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Intercepted Communications in the *Ongwen* Case: Lessons to Learn on Documentary Evidence at the ICC

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Abstract

In the *Ongwen* judgment, the International Criminal Court (ICC) deemed 'highly probative evidence' the Lord's Resistance Army radio communications intercepted. However, the Defence had argued that it was unreliable evidence for several reasons. After considering the definition and regulatory framework governing the admission and assessment of documentary evidence at the ICC and retracing the road intercept evidence made from Uganda to the *Ongwen* trial, the article will analyse the issues posed by intercept evidence, including some of the challenges the Defence raised against their reliability. The objective is to call attention to the overlooked concerns the interception of communications during the period to which the charges refer may give rise to at the ICC, in particular, in terms of reliability. The article argues that intercepted communications' peculiar weaknesses require specific attention. As a consequence, their reliability and weight should be assessed with circumspection in the overall evidentiary context.

Keywords

International Criminal Court – Ongwen – intercepted communications – fair trial rights – evidence – evidence reliability – evidence submission – evidence admission

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1 Introduction

Although witness testimonies have a key role in trials at the International Criminal Court (ICC), lately other forms of evidence have begun gaining momentum. This trend is clear if one looks at one of the most recent trial judgment the ICC delivered—the *Ongwen* judgment.[1] Having being abducted as a child, Dominic Ongwen became one of the commanders of the Lord's Resistance Army (LRA), a non-state armed group that pursues an armed rebellion against the Ugandan Government. During the trial, the Prosecution submitted 2507 items of evidence related to the interception of LRA radio communications by the Ugandan government during the period to which the charges refer (hereafter, 'the intercepted evidence').[2]

The Defence challenged intercepted evidence arguing for its unreliability on several bases, including the circumstances and purposes behind its creation. Such arguments used up almost ten per cent of the entire defence closing brief.[3] The Trial Chamber IX nevertheless relied heavily in its judgment on intercepted evidence, which it defined as 'highly probative … in this case'.[4] The discussion on intercept materials took up more than 33% of the judgment's section on the evidence of the case, where the Chamber dismissed all of the Defence's arguments and concluded that intercepted evidence is altogether reliable.[5] Ongwen was found guilty under 62 counts of war crimes and crimes against humanity committed between 1 July 2002 and 31 December 2005 in Northern Uganda.[6]

The present chapter aims to call attention to the overlooked concerns raised at the ICC by the interception of communications made during the period the charges refer to. It will do so in three steps: (i) outlining the definition of intercepted communications as a type of documentary evidence and the regulatory (legal and jurisprudential) framework governing the submission, admission and assessment of documentary evidence at the ICC (Section 2); (ii) retracing

1 ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Trial Judgment, 4 February 2021 (*Ongwen* Trial Judgment), para. 686.

2 ICC, *Prosecutor* v. *Ongwen,* Case No. ICC-02/04-01/15, Prosecution's formal submission of intercepted evidence *via* the 'bar table', 28 October 2016. Other types of intercepted evidence different from such communications—including the intercept operation pictures or sketches, TONFAS codes and direction-finding evidence—will not be addressed in this chapter.

3 ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15, Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020', 13 March 2020 (*Ongwen* Defence Closing Brief), paras 225–300.

4 *Ongwen* Trial Judgment, *supra* note 1, para. 686.

5 *Ibid.*, paras 555–592, 614–810.

6 *Ibid.*, para. 686.

the road intercepted evidence made from the interception process in Uganda to the *Ongwen* trial, which will serve as a case study (Section 3.1); (iii) analysing the issues posed by intercepted evidence, including some of the challenges the Defence raised against their reliability (Section 3.2). The closing section will finally provide for some conclusive thoughts on lessons to learn on documentary evidence at the ICC and its implications (Section 4).

2 Intercepted Communications as a Type of Documentary Evidence and the Regulatory Framework that Govern it at the ICC

Intercepted communications are a category of evidence that includes both audio tapes containing audio communications intercepted using technical equipment and the documents where the transcript of such audios is written down. They are a type of 'documentary evidence'—a broad category that comprises, as underlined by the *ad hoc* tribunals' jurisprudence, 'anything in which information of any description is recorded'.[7] Following a traditional categorisation of documentary evidence,[8] intercepted communications can be considered as 'non-testimonial' (meaning not related to a prior recorded testimony) and 'contemporaneous' (meaning produced when the events to which the charges refer to took place). Moreover, as documentary evidence in general, they have been produced by someone who is generally absent from the proceedings and, as such, cannot be cross-examined. For this reason, documentary evidence has been considered by the scholarship as a type of 'hearsay'.[9]

The introduction of documentary evidence at the ICC is explicitly allowed by Article 69(2) of the Rome Statute (hereafter, 'the Statute') as far as the evidence is not 'prejudicial to or inconsistent with the rights of the accused'.[10] With regard to its submission, admissibility and relevance, documentary evidence is subject to the general regulatory framework that governs all forms of evidence: Article 69 of the Statute and Rule 63 of the Rules of Procedure and

7 ICTR, *Prosecutor* v. *Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgment and Sentence, 27 January 2000, para. 53.

8 M. Nerenberg and W. Timmermann, 'Documentary Evidence', in K.A.A. Khan, C. Buisman and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (Oxford University Press, Oxford, 2010) pp. 445–446.

9 *Ibid.*, p. 494.

10 *Rome Statute of the International Criminal Court* (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

Evidence (RPE).[11] The case law has nevertheless adjusted these general provisions to the specificities of documentary evidence. This section will summarise the resulting framework which regulates documentary evidence at the ICC.

According to the Statute, the Court can base its decisions only on the evidence 'submitted and discussed before it at the trial'.[12] The parties may submit evidence relevant to the case,[13] meaning that, through a procedural specific act, they can present to the trial chamber evidence to prove or disprove the facts in issue, either on their own initiative or pursuant to a request by the chamber itself.[14] Although it is not required to tender documentary evidence through witnesses as it can be introduced either in writing/audio/visual form[15]—'from the bar table', the practice has underlined that admission through a witness is the 'preferable approach'[16] and that 'bar table' applications should indicate 'the reason for not tendering the document through a witness'.[17]

The chambers have the authority to rule on the admissibility and relevance of any evidence.[18] In so doing, they assess freely all types of evidence submitted,[19] enjoying in this respect—the case law underlines—'a significant degree of discretion'.[20] The Statute only provides for two general principles concerning the ruling on both admissibility and relevance. First, chambers may rule on those 'taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness', in accordance with the RPE.[21] The RPE underlines

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

12 ICC Statute, Article 74(2).

13 *Ibid.*, Article 69(3).

14 See, *inter alia*, ICC, *Prosecutor* v. *Bemba et al.*, Case No. ICC-01/05-01/13, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018 (*Bemba et al.* Appeals Judgment), para. 576.

15 *Ongwen* Trial Judgment, *supra* note 1, para. 234.

16 ICC, *Prosecutor* v. *Ruto and Sang*, Case No. ICC-01/09-01/11, Trial Chamber, Decision on the Joint Defence Application for Admission of Documentary Evidence Related to the Testimony of Witness 536, 15 July 2014, para. 11.

17 ICC, *Prosecutor* v. *Ruto and Sang*, Case No. ICC-01/09-01/11, Trial Chamber, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, para. 27.

18 ICC Statute, Articles 64(9)(a) and 69(4).

19 RPE, Rule 63(2).

20 See, *inter alia*, ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber, Decision on the admissibility of four documents, 13 June 2008, para. 24.

21 ICC Statute, Article 69(4).

that '[e]vidence ruled irrelevant or inadmissible shall not be considered by the Chamber'.[22] Secondly, when the evidence is collected by a state, chambers should not 'rule on the application of the State's national law'.[23] More generally, chambers should not 'apply national laws governing evidence', unless they need to apply 'general principles of law derived … from national laws of legal systems of the world', in accordance with Article 21 of the Statute.[24]

The ICC legal framework also refrains from providing detailed rules on evidence's admissibility. The Statute only establishes that evidence is not admissible if it has been obtained in violation of the Statute or 'internationally recognized human rights' and the violation 'casts substantial doubt on the reliability of the evidence' or the admission 'would be antithetical to and would seriously damage the integrity of the proceedings'.[25] Having been left with considerable discretion, the approaches adopted by trial chambers on the issues of submission, admission and relevance of documentary evidence have varied significantly.

Article 69(4) of the Statute, which states that the 'Court *may* rule on the relevance or admissibility of any evidence',[26] has been interpreted as giving trial chambers 'the power to rule or not on relevance or admissibility when evidence is submitted'.[27] According to the case law, upon submission of an item of evidence by a party, trial chambers have 'discretion' to either:

> (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.[28]

22 RPE, Rule 64(3).

23 ICC Statute, Article 69(8).

24 RPE, Rule 63(5).

25 ICC Statute, Article 69(7).

26 Emphasis added.

27 ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08 OA 5 OA 6, Appeals Chamber, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"', 3 May 2011 (*Bemba* Appeals Judgment on Evidence), para. 37.

28 *Bemba et al.* Appeals Judgment, *supra* note 14, paras 8, 598. *See also Ongwen* Trial Judgment, *supra* note 1, paras 234–235.

In other words, trial chambers can decide whether to admit evidence right after its submission or to 'defer its consideration … until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person'.[29] As the evidence is generally considered 'admitted' in the first procedure and 'recognised as submitted' in the second one,[30] the first approach has been referred to as the 'admission' model and the second as the 'submission' one.[31]

While the first model has been dominant in the jurisprudence of the *ad hoc* tribunals[32] and in the first trials at the ICC,[33] trial chambers have recently started to adopt the second.[34] Such a shift has been justified by several advantages the 'submission' model would allegedly bring, including the fact that the chamber 'will be in the best position to meaningfully assess each item of evidence' after all evidence has been submitted; that it would 'prevent multiple determinations on one and the same item of evidence … at different stages of the trial' thus contributing to the 'expeditiousness of the trial'; and that it would ensure that 'all the evidence submitted will be subjected to a uniform treatment'.[35]

It has been underlined, however, that the 'submission' model may have 'detrimental consequences in terms of fairness to the parties, in the sense that neither prosecution nor defence may know for sure what evidence will ultimately be considered by the Chamber'.[36] As underlined by Judge Henderson in his

29 *Bemba* Appeals Judgment on Evidence, *supra* note 27, para. 37.

30 *Ongwen* Trial Judgment, *supra* note 1, para. 235.

31 F. Guariglia, '"Admission" v. "Submission" of Evidence at the International Criminal Court: Lost in Translation?', 16 *Journal of International Criminal Justice* (2018) 315–339, p. 316.

32 *Ibid.*

33 *See, inter alia*, ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber, Corrigendum to Decision on the Admissibility of Four Documents, 20 January 2011 (*Lubanga* Decision on Evidence Admissibility) and ICC, *Prosecutor* v. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, Trial Chamber, Decision on the Prosecutor's Bar Table Motions, 17 December 2010.

34 *See, inter alia*, ICC, *Prosecutor* v. *Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/0501/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015; ICC, *Prosecutor* v. *Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber, Decision on the Submission and Admission of Evidence, 29 January 2016 (*Gbagbo and Blé Goudé* Decision on the Submission and Admission of Evidence); ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016; ICC, *Prosecutor* v. *Yekatom and Ngaïssona*, Trial Chamber, Initial Directions on the Conduct of the Proceedings, 26 August 2020.

35 *Gbagbo and Blé Goudé* Decision on the Submission and Admission of Evidence, *supra* note 34, paras 13–15.

36 Guariglia, *supra* note 31, p. 318.

dissenting opinion in *Gbagbo and Blé Goudé*, deferring the admission of evidence to the deliberation stage 'hardly assists the Prosecution in determining whether it has discharged its evidential burden' and 'the rights of the accused are also undermined'.[37]

On the contrary, the 'admission' model would be able to 'purge' the proceedings of 'irrelevant, tainted of unreliable evidence and move forward on a clear and certain basis'.[38] In the 'submission' model, considerations on admissibility and relevance also risk being 'conflated' with the ones on weight and credibility—and, in all likelihood, 'subsumed in the latter'. Admissibility and relevance, therefore, stop performing the 'threshold function' they should have within the proceedings.[39] If it is true that such a model is 'typically designed in order to screen from "inappropriate" material a—separate—trier of facts, most usually a jury',[40] this does not mean that such 'screening' would not benefit trials where triers of facts are professional judges, especially in international criminal justice, where the evidence is gathered in difficult circumstances and refer to crimes committed in highly politicised and turbulent contexts.

Bemba et al. posed an important limit to the 'submission' model: trial chambers are anyway 'required to ensure that evidence which is affected by an exclusionary rule is ruled inadmissible under the applicable ground … This consideration is mandatory in nature.'[41] Given the scarceness of exclusionary rules within the ICC legal framework, this correction to the model is nevertheless still inadequate to ensure the aforementioned 'threshold function'.

Moreover, there is confusion as to how the admissibility of documentary evidence should be assessed. While in *Ruto and Sang* it was established that 'all *prima facie* relevant evidence is admissible',[42] in *Lubanga* a two-fold analysis was required: that of *prima facie* relevance *and* probative value.[43] The first has been interpreted as the fact that an item of evidence 'relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of

37 ICC, *Prosecutor* v. *Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber, Dissenting opinion of Judge Henderson (adduced to 'Decision on the Submission and Admission of Evidence', 29 January 2016, paras 8–9, *to see also for more information on the disadvantages of the 'submission' model.*

38 Guariglia, *supra* note 31, p. 316.

39 *Ibid.*, p. 322.

40 *Ongwen* Trial Judgment, *supra* note 1, para. 246.

41 *Bemba et al.* Appeals Judgment, *supra* note 14, para. 582.

42 ICC, *Prosecutor* v. *Ruto and Sang*, Case No. ICC-01/09-02/11, Trial Chamber, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014 (*Ruto and Sang* Decision on Admission), para. 15.

43 *Lubanga* Decision on Evidence Admissibility, *supra* note 33, paras 26–28.

participating victims'.[44] More difficult to assess is the probative value because 'innumerable factors may be relevant to this evaluation'.[45] Although 'no finite list of possible criteria that are to be applied' exist, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia is referred to in order to identify some of them, for example, 'indicia of reliability', including authenticity.[46] Other chambers have, however, taken the stance that reliability is a component in the assessment of the weight to be given to the evidence, rather than a component in assessing admissibility—thus adopting the so-called 'alternative approach'.[47] The importance of the probative value in the assessment of evidence's admissibility is also underlined in other decisions,[48] so much so that, in *Bemba*, an item of evidence was considered relevant if it had probative value.[49] The case law has nevertheless recognised that admission can be rejected when its prejudicial effects would outweigh the low probative value of an item of evidence.[50]

Given this legal framework and the jurisprudential interpretation that has been given to it, the admissibility standard for documentary evidence is not only 'permissive',[51] but almost absent. Documentary evidence—which is often very voluminous—is generally considered *in toto* submitted unless one of the (very few) exclusionary rules prohibits its admission. This is in addition to the unfettered discretion trial chambers have in the assessment of the probative value and weight to give to documentary evidence in light of the whole body of evidence when deciding on the innocence or guilt of the defendant.

Such a strong reliance on the principle of free evaluation of evidence by professional judges both in terms of admissibility and probative weight has frequently been considered closer to the civil law approach than the common law one and justified on this basis. However, the scholarship has suggested that a system based on 'automatic or semi-automatic incorporation of evidence' is

44 *Ibid.*, para. 27.

45 *Ibid.*, para. 28.

46 *Ibid.*, para. 29. *Similarly, see also Ruto and Sang* Decision on Admission, *supra* note 42, para. 15.

47 ICC, *Prosecutor* v. *Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 30 September 2008, para. 78.

48 *See, inter alia*, *ibid.*, para. 77.

49 ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 42.

50 ICC, *Prosecutor* v. *Ruto and Sang*, Case No. ICC-01/09-02/11, Trial Chamber, Second Decision on the Prosecution's Request for Admission of Documentary Evidence, 20 July 2015, para. 16; *Lubanga* Decision on Evidence Admissibility, *supra* note 33, para. 31.

51 Nerenberg and Timmermann, *supra* note 8, p. 444.

being imported 'without some of the fundamental safeguards underlying such system'.[52] The system thus resulted in a 'awkward hybrid in which documentary evidence is sometimes even more readily admissible than it would be in a civil law system without necessarily having left intact [its] checks and balances'.[53] For example, documents are not prepared by an independent judicial officer, but rather by the tendering party. Moreover, there are no detailed rules on the permissible means of evidence and how evidence should be collected. This is in contrast to national civil law systems, where such area of law is usually strictly regulated.[54] This divergence is even more apparent when intercept communications are concerned because this type of evidence is deemed peculiar and able to seriously infringe upon the rights of suspects, defendants and even third persons.

3 Intercepted Communications Within the *Ongwen* Trial

3.1 *From Uganda to the Netherlands: the Road from the Interception to the Trial*

During the period relevant to the charges against Dominic Ongwen, the LRA used high-frequency radios as the main system to communicate between units in Northern Uganda and Sudan. The equipment used to communicate was obtained through looting and was generally accessible from brigade level and upwards. Solar energy was employed to power the radios. Although there were specifically appointed signallers and radio operators, commanders spoke personally on the radio, too.[55] Jargon, proverbs and codes were used to obscure the meaning of the communications.[56]

Such communications were intercepted by three different governmental actors: the Uganda People's Defence Force (UPDF, the army), the Internal Security Organisation (ISO, the national intelligence agency) and certain local police forces. The main purpose of the intercept operation was to 'gain military intelligence to further the war effort against the LRA'.[57]

52 Guariglia, *supra* note 31, p. 337.
53 Nerenberg and Timmermann, *supra* note 8, p. 449.
54 *On this, see also* Guariglia, *supra* note 31, p. 336.
55 *Ongwen* Trial Judgment, *supra* note 1, paras 125, 879–881.
56 *Ibid.*, paras 616, 688.
57 *Ibid.*, paras 617–618.

The interception process followed by the interceptors can be summarised as follows: (i) LRA radio communications, which were predominantly in Acholi (a local dialect), were listened to from different locations and were taped onto audio cassettes; with the exception of the ISO's audio cassettes, such cassettes do not provide information on the date of the recordings or their content; while listening to the communications, interceptors prepared 'shorthand notes' of the communications; (ii) afterwards, interceptors carried out the necessary 'interpretative work' to comprehend the contents of the communications, for example, they repeated their listening of the tape in order to break the communications' codes; (iii) as soon as possible, the interceptors prepared a 'logbook summary' of the information intercepted in plain English for commanders to understand; logbook entries were dated and appeared in chronological order; (iv) a sort of 'dissemination' phase followed—the information or the logbooks themselves were passed in different ways to Kampala or other locations where they were also reviewed by the commanders; (v) finally, recordings and logbooks were securely stored either at the sites of interception or in Kampala.[58]

The procedures followed by the different interceptors were similar but there were also some differences. Police operations, in particular, were conducted 'less formally', their collection was incomplete, the conversations were not recorded into audio cassettes and, as they did not manage to break the LRA codes, they recorded only what was communicated in clear language.[59] The operations were conducted independently of each other for counterintelligence purposes (*i.e.* to make sure that no interceptor was a spy or was manipulating the material) but the UPDF and ISO personnel at times assisted each other to understand certain communications.[60]

Since 2004, the Prosecution has been in contact with the Ugandan Government to receive the intercepted materials. The majority of evidence was retrieved by the Prosecution from two government contacts, one of whom testified live before the Court.[61] During the trial, the Prosecution submitted 2,507 items of evidence.[62] The Trial Chamber adopted the 'submission' model, arguing that it would allow them to assess the evidence 'more accurately … in light of the entirety of the evidence submitted' and that it is in 'conformity

58 *Ibid.*, paras 620–622, 626, 649.

59 *Ibid.*, paras 630–631. *See also* paras 623, 627–628 and 632 for other specificities of the single interception procedures.

60 *Ibid.*, paras 617–618, 661.

61 *Ibid.*, paras 633–636.

62 Prosecution's formal submission of intercepted evidence *via* the 'bar table', *supra* note 2.

with the accused's right to a fair trial'.[63] The Chamber thus recognised all intercepted materials as submitted prior to trial.[64]

As acknowledged by the Trial Chamber itself, however, 'intercepted communications use so much unusual phrasing that they are difficult to understand without additional evidence'.[65] For this reason, a fundamental role has been played within the trial by the so-called 'intercept witnesses'—witnesses discussing the interception's operations and specific intercepted communications.

Such witnesses can be divided into different categories: (i) the Prosecution's 'core' intercept witnesses—namely, two veteran LRA signallers and the two primary government interceptors;[66] (ii) eight witnesses involved in the ISO operation, including superiors and supervisors that were not personally tasked with the actual interception of communications;[67] (iii) five witnesses involved in the UPDF operation, including staff trained to monitor radio communications and supervisors of these persons;[68] (iv) three witnesses involved in the police operations as members of the Ugandan police;[69] (v) two witnesses who were former LRA soldiers with knowledge about signalling (these last were however considered as 'ordinary' witnesses instead of 'intercept witnesses' by the Chamber[70]), for a total of 22 witnesses. In addition, a member of the Situation Analysis Section within the Office of the Prosecutor discussed a report which included an analysis of the evidence collected in relation to the intercepted material, how the collection took place and how it was registered by the Prosecution.[71] Of these, only 9 testified live before the Court;[72] in the other cases, prior recorded statements were introduced pursuant to Rule 68(2)(b) of the Statute.

The general procedure to which the witnesses who testified live on intercepted communications were subjected can be illustrated by identifying two moments: one prior to testifying and one during the witness's in-court testimony. Before testifying, the Prosecution played the recording to each witness

63 *Ongwen* Trial Judgment, *supra* note 1, paras 237, 239, 241–244, 246.
64 *Ibid.*, para. 640.
65 *Ibid.*, para. 559.
66 *Ibid.*, paras 555–563.
67 *Ibid.*, paras 567–575.
68 *Ibid.*, paras 576–581, 619.
69 *Ibid.*, paras 582–585.
70 *Ibid.*, paras 388, 549, 566.
71 *Ibid.*, para. 589.
72 The four 'core witnesses', the two former LRA soldiers, the member of the Situation Analysis Section and two other witnesses.

independently and provided the witness with a draft transcript previously prepared by the Prosecution. When requested by the Prosecution, the witness was supposed to identify the speakers. The witness could also make corrections to the transcript, if needed. During the in-court testimony, the Prosecution played again the recording to the witness. The witness was requested to have a 'summary' of the recording. Only after was the witness given the transcript they previously annotated to discuss certain lines or annotations. The witness was then asked to confirm in court whether the recording played matched the transcript. A similar in-court procedure was also at times used when the Defence played recordings to witnesses.[73]

Witnesses were generally played the 'enhanced' audio version of the recordings. The Prosecution selected certain audio recordings for 'enhancement'. The process was aimed to 'enhance the quality of the original audio material to enable members of the court to comprehend or interpret the material to the best possible standard without adding to or detracting from the content of the original'.[74] Two witnesses were primarily responsible for this and provided technical reports on the processes applied for each audio.[75] One was an audio forensic specialist who sells software for audio 'enhancement' and has experience in 'enhancing' audio for the purpose of criminal proceedings. The other one was a Prosecution forensic officer trained by the first expert to conduct the 'enhancement' with the mentioned software; the latter conducted the enhancement with the assistance of another colleague, also trained by the former.[76] They both testified live before the Court and provided a prior recorded statement.

To summarise, although all the intercept materials were considered as 'submitted', the Chamber could only focus on the limited evidence which could be reviewed in one of the working languages of the Court, in particular, on: (a) those audio recordings which had translated transcripts and whose content was further explained by witness' testimony;[77] (b) the logbooks, which 'formed an essential part of the Chamber's assessment of particular recordings' as they were considered 'contemporaneous written records' of the intercepted communications[78] (although they were in fact written afterwards and following an 'interpretative' work); (c) intercept witnesses' testimonies, specifically to

73 *Ongwen* Trial Judgment, *supra* note 1, paras 557, 566, 651.

74 *Ibid.*, para. 651 referring to P-0242 Statement, UGA-OTP-0261-0333-R01, at para. 17; P-0242: T-128, p. 12, line 2 and p. 13, line 2.

75 *Ibid.*, para. 655.

76 *Ibid.*, paras 586–588, 652.

77 *Ibid.*, paras 648, 650.

78 *Ibid.*, para. 658.

understand the content of the audio recordings and to identify the voices of speakers.[79] Little or no relevance was placed on the other intercepted evidence.

Intercepted evidence was extensively used by the Chamber in its judgment—it was systematically mentioned in the evidentiary discussion. Most notably, it has been relied on to establish: 'certain dynamics within the LRA at the relevant time',[80] including the LRA hierarchy and Ongwen's position and role therein;[81] how and when attacks and killings were reported to commanders;[82] LRA abductions (including those perpetrated by Ongwen);[83] the orders that have been given to direct violence against and kill civilians;[84] Ongwen's awareness of the risk of being individually criminal responsible for his actions as LRA commander;[85] and, finally, the attribution of attacks.[86]

3.2 *The Concerns Raised by Intercepted Evidence at the ICC*

Several are the issues that intercepted evidence can raise at the ICC. Starting from the interception process, the concerns can be divided into the following categories: (1) *who* intercepted the communications; (2) *how* communications were intercepted; (3) *why* communications were intercepted; and (4) *what* is the product of the intercept operations.

Regarding the *who*, contemporaneous intercepted evidence is expected to be collected at the national level. In *Ongwen*, in particular, it was created and provided to the Prosecution by a party of the conflict, that—as underlined by the Defence—had an interest in the outcome of the case.[87] Although this problem is difficult to circumvent as it is often the case that evidence is collected by actors that are not external to the conflict, the risk that this affects the reliability of the evidence must be taken into account when assessing intercepted evidence.

Moving to the *how*, many are the factors that could impact the reliability of the interception process. These can be divided into three categories, namely those revolving around: (a) the technical equipment used; (b) the

79 *Ibid.*, para. 650.
80 *Ibid.*, para. 853.
81 *Ibid.*, *e.g.*, paras 858, 884, 1047, 1071, 1075, 1079, 1855.
82 *Ibid.*, paras 872, 1167, 1379, 1616, 1846.
83 *Ibid.*, paras 895, 1558, 2103–08, 2331.
84 *Ibid.*, paras 1107, 1118, 1131, 1134, 1862.
85 *Ibid.*, para. 2629.
86 *Ibid.*, paras 1618–1638, 1857, 1871, 2001–2005.
87 ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15, Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020', 13 March 2020 (*Ongwen* Defence Closing Brief), para. 244.

environmental and atmospheric conditions at the time of the interception; and (c) the training of the intercepting personnel. In the case under discussion, the Defence underlined that interceptions were made with different and rudimentary equipment in often adverse conditions. As a result, the quality of the communications intercepted was low and voices and messages may have been distorted.[88] In addition, when writing the logbooks in plain English, interceptors carried out an 'interpretative' and translation work that most probably would have needed specific training, knowledge and experience (or even independent experts). As emphasised by the Defence, it is impossible to verify 'whether the code-breakers accurately interpreted the proverbs and broke the codes as only the end product is available to the Trial Chamber'.[89]

The *why* communications were intercepted can also raise concerns as it reflects on *how* communications were intercepted. In *Ongwen*, most notably, interceptions were made not for prosecution, but for military reasons, hence without fair-trial guarantees and a professional forensic process—an issue which the Defence underlined.[90] As a consequence, there could be also possible intrinsic bias that may not reflect exculpatory elements.

Finally, *what* results from the interception process and is submitted at trial can be cause for concerns for multiple reasons, in particular, related to the extent and representativity of the material. The intercepted evidence can in fact be incomplete, with the consequence that important information that could be relevant for the interpretation of other items of evidence may be lacking. But it can also be too voluminous to be effectively reviewed by the parties and the judges and, possibly, irrelevant in most of its parts—which could, one the one hand, affect this 'reviewability' and, on the other, contain personal information impacting on the rights of the defendant or third persons. In *Ongwen*, the Defence argued that most of the intercept material was irrelevant[91] and that there were significant discontinuities in the tapes.[92]

Moving to the stages following the interception, it is evident that record-keeping and the chain of custody represent fundamental steps. Therefore, it is of the utmost importance that they are carried out in the most accurate manner possible to ensure the reliability of the documentary evidence and

88 *Ibid.*, paras 258–260.

89 ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15, Defence Response to "Prosecution's formal submission of intercepted evidence via the 'bar table'" (ICC-02/04-01/15–580), 21 November 2016 (*Ongwen* Defence Response on intercepted evidence's submission), paras 30–32.

90 *Ongwen* Defence Closing Brief, *supra* note 87, para. 257.

91 *Ibid.*, paras 232–233.

92 *Ibid.*, paras 248, 250–251.

the correct interpretation of its content. This holds true for both the storing of the originals and their labelling. When originals go missing or the chain of custody raises doubts, the reliability of intercepted evidence is undermined. In the *Ongwen* case, the Defence pointed out that record-keeping was generally far from being meticulous, for example, labels fell off, records were damaged by damp, and there were indications that the recordings presented 'seeming intentional damage' and had been tampered with.[93] It lamented, moreover, problems concerning the chain of custody—it described this as 'murky' and showing 'systematic failures' in the system.[94] It stated that many recordings were copies[95] and that the Prosecutor did not authenticate the recordings and/or provide evidence of their authenticity.[96] Finally, it argued that the material provided to the Prosecutor was the result of an 'intentional or unintentional selection' by the Ugandan governmental authorities.[97] It is to be underlined, in addition, that the police did not even record the audio on tapes and they destroyed shorthand notes.[98]

The process of 'enhancement' of the audio recordings also raises doubts and concerns, which can be divided into three categories: (a) the methodology used for the 'enhancement'; (b) the training and experience of who carried out the process; and (c) the effects of the 'enhancement' on the original audio recordings. Concerning the first issue, it should be emphasised that the methodology employed for 'enhancement' should be carefully detailed and disclosed to all the parties and the judges so that other experts may be appointed—when deemed necessary—to double-check it. Notably, the Defence underlined that it was able to scrutinise the report on the 'enhancement' methodology only after it requested the Prosecution to disclose such documentation. It identified several issues impacting the integrity of the process but it was prejudiced by the limited time available to do so.[99]

The training and experience of who carried out the process should not only be adequate but also solid. In *Ongwen*, the Defence argued that the Prosecution staff who enhanced the recordings lacked the knowledge, training, experience and skills to avoid altering the recordings.[100] Moreover, as Acholi has a tonal element and none of the staff involved in the 'enhancement' knew that

93 *Ibid.*, paras 243–249, 252–255, 262.
94 *Ibid.*, paras 238–239.
95 *Ibid.*, para. 238.
96 *Ibid.*, para. 225.
97 *Ibid.*, paras 248, 250–251.
98 *Ongwen* Trial Judgment, *supra* note 1, paras 630–631.
99 *Ongwen* Defence Closing Brief, *supra* note 87, para. 277.
100 *Ibid.,* paras 264–268.

language, it was admitted by the experts that, if the content was changed, they would have not known.[101]

Lastly, the impact of the 'enhancement' on the original recording should be carefully assessed. The Defence argued that the 'enhancement' could have impacted upon the integrity of the recordings[102] and the character of the voices therein (with consequences for the attribution of voices).[103] Moreover, it may have inadvertently removed probative content and information that could provide context, such as the sound of gun-shots.[104] As a result, the 'enhancement' could have 'further contributed to the unreliability of the evidence'.[105]

The last stage that needs to be carefully considered for the purpose of the reliability of intercepted evidence is how such evidence is presented at trial. First, all the intercept material should be made available to all the parties and the judges. This entails that material that is originally in a non-working language of the Court should be translated by experts and made accessible. Secondly, where possible, it should be good practice to present the material through reliable witnesses that can testify to its creation and/or its content. Witnesses should thus have been involved in the interception process or be otherwise able to understand the content of the intercepted evidence and/or be able to attribute voices. Ideally, more witnesses should testify on the same item of evidence. Hearing witnesses discussing intercept materials is not enough when such materials are not readily accessible to all the parties and the judges.

The Ongwen's Defence argued that the Prosecution failed to provide translations and transcriptions for most of the recordings and that 'selecting a small part of the corpus of recordings while a huge body of unintelligible and indecipherable materials exists de-contextualises the material and is cherry picking.'[106] The fact that both the Defence and the Trial Chamber had *de facto* access only to a limited fraction of the submitted intercept materials raise serious problems related to the degree of comprehension and understanding that the Defence and judges could have had of the intercepted materials—this is 'not fair to the Accused'.[107] The Defence also argued against the reliability and credibility of two of the intercept witnesses: it considered them biased, having an interested role in the case and one in particular also showed animosity

101 *Ibid.*, para. 271.
102 *Ibid.*, paras 269–271.
103 *Ibid.*, paras 272–274.
104 *Ibid.*, paras 275–276.
105 *Ibid.,* para. 225.
106 *Ibid.*, paras 225, 293, 295.
107 *Ibid.*, para. 233.

towards the Defence and the defendant.[108] It underlined, in addition, the practical difficulties related to the attribution of voices: witnesses were asked to identify the voices of individuals they had never (personally) met nor heard in potentially 10–15 years, and they may have been prone to suggestion. Also, the rudimentary equipment used for the interception and the 'enhancement' could have changed the voices.[109]

When the concerns that documentary evidence raises are so numerous and substantial, it would be opportune to rule on them before the trial ends. However, the Chamber concluded that such objections were 'primarily related to the relevance and probative value of the evidence concerned' (which are, actually, to be analysed also for the purpose of the evidence's admission) and that it thus saw 'no reason for exceptionally considering these objections' before the judgment. Hence, it considered the evidence as submitted.[110] The Ongwen's Defence noted that such a lack of ruling 'undermined the fairness of the proceedings'[111]—as a result, in fact, the evidentiary record was 'overcrowded' with 'prejudicial items' and no safeguards were in place to ensure 'the quality of the evidentiary process'.[112]

In *Ongwen*, the Trial Chamber addressed most, if not all, of the issues raised by the Defence. Although it is difficult for an external viewer to assess the merit of the majority of the issues raised by the Defence (for example, that the recordings have been tampered with), one could, however, criticise the approach taken by the Trial Chamber on at least two levels. First and foremost, the intercepted materials submitted by the Prosecution were extremely 'voluminous'[113] and hardly intelligible not only for the Defence (itself serious) but also for the Trial Chamber because of how the Prosecution handled, submitted and presented this same evidence at trial. As admitted by the Trial Chamber, what the Chamber was able to discern from the original recordings was 'only the general impression that all intercepts concern men speaking in a non-working language over the radio'[114]—judges themselves ended up being very much 'removed' from the original evidence and its content.

As a consequence, the entrance of such items of evidence into the trial had an 'overwhelming effect' on the Trial Chamber and the Defence, which both

108 *Ibid.*, paras 225, 279–291.
109 *Ibid.*, paras 296–298.
110 *Prosecutor* v. *Ongwen*, Trial Chamber, Decision on Prosecution Request to Submit Interception Related Evidence, *supra* note 34, paras 22–26.
111 *Ongwen* Defence Closing Brief, *supra* note 87, para. 97.
112 *Ibid.*, para. 101.
113 *Ongwen* Trial Judgment, *supra* note 21, para. 614.
114 *Ibid.*, para. 650.

had to deal with multiple pieces of evidence that were translated (by non-experts) in a cherry-picked fashion and that involved issues of which assessment would have required specific technical competences that are often missing in defence teams—for example, independent experts to check whether the enhancement process distorted voices or contents and verify that the recordings are original and intact.

The Chamber stated that the material before it which could be reviewed in a working language of the Court in itself 'provide[d] sufficient context for the Chamber's analysis of this material', and 'even more so in combination with an abundance of witness evidence which confirm[ed] the veracity of the interception procedures'.[115] However, this does not mean, first, that it was not important to make accessible to the Chamber all the relevant material (and such assessment of the relevance could have hardly be done by the Prosecution alone); secondly, that the materials available to the Chamber in a working language of the Court were, more often than not, logbooks, which cannot be considered as reliable as the original recordings. No steps were carried out to remedy this.

As mentioned, the Prosecution only had access to the entire volume of evidence and it selected which ones were to be transcribed, translated, 'enhanced' and brought to the attention of the Court. To expect the Defence to be able to actually check on this 'cherry-picking' procedure is unreasonable with the limited resources it has when compared to those of the Office of the Prosecutor. Knowing the entire *corpus* of evidence and possessing the technical ability necessary to actually understand and assess it are fundamental, on the one hand, for the defence to be able to challenge the evidence; on the other hand, for the chamber to correctly assess the admissibility, relevance and weight of the evidence.

Secondly, the Chamber stated on several occasions that the arguments of the Defence were 'without clear evidentiary basis'. This happened, for example, with reference to the argument that the 'enhancement' may have impacted the integrity of the audio recordings.[116] The fact that many of the issues raised by the Defence in *Ongwen* were dismissed by the Trial Chamber for a lack of evidentiary basis (rather than, for example, for the unreasonableness of the issue) may point to the fact that the Defence had difficulties in challenging such type of evidence because of its volume and the technical, human and financial resources that were needed for such a purpose.

115 *Ibid.*, para. 643.
116 *Ibid.*, para. 653.

The fact that the Trial Chamber adopted the 'submission' model when approaching intercepted evidence—notwithstanding the high volume of items it comprised, the reliability issues it raised and the risks such model poses when used in certain cases—exacerbated the situation. As underlined by the Defence itself, 'there [were] over 4200 items formally submitted into evidence. The combination of lack of notice in charges and no evidentiary rulings put an unfair burden on the Defence. As a result, the Defence was required to work on the assumption that all the items submitted into evidence by the Prosecution may be used against Mr Ongwen.'[117]

4 Conclusions and Implications

As we have seen, intercepted communications in *Ongwen* gave rise to a number of issues. Such issues can well surface when other types of similar intercepted evidence or even other forms of documentary evidence are concerned. The *Ongwen* case should provide some lessons: no party should be left in doubt as to what concerns the item of documentary evidence that has been submitted at trial—the right to a fair trial and the principle of the equality of arms are seriously violated when this happens.

This holds true in particular in the context of the ICC, where the defence is inherently in a marked position of disadvantage when compared to the Prosecution, which can, in contrast, count on resources and technical support within its Office. Likewise, no trial chamber should be put in the position of not knowing every single piece of evidence submitted. Such knowledge should be *actual* and *effective* for both parties and the trial chamber, meaning that, if evidence requires technical competences to be analysed, they should all be put in the position to assess and, where necessary, challenge them.

Utilising the 'submission' model at least in those cases where serious concerns or doubts on the reliability of (documentary) evidence have emerged seems also necessary.[118] Different scenarios can in fact 'justify a threshold determination at the submission stage',[119] for example, when evidence is not translated or intelligible. If the Chamber had ruled those evidence inadmissible, the Prosecution might have been encouraged to make such evidence more intelligible for everyone.

117 *Ongwen* Defence Closing Brief, *supra* note 87, para. 98.
118 Guariglia, *supra* note 31, p. 337.
119 *Ibid.*, p. 334.

Other scenarios requiring such a 'threshold determination' have been identified by the scholarship. First, when the principles of orality and immediacy (according to which evidence must be produced orally before the trial judges) have not been respected.[120] Contemporaneous documentary evidence is by definition formed outside the trial, but it cannot be as 'distant' from the trial as to be unintelligible to the judicial actors. Secondly, when the reliability of important pieces of evidence is put into question. The scholarship makes the example of shortcomings identified in the collection and chain of custody of DNA evidence collected by national authorities following their own procedures. The similarities with intercepted evidence are evident. In such cases, 'it seems wiser to fully explore the circumstances of collection and custody… and make a determination on the reliability—and therefore admissibility'.[121]

Ruling on the admissibility of evidence 'on a rolling basis and before the close of the evidentiary stage of the proceedings'[122] under the 'threat' of non-admission may encourage the tendering party to be more transparent in the disclosing of evidence and would prompt the trial chamber to proceed to an assessment of relevance and admissibility of evidence more strictly on an 'item-by-item basis'[123]—as required by the jurisprudence itself. This would even foster a 'culture of admission' that does not tend to merge all considerations on relevance, admissibility, probative value and the weight of evidence together. Although a separate ruling on the relevance and probative value of individual items of documentary evidence is 'discretionary in nature', the jurisprudence underlined it may be 'justified in the specific circumstances of an individual case'[124]—and it would be in the circumstances above-described.

Contemporaneous documentary evidence in general is a type of evidence with a twofold character. On the one hand, it can be considered more reliable than witnesses as the memory of the events it documents does not fade over time. For this reason, it is often considered inherently reliable—unless the circumstances of its creation suggest otherwise, it is generally not created to deceive the court since it was created at the time at which the crimes were allegedly committed.[125] On the other hand, if its authenticity, integrity,

120 *Ibid.*, p. 335.

121 *Ibid.*, p. 336.

122 Dissenting opinion of Judge Henderson, *supra* note 37, para. 27.

123 *Bemba* Appeals Judgment on Evidence, *supra* note 27, para. 53.

124 *Ongwen* Trial Judgment, *supra* note 1, para. 236.

125 *E.g.*, *Lubanga* Decision on Evidence Admissibility, *supra* note 33, paras 56–57 underlined that the notebooks listing alleged child soldiers and the logbook recording their movement were made with no 'motive to fabricate or distort the records' and 'errors associated with failing memories are not apparently great'.

originality, reliability is not guaranteed, it can seriously affect the accused's fair trial right. It is no novelty in fact that documents can not only be falsified or intentionally manipulated to obtain a certain result, but they can also be *unintentionally incorrect* because, for example, they have been created by someone who lacked the necessary knowledge or training. As underlined by the Defence in *Ongwen*, '[s]everal technical and/or human factors could [introduce] major gaps and errors into the intercept collection process'.[126] However, documentary evidence cannot be cross-examined and its 'air of authority … may allow [it] to be given more weight than [it] may deserve'. For this reason, it 'must always be treated with significant caution and circumspection'.[127]

Intercepted communications are no exception; they have peculiar weaknesses and pose specific problems in terms of reliability that need to be carefully addressed by judges when deciding on their admissibility and weight. For this reason, intercepted communications should be dealt with extreme attention and prudence, and should be carefully considered in the overall evidentiary context. All issues related to their relevance, admissibility, probative value and weight should not be treated superficially or underestimated as their impact on the fairness of the trial can be substantial.

As with intercepted communications, many other far more technical and technologically advanced evidence poses similar problems. Concerns regarding how the ICC is handling and will handle in future new types of evidence are justified—the Court may not be ready for it.

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126 *Ongwen* Defence Response on intercepted evidence's submission, *supra* note 89, paras 18–22.

127 Nerenberg and Timmermann, *supra* note 8, p. 498.