 'expert evidence' to ensure standards in its presentation before international courts are 'clear, objectively justifiable, and non-biased'.[68] For example, the 'Leiden Guidelines' were 'created to address the legal lacuna by examining the different evidentiary standards relating to [digitally derived evidence] before the international criminal courts and tribunals'.[69] The Berkeley Protocol's express aim is to ensure this information is

[63] Octavio Luiz Motta Ferraz, 'Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2009).

[64] *Berkeley Protocol* (n 21) 23–24.

[65] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007) 1.

[66] Colm Campbell and Catherine Turner, 'Utopia and the Doubters: Truth, Transition and the Law' (2008) 23 *Legal Studies* 374.

[67] Shreya Atrey, '"The Danger of a Single Story": Introducing Intersectionality in Fact-Finding' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016).

[68] Matthew Gillett and Wallace Fan, 'Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom' (2023) 21 *Journal of International Criminal Justice* 661, 686.

[69] Aalto-Setälä et al (n 23) 3.

'admissible, as well as relevant, reliable, and probative'.[70] Such epistemic restrictions are not grounded in establishing 'truth' or giving voice to people's experiences or providing any other means by which harm might be identified, documented, and presented. By mediating investigation through legal process, there is no recognition of any testimonial injustice that may result. Given that most legal systems are populated by elite, male actors who decide what is 'relevant, reliable, and probative,' the chances of systematic injustice arising are strong. We know enough about the inherent prejudices and biases of a socially privileged, male dominated legal profession, to understand that systematic injustice is likely to result.

Little of this is appreciated in what we see as OSI's legal deference. The law and its epistemic violences are rendered unproblematic in these documents. While the Berkeley Protocol's recognises that access to data and technologies may be stratified by 'gender, ethnicity, religion, belief, age, socioeconomic status, membership of a racial, linguistic, ethnic or religious minority, indigenous identity, migration status and geographic location', none of these issues are reflected in its engagement with the law and legal practice.[71] The law remains presented as a neutral, integrated, and nondiscriminatory structure.

Method

The tendency to defer to law is also legible in the methods that these protocological documents recommend. Perhaps most explicitly, the Berkeley Protocol notes that 'whatever the purpose of their investigation, by adhering to the methodological principles outlined in the Protocol, which are designed around common legal standards, open source investigators will ensure the high quality of their work'.[72] Similarly, the Leiden Guidelines are grounded in 'the jurisprudence of the international criminal courts and tribunals'.[73] Such grounding forecloses alternative methodologies that might better serve the aims of any particular investigation.

The emerging goal of standardising OSI methods so as to professionalise the field is perhaps not surprising given the dominant target audience for these documents (judges, lawyers, fact finders, amongst others). Nevertheless, we argue that narrow framings such as these risk sidelining myriad other forms of experimental or counter-hegemonic investigations that have been fundamental to the development of OSI. While these may not meet legal standards, they represent powerful forms of inquiry whose strength lies in their flexibility and adaptability to a range of aims and circumstances. Though the documents we have discussed, in principle, conserve openness, the methodological standards prescribed by them mean that the protocols are in danger of becoming intransigent and inflexible. For example, the True Project's 'Evaluating digital open source imagery: A guide for judges and fact-finders' underscores the need for methods of conducting OSI 'in a professional, legal and ethical manner'.[74] Similarly, the Berkeley Protocol argues that 'while technologies, tools and techniques used in open source investigations will change, certain overarching methodological and ethical principles should endure' and are necessary to 'professionalising the field'.[75] Across these protocols, professionalising OSI involves conforming to the demands of legal institutions—including, as we have demonstrated, their structural prejudices.

[70] *Berkeley Protocol* (n 21) v.
[71] ibid 45.
[72] ibid 4 (emphasis added).
[73] Aalto-Setälä et al (n 23) 4.
[74] True Project, 'Evaluating Digital Open Source Imagery: A Guide for Judges and Fact-Finders' (2024) 3 <https://www.trueproject.co.uk/osguide>.
[75] *Berkeley Protocol* (n 21) 11.

The legal deference can also be perceived in how many of these documents define and discuss 'technical ability'. They make reference to particular 'technical standards' and 'skillsets' that must be reached and fulfilled as minimum requirements. For instance, the Berkeley Protocol states, 'digital information may be accessible to those with specialised technical skills and training who can gain access to networks and data inaccessible to, or unlikely to be accessed by, the average person'.[76] Invoking technical proficiency in this way serves to calcify a particular hierarchy of knowledge. By universalising what counts as technical skill, professionalised standards fail to recognise myriad vernacular and counter-hegemonic skillsets and knowledge bases, from linguistic expertise, to social history and forensic cosmo-epistemologies that defy institutionalisation.[77] Imposing a restricted conception of technical standards precludes a more pluralistic and inclusive approach to the development of OSI techniques and methodologies.

Such forms of preclusion can also be found within chapter 2 of the Berkeley Protocol, where subsections focus on both 'dignity' and 'humility' as ethical principles. Within the 'humility' subsection, the Protocol states, 'open source investigators should be humble, recognising their own limitations and having an awareness of what they do not know. Proper understanding and interpretation of open source information may require specialised training or consultations with experts'.[78] Here, the need for an investigator to maintain humility is narrowly invoked in relation to their potential technical limitations, which can be redressed through professionalised methods of 'training' and 'consultation'. An investigator's myriad social, political, and positional limitations to understanding an event's local textures and specificities largely fall beyond the Protocols' consideration. And yet these aspects are fundamental for investigators to consider, particularly as they try to comprehend variegated forms of situated and localised harm and violence, as well as specific and embedded frameworks of justice and accountability that might redress such forms of violence. Consequently, a more capacious conceptualisation of humility would be cognisant of broader social, political, and positional limitations, beyond merely technical considerations.

Similarly, the section on 'dignity' suggests a need to 'integrate safeguards concerning the digital, physical and psychosocial security of witnesses, survivors, other investigators, those accused and others who may be negatively affected'.[79] Here, dignity is narrowly aligned with a need to maintain security and privacy. Whilst these considerations are important, the fact that they become the central lens through which dignity is to be understood (as a key *ethical* principle) elides a more bottom-up and solidarity-based approach (following McAvoy) that would allow different subjects of investigations (affected communities, individuals, and actors) to collaboratively and collectively define what the pursuit of dignity (and, concomitantly forms of justice and accountability) might look like for them.[80] Once again, situated concerns are subordinated to universalising protocols that defer to the law as a selective intermediary controlling access to delimited modes of justice and accountability.

Summary

Despite our critiques of legal deference and the dangers it poses, we recognise that leveraging OSI to pursue legal redress might fulfill some notions of accountability. The desire, in particular, to subject perpetrators of atrocity to a criminal trial, where evidence of

[76] ibid 6.
[77] Joseph Pugliese, *Biopolitics of the More-Than-Human: Forensic Ecologies of Violence* (Duke University Press 2020).
[78] *Berkeley Protocol* (n 21) 15.
[79] ibid 15.
[80] McAvoy (n 18).

wrongdoing is presented in a putatively dispassionate and objective process in which punishment follows conviction, remains dominant. It drives much international advocacy in the face of mass suffering (and some specific human rights violations) arising from military conflict and state violence. But even so, few would claim that legal forms of justice have been effective or adequate in addressing state and systemic violence, named human rights violations, or other forms of injustice. Criminal processes for these matters are rare at both national and international levels. Moreover, the ineffectuality of international legal mechanisms in the face of such injustices owes less to evidentiary deficits that OSI can address and more to a lack of political will among states to prosecute those most responsible.

Given these shortcomings, why tether OSI to such a narrow mode of advocacy? We argue that if OSI is not to be constrained by the developing tendency towards legal deference, then formal guidance should be reconstituted to embrace broader goals than those associated with legal process. It is to this end that we now turn.

TACTICS

Our critique so far points to some of the salient dangers we see in a legalistic capture of OSI. The aim of the following sections is to offer an alternative set of tactics that can help to critically revise, redraft, and augment key dimensions of these protocols or provide a different approach altogether. By offering up such tactics, we aim to foster a more pluralistic, decentralised, solidarity-based approach to OSI rather than privilege the demands of the law. Our framing of these revisions as tactics is itself a methodological and epistemological move inspired by Philip, Irani, and Dourish's framing of 'tactical epistemologies'. Tactical epistemologies are unlike 'methodologies, strategies, or universal guarantors of truth' because they 'lead not to the true or final design solution but to the contingent and collaborative construction of other narratives'.[81] A tactical epistemology 'expands the scope of what one needs to know' and creates space for a more flexible set of heuristics that work against the institutionalising, universalising, and legally deferential logics we have identified.[82] It complements Sophie Dyer and Gabi Ivens' effort 'to centre the experiences of marginalised or underrepresented populations typically underserved or excluded from judicial forms of justice and accountability'.[83] Realising this democratic potential requires approaches that can support 'investigations working outside legal systems in the pursuit of nonjudicial forms of social justice'.[84]

In mapping these alternative tactics for OSI, we do not aim to provide a universal or dogmatic framework. Instead, we advance a tactical epistemology that conserves the flexibility necessary to foster a solidarity-based mode of OSI. None of this is to advocate for the dismissal of the protocols in their entirety. Rather, it is to argue for their reform. We believe that a democratic OSI should defer not to the law but to the priorities of those victimised by the violence under investigation. In some circumstances, they may wish to pursue legal avenues as a tactic of resistance. All we suggest is that the pursuit of legal avenues should be a democratic decision, and not a professional default. To organise our proposals, we focus on each term comprising open/source/intelligence.

[81] Kavita Philip, Lilly Irani and Paul Dourish, 'Postcolonial Computing: A Tactical Survey' (2012) 37 *Science, Technology, & Human Values* 3, 23.
[82] ibid.
[83] Dyer and Ivens (n 46) 7.
[84] ibid 7.

Open

A solidarity-based approach to OSI would not take the openness of open-source intelligence/information for granted. The qualifier 'open-source' describes 'information that any member of the public can observe, purchase or request, without requiring special legal status or unauthorised access'.[85] Such availability often results from contested processes such as illicit recording, data leaking, and the non-consensual circulation of sensitive information, the ethical implications of which cannot be universalised as they depend on the specific power dynamics involved. Activist projects such as the Electronic Frontier Foundation's 'Atlas of Surveillance' and the Invisible Institute's 'Citizens Police Data Project' aggregate information about police surveillance and misconduct (respectively) into publicly searchable databases.[86] These projects grant access to information that is typically shielded from public scrutiny in order to hold institutions accountable. They do not find facts; they make information available. They reverse the surveillant gaze and *produce* information's openness by enabling public access to formerly confidential data.

The Berkeley Protocol acknowledges that identity-based discrimination leads to an 'imbalance' in the information available about different groups, but does not indicate how to combat this effectively.[87] Investigators should go further than acknowledging the problem, by confronting the asymmetries that structure who is represented in open-source information and who has the resources to protect themselves from the consequences of such openness. Legally deferential approaches to OSI tend to assume that visibility begets justice and empowerment while oppression results in online invisibility. However, many survivors of violence and/or their communities do not want information about their traumas circulating openly online. The ready availability of information can be psychologically distressing or (re-)traumatising,[88] can violate spiritual principles,[89] and can expose subjects to criminalising forms of surveillance. Often, visibility equals vulnerability—hence the subversive potential of the databases discussed above, which expose the inner workings of powerful institutions.

The reversibility of OSI practices of 'watching the watchers' should give any open-source investigator pause for thought. Law enforcement frequently employ OSI methods themselves, inspiring citizen vigilantism and criminalising cyberspace.[90] During the 2020 uprisings for racial justice, sparked by the police murder of George Floyd in the United States, law enforcement agencies employed OSI to target demonstrators and journalists reporting on protests.[91] Many protestors made videos openly available as evidence of police repression and expressions of solidarity, only to have these videos incriminate them upon subjection to legal analysis in jurisdictions where emergency declarations and curfew orders authorised exceptional police use of force while criminalising the occupation of public space.

[85] *Berkeley Protocol* (n 21) 3.

[86] 'Atlas of Surveillance' (Electronic Frontier Foundation, 27 May 2021) <https://www.eff.org/pages/atlas-surveillance> and 'Citizens Police Data Project' (CPDP, 23 March 2015) <https://cpdp.co/>.

[87] *Berkeley Protocol* (n 21) 46.

[88] Safiya Umoja Noble, 'Critical Surveillance Literacy in Social Media: Interrogating Black Death and Dying Online' (2018) 9 *Black Camera* 147.

[89] Kisha Supernant and Gary Warrick, 'Challenges to Critical Community-Based Archaeological Practice in Canada' (2014) 38 *Canadian Journal of Archaeology* 563.

[90] Daniel Trottier, 'Digital Vigilantism as Weaponisation of Visibility' (2017) 30 *Philosophy & Technology* 55-72.

[91] Sam Biddle, 'Police Surveilled George Floyd Protests With Help From Twitter-Affiliated Startup Dataminr' *The Intercept* (9 July 2020) <https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests/>; Anjuli Shere and Jason Nurse, 'Police Surveillance of Black Lives Matter Shows the Danger Technology Poses to Democracy' *The Conversation* (24 July 2020) <http://theconversation.com/police-surveillance-of-black-lives-matter-shows-the-danger-technology-poses-to-democracy-142194>; Tal Axelrod, 'DHS Stops Compiling Intel Reports on Journalists Covering Portland Protests' *The Hill* (1 August 2020) <https://thehill.com/homenews/administration/510097-dhs-stops-compiling-intel-reports-on-journalists-covering-portland/>.

The ambivalence of information's openness—variously a basis for democratic accountability or repressive surveillance—indicates a need to approach openness not as an empirical fact but as a *relation*. Who opened this information, to whom, and why? Answering such questions requires contextual understanding of sources' circumstances, yet dominant frameworks such as the Berkeley Protocol explicitly stipulate that 'open source information does not involve interacting with or soliciting information from individual Internet users'.[92] Built into this definition is an extractive premise that occludes any sense of relation or obligation to sources. Investigators are encouraged to identify sources in order to avoid copyright violations or to authenticate information, but not to assess the ethics of data collection, storage, and use.[93] The Protocol adopts a cautious stance toward information's openness, insofar as data use risks violating a human right to privacy or data protection laws.[94] But these universalising frameworks cannot account for the contextual concerns that would guide sources' decisions about how their information should circulate.

Rather than frame questions of access in binary terms (open/closed), a relational approach would examine how sources, investigators, survivors, and other stakeholders are positioned in a field of power. Access might be qualified based on group membership, investigative intent, or degrees of trust. For example, the Mukurtu digital content management system was created to foster principles of Indigenous data sovereignty. Developed by the Center for Digital Scholarship and Curation at Washington State University, in collaboration with eight Indigenous Plateau nations, 'the free and open source platform is designed to meet the particular curatorial and access needs of indigenous peoples'.[95] Its granular settings enable users to tag metadata according to culturally specific principles and to make information openly available to some but restricted or unavailable to others. An OSI practice might employ Mukurtu to collaborate with survivors of violence and their communities by granting them autonomy to determine the relative openness and uses of their information.

Adopting this relational approach certainly poses practical challenges. Most obviously, it requires that investigators cede power to sources, especially those who are politically vulnerable. But deference to community control over information and its uses represents a crucial mechanism for grounding OSI's methods in principles of solidarity and community-led decision-making. This might mean that information useful to prosecutors would be kept confidential, potentially undermining any criminal prosecution. That might be the price payable to preserve the autonomy of those who have suffered, instead of assuming that their interests are always reflected in legal proceedings. Solidarity entails a willingness to compromise.

Source

Information does not materialise from thin air, nor does it pre-exist its capture. Rather, information necessarily emerges from a position, a source, whose experience is remediated as informatic. The Berkeley Protocol only addresses sources insofar as it accedes to a legalistic notion of evidential provenance. Yet the power imbalances inherent to OSI necessitate a critical engagement with sources' positionalities, as well as with the act of *re*-sourcing that OSI provokes. The capture and remediation of information can even render sources into resources in the extractive sense, by integrating information into evidentiary economies that may or may not serve the source's own interests. In short, the process of transforming traumatic experiences into evidentiary data requires critical examination for the democratic

[92] *Berkeley Protocol* (n 21) 6.
[93] ibid 29, 63.
[94] ibid 12, 27.
[95] Kimberly Christen, 'Mukurtu CMS: An Indigenous Archive and Publishing Tool' (Humanities for All, 18 October 2020) <https://humanitiesforall.org/projects/mukurtu-an-indigenous-archive-and-publishing-tool>.

potential of OSI to be fulfilled. We advocate a more reflexive OSI attentive to power and positionality, one that enacts what Donna Haraway describes as a 'feminist objectivity' that 'allows us to become answerable for what we learn how to see'.[96] Recognising that knowledge is always situated and partial, this mode of inquiry would prioritise being answerable to those who have suffered harm over being answerable to juridical protocol.

We might start with the notion of data sovereignty, which involves explicit recognition of the agency of those from whom information has originated. This imperative is especially pertinent (and we would say reflective of epistemic justice demands) in the gathering of personal testimony and human intelligence (HUMINT). In the long tradition of peoples' tribunals, listening has been regarded as a political objective in itself, one which respects the autonomy of those imparting experience to do so in terms and ways that are culturally and personally relevant to them. In such contexts, legitimacy is deeply contextual and resists abstraction into universal legal principles. It requires a method that is flexible, rather than fixed by a legalised notion of evidence, one determined by a legal forum. Moreover, it calls for a reflexive method in which the listener acknowledges their own feelings, motives, and reactions in the recording and transposition of information—an expanded version of investigative humility that accords with Fricker's 'virtues of reflexive social awareness' in the practice of testimonial and hermeneutic justice.[97] This flexible, reflexive method approaches investigation as itself a process of, not merely a prelude to, accountability. Investigation is not circumscribed by its usefulness for a legal process. Information is created in ethical relation, not instrumentalised to serve the investigator's predetermined ends.

This practice has been adopted in several contexts, such as truth and reconciliation commissions and peoples' tribunals, the latter of which aim to acknowledge forms of violence and oppression which law ignores or denies. Dianne Otto has tracked some of these initiatives and concluded that they have provided 'victims with the opportunity for their voices to be heard and valued, and enable[d] the creation of an archive, not controlled by the state, of their suffering and courage into the present'.[98] Focusing particularly on the ability of suitably constructed tribunals to enable women to speak of sexual violence otherwise often ignored in standard criminal justice processes, Otto highlights the value of this 'political listening'. From her participation in the Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict in 2012 (held in Cambodia), Otto noted that 'testifiers were given full control of their testimonies', which enabled them to speak not just of their suffering but their 'resistance, strength and determined survival'.[99] Similarly, the 2015 'Judicial Council for the Women's Court–Feminist Approach to Justice' followed a grassroots process which sought out and then helped prepare testifiers to give their accounts.[100] The emphasis was not on extracting objectively infallible evidence to be marshaled in court, but on listening over a protracted period so that testimonies could be delivered with confidence. This form of justice centres survivors and emotions rather than subordinating their interests to legal demands.[101]

If we are to overcome the hermeneutical injustice perpetrated against oppressed knowers, there should also be an obligation to be curious. Epistemic humility would commit

[96] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) *Feminist Studies* 583.
[97] Miranda Fricker (n 59) 170.
[98] Dianne Otto, 'Beyond Legal Justice: Some Personal Reflections on People's Tribunals, Listening and Responsibility' (2017) 5 *London Review of International Law* 225, 248.
[99] ibid 233, 238.
[100] ibid 245–246.
[101] ibid 248.

investigators to unearthing genealogies of knowledge that challenge hegemonic narratives about what counts as wrongdoing. An active search for what José Medina calls 'subjugated knowledges' with a view to creating 'epistemic friction of knowledges from below' would at least challenge the assumption that legal systems are always capable of recognising and redressing injustice.[102] It would require due diligence when investigating how people experience hardship, poverty, and pain, rather than perpetuating a one-dimensional, top-down conception of injustice. These tactics also apply beyond testimony, to archives of social history and structural or systemic injustices. Even if it is not possible to identify or access a source of information, the ethics of re-sourcing would require anxious deliberation about how and to whom such information should be relayed. This might involve participatory methods that respect the priorities of the original knower and their community—hardly a simple process given the nuances in identifying the contours, interests, and representatives of a given community. But failure to acknowledge this responsibility, as several approaches to OSI we have identified do, is questionable. Moreover, it can also contravene attempts within legal advocacy to include victims in international and national criminal justice procedures.[103]

Additionally, we propose that OSI should do more than simply receive testimony or capture data relating to alleged wrongs. Reflexive investigations should also accumulate information that highlights the inadequacies of law itself, including in its definitions of wrongdoing and its structuring of legal processes to exclude those harmed. This tactic would probe and corroborate how legal processes have failed vulnerable communities. For instance, the experience of women in war has consistently been ignored in analysis of mass suffering in conflict.[104] Equally, it would provide a different perspective for legal process, where desirable, so as not to discount the value of legal process where it serves one purpose of OSI gathering. As mentioned above, processes have been adopted that have been actively designed to address these concerns. Only in this way can the confines of the legalised spaces and approaches we have outlined be challenged.

Finally, in re-sourcing, careful consideration should be given to the translation and accessibility of information for the benefit of its originators and the communities from which they come. The legal bodies that pronounce on the assessed information rarely do so with a view to ensuring understanding for those affected or the general public. Courts are not designed or skilled to do this. OSI investigators may consider how information could be deployed to achieve political aims as well as legal ones and to avoid the exclusive—and exclusionary—nature of legalised narratives.

Intelligence/information

A solidarity-based approach to OSI necessitates a broader conception of intelligence than that formalised through law-centric protocols. The Berkeley Protocol employs the 2006 Intelligence Community Directive 301's definition of intelligence as information 'that is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement'.[105] This directive formed part of

[102] José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination* (Oxford University Press 2012) 293.

[103] Although of limited application, initiatives to enable the participation of victims in the International Criminal Court proceedings, for instance, have developed over recent years through the Victims Participation and Reparations Section of the Court. See International Criminal Court, 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC' (2018) <https://www.icc-cpi.int/about/victims>.

[104] Judith Gardam, 'Women's Human Rights and the Law of Armed Conflict' in Niamh Reilly (ed), *International Human Rights of Women* (Springer 2019).

[105] 'Intelligence Community Directive' (National Open Source Enterprise 2006) ICD 301 8.

the United States Intelligence Community's broader response to the September 11 attacks on the World Trade Center. Through such directives, US intelligence agencies sought to increase the scope of intelligence that could be gathered and leveraged to identify, assess, and predict security threats to the United States. Clearly, this directive is far from a neutral document. It supported the post-9/11 expansion of the US global counterinsurgency, military interventionism, and border securitisation. The Protocol's adoption of this definition suggests a lack of critical consideration of the epistemic baggage inherited from frameworks devised by powerful imperial actors. This is further underscored by the definition's discursive framing through language of 'collection' and 'exploitation' that reinforces extractive relations between content-creator and content-analyser.

We aim to reorient the definitional parameters of intelligence/information in accordance with our more situated and relational framework. As touched upon briefly in the previous section, a critical humility-based approach could advance this effort. Expanding the Berkeley Protocol's conception of humility beyond merely technical and legal considerations, we take inspiration from Métis scholar Warren Cariou who identified humility as 'the first requirement for someone seeking knowledge or asking for advice' and thus 'the basis of education, the gateway to knowledge'.[106] This ethical stance grounds the aforementioned politics of listening in 'a subject's … openness to learning'.[107] As we have argued, the legal deference of OSI protocolisation imposes universalised epistemologies shorn of situated knowledges and local context. 'Raw' or 'unfiltered' data exists 'out there,' waiting to be 'made sense of' or 'tamed' through a suite of investigative methods and legal mechanisms that, once again, preclude solidarity-based, relational modes of investigation. Like Cariou, we counter totalising and appropriative epistemologies by recognising that some phenomena elude comprehensive understanding and that it can be appropriate to limit access to certain knowledges, such as spiritual or personal information.[108] Within this framework, understanding and accepting epistemic limits is a critically *generative* practice that encourages investigators to reckon with structural asymmetries in which they are embedded. Beginning from this position promotes the integration of democratic and alternate mechanisms of accountability into OSI methods. Critical humility can provide a crucial grounding that forces investigators to account for the situated and relational nature of their investigation from the beginning, allowing for a more reflexive relation to the law.

Critical humility can begin to rebalance the asymmetrical power relations inherent in OSI by ceding authority to sources. An example of such an approach can be found in the 'Fortifying Community Truth' project, spearheaded by the human rights group WITNESS. This focuses on empowering underrepresented communities in West and Central Africa to defend their truth against media manipulation. More specifically, it aims to train local activists, community figures, and journalists in techniques of digital verification, open-source investigation, and data analysis. Nkem Agunwa, Africa Program Manager at WITNESS, has argued that this initiative 'is rooted in the belief that a community-based verification process is not only effective but also empowers individuals and communities to stand firm in the face of disinformation'.[109] Moreover, the project aimed to ensure that such 'training' didn't reinforce the structural asymmetries inherent to legal deferential forms of OSI. Rather, it allowed these diverse communities to mold and retrofit OSI methods to their own specific

[106] Warren Cariou, 'On Critical Humility' (2020) 32 *Studies in American Indian Literatures* 1, 3.
[107] ibid 6.
[108] ibid 8.
[109] Sunday Awosoro, 'WITNESS Launches Project to Strengthen Community Verification and Justice—Dubawa' (Dubawa, 6 June 2024) <https://dubawa.org/witness-launches-project-to-strengthen-community-verification-and-justice/>.

and localised needs. As Georgia Edwards, Coordinator of the Video as Evidence Program at WITNESS, has argued, the methods used within the project leverage 'cohort members' skills and knowledge to enhance the value' of OSI praxes—'pushing back dismissals, denials or delegitimisation, communities have the power to defend their truth and should leverage their collective wisdom'.[110] Here we see a tangible example of how the asymmetrical power relations inherent in OSI can be rebalanced. OSI strategies and techniques are placed in the hands of those most familiar with, and affected by, instances of community harm and violence.

The tangible linking of emergent strategies of digital investigation with community-based forms of collective wisdom offer up powerful new frameworks for justice and accountability that are driven by local actors and communities. Here, affected communities are no longer instruments of concern, but interlocutors in the investigative process and its forms of justiciability. Ultimately, such an approach is framed through a critical humility-based praxis that can help to cede authority to sources. Consequently, Fortifying Community Truth illustrates how effective OSI training for affected communities can be a bottom-up process. Such training should be co-constitutive, used to enable affected groups to influence and reshape how OSI might best serve their communities' needs and contextual specificities.[111] Humility as a grounding principle thus offers up a productive tactical intervention to the protological; it is a shift that can help to foster a more solidarity-based mode of OSI.

CONCLUSION

The tactical interventions we have mapped out are not exhaustive or prescriptive. They actively avoid fashioning an overarching, dogmatic framework for OSI. Instead, these partial and situated provocations seek to initiate conversation and critique, interrogating the logics of legal deference that underpin efforts to professionalise the field. Moving beyond legalistic protocols, our tactics aim to recover OSI's capacity to advance a solidarity-based, democratic mode of critical praxis, one that is fundamentally participatory. These tactics are necessarily partial and provisional because their full elaboration would require direct engagement with communities and actors who are the subjects and co-initiators of investigations, shaping their processes, outcomes, and objectives. While we recognise the challenges inherent in such collaboration, we reject the emerging premise we detect across professionalised OSI that investigators need not necessarily concern themselves with the voices and views of those who suffer violence. Moreover, we suggest that these tactical interventions can resonate beyond the field of OSI by helping to unravel the myth of legal homogeneity, where law is seen to operate in an integrated and unified manner. Whereas this myth underpins the protological rubric of OSI's standardisation, our tactics reintroduce legal pluralism, counter-hegemonic mechanisms, and democratic accountability back into the investigatory process. They also reject the law's supremacy as the determining factor in deciding whether and what harm or wrongdoing can be recognised and addressed.

[110] ibid.

[111] Other organisations and individuals within the field have similarly suggested that OSI practices need to be co-constitutively designed with affected communities. For example, Mnemonic's training objectives state that 'more individuals and organisations from historically excluded communities need to be equipped and empowered to use archival and open-source investigative tools and techniques. This will allow affected groups to create and own the narrative of incidents they are seeking justice for,' Mnemonic, 'Our Work' <https://mnemonic.org/en/our-work>. Similarly, Forensic Architecture's 2020 exhibition 'Assembled Practices' focused on 'various counter-forensic methodologies mobilised by the agency in their efforts to socialise evidence collection,' Forensic Architecture, 'Assembled Practices' (2020) <https://forensic-architecture.org/programme/exhibitions/forensic-architecture-assembled-practices>.

This article has thus sought to show how the current shift to the protological risks capturing and controlling OSI by deferring to the law and its systems and needs. The irony of this approach is that it forfeits the very forms of openness and decentralisation that protocols, in principle, conserve—those that proponents identify at the root of OSI's democratising potential.[112] For example, a UN Special Rapporteur on executions notes that digital technologies 'create opportunities for pluralism that can democratise the process of human rights fact-finding, as well as offer mechanisms of social accountability that citizens can use to hold States and others to account'.[113] Legally deferential standards foreclose possibilities for democratic fact-finding, legal pluralism, and alternate mechanisms of accountability. Like Dyer and Ivens, we identify a 'radical, democratising potential' in OSI's ability 'to centre the experiences of marginalised or underrepresented populations typically underserved or excluded from judicial forms of justice and accountability'. Realising this potential requires tactics that can support 'investigations working outside legal systems in the pursuit of nonjudicial forms of social justice'—tactics that challenge the totalising logic of legal deference.[114]

We recognise, however, that some might reasonably claim that if OSI evidence is to be effectively leveraged in legal contexts, it must comply with pre-defined rules of admissibility pertaining to relevance, probative value, and prejudice. This premise guides the formation of protocols designed to ensure open-source evidence's admissibility in diverse juridical spaces. We also accept that such efforts represent one avenue through which OSI can be used to fight for justice and accountability in the face of forms of structural, systemic and political violence. However, we argue that attention must be paid to the forms of legal deference that occur pre-emptively when OSI practices and methods are funneled through such mechanisms, homogenising and monopolising the entire field. These forms of legal translation have not been effectively understood or rigorously interrogated. We further argue that the radical, democratising potentialities of OSI practices are potentially diminished or entirely lost within such modes of protocolisation, which risk undermining aims for justice and accountability as much as supporting them. Therefore, before legal deference becomes a standard method within OSI practices, we should pause to interrogate the ethical and epistemological impacts of the protocolised shifts.

[112] Alexander R Galloway, *Protocol: How Control Exists after Decentralization* (The MIT Press 2004).

[113] UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (24 April 2015) A/HRC/29/37 6.

[114] Dyer and Ivens (n 46) 7.

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