THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(IN THE INTERNATIONAL CRIMES DIVISION)

COURT CASE: HCT – 00 – ICD – CR – SC – NO. 002 OF 2010

(Arising from Criminal Case No. Buganda Road Court/AA/009/2010)

UGANDA

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=== PROSECUTION

VERSUS

THOMAS KWOYELO ALIAS LATONI

========== ACCUSED

BEFORE: HON. LADY JUSTICE SUSAN OKALANY

RULING ON THE PRELIMINARY OBJECTION OF THE DEFENCE

BACKGROUND

1. Briefly, from the summary of the case filed by the prosecution, Mr. Kwoyelo Thomas alias Latoni (hereinafter referred to as the Accused), is stated to have been a senior commander/officer in the Lord's Resistance Army (LRA) a rebel group under the overall command of Joseph Kony, which was engaged in a protracted armed conflict in Northern Uganda. The said conflict with the army of Uganda – the Uganda People's Defence Forces, (hereinafter referred to as UPDF), was not of an international character. It is further stated that the armed hostilities were executed with an intensity far higher than internal disturbances such as riots, or isolated and sporadic acts of violence, and were constant, regular, and protracted.
2. It is claimed that from 1987 to 2005, the overall objectives of the LRA were to overthrow the government of Uganda through armed rebellion and to procure resources for the pursuit of their criminal activities. To that end, the LRA adopted several tactics, implemented throughout their organization; some of their tactics included launching attacks on the civilian population which

included those in internally displaced persons camps (IDP camps) as well as abducting civilians. It is also claimed that the male abductees were conscripted and used as soldiers, while female abductees mostly performed the duties of domestic servants, sex slaves, and forced exclusive conjugal partners.

3. It is alleged that the attacks that were carried out on the civilian population in the Northern part of Uganda from at least 1992 to 2005, were widespread or systematic and that the Accused was part of and connected to the widespread and systematic attack. The attacks were carried out by the LRA which was well-structured and armed during the protracted armed violence.
4. It is further alleged that the Accused's acts took place in the context of and were connected with this armed conflict. The Accused was a long-term member of the LRA who held several command positions due to his participation in numerous LRA operations. Additionally, it is alleged that the Accused took an active part in those hostilities, well aware of the factual circumstances that established the existence of the internal armed conflict.
5. According to the DPP, the LRA committed serious criminal offences recognised as forming part of international law at the time and failed to comply with many standards of war, particularly in selecting its targets and choosing the means and methods of attack. It is stated that in many instances, the LRA launched direct attacks on civilian objects, killing an unspecified number of civilians, destroying civilian property, not being military objects, and sexually assaulting women and girls. Such attacks were widespread and systemic; the attacks did not only breach Article 3, Common to the Geneva Convention Act, and Additional Protocol II of the Geneva Conventions Act, but they also breached established rules of Customary International Law (CIL).
6. On the 14th day of March 2017, this Court granted the prosecution’s application to tender an amended indictment containing 93 charges, which the Deputy Registrar of this court read out to the Accused. In summary, the said amended indictment against the Accused contains charges, based on international criminal law, with domestic charges in the alternative. The international criminal charges consist of crimes against humanity of murder (Counts 1, 15, 20, 50, 74), enslavement (Count 81), rape (Counts 84, 89), torture (Counts

85, 90), imprisonment (Count 31), and other inhumane acts (Counts 42, 47, 71).

7. The indictment further includes international criminal charges that are serious violations of Common Article 3, a treaty provision of the Geneva Conventions, applicable to internal armed conflict. The Common Article 3 charges in the indictment include murder (Counts 2, 16, 21, 51, 75), hostage taking (Counts 4, 32), cruel treatment (Counts 43, 48, 72), outrages upon person dignity (Counts 44, 49, 73, 82, 86, 91), violence to life and person as cruel treatment and torture (Counts 87, 92), and pillage (Counts 13 & 70).
8. The alternative charges under the Penal Code Act (PCA) are murder (Counts 3, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64,65, 66, 67, 68, 69, 76, 77, 78, 79, & 80), kidnapping with intent to murder (Counts 5, 6, 7, 8, 9, 10, 11, 12, 33, 34, 35, 36, 37, 38, 39, 40 & 41), aggravated robbery (Count 14), attempted murder (Counts 45 and 46), procuration of unlawful carnal knowledge (Count 83) and rape (Counts 88 & 93).

REPRESENTATION

9. The state was represented by Mr Charles Richard Kaamuli (Principal State Attorney), who was the lead prosecutor, Mr George William Byansi (Senior Principal State Attorney), and Ms Akello Florence Owinji (Principal State Attorney), while the Accused was represented by Mr Caleb Alaka (lead counsel) together with Mr Evans Ochieng on a private brief. Mr. Charles Dalton Opwonya and Mr. Boris Anyuru were counsel for the Accused on state brief. Ms Jane Magdalene Amooti and Mr Kilama Komakech were the victims' counsel.

THE PRELIMINARY OBJECTIONS OF THE DEFENCE

10. Upon the conclusion of the reading of charges by the learned Deputy Registrar of the International Criminal Division (ICD), the defence, led by Counsel Caleb Alaka, informed this Court that they had momentous objections against the indictment for being defective, illegal, unconstitutional and duplex. He categorized the charges brought against the Accused under CIL into two. The first category is crimes against humanity, which are: murder in counts 1, 15, 20, 50, and 74; imprisonment under count 31; enslavement in count 81; rape in counts 84 and

89, torture in counts 85 and 90 and other inhuman acts as a crime against humanity in counts 42, 47 and 71 and in the second category, involving violations of Article 3, common to the Geneva Conventions, which include murder in counts 2, 51 & 75, hostage-taking in counts 4 and 32, pillaging in courts 13 and 17, cruel treatment in counts 43, 48 and 72, outrages upon personal dignity in counts 44, 49, 73, 82, 86 and 91 and violence to life and person in particular cruel treatment and torture in counts 87 and 92 of the amended indictment.

11. Mr. Alaka submitted that the principle of legality means that an offence should be defined by law and the penalty thereof, should also be prescribed by law as stipulated in Article 28, clauses 7 and 12 of the Constitution of the Republic of Uganda, which also provides for the non-derogable right to a fair hearing under Article 44(c). Mr. Alaka argued that these charges contravene the principle of legality and the right to a fair hearing as stipulated in those provisions of the Constitution of Uganda 1995. He submitted further that the impugned offences have no clear definitions, elements, or penalties prescribed under CIL. If any penalties exist under international law, they are disqualified by Article 28 clauses (7) & (12) of the Constitution.

12. Counsel Alaka explained that CIL stems from international obligations that result from established state practice as opposed to obligations arising from formal written international treaties. That CIL is established by showing the existence of a durable state practice and opinio juris. He cited Article 38(1)(b) of the Statute of the International Court of Justice, which provides for CIL as one of its sources of law applicable and contended that while CIL results from a general and consistent practice of states, which they follow from a sense of legal obligations, CIL is not applicable in the Ugandan criminal justice system, as a basis for framing charges, because the framers of Article 28 clauses (7) and (12) of the Constitution intended that there should be in existence, explicit offences, which are defined by law and penalties thereof, also prescribed in the penal laws.

13. It was further submitted for the Accused, that the jurisdiction of the ICD enshrined under direction 6 of Legal Notice No. 10 of 2011 – The High Court (International Crimes Division) Practice Direction 2011, provides for such jurisdiction, without prejudice to Article 139 of the Constitution. The ICD is empowered to try any offence relating to genocide, crimes

against humanity, war crimes, terrorism, human trafficking, piracy, and any other international crimes as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act Cap 363, the International Criminal Court Act No. 11 of 2010 or under any other penal enactment. He declared that there was no penal enactment in our jurisdiction providing for charges under CIL and that the provisions of direction 6 of Legal Notice No. 10 of 2011 are in conformity with Article 28 Clauses 7 and 12 of the 1995 Constitution of Uganda. According to counsel, any crime that is not provided for under the penal laws of Uganda is illegal and unconstitutional and this court has no jurisdiction over the CIL charges preferred in the amended indictment.

14. Mr. Alaka submitted that Uganda's foreign policy objectives stipulated in the Constitution, demand respect for international law and treaty obligations but make no reference to CIL. Article 287 of the Constitution mentions international agreements, treaties, and conventions but not CIL. Mr. Alaka observed that the Constitution, which is the supreme law of Uganda, has binding force on all authorities and persons throughout Uganda as per Article 2 thereof. That the said Article requires that if any other law or custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail and that other law or custom shall to the extent of its inconsistency, be void.

15. He declared that the act of the DPP in preferring charges of crimes against humanity against the Accused person, is inconsistent with and is in contravention of Articles 2 (1) & (2), 28 (7) & (12), and 44 (c) of the Constitution of Uganda. Counsel thus submitted that the charges against the Accused of murder, imprisonment, other inhuman, enslavement, rape and torture as crimes against humanity under customary international law in counts 1, 15, 20, 31, 42, 47, 50, 71, 74, 81, 84, 85, 89 and 90 are inconsistent with and in contravention of Articles 2(1) and (2) of the Constitution, Article 28 Clauses 7 & 12 as well as Article 44(c) of the constitution.

16. He submitted similarly in respect of the second category of charges brought by the prosecution in the amended indictment, which include murder as a violation of Article 3(1)(a) common to the Geneva Conventions, in counts 2, 51 & 75, hostage taking as a violation of Article 3(1)(b) common to the Geneva Conventions in counts 4 and 32, pillaging as a violation of Article 3 common to the Geneva Conventions in counts 13 and 17, cruel treatment as

a violation of Article 3 (1)(a) common to the Geneva Conventions in counts 43, 48 and 72, outrages upon personal dignity as a violation of Article 3(1)(c) common to the Geneva Conventions in counts 44, 49, 73, 82, 86 and 91 and violence to life and person in particular cruel treatment and torture as a violation of Article 3(1)(a) common to the Geneva Conventions, in counts 87 and 92 of the amended indictment.

17. Mr. Alaka contended that there cannot be a violation of Common Article 3, under CIL, and that if that were the case, there would be no certainty as is required for preferring criminal offences. He also stated that criminal offences must have certainty as was held in the case of ***Onyango Obbo and Andrew Mwenda Vs Attorney General Constitutional Appeal No. 2 of 2002 on page 3***. He further contended that Article 3, common to the Geneva Conventions, simply provides guidelines for parties involved in a non-international armed conflict and binds the high contracting parties to a conflict. It does not define or create criminal offences, nor does it prescribe penalties or provide for the elements of any offences. Therefore, the charges against the Accused of murder, hostage taking, pillaging, cruel treatment, outrages, and violence to life and person as violations of Article 3 (1a), Article 3 (1b), and Article 3 (1c) common to the Geneva Conventions, under customary international law are inconsistent with or in contravention of Articles 21(2), 28(7), 28(12) and 44 of the Constitution of the Republic of Uganda and this means that the Accused is being charged with offences that did not constitute criminal offences at the time they allegedly took place.

18. Mr Alaka opined that Article 28 (12) of the Constitution does not envisage that a person can be charged under CIL or Article 3, common to the Geneva Conventions since it only provides for minimum standards. That the Accused is entitled to know the charges against him, the ingredients of offences, and the penalties upon conviction. In this case, the Accused person cannot know the charges against him since the charges are based on customs that have not been established in Uganda.

19. Lastly, he submitted that the purpose of a pre-trial hearing is to ensure that there will be fairness and expeditiousness in the proceedings at the main trial, as provided for under Rule 6(2)(h) of the Judicature (High Court International Crimes Division) Rules 2016. If the Court finds that the charges against the Accused are

defective, then this case would have nothing to do with the ICD, because there would only be ordinary criminal offences left under the Penal Code Act, which should be tried by the Criminal Division of the High Court. He invited this Court to strike out the amended indictment and release the Accused.

20. Mr. Evans Ochieng, in his submissions, concurred with the submissions of Mr. Caleb Alaka, referring the Court to the general allegations in paragraph 2 of the indictment, where it is stated that the offences charged were committed within the context of an internal armed conflict. He asserted that the general allegations establish clearly, that international law does not apply in this case. Counsel argued that charges based on CIL would only apply between contracting states and not between a state and individuals within those states. Since the conflict in question is classified as a non-international armed conflict, it means that the said conflict is a local one, in which domestic laws provide for offences and penalties, particularly, the Penal Code Act.

21. Counsel complained about what he considered to be the wrong method of preferring charges, where a serious offence is preferred in an alternative count, contrary to the established position of charging a lesser offence and not another capital one in the alternative. By preferring charges of murder under the Penal Code Act as alternative charges to crimes against humanity brought under CIL, the prosecution had acted contrary to the law of drafting of charges and thus, the indictment is fatally and incurably defective.

22. He also questioned the intention of the prosecution in preferring several counts of murder based on one act, such as charging the Accused with murder as a crime against humanity and then murder as a violation of Common Article 3 as well as murder as an alternative charge under the Penal Code Act in respect of the same victim. He wondered if the trial Court would convict the Accused person on all three counts, arising from the same act. He concluded that the said method of preferring charges was intended to embarrass the Accused and prayed that the indictment be found defective and be struck out.

23. Mr. Charles Dalton Opwonya, lead counsel for the Accused on State Brief, submitted inter alia that the purpose of Pre-Trial proceedings is to resolve all issues that arise before the trial phase begins, particularly, to supervise how the Office of the DPP carries out its investigatory and prosecutorial mandate, to

guarantee the rights of suspects, victims and witnesses during these phases, and to ensure that there is integrity of the proceedings. Following confirmation of the charges hearing, the Honourable Judge of the Pre-Trial Court may:

a) Decline to confirm the charges, which decision does not prevent the prosecution from presenting a subsequent request for confirmation of the charges based on additional evidence;
b) Adjourn the hearing and request the prosecution to consider providing further evidence or conducting further investigations, or amending the charges, because the available evidence shows that a different crime was committed; or
c) Confirm the charges and commit the case for trial.

24. On the issue of duplicity, counsel asserted that a look at the charges shows that there is duplicity in almost all the charges. The rule against duplicity ordinarily prohibits a prosecutor from charging in one count of an indictment or complaint two or more offences provided by the law. He stated that it is plain enough that the basis for the rule on duplicity is fairness to an Accused in the sense of his or her being informed, at the very outset, about what the specific offence, which is being alleged is and if the offence is established, to have certainty of what charge he or she has been found guilty. He referred to the following quotation from the judgment of Evatt, J. in ***Johnson v. Miller, [1937] HCA 77; 59 CLR 467; 11 ALJR 344; [1938] ALR 104***:

> *"It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularise the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged. Indeed the matter arises at an even earlier stage. The defendant cannot plead unless he knows what is the precise charge being preferred against him. If he so chooses, a defendant has a right to plead*

guilty, and therefore to know what it is he is being called upon to answer."

25. Additionally, he cited the decision of the Special Court for Sierra Leone (SCSL), in the case of ***Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-A March 3, 2008***, where the Appeals Chamber of the said Court, while affirming the Trial Chamber's conviction of Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, who were senior members of the Armed Forces Revolutionary Council (AFRC) partially granted the prosecutor's appeal against the Trial Chamber's dismissal of Count 7 of the indictment and reiterated the rule against duplicity, stating that it: "applies to international criminal tribunals, such that the charging of two separate offences in a single count renders the count defective." According to Mr Opwonya, the "alternative" charges and other charges against the Accused where there are two or more separate offences on the same act renders the indictment defective for duplicity, and the defective counts should, therefore, all be struck out.

26. In respect of retrospectivity, Counsel submitted that on 10th December 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, which can be simplified as follows:

I. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial, at which he has had all the guarantees necessary for his defence and

II. No one shall be held guilty of any penal offence on account of any act or omission that did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one applicable when the penal offence was committed.

27. Counsel recounted the history surrounding the establishment of the ICD as a special division of the High Court of Uganda, which was founded in July 2008 as the War Crimes Division, by the Hon. Justice James Ogoola, Principal Judge of the High Court, as he then was, under Article 141 of the Constitution of the Republic of Uganda 1995. Under section 6 of The High Court (International Crimes Division) Practice Directions, Legal

Notice No. 10 of 2011, the said division was renamed the ICD to deal with those who have committed serious crimes, such as war crimes; crimes against humanity; genocide; terrorism; human trafficking; piracy and other international crimes. Counsel noted that the Rome Statute was domesticated as the International Criminal Court (ICC) Act No.11 of 2010 on 25th May 2010, and its date of commencement was 25th June 2010. The said Act allows Ugandan courts to try crimes against humanity, international crimes, and Genocide but bars retrospective operation of the law, and so does our Constitution and other laws, including Article 7 of the European Court of Human Rights (ECHR).

28. He submitted that the application of the ICC Act of 2010 retrospectively, is a violation of the law and is a very discriminatory act. He questioned the prosecution's failure to charge the suspects who suffocated the masses in train wagons in Mukura since those offences were also committed before the ICC Act came into effect.

29. Counsel appealed to this Court, not to confirm the charges in the amended indictment.

30. Mr. Boris Anyuru, counsel for the Accused on state brief concurred with the submissions of his co-counsel and also urged the court to strike out the charges on grounds of duplicity, highlighting counts 86 to 87, which both involve the same victim – LW.

PROSECUTION SUBMISSIONS IN REPLY TO THE PRELIMINARY OBJECTIONS

31. Prosecution Counsel made a jointly written reply to the defence submissions, the summary of which is as below. The accused was a senior commander/officer in the Lord's Resistance Army (hereinafter referred to as "LRA") a rebel group under the overall command of Joseph Kony. From 1987 to 2005, the LRA's overall objectives were to overthrow Uganda's government through armed rebellion and procure resources to pursue their criminal activities. That the LRA, in execution of their objectives, carried out widespread or systematic attacks against the civilian population in the northern part of Uganda from at least 1992 to 2005. This resulted in a non-international conflict between the LRA and the Uganda People's Defence Forces (UPDF) in northern Uganda. The LRA was well-structured and armed and carried out protracted

armed violence, rendering them fully able to plan and carry out prolonged military operations.

32. The prosecution stated that the acts of the Accused, giving rise to the indictment, took place in the context of and were connected with this armed conflict. The Accused took an active part in those hostilities while aware of the factual circumstances that established the existence of this non-international or internal armed conflict.

33. The LRA committed serious criminal offences recognised as forming part of international law at the time relevant to the charges. The indictment includes several counts based on international criminal law, with domestic charges in the alternative. The international criminal charges include the crimes against humanity of murder in counts 1, 15, 20, 50, 74, enslavement in count 81, rape in counts 84, 89, torture in counts 85, 90, imprisonment in counts 31, and other inhumane act in counts 42, 47, 71.

34. It was additionally submitted that the indictment includes international criminal charges that are serious violations of Common Article 3, a treaty provision of the Geneva Conventions applicable to internal armed conflict. It was stated that the Common Article 3 charges in the indictment include murder in counts 2, 16, 21, 51, and 75, hostage-taking in counts 4 and 32, cruel treatment in counts 48 and 72, outrages upon personal dignity in counts 44, 49, 73, 82, 86, 91, violence to life and person as cruel treatment and torture in counts 87, 92, and pillage in count 70. These crimes constitute serious violations of international law and are of utmost concern to the whole world.

35. Furthermore, they asserted that it is the primary responsibility of domestic courts to try such offences, while international tribunals, such as the ICC, are only supposed to play a complementary role, where domestic courts cannot try such offences. Under both treaty law and CIL, Uganda is bound to prosecute the Accused for international crimes, even in the absence of specific domestic legislation laying down those crimes. At the time of the conduct charged in the amended indictment, the international crimes thereof – crimes against humanity and serious violations of Common Article 3) were well-established bases for individual criminal liability both under treaty law and CIL, thereby providing the Accused with sufficient foreseeability and accessibility as required by both domestic and international

law. The charged offences were all crimes under CIL at the time of their commission and the ICD has the ability and duty to try them.

36. State Counsel additionally asserted that CIL is a body of law that has been applied by both international and domestic courts to prosecute serious crimes because it captures the seriousness of such crimes. The prosecution defined CIL as a branch of law that is created and sustained by the constant and uniform practice of states in circumstances that give rise to a legitimate expectation of similar conduct in the future. The prosecution relied on several authorities, including ***The American Law Institute's Restatement of the Law Third: The Foreign Relations Law of the United States,*** in which CIL is described as a source of international law, resulting from a general and consistent practice of states, followed by them from a sense of legal obligation; consisting of two elements: state practice and opinio juris. It was stated that CIL is recognised as a source of law under Article 38 of the ICJ Statute and that the UN Charter, in Article 93, determines that all UN member states are ipso facto, parties to the ICJ Statute; therefore, Uganda is bound by its obligations under international law.

37. Concerning the assertion of the defence that the CIL charges in the indictment violate the principle of legality, the prosecution replies that the prosecution of crimes under CIL does not violate the principle of legality since there is enough evidence to establish the foreseeability and accessibility tests regarding the Accused's conduct during the armed conflict in Northern Uganda from 1993-2005. It was stated that the principle of *nullem crimen sine lege*, which is enshrined in the Constitution of Uganda, is also found in several international and human rights instruments such as Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) (1966), Article 7(2) of the African Charter on Human and People's Rights (ACHPR), and Article 11 of the Universal Declaration of Human Rights (UDHR) 1948, and is to the effect that no one shall be held guilty of any offence on account of any act or omission, which did not constitute an offence under the law, at the time it was committed and no heavier penalty than the one that was applicable at the time the penal offence was committed, shall not be imposed.

38. It was therefore, the statement of State Counsel that all that is required is for this court to be satisfied that a certain act

or set of acts alleged are criminal and that the Accused is individually responsible under the relevant legal regime, applicable at the time he is alleged to have committed the acts and also, that the crime was sufficiently defined at the time of the acts for him to be put on notice of the penal consequences of his actions.

39. The prosecution submitted at length about how responsibility for criminal conduct has developed both under treaty law and under the jurisprudence of international tribunals. They referred to the standards of conduct of war provided for in treaties, including The Hague Conventions and Regulations of 1899 and 1907, which were recognised and confirmed after the Second World War, before the enactment of the Geneva Conventions. The Nuremberg International Military Tribunal (IMT) prosecuted international crimes such as crimes against humanity and war crimes. It was also submitted that significant case law was developed by the Nuremberg Tribunals in adjudication of crimes committed by individuals during the Second World War which gave birth to the Nuremberg Principles. Counsel cited the Judgment of the International Military Tribunal of Nuremberg (October 1, 1946), p. 468, p. 80 where it was held as follows, about the Hague Convention Land Warfare Regulations:

> *The rules of land warfare expressed in the convention undoubtedly represented an advance over existing International Law at the time of their adoption. The convention expressly stated that it was an attempt "to revise the general laws and customs of war," which it thus recognised to be then existing, but by 1939 these rules laid down in the convention were recognised by all civilized nations and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.*

40. It was asserted that the Nuremberg IMT Charter Article 6(b) criminalizes war crimes that are violations of the laws or customs of war and which include: murder, ill-treatment, or deportation to slave labour or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. The

Nuremberg principles provide that just because internal law does not impose a penalty for an act that constitutes a crime under international law does not relieve a person who committed such a crime from responsibility under international law.

41. The prosecution emphasised the fact that the jurisprudence of human rights bodies and the ad-hoc tribunals recognises the position that the application of unwritten laws is not inconsistent with the principle of legality as long as the offence (and the elements that make it up) existed as a matter of customary law (or general principles of international law) and were sufficiently accessible and foreseeable at the time. In 1950, the United Nations International Law Commission adopted several "Nuremberg Principles" that summarised the "principles of the law recognised" in the Charter and judgment of the IMT, including Principle II, which provides:

> *The fact that internal law does not impose a penalty for an act that constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.*

42. The prosecution submitted that the crimes alleged against the Accused in the amended indictment occurred from 1993 up to 2005, overlapping and post-dating the events in Yugoslavia and Rwanda, for which the International Criminal Tribunal for the Former Yugoslavia (ICTY)1992 and the International Criminal Tribunal for Rwanda (ICTR),1994 have developed jurisprudence. The ICTY and ICTR jurisprudence has been relied upon by subsequent tribunals such as the ICC, the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL) and in those tribunals, the principle of legality was not considered violated, since the legal instruments establishing those tribunals did so after the offences and were only acknowledging in writing what had already become established and accepted as crimes in unwritten (customary) law at the time of the commission of the offences. It was therefore argued that there is no ex post facto application of the law in preferring the disputed charges in the amended indictment against the Accused.

43. It was submitted that war crimes are governed by Common Article 3 of the Geneva Conventions Act, which is based on treaty law and accepted as CIL, thereby conforming to the principle of

legality. The jurisprudence regarding these war crimes was developed in case law of the IMT and Nuremberg Military Tribunals (NMT) and such jurisprudence first applied to the international armed conflict of the Second World War, while the ICTY and the ICTR tribunals are the source of jurisprudence on Common Article 3. The prosecution cited several cases, including ***Prosecutor v. Mrksic, Case No. IT-95-13/l-A, Judgement, 5 May 2009 para 70; Prosecutor v. Kunarac, Case No. IT-96-23&IT-96-23/l-A, Judgement, 12 June 2002, para. 68 and the International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), 27 June 1986, paras. 219 & 220*** support the position that Common Article 3 of the Geneva Conventions acquired the status of CIL before crimes in the indictment and is applicable in international and non-international armed conflicts.

44. Concerning the specificity and definitions of the war crimes brought by the prosecution, it was submitted in reply that various definitions of war crimes exist, including in the IMT Charter and the NMT Control Council Law No. 10. Furthermore, it was submitted that the ICTY has also declared that the *nullem crimen sine lege* principle does not require that an Accused knew the specific legal definition of each element of the crime he committed, neither does it require that an armed conflict is classified as international or non-international, see ***Prosecutor v. Kordic & Cerkez, No. IT-65-14/2-A***, ***Judgement (17 December 2004) at para. 311***.

45. The prosecution emphatically emphasised specific violations of Common Article 3 of the Geneva Conventions Act in their amended indictment. They firmly submitted that these offences are identical to those specified in 1945 by the NMT Control Council Law No. 10 and punished in NMT cases, as well as in ICTR and ICTY jurisprudence and some domestic courts. The highlighted violations include murder and violence to life and person, both of which are unequivocally prohibited under Common Article 3(1)(a) of the 1949 Geneva Conventions. Murder under Common Article 3(1)(a) of the 1949 Geneva Conventions is prohibited in the context of individuals not taking an active part in hostilities. They maintained that individuals have been convicted of murder under various international tribunals. The ICTY determined that the elements of murder as a crime against humanity and as a violation of the laws or customs of war were

the same. It defined murder as the death of the victim resulting from an act or omission by the accused, committed with the intent to kill or cause serious bodily harm with the reasonable knowledge that it would likely lead to death. ***Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 556; *Prosecutor v. Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 37; *Prosecutor v. Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 715; *Prosecutor v. Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at paras. 57-58.** As for the offence of violence to life and person under Common Article 3(1)(a) of the 1949 Geneva Conventions, the cases of ***Prosecutor v. Karemera*, No. ICTR-98-44-PT, *Decision on Count Seven of the Amended Indictment—Violence to Life, Health and Physical or Mental Well-Being of Persons* (5 August 2005), paras 5-10 and *Setako v. Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 257-262** were cited to demonstrate the application of "violence to life" as a serious violation of international law within the context of non-international armed conflicts.

46. The prosecution observed that in ***Karemera's case*** supra, the ICTR found that "violence to life" was part of customary international law as of 1994, and thus its application to the accused did not violate the principle of *nullem crimen sine lege* and in the ***Setako's case*** supra, the ICTR convicted a defendant for violence to life, health, and physical or mental well-being within the context of a non-international armed conflict, as a serious violation of Common Article 3 and Additional Protocol II. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have convicted individuals for cruel treatment as a violation of Common Article 3 of the Geneva Conventions.

47. Concerning cruel treatment as a Common Article 3 war crime, it was submitted that cruel treatment, as defined by the ICTY and ICTR, is an intentional act or omission that causes serious physical or mental suffering or injury, or constitutes a serious attack on human dignity. It falls short of the severe suffering required for torture. The decisions in the cases of ***Prosecutor v. Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 765; *See Celebici,***

Judgement (AC), para. 424. *See also Naletilic and Martinovic,* Judgement (TC), para. 246; *Blaskic,* Judgement (TC), para. 186; *Jelisic,* Judgement (TC), para. 41; *Celebici* Judgement (TC), para. 552; *Tadic,* Judgement (TC), paras. 723-726 were cited in support of that definition.

48. The prosecution discussed the prohibition of outrages upon personal dignity under Common Article 3(1) (c) and how the ICTY and ICTR have convicted defendants for the offence. **In *Prosecutor v. Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 67**. It was held: *"The determination of what constitutes a war crime is dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. The laws of war are not static, but by continual adaptation follow the needs of a changing world. There is no question that acts such as rape, torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to these Indictments."* Outrages upon personal dignity was described as "*any act or omission, which would be generally considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity.*" **See *Prosecutor v. Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 119-120, 163.**

49. Additionally, it was maintained that rape can be charged as an outrage against personal dignity in violation of Common Article 3. **See *Prosecutor v. Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 173; *Prosecutor v. Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 436.**

50. On taking of hostages in armed conflicts prohibited by Common Article 3(1)(b) of the Geneva Conventions which rule protects individuals not involved in the fighting, the prosecution submitted that hostage-taking is considered a war crime under international law including the Hostages Convention, a treaty that Uganda signed in 1980 and ratified without reservation in 2003, that requires states to punish hostage taking with appropriate penalties. Hostage-taking was defined as holding civilians to ensure the future good behaviour of their community as per ***W. List and Others*, NMT.** The prohibition of hostage-taking extends to both international and non-international conflicts and is recognised by various international tribunals and standards.

See ***ICC Statute, Article 8(2)(a)(viii) and (c)(iii); ICTY Statute, Article 2(h); ICTR Statute, Article 4(c); Statute of the Special Court for Sierra Leone, Article 3(c).***

51. The prosecution discussed the prohibition against pillage, also known as "plunder," asserting that it is a well-established rule of CIL, prohibited in international and non-international armed conflicts, and has been recognised in various international treaties and conventions. Pillage has been determined to be a war crime and has been punished in several cases by international tribunals such as the IMT Nuremberg, ICTY, ICTR, SCSL, and ICC. See ***ICTY, Jelisić case, Judgment; Delalić case, Judgment; Blaškić case, Judgment; and Kordić and Čerkez case, Judgment.*** Additionally, domestic courts, such as the National Court of Appeals in Argentina, have applied the prohibition against pillage to conduct committed during internal violence. See ***Argentina, National Court of Appeals, Military Junta case, Judgment, 9 December 1985.***

52. Pillage, which is the act of looting or plundering in armed conflicts, is also prohibited under Common Article 3 as a war crime. This rule is established in international treaties like The Hague Regulations and the Fourth Geneva Convention for international conflicts. In non-international conflicts, pillage is prohibited by Additional Protocol II. Various international courts, including the ICTY, ICTR, SCSL, and ICC, list pillage as a war crime. Additionally, domestic courts, such as the National Court of Appeals in Argentina, have applied this prohibition to acts committed during internal violence.

53. Concerning crimes against humanity, it was the thrust of the prosecution's submission that crimes against humanity were punishable under CIL long before the conduct charged in the case before me and were enumerated in Control Council Law No. 10 of 1945. These crimes are recognised in the preamble of the Declaration of St. Petersburg of 1868 and the Martens Clause in the Hague Conventions of 1899 (Preamble of The Hague Convention (II) concerning the Laws and Customs of War on Land, 29 July 1899 (1899 Hague Convention II) and 1907 (Preamble of The Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 ("1907 Hague Convention IV'), in which it was provided:

> *“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to*

declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."

54. Additionally, it was submitted that the IMT and the International Military Tribunal for the Far East (IMTFE) Charters specifically enumerate crimes under the rubric of crimes against humanity, to include murder, enslavement, and other inhumane acts, whether or not they were committed in violation of the domestic law of the country in which they were perpetrated (***Charter of the IMTFE Article 5(c), IMT Article 5(c)***. The ICTY, ICTR, SCSL, ICC, and ECCC have agreed that crimes against humanity, as defined by Control Council Law No. 10, were customary international law applicable to conduct committed during the 1990s and thereafter and essentially adopted the text and specific crimes of the NMT Control Council Law. No. 10, which included not only murder, enslavement, and other inhumane acts but also rape, imprisonment, and torture. See ***ICTY Article 5, ICTR Article 3, SCSL Article 2, ICC Article 7, ECCC Article 5.*** The elements of such crimes against humanity were also customary international law before the 1990s.

55. The ***Decision on Appeal by NUON Chea and IENG Thirith Against the Closing Order, D427/2/15, 15 February 2011, par. 130, in which the ECCC, which combines dualist Cambodian domestic law with international criminal law, held that crimes against humanity were CIL as applicable to crimes that occurred as early as 1975-79 and*** was cited by the prosecution to support their arguments.

56. State Counsel discussed the specific crimes against humanity outlined in the amended indictment and their status under customary international law. It was submitted that murder was recognised as a crime against humanity after World War II and was subsequently enumerated in the statutes of various international courts. See ***ICTY Article 5(a), ICTR Article 3 (a), SCSL Article 2, ICC Article 7(a), ECCC Article 5.***

57. Also, the prosecution cited international laws and conventions that explicitly define "enslavement" as a crime against humanity. They cited the 1945 IMT Charter, Allied Control Council Law No. 10 of the NMT, and Charter of the IMTFE as legal

frameworks that specifically identify enslavement as a grave offence. It was maintained that enslavement as a crime against humanity was subsequently enumerated in the statutes of the ICTY, ICTR, SCSL, ICC, and ECCC. ***See ICTY Article 5, ICTR Article 3, SCSL Article 2, ICC Article 7, ECCC Article 5***. Additionally, counsel referred to the ***Pohl*** and ***Milch*** cases of the NMT, cited in the ***Kunarac*** case supra, which resulted in convictions for enslavement as a crime against humanity. (See ***Prosecutor v. Kunarac et al, No. IT-96-23&23/1, Judgement (12 June 2002) at para. 525. (Citing US v Oswald Pohl and Others, Judgement of 3 November 1947, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10, Vol V, (1997), p 958 at p 970*** and ***Prosecutor v. Kunarac et al, No. IT-96-23&23/1, Judgement (12 June 2002) at para. 525. (Citing US v. Milch, Judgement of 31 July 1948, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol II (1997), p 773, 790-791.).***

58. It was further submitted that torture was defined as a crime against humanity in several international statutes, including the ICTY and ICTR. The accused were convicted of torture as a crime against humanity in specific cases, such as the Akayesu case **(*Prosecutor v. Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 593)** and Kunarac case ***(Prosecutor v. Kunarac et al, No. IT-96-23&23/1, Judgement (12 June 2002) at para. 883, 886, 888)***.

59. The prosecution discussed imprisonment as a crime against humanity, as defined by various international tribunals. They submitted that the statutes of several international courts recognise imprisonment as a crime against humanity. Additionally, specific cases where accused persons were convicted of imprisonment as a crime against humanity by the ICTR and the ICTY were highlighted, including the ***Krnojelac, Judgement (TC), 15 March 2002, para. 119-122***; and ***Kordic and Cerkez Judgement (TC), paras. 302-303***.

60. Rape as a crime against humanity was discussed by the prosecution, stating that various international legal instruments and court judgments recognise rape as a crime against humanity. The 1945 ***NMT Control Council Law No. 10 Article II(1)(c),***

the statutes of the ICC, ICTY,ICTR, and the SCSL *(**ICC Statute, Article 7(1)(g); ICTY Statute, Article 5(g); ICTR Statute, Article 3(g), SCSL Article 2***, all enumerate rape as a crime against humanity. The ICTR's 1998 Akayesu judgment, ***(Akayesu case, Judgment, par. 596)*** was the first to convict for sexual crimes committed in the 1990s as rape as a crime against humanity. The ICTY ***Prosecutor v. Kunarac et al, No. IT-96-23&23/1, Judgement (12 June 2002) at paras. 537 (Citing Prosecutor v Furundija, Judgement, Case IT-95-17/1-T, 10 Dec 1998, par 227)*** also convicted individuals for rape as a crime against humanity, noting the customary law status of this designation by the ILC.

61. The last category of crimes against humanity discussed by State Counsel was "other inhumane acts". It was submitted that this kind of crime against humanity was identified in the post-Second World War Charters of the Nuremberg IMT and Tokyo IMTFE, as well as Control Council Law No. 10 of the NMTs. It was stated that the statutes of the ICTY, ICTR, SCSL, ICC, and ECCC (***Article 5, ICTR Article 3, SCSL Article 2, ICC Article 7, ECCC Article 5***) specified this crime. The ICTY and ICTR have convicted persons for the crime of "other inhumane acts" for conduct that occurred during the early 1990s, and the term "other inhumane acts" was deliberately designated by international tribunals as a non-exhaustive residual category since an exhaustive categorisation would merely create opportunities for evasion of the letter of the prohibition. The ECCC affirmed that "other inhumane acts" function as a residual category, criminalising conduct that meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes. See ***Case File No. 002/19-09-2007/ECCC/TC, E313, par 437.***

62. The ***ECCC Case No. 002/01 Judgment, para. 435; See also ECCC para. 157*** affirming the CIL criminalisation of “other inhumane acts” was relied upon by State Counsel to support the position that "other inhumane acts" was considered a crime against humanity under customary international law before 1975 and was accessible and foreseeable to accused persons, so it did not violate the principle of *nullem crimen sine lege.*

63. In reply to the defence argument that the penalties for the impugned charges are non-existent in our laws, basically that the *nulla poena* aspect of the principle of legality was disregarded by

the prosecution, it was asserted by State Counsel that international law does not require that CIL should provide explicitly for a specific penalty for core crimes to be legitimately prosecuted. ***Article 27 of the Nuremberg Charter*** (which was adopted after the commission of the crimes) was cited and provides: *"The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just"*. In effect, only the *maximum* sentence was provided statutorily (and *ex post facto*).

64. In the same manner, it was submitted that the Statutes of the *ad hoc* tribunals only provide for a general ceiling set by the maximum sentence that can be imposed (life imprisonment). For instance, ***Article 24 of the ICTY Statute*** was cited, which provides no further guidance as to what sentence might be appropriate about any particular international crime but provides for a general maximum. It provides:

> *The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.*

65. State Counsel submitted that challenges based on the lawfulness of conviction and sentence based on general international law and an absence of a pre-existing legal basis at the time of the crimes have all been rejected. They cited the decision in the ***Rauter*** case, ***(the trial of Hans Albin Rauter, Netherlands Special Court in 'S-Gravenhage (The Hague) (Judgment delivered on 4 May 1948) and Netherlands Special Court de Cassation (Judgment delivered on 12 January 1949), Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Volume XIV (London, 1949), at 118-123***, in which it was held that the *nulla poena* aspect of the principle of legality was discarded on the basis that interests of justice *"do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent".*

66. It was also submitted that only a general ceiling for the maximum sentence is required, and in the case of the ad-hoc

tribunals, such a ceiling was provided ex post facto. It was further submitted that it is not a legal requirement that a set of applicable sentencing principles concerning a particular international crime be provided; the absence of express sentencing provisions under CIL is not a bar to the prosecution of crimes under CIL.

67. The prosecution additionally asserted that different jurisdictions have taken different approaches, including borrowing sentencing ranges for ordinary crimes, noting that international crimes warrant the severest penalties or, in some cases, setting aside the *nulla poena* aspect of the principle of legality altogether.

68. The Prosecution argued that the conduct of the Accused was foreseeable; he was a commander in an organised military structure and could reasonably foresee that crimes against non-combatants would be punishable under the laws and customs of war. It was concluded by the prosecution that the absence of specific penal legislation in Uganda for the international crimes charged, was not a violation of the principles of *Nullem Crimen and Nulla Poena Sine Lege,* neither was it a bar to domestic prosecution.

69. Apart from the examples of international tribunals, State Counsel cited examples of domestic legal orders that had applied CIL. One such case was Canada (***The Report of the Canadian Commission of Inquiry on War Criminals, 1986, p 13***2, where it was stated:

> *It follows that, due to this adoption of 'customary' international law lato sensu into Canadian law through Art. 11(g) of the Canadian Charter of Rights and Freedom, war crimes now form the basis of a criminal prosecution in Canada, notwithstanding the lack of any domestic law, or even any domestic law to the contrary" and the opinion of Justice Cory in the Canadian Supreme Court – R v Imre Finta, 24 March 1994, par 64: "Section 11(g) of the Charter allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognised by the community of nations regardless of when or where the criminal act or omission took place."*

70. South Africa was similarly cited ***(Section 232 and 35(3)(1) of the Constitution***), and Angola. ***(See Lockwood,***

"Report on the Trial of Mercenaries: Luanda, Angola, June 1976", 7 Manitoba Law Journal 183 (1977).

71. The decision of the Hungarian Constitutional Court, ***Decision No. 53/1993, on war crimes and crimes against humanity, 13 Oct 1993***, where it was held that the norms on war crimes and crimes against humanity are undoubtedly part of CIL and, as such, directly applicable in the Hungarian legal order. In coming to that view, the court referred in particular to the intrinsic gravity of war crimes and crimes against humanity, their jus cogens status, and the fact that international law imposes a duty on states to prosecute those crimes.

72. The prosecution cited several other examples of domestic jurisdictions, including Argentina and Guatemala, that have allowed CIL to form the basis for the prosecution of war crimes and crimes against humanity when such crimes were not recognised under domestic law.

73. Reference was also made to Colombian domestic courts that have successfully conducted trials of suspects for crimes against humanity, even when faced with retroactivity challenges. It was argued that although the Colombian domestic criminal code has sections implementing certain crimes against humanity, these courts were faced with the absence of provisions for sexual crimes as crimes against humanity in the Penal Code. The Colombian courts permitted prosecutors to charge crimes under the war crimes category in the penal code, and judges would declare those crimes as crimes against humanity. The courts convicted suspects of crimes of sexual violence during the context of the internal armed conflict in Colombia as both war crimes and crimes against humanity when those crimes were not recognised as crimes in Colombian domestic laws at the time of the charged conduct. What mattered was that the charged incidents took place in a broader context and pattern of violence; therefore, according to them, they special status as CIL crimes and overcoming challenges based on legality. See ***Kravetz, D. "Promoting Domestic Accountability for Conflict-Related Sexual Violence: The Cases of Guatemala, Peru, and Colombia," 32 Am. U. Int'l L. Rev. 2016-2017, P.742 -745.***

74. Also, it was stated that the Colombian courts have adopted a flexible interpretation of the legality principle by ruling that certain conduct can be characterised as an international crime

based on Colombian treaty obligations, See ***Kravetz***, ***D***. supra, at p. 746-747.

75. The prosecution's opinion on the applicability of Customary International Law (CIL) in Uganda can be summarised as follows:

1. The Ugandan Constitution allows for the application of CIL. According to Article 2(2) of the Ugandan Constitution, customs are not limited to local or cultural customs but also encompass unwritten laws generally.
2. Criminal charges based on established CIL do not violate the legality principle requirement under Article 28(7) of the Ugandan Constitution. The charges preferred against the Accused in the indictment meet the legality requirement, as there is a specific definition of such crimes, as demonstrated by the jurisprudence of various international tribunals.
3. The crimes charged, which were prescribed by law at the time of their alleged commission, are well defined under CIL, accessible, and foreseeable. These charges have also been verified and approved by international criminal tribunals.
4. The Ugandan Constitution does not require the penalty to be expressly written or the mode of creation to be specified. Therefore, the Constitution does not prohibit the direct application of CIL in Uganda in that respect.
5. The Ugandan Penal Code Act stipulates serious crimes and can be applied to sentencing in the absence of express sentencing provisions. Ad-hoc tribunals have referred to the sentencing regimes of the respective domestic courts, and the trial court should apply this procedure in the present case.
6. There was no violation of the ex post facto prohibition because the crimes in question were already considered illegal under international law at the time they were committed. The statutes and charters of the international tribunals only formally acknowledged this fact after the fact.
7. The principle of legality only requires that the offence and its elements were established under customary law or general principles of international law and reasonably accessible and foreseeable at the time.
8. Article 126(2)(e) of the Ugandan Constitution should be interpreted in a manner that enables the effective prosecution and punishment of international crimes in Uganda, regardless of whether the conduct was explicitly criminalised. The primary focus of substantive justice should be to safeguard

society, and the offences for which the Accused is charged are detrimental to society and should not remain unpunished due to a strict interpretation of the principle of legality.

9. Under Article 287, the Constitution of Uganda recognises the binding nature of international agreements, treaties, and conventions. Uganda is required to respect and enforce such treaty obligations and fulfil its international responsibilities and obligations under treaty law and CIL.

10. It is acceptable to bring multiple charges as long as a single act meets the contextual elements of war crimes or crimes against humanity. This practice is recognised both in Uganda and internationally at the UN ad-hoc tribunals and the ICC. It is consistent with Ugandan laws and international best practices and is not seen as unfair or oppressive to the Accused.

11. Clear notice regarding the alleged conduct, the crimes alleged, and the manner of commission or contribution to the crime has been given to the Accused. The charges contain specified offences with sufficient particulars, providing the Accused with reasonable information on the nature of the offences charged. This satisfies the rules for framing of charges under the Trial on Indictments Act. The charges are factually identical to the previous indictment and do not allege new facts. There is no demonstration of prejudice to the Accused, as the elements of each category of crimes are clear and laid out, and the Defence Counsel must advise the Accused before he pleads to the charges. The trial court must ensure that counsel has properly advised the Accused and understands the nature and tenor of those charges.

JOINT SUBMISSIONS OF VICTIMS' COUNSEL

76. Ms Magdalene Amooti and Mr Kilama Komakech made joint submissions in response to the objections to the amended indictment by the defence. Counsel supported the argument of Counsel Ochieng and Counsel Anyuru to the effect that the prosecution breached the rule against duplicity in preferring some of the counts in the indictment. They submitted that it is a well-known principle of the law, that no single charge of an indictment should contain more than one separate offence, which is a position that is extensively restated in international criminal case law, including in the SCSL and the ICTR. It was further their submission that the duplicity in question is curable and should

not lead to the striking out of the indictment. They cited the case of ***Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-A on March 3, 2008***, in which the Appeals Chamber held inter alia, that while the charge was duplicitous, the Trial Chamber had erred in law by dismissing the charge altogether; instead, the charge should have been amended.

77. Victims Counsel referred this court to the Crown Prosecution Service (CPS) Guidelines of England and Wales, which state as follows:

a) One offence should be charged in one count if it comprises a single act - even if the offence has more than one victim or involves activities in respect of more than one item of property;
b) Where two or more acts of a similar nature committed by one or more defendants are connected in time and place of commission, or by common purpose, they can be charged in a single count;
c) Where the wording of the particular statute makes it clear that only one offence is created but provides two or more alternative ways of committing that one offence, then each alternative way should be made the subject of a separate count in the indictment. The only exception to this is where case law has established that, in a particular case, the placing of alternative ways in the same count will not be regarded as bad for duplicity; and
d) In any case, where there is doubt as to whether the language of the particular statute creates more than one offence, it will always be safer to charge two or more counts."

78. According to the victims' counsel, this honourable Court should disregard the defence submissions about striking the defective indictment and instead make an order for amendment of the same as follows:

a) PART II: Regarding the alternative counts under the Penal Code Act, in respect of victims C4, C5, C6, C7, C19, C20, Odong Menya, Okot Charles, Ojok Patrick, and Ogena Simon, mentioned in main count 4, it was proposed that those counts should be merged in one alternative count 5, instead of splitting them into counts 6, 7, 8, 9, 10, 11 & 12

of the indictment as they arise on the same date (4/9/1994) and place (Abera village in Parubanga Parish, Pabbo Sub County in Kilak County, in the current Amuru District);

b) PART III: In respect of main count 13 and alternative count 14, redacted victim “C5” and others should be mentioned in both counts to protect the special concerns of the victims in the affected community of Abera Village – Parubanga Parish, Pabbo Sub County in Kilak County, current Amuru District who have not been included as victims since it is common knowledge that such incident in a village cannot be suffered by a single individual “C5”;
c) PART IV: Concerning counts 17, 18 & 19 should be merged into one alternative count as the victims mentioned in the main counts 15 & 16, facts, the month of February and year 1996 are the same;
d) PART V: Alternative counts 22, 23, 24, 25, 26, 27, 28, 29, and 30, detailing the initials of the murdered victims stated in the main count 21, should be merged as one alternative count 22 since the facts and the scene of Crime (Abera Village) are the same as in main count 21.
e) PART VI: For alternative counts 33, 34, 35, 36, 37, 38, 39, 40, and 41 it was stated that these should be merged into one alternative count 33 since the victims and facts stated therein, including those mentioned in the main count 31 & 32 are the as per the indictment;
f) PART VII: Alternative counts 45 & 46, should be merged into one alternative count 45, because the victims and facts stated therein including those mentioned in the main count are the same;
g) PART IX: About alternative counts 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 & 69, founded on the same facts with the main counts 50, 51 & 52, counsel suggested that these alternative counts should be merged into one count;
h) PART XII: About alternative counts 76, 77, 78, 79 & 80 also founded on the same facts in counts 74 & 75 it was proposed that they be merged into one alternative count; and
i) PART XIV and PART XV: It was proposed that the main counts and alternative counts should be merged since the

offences and particulars of each offence are based on the same facts.

79. It was submitted concerning the application of CIL in our jurisdiction, that whilst Uganda domesticated the Rome Statute (ratified by Uganda on 14th June 2002) by the adoption of the International Criminal Court Act 2010 (the ICC Act), which criminalizes the aforementioned crimes, the allegations against the Accused date back to the period between 1992 to 2005, and due to the prohibition of retroactive application of penal laws in Uganda, the ICC Act is therefore not applicable to the current case. It was further submitted that Uganda ratified the four Geneva Conventions of 1949 through the adoption of the Geneva Conventions Act 1964, but this domestic legislation solely criminalises acts that amount to grave breaches as defined in the said Geneva Conventions. It was stated that the criminalisation of grave breaches by the said conventions only applies to international armed conflict and not non-international armed conflicts.

80. It was also submitted that Common Article 3 of the four Geneva Conventions and Protocol II thereof are the laws applicable to this case. However, the Geneva Conventions Act of 1964 does not incorporate Common Article 3, whereas Protocol II was ratified by Uganda in 1991. Thus, the alleged crimes against the Accused that took place in the context of a non-international armed conflict lack a domestic law criminalizing them.

81. Victims' counsel, therefore, supported the prosecution's argument that the amended indictment charges serious violations of Common Article 3 as well as crimes against humanity based on CIL. Counsel raised the following questions for the determination by this Court:

1. Is Uganda bound by CIL even though there is no reference to it in the Constitution?
2. Did violations of Common Article 3 constitute war crimes under CIL in 1992?
3. Which crimes against humanity were recognised under CIL in 1992?
4. Does the prosecution of acts allegedly committed in 1992 before the ICC Act 2010 entered into force violate the principle of legality?

82. The Victims' Counsel referred to the International Court of Justice's definition of customary international law (CIL) as "international custom, as evidence of a general practice accepted as law." They explained that to determine if a rule can be considered customary CIL, it is important to establish that many states consistently practise the rule and that these states view the rule as legally binding. They also mentioned that rules fulfilling these criteria become binding on all states, while rules codified in treaties only bind the states that have ratified such treaties. Additionally, they noted that in some cases, rules contained in treaties are the same as those recognised as CIL. In those cases, states that have not yet ratified the treaty are still bound by this rule and where rules of CIL existed before states ratified a specific treaty, this rule still applies.

83. According to counsel, this means that if crimes against humanity and war crimes provided for in Common Article 3 of the Geneva Conventions were recognised as CIL before the promulgation of the ICC Act 2010, the Accused can be prosecuted for any acts comprising such crimes, committed before 2010 except that Uganda is not bound by such rules if it had persistently rejected the legal practice before it eventually was recognised as CIL under the so-called persistent objector rule. The Inter-American Commission of Human Rights decision in the case of ***Michael Domingues v. United States, Case 12.285, Report No. 62/02, 22 October 2002***, was cited to buttress that argument. It was argued that there is no evidence that Uganda had persistently objected to the prohibition of crimes against humanity or war crimes before they were recognised under CIL and consequently, Uganda is bound by CIL, which dictates that certain acts are recognised as war crimes or crimes against humanity.

84. The Victims' counsel argued that international tribunals have recognised that serious violations of Common Article 3 of the Geneva Conventions constitute war crimes under CIL. They cited several decisions to support the position that the prohibitions in Common Article 3 are part of CIL as follows: ***ICTY Appeals Chamber, Prosecutor v. Dusko Tadic a/k/a "DULE", 2nd October 1995, ICTY Trial Chamber, Prosecutor v. Mladen Naletilic, aka "TUTA" and Vinko Martinovic, aka "STELA", Case No. IT-98-34-T, 31st March 2003, ICTY Trial Chamber, Prosecutor v. Kvocka, Case No.***

IT-98-30/1-T, 2nd November 2001, ICTY Trial Chamber II, Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, 30th November 2005, ICTY Trial Chamber II, Prosecutor v. Naser Oric, Case No. IT-03-68-T, 30th June 2006, ICTY Trial Chamber, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, 22nd February 2001.

85. Additionally, the following decisions of the ICTR in respect of crimes committed in 1994 that support the ICTY rulings were cited: ***ICTR Trial Chamber I, Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, 7 June 2001, ICTR Chamber I, Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgment, Case No. ICTR-96-3-T, 6th December 1999.***

86. Regarding whether crimes against humanity were recognised under CIL, victims' counsel submitted that these crimes have been recognised under CIL, since their written recognition in the Charter of Nuremberg and the Tokyo Tribunals after the end of World War II in 1948 and that both the ICTY and the ICTR make implicit references to their roots in CIL when interpreting the elements of crimes against humanity. Furthermore, it was submitted that The European Court of Human Rights (ECHR) also came to the same conclusion that crimes against humanity have been recognised as crimes under CIL at least from 1992 onwards. The decision of the ECHR in the case of ***Boban ŠIMŠIĆ v. Bosnia and Herzegovina, Application No. 51552/10, 10 April 2012, was cited***, in which it was held as follows:

> *The Court observes that the present applicant was convicted in 2007 of persecution as a crime against humanity concerning acts which had taken place in 1992. While the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code [in Bosnia-Herzegovina], it is evident from the documents cited in paragraphs 8-13 above that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law.*

87. The victims’ counsel argued, therefore, that in the present case, the charges of crimes against humanity can be based on CIL even though, at the time of the alleged commission of crimes (1992 – 2005), Uganda did not have domestic laws that

criminalised violations of Common Article 3 since those crimes were recognised under CIL from at least 1948 onwards.

88. As far as definitions of the crimes against humanity that are contained in the amended indictment against the Accused are concerned, namely: murder, torture, enslavement, imprisonment, and rape, it was contended that definitions for these crimes under CIL apply from at least 1992 onwards as the ICTY's jurisprudence covers matters from that year forward. Therefore, it was maintained that this court can use those definitions to assess the factual allegations against the Accused in this case, in which the offences charged are alleged to have been committed from 1992 onwards.

89. On the issue of whether the amended indictment violates the principle of legality, the Victims counsel agreed with both the defence and the prosecution, that the principle of legality is an integral part of the rights of an Accused, enshrined in Article 28(7) of the Constitution of Uganda and in international human rights instruments, in particular Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which was ratified by Uganda in 1995. They argued, however, that international jurisprudence has established that the prosecution of crimes that are solely recognised as CIL at the time of their alleged perpetration does not violate the principle of legality because it is per Article 15(2) ICCPR. They relied on the decision of the ICTY in ***Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC, and Esad LANDŽO (aka "ZENGA") Trial Judgment, Case No. IT-96-21-T, 16 November 1998, para. 313*** in which it was held:

> *It is undeniable that acts such as murder, torture, rape, and inhuman treatment, are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of nullum crimen sine lege in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the Accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not*

foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.

90. In response to the argument made by the Defence Counsel that the Accused should merely be charged with offences under the Penal Code Act and prosecuted in the Criminal Division of the High Court since the international offences charged in the amended indictment are not penalised in our laws, victims counsel reiterated their earlier submissions on the applicability of CIL in the Ugandan Courts. They observed that while some jurisdictions had refused charges brought under CIL as no such crimes existed in their domestic laws at the time of the facts in question, such as the English Court in ***R v. Jones (Margaret) & Others, [2006] UKHL 16, para. 28***, charging the Accused with the underlying crimes under domestic law is insufficient to discharge the state's duty under international law. Protocol II of the Geneva Conventions, although not added to the Geneva Conventions Act 1964, applies since Uganda is still a State Party to the Protocol and, therefore must enforce its provisions and its obligation under CIL, to investigate and prosecute war criminals as recognised by the International Committee of the Red Cross (ICRC) per Customary IHL Database: Rule 151 providing that individuals are criminally responsible for war crimes they commit; Rule 156 providing that serious violations of IHL constitute war crimes; and Rule 158 requiring that states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.

91. Additionally, counsel quoted the decision in ***Prosecutor v. Michel Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis, 30 August 2006*** where the ICTR stated as follows on the possibility of national courts pursuing a domestic charge of homicide, as opposed to the ICTR trying the Accused for genocide:

> *In the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide … The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.*

92. In other words, it was argued that focusing solely on pursuing the underlying crimes under the Penal Code Act would downplay the horrific nature and context of the atrocities committed. A state has an international legal obligation to

prosecute war crimes within its jurisdiction, and it would be insufficient to do so without acknowledging the gravity of these acts as war crimes.

REASONS FOR THE RULING

93. I have thoroughly reviewed the defence's submissions on the preliminary legal issues raised against the amended indictment, along with the prosecution's response, the observations by the victims' counsel, and the array of authorities provided by all counsel for my guidance.

94. I want to emphasise from the outset of my brief discussion that this court acknowledges the novelty of the legal issues raised in the defence's objections and the prosecution and victims' counsel's responses within our legal system. This is because the prosecution's recently amended indictment includes charges framed under CIL, a type of indictment unprecedented in our criminal justice system.

95. The gist of the defence lawyers' arguments is that CIL should not be applicable in Uganda because it is not written down, lacks clarity on sentencing, and violates certain articles of the Constitution of Uganda. They also argue that Common Article 3 does not have penal consequences, only serves as a guideline between countries, and therefore does not bind individuals. Additionally, they contend that Legal Notice No. 10 of 2011 limits the court's jurisdiction to only international offences, excluding CIL. They argue that the charges in the amended indictment are illegal, unconstitutional, involve double jeopardy, and are duplicative.

96. On the other hand, the substance of State Counsel's arguments is that Uganda is obligated under both treaty law and CIL to prosecute the Accused for international crimes, even without specific domestic legislation on war crimes and crimes against humanity. Therefore, this Court has the authority to try international crimes, as domestic courts have the primary responsibility for such offences, with the ICC playing a complementary role. During the time of the conduct described in the amended indictment, crimes against humanity and serious violations of Common Article 3 were well-established as grounds for individual criminal liability under both treaty law and CIL. This means that the Accused had enough knowledge and access to this information, and therefore the amended indictment does not

violate the principle of legality. The Accused should be held accountable according to the international standards applicable to armed conflict under CIL. Trying the Accused for these crimes would not violate Article 28 of the 1995 Constitution of Uganda, as the Constitution simply states that the acts or omissions for which the Accused is tried must have constituted a criminal offence at the time of their commission. The Constitution does not specify that these acts or omissions need to have been criminalised under domestic law. The prohibition of war crimes has been a fundamental aspect of international law since Nuremberg, and therefore the Accused should be tried under Common Article 3 of the Geneva Conventions, as per CIL. The absence of a specific punishment in domestic law is not a barrier to punishing international crimes, and the charges are properly formulated under our laws and international laws and are not illegal or duplicitous.

97. Also, the victims' counsel observations are mostly similar to those of the prosecution, except for their concerns about duplicity. They believe that while some charges are duplicative, this does not mean the entire indictment should be dismissed. They argue that the court can order the charges to be corrected. They also insist that a breach of international law should not go unpunished just because the act or omission was not considered a crime under national law at the time. They argue that the indictment against the accused for crimes against humanity and war crimes does not violate the principle of legality, as these crimes were recognised under CIL at the time of their alleged commission.

98. From my appreciation of the contentions of the parties, and whilst I agree with the several issues raised by the parties and the participating victim counsel, I think that just three issues arise for the determination of this court, namely:

ISSUE NO. 1: IS CIL DIRECTLY APPLICABLE IN UGANDA'S LEGAL ORDER ESPECIALLY IN THE PENAL CONTEXT

99. Based on the submissions above, it is clear that CIL is not a written source. However, documentation of customary law can be found in diplomatic correspondence, national law, executive and judicial decisions at national and international courts, among other sources. As correctly pointed out by the State Counsel, CIL results

from a general and consistent practice of states, followed by them from a sense of legal obligation. For an international norm to be considered CIL, it must be strong enough so that states believe it to be a compelling law. States must believe that they have a legal duty to conform to a specific rule or norm of CIL. This belief is termed opinio juris. Black's Law Dictionary (West 8th ed. 2004) defines opinio juris as the: "*principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.*"

100. The second element is the usage of that rule or norm. There must be widespread and consistent state practice. The ***Statute of the International Court of Justice*** outlines the standard for CIL in ***Article 38(1)(b)***, which requires that the custom be “a general practice accepted as law”. The general practice requirement refers to the actual state practice or actions. Practices generally followed by states but which they feel free to ignore legally lack the opinio juris element and thus are not CIL. At the same time, a practice that was originally to be followed for other reasons may become CIL if states come to believe they have a legal obligation to it.

101. Opinio juris, the belief that an action is undertaken out of a sense of legal obligation, can be determined by examining how states comply with CIL. Just like CIL, opinio juris is a complex and debated concept in the field of international law. For a norm to become legally binding, many states must consistently acknowledge and adhere to it over time. However, if a state explicitly objects to a norm achieving legal status, that state can be exempt from the norm after it becomes law, provided that it can demonstrate consistent objection to the rule and refute any assumption that it consented to the norm.

102. Jus cogens are norms that are considered by the international community to be so fundamental and non-derogable that no state can legitimately object to them. Black's Law Dictionary supra defines jus cogens as..."*A mandatory or peremptory norm of general international law accepted and recognised by the international community as a norm from which no derogation is permitted.*"

103. Uganda is a common law country, having been a former British colony. International law is not explicitly recognised as a source of law under our Constitution, the Judicature Act, or any

other legislation. Treaties, which are interpreted to include conventions, agreements, or other arrangements, are under ***Article 123(1)*** of the Constitution required to be ratified under the ***Ratification of Treaties Act (Cap 204)*** and then domesticated by an Act of Parliament by ***Section 123(2)*** of the same Act. However, CIL is not treaty law. It is a mandatory or peremptory norm of general international law accepted and recognised by the international community as a norm from which no derogation is permitted. Can it be said that the CIL principles underlying the preferment of atrocity crimes against individuals ex post facto, as was done since Nuremberg and replicated in the ICTY and ICTR inter alia, do not apply to Uganda in light of the provisions of our Constitution? I disagree.

104. The prosecution asserted, and I accept their view, that ***Article 2(2) of the Constitution*** can be interpreted to mean that CIL is applicable in Uganda, to the extent that it is not contrary to the Constitution of Uganda and that this provision does not necessarily limit the understanding of "custom" to that of local and cultural traditions, but that it clearly allows for the relevance of unwritten law generally. The said Article provides as follows:

> *If any other law or custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail and that the other custom, to the extent of inconsistency, shall be void.*

105. The provision emphasises that the Constitution holds supreme authority in Uganda, rendering any conflicting laws or customs null and void to the extent of the inconsistency. Importantly, it does not exclusively limit its application to local or native customs. To come to this conclusion, I am fortified by the case of ***Major General David Tinyefuza v. Attorney General (Constitutional Petition No. 1 of 1996) [1997] UGCC 3*** where the Constitutional Court in explaining the liberal approach to interpretation of constitutional provisions, cited with approval the cases of ***Republic v. El. Mann [1969] E.A. 357 and Uganda v. Kabaka's Government [1965] E.A. 393***, in which it was held that the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters.

106. The court further cited Mwendwa, CJ, (as he then was) ***in El. Mann (supra***) while explaining this principle that,

> *"In certain contexts a liberal interpretation of Constitutional provisions may be called for. In my opinion Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning."*

107. Furthermore, the ***Judicature Act (Cap 13)*** in ***Section 14(2)*** acknowledges the significance of unwritten law and custom, stating the following*:*

> *Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised—*
>
> *(a) in conformity with the written law, including any law in force immediately before the commencement of this Act;*
>
> *(b) subject to any written law and insofar as the written law does not extend or apply, in conformity with—*
>
> *(i) the common law and the doctrines of equity;*
>
> *(ii) any established and current custom or usage; and*
>
> *(iii) the powers vested in, and the procedure and practice observed by, the High Court immediately before the commencement of this Act insofar as any such jurisdiction is consistent with the provisions of this Act; and*
>
> *(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience.* [Emphasis added]*.*

108. A related provision is ***Section 15(1) of the Judicature Act*** which stipulates as follows:

> *Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is*

not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law. [Emphasis added].

109. The repugnancy test is not a difficult one to pass in the case before this court. CIL is a well-established branch of the law is not inconsistent or in opposition to the constitution or to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with any written law and since the facts of this case do not warrant such a discussion, I do not intend to discuss the repugnancy clause that has its origins in the 1902 and 1920 of the Uganda Orders in Council, except to state that its origins are in ***Section 20 of 1902 of the Uganda Orders in Council***, which was concerned with native customs. It provided as follows:

> *In all cases, civil and criminal of which all the parties are natives, every court shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or any regulation or rule made under any order in council or ordinance.*

110. ***The Judicature Act***, as currently written, just as our Constitution is in regard to the word 'custom', does not contain any limitations on the phrase "established and current customs" that would exclude established international customary law that stems from international criminal law, international humanitarian law and international human rights law.

111. In addition to the decisions of international tribunals mentioned by the prosecution and victim counsel—such as the ICTY, ICTR, ECCC, and the SCSL—this court has also been presented with evidence demonstrating that domestic criminal courts in Canada (as per the ***Report of the Canadian Commission of Inquiry on War Criminals, 1986 and R v. Finta, Judgment of 24 March 1994)***, Angola (refer to ***Lockwood, Report on the Trial of Mercenaries: Luanda, Angola, June 1976, 7 Manitoba Law Journal 183 (1977))***, and Hungary ***(as per Constitutional Court, Decision NO 53/1993, on War Crimes and Crimes against humanity, 13 Oct 1993, English translation available in Solyom/Brunner, Constitutional Judiciary in a new democracy: the***

Hungarian Constitutional Court (UMP, 2000) at 273-283) have determined that their constitutional orders allowed for the application of CIL in their domestic legal systems for the prosecution of individuals accused of serious crimes not explicitly provided for in their penal laws.

112. The views expressed by these authorities support my belief that our constitutional order does not prohibit this court from considering the charges brought against the accused under CIL. The imperative to put an end to impunity and ensure accountability for heinous acts is what prompted the United Nations to establish international criminal tribunals such as the ICTY, ICTR, ECCC, and the SCSL. This underlying principle also drove the establishment of the ICC. It is worth noting that the constitutional provisions of these courts specified the retroactive application of law based on CIL.

113. The ICRC Commentary on the Additional Protocols to the Geneva Conventions, paragraphs 3103- 3104, summarises the dilemma regarding the application of CIL by national courts. In matters of criminal law, national courts primarily apply their national legislation. In many countries, they can only apply provisions of international conventions if those provisions have been incorporated into national legislation through a special legislative act. Thus, in several European countries, the punishment of war crimes and crimes against humanity has often faced obstacles since the Second World War. These obstacles could only be overcome by invoking the need to repress crimes rightly condemned by all nations, even in the absence of specific rules of application. This reference to international law has often been called the 'Nuremberg clause'. Although the principle of legality *(nullum crimen, nulla poena sine lege)* is a pillar of domestic criminal law, the lex should be understood in the international context as comprising not only written law but also unwritten law, since international law is in part customary law. Thus, the second "principle of Nuremberg" reads: *'The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law*."

114. The ICRC commentary offers a thorough and insightful analysis, outlining the obligation of countries to integrate customary international law (CIL) into their domestic legal

systems. It asserts that states are bound by CIL, even if it is not explicitly included in their domestic legislation. The commentary underscores the significance of applying CIL in cases involving serious violations of international law, such as war crimes and crimes against humanity. It emphasises the crucial role of directly applying CIL in prosecuting individuals suspected of committing such grave crimes. Furthermore, it highlights the obligation to prosecute perpetrators for violations of criminal law at both domestic and international levels. In essence, the commentary presents a compelling argument for the application of CIL in domestic jurisdictions to ensure that individuals suspected of committing grave breaches of international law are effectively prosecuted and held accountable.

115. Below are a few decisions that demonstrate the dilemma mentioned in the ICRC commentary. ***In R v. Jones (Margaret) & Ors, Appeal Judgment, [2006] UKHL 16, [2007] 1 AC 136, [2007] 2 WLR 772, [2006] 2 All ER 741, [2006] 2 Cr App R 9, (2002) 2 CAR 128, ILDC 380 (UK 2006),*** *29th March 2006, United Kingdom*; ***House of Lords [HL]*** the key question for resolution in the case was whether the international law crime of aggression was capable of being a ‘crime’ within the meaning of the Criminal Law Act, 1967 (United Kingdom) or an ‘offence’ within the meaning of the Criminal Justice and Public Order Act. It was held that the creation of criminal offences in England and Wales is a legislative, not a judicial task. The House of Lords in England resisted the idea that any new crimes under CIL automatically became crimes under domestic law.

116. Similarly, in Australia, the court in ***Nulyarimma v. Thompson [1991] Federal Court of Australia 1192, 1 September 1999*** where it was alleged in the Federal Court of Australia that certain politicians, together with the Commonwealth government, had committed acts of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention") against members of the Australian Aboriginal community, the Federal Court unanimously dismissed the matter. Two judges (Wilcox and Whitlam JJ) held that genocide was not a crime under Australian domestic law. The third judge (Merkel J) dissented and held that genocide, an international crime, was part of the common law of Australia, but agreed with the majority that in the instances in

issue, the claims were not sustainable and as such should be dismissed.

117. ***In Hissein Habre v. République Du Senegal Economic Court of West African States, (ECOWAS ruling), ECOWAS (18 November 2010) ECW/CCJ/JUD/06/10 the Court of Justice of the Economic Community of West African States (ECOWAS)***, held that the legal reforms adopted by Senegal in 2007 to incorporate international crimes into its Penal Code to empower its courts to prosecute Hissene Habre for crimes against humanity committed in Chad twenty years before the amendment, violated the principle of legality, specifically the principle against non-retroactivity of criminal law. The court held that such crimes could only be prosecuted by a hybrid tribunal with jurisdiction to try Habre for the international crimes alleged, based on general principles of law common to the community of nations.

118. On the other hand, particularly in non-criminal matters, several national jurisdictions including Kenya, Canada, the UK, and Argentina have recognised that CIL can be directly applicable in domestic legal orders except where it is explicitly ousted by legislation or where it conflicts with the existing authorities. For instance, in the Kenyan case of ***Mary Rono v. Jane Rono and another, Civil Appeal 66 of 2002, [2005]eKLR*** the Court stated:

> *There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the Common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. <u>However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation</u>.* [Emphasis added].

119. It was further held:

Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states: - "It is within the proper nature of the judicial process and well-established functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – to remove ambiguity or uncertainty from national constitutions, legislation or the common law.

120. The decision in ***Longwe v. International Hotels 1993 (4 LRC 221),*** was cited with approval, where Justice Musumali stated:

> *.....ratification of such [instruments] by a nation-state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convention in my resolution of the dispute.*

121. At the time of the decision in ***Rono's case*** supra, the Kenyan legal regime was similar to ours in that it was silent on the position of CIL in its legal order), it was decided that domestic courts could apply CIL even in the absence of implementing legislation as long as it did not directly contradict domestic law.

122. In ***Trendtex Trading Corp v. Central Bank of Nigeria, [1977] 2 W.L.R. 356 at pages 367, 380, 385, and 386 (see also [1977] QB 529)***, the English Court of Appeal recognised that the rules of CIL were part of English law. It decided per curiam that the modern principle of restrictive sovereign immunity in international law is consistent with justice, comity, and good sense. In that case, the Court deferred from the practice of first requiring that international law be domesticated before it could be incorporated.

123. From these authorities, other jurisdictions have relied on their Constitutions and national laws to determine whether CIL is directly applicable to their domestic legal order. They have considered whether such an application contravenes the principle of legality. It is clear that national legal systems have been

restrictive when their national constitutions and laws provide for limitations on the applicability of international law.

124. In the same way, Uganda's Constitution, has no such restrictions, and courts have occasionally applied international law. In the case of ***Attorney General v. Susan Kigula & 417 others, on page 60,*** Hon. Ag. Justice of the Supreme Court Egonda-Ntende expressed his opinion on this matter.

> *It is worthwhile noting that Uganda acceded to the International Covenant on Civil and Political Rights on 21st September 1995 and to the First Optional Protocol on 14th February 1996. At the very least the decisions of the Human Rights Committee are therefore very persuasive in our jurisdiction. We ignore the same at peril of infringing our obligations under that treaty and international law. We ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the International Covenant on Civil and Political Rights*".

125. The issue at hand revolves around whether the rules of CIL pertaining to the charges in question had been established at the time of the offences, thus allowing for the criminalization of such acts. In order to address this issue, I have thoroughly examined the case law of the ICTR and the ICTY as provided to this court by the prosecution and victims' counsel. It is clear to me that these authorities plainly articulate the elements and definitions of crimes under CIL. Failing to prosecute alleged war crimes and crimes against humanity allegedly committed during the conflict between the LRA and the government of Uganda would constitute a denial of justice for the victims in that conflict, if these allegations can be established. In such a scenario, the classification of the offences under the penal code would not adequately reflect the gravity of the offences. This would suggest that our country has breached its international obligations, including the responsibility to extradite or prosecute under the Convention against Torture, the obligation to ensure an 'effective remedy' for violations under ***Article 2*** of the ***International Covenant on Civil and Political Rights (ICCPR)***, and the affirmative duty to prosecute perpetrators for violations of criminal law, both domestically and internationally.

126. The cases before the ICC include the case of Uganda's Dominic Ongwen. Uganda referred the said case against the LRA leaders to the ICC in December 2003 and in July 2004, the Office of the Prosecutor (OTP) began investigations into the Uganda situation. On July 8, 2005, ICC judges issued an arrest warrant against Dominic Ongwen, Joseph Kony, Vincent Otti, Okot Odhiambo, and Raska Lukwiya. The arrest warrants against Joseph Kony and Vincent Otti are pending; the charges against Okot Odhiambo, and Raska Lukwiya have abated, after their death. The state's conduct is an exhibition of its commitment not just to ending impunity but to international law, including CIL, as the Rome statute codified CIL and the reference of the LRA leaders happened way before the ratified Rome Statute was domesticated. The state was willing to surrender its citizens to be tried under a law that it had not penalised itself. It can be further gathered from the statement made by Uganda (delivered by Ambassador Mirjam Blaak, Head of the Uganda Delegation) in the ***General Debate of the Fifth Session of the Assembly of States Parties (ASP) to the ICC on Thursday 23 November 2006*** at The Hague. She stated, inter alia, while explaining why the Government of Uganda had opted to enter into peace negotiations with the LRA:

> *"In December 2003, the Government of Uganda (GoU) decided to refer the case to the ICC not because the Government was unable or unwilling to try the LRA itself but because the ICC was established specifically to deal with crimes of this magnitude and the GoU was unable to access the LRA which was operating outside its territory. We thought that the ICC would galvanise international cooperation and compel those countries harbouring the LRA to act appropriately. In September 2005, when the warrants of arrest were served, the GoU expected the UN and the States Parties to honour their international obligations to assist in giving effect to the arrest warrants…… This inability to arrest factored into the decision of the Government of Uganda to enter into peace negotiations with the LRA….The Government of Uganda assures the ICC and state parties that we are seeking a permanent solution to the violence that serves the need for peace and justice, compatible with our obligations under the Rome Statute. The talks are continuing and at this stage it is speculative to*

determine the outcome but please rest assured that Uganda will not condone impunity. What Uganda has experienced serves as an example of the acute need for international cooperation to give effect to ICC arrest warrants and makes us realise even more the need for all States Parties to cooperate with the ICC in fulfilling its obligations. In addition to the ICC arrest warrants, the UN Security Council has recognised the LRA as a regional threat that cannot be resolved without the cooperation of States. I would like to call upon all States Parties to recognise that executing the ICC arrest warrants is a collective responsibility requiring intensified international cooperation. The Court cannot execute its mandate by issuing warrants to many suspects who cannot be arrested and surrendered. We do not wish to see a Court without trials."

127. From this statement, the importance of the ICC cannot be overstated for our country. The demand for accountability is crucial, as evidenced by the provision in the ICC Statute for complementarity to national courts. The Rome Statute emphasises this principle of complementarity and limits the ICC's jurisdiction to the "most serious crimes of concern to the international community as a whole." This court, conceived during the Juba Peace Talks on Accountability and Reconciliation held between 2006 and 2008, serves as an accountability mechanism within the Ugandan judiciary, aiming to try those who have committed serious crimes during the conflict.

128. Despite the failure of the peace talks, the Ugandan government has fulfilled its part of the bargain. Uganda's advantage in accessing evidence and witnesses, as well as its experience in administering laws and operating without language barriers, eases logistical issues associated with prosecuting crimes domestically. National courts remain the primary enforcers of international criminal law, and the ICC is not meant to replace national criminal justice systems but to step in only when national courts are unable or unwilling to prosecute.

129. Based on my previous discussion, I hold a different view from the defence's argument regarding the applicable law before the ICD. Legal Notice No. 10 of 2011 grants the court jurisdiction over serious crimes. Similarly, the Geneva Conventions Act of 1964 is applicable during international armed conflict, and the

ICC Act of 2010 covers crimes in both international and non-international armed conflicts after 2010. As such, the crimes allegedly committed by the accused between 1992-2005 fall outside the scope of these laws. In this case, the use of CIL as a source of criminal law is justified, as it is well-established for use in both international and domestic courts. Therefore, the decision to include charges under CIL in the indictment reflects a commitment to upholding internationally recognised legal principles and addressing crimes that may not be explicitly codified in domestic laws. This approach demonstrates a willingness to hold individuals accountable for serious violations of human rights and international law, contributing to both national and global pursuit of justice and accountability.

130. I wholeheartedly concur with the prosecution's position that the prosecution of international crimes in Uganda should unequivocally align with international criminal law, emphasising the paramount principles of legality and fairness in the prosecution process. The crimes in question are meticulously defined, thoroughly scrutinised, and endorsed by international criminal tribunals, thereby upholding the integrity of the legal framework. It is essential to recognise that there is no contravention of the ex post facto prohibition, as these crimes were unequivocally categorised as illegal under international law at the time of their commission. Furthermore, I am in agreement with the assertion that our Constitution should be construed in a manner that facilitates the effective and just prosecution and punishment of international crimes, thereby ensuring the substantive safeguarding of societal interests.

131. In the context of this case, it would be unjust for the court to rule that the Accused cannot be prosecuted for international crimes merely because they were not defined in our penal laws at the time the crimes were committed. It is important to note that these crimes were well-established under CIL, which is a branch of law that Uganda has not distanced itself from. Importantly, Uganda surrendered Dominic Ongwen to face charges at the ICC for the same conduct the Accused is charged with. This discrepancy creates the appearance of a double standard. Applying a consistent standard, it would be more equitable to apply CIL directly to bring relevant charges against all suspects of serious crimes committed between 1964 and 2010, including the Accused. This approach would align with principles of fairness

and justice, and it provides a necessary avenue for accountability for international crimes.

ISSUE NO. 2: DOES THE AMENDED INDICTMENT AGAINST THE ACCUSED VIOLATE THE PRINCIPLE OF LEGALITY?

132. As rightly opined by the defence, the principle of legality, as enshrined in both domestic and international law, is fundamental to ensuring individual liberties, fairness, and the separation of powers within a state. It is a cornerstone of justice and due process that an act or omission must have constituted a criminal offence at the time it occurred and that penalties must be prescribed by law. The inclusion of charges by the prosecution that are not recognised in the legal order raises valid concerns about legality and adherence to fundamental legal principles. Therefore, it is essential for this court to carefully consider the application of the principle of legality in the case at hand to uphold the rule of law and protect the individual rights of the accused. On the other hand, while the inclusion of charges under CIL in the amended indictment may raise concerns regarding the principle of legality, it is important to acknowledge the evolving nature of legal systems and the recognition of CIL as a source of law, and its role in shaping legal norms and standards at both the domestic and international levels.

133. The principle of legality or *nullum crimen, nulla poena sine lege* comprises both prohibited criminal conduct (*nullum crimen sine lege)* and penalties for it (*nulla poena sine lege*). It is the cornerstone of both domestic and international criminal law. It is enshrined both in the Ugandan Constitution and key international human rights instruments to which Uganda is a party. Simply put, it requires that no one may be convicted for an act that was not a crime under the applicable law at the time it was done and no one may be subjected to a punishment greater than is provided for a crime under the applicable. The crime in question must be sufficiently defined at the time of the acts allegedly committed by the perpetrator to put him/her on notice of the penal consequences thereof. (See ***Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 43 Harv. Int'l L.J. 237, page 242).***

134. The elements of the principle of legality are recognised as general principles of law recognised by the international community. (See ***Claire de Than & E Shorts International***

criminal law and human rights (2003) 136). There are several components of the legality principle, but mainly, it encompasses the following: The principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*); the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta)*; the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and the prohibition against uncodified, i.e. unwritten, or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta)*, which in this context means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached. (See ***Clause KreB, The Principle of Legality, published by Max Planck Encyclopedia of Public International Law, at www.mpepil.com).***

135. He explains that the legality principle is theoretically grounded inter-alia, on the need: to guarantee individual liberties against state arbitrariness by providing individuals with foreseeability and reliability in the exercise of their rights, which safeguard is fundamental, because criminal law conveys the highest legal condemnation of acts in a society and provides for the highest sanctions for such acts; for fairness, in that an Accused should be able to know beforehand, whether his/her acts are liable to punishment; for definition of criminal conduct and any consequent sanctions with sufficient precision, before the commission of such criminal act, since criminal law is meant to deter citizens from engaging in undesirable conduct; and to promote democracy and separation of powers between the three arms of the state and prevent judicial arbitrariness, in that the legislator who is the direct representative of the people in parliament has the powers to limit their liberties and determine which conduct to criminalize. See ***Clause KreB*** supra.

136. In determining the first question I have raised above, I will stick to two major and divergent versions of the principle of legality, namely*, nullum crimen, nulla poena sine lege praevia version and the nullum crimen, nulla poena sine lege scripta* one, because of the availability of one of the two components of legality in the Constitutions of some Commonwealth countries, as well as in some international human rights instruments that I will cite shortly. While the former version of the principle necessitates that the crime and its penalty be provided for law, which law

includes domestic and international law, the latter version requires prior recognition of any crime or penalty in a written statute.

137. Uganda has adopted three constitutions since its independence. The first was the 1962 constitution, which was replaced by the 1967 constitution. In 1995, a new constitution was adopted and promulgated on October 8, 1995.

138. ***Article 28*** in ***clauses (7) and (12) of the Constitution*** embodies the principle of legality, stipulating as follows:

> *(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence. [emphasis added].*
>
> *(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law[emphasis added].*

139. To better understand these provisions, I have compared them with the previous Constitutions of Uganda and some Commonwealth countries. ***Article 15(4)*** of the ***1967 Constitution of Uganda*** and similar clauses in the Constitutions of Kenya, Rwanda, the Republic of South Africa, Canada, the Federal Republic of Nigeria, and Ghana emphasise the requirement that an act or omission must have constituted a criminal offence at the time it occurred and that penalties must be prescribed by law.

140. ***Article 15(4) of the 1967 Constitution of Uganda*** stipulates as follows:

> *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.*

141. ***Clause 8*** thereof provides that: *No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law:*

> *Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself*

notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not prescribed.

142. And ***Clause 13*** states as follows:

For the purposes of this article, the expression, "criminal offence" means a criminal offence under the law of Uganda;.....[emphasis mine].

143. Similarly. ***Article 24 (4) and (13) of the 1966 Constitution of Uganda*** is coached in the same terms as the cited provisions of the **1967 Constitution**.

144. Under the previous Kenyan Constitution of 2008, a criminal offence was defined as one falling under the laws of Kenya, excluding international law. However, the current Constitution of Kenya 2010 now allows charges to be brought under international law. ***Article 77(15)*** defines a criminal offence as one that falls under the laws of Kenya, explicitly excluding international law from its criminal justice system. However, the current Constitution of Kenya 2010, as amended, under Article 50, now allows for charges to be brought under international law. It stipulates:

(2) Every Accused person has the right to a fair trial, which includes the right—

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or (ii) a crime under international law.

145. Similarly, the Constitution of Rwanda and the Constitution of the Republic of South Africa recognise international law as a basis for the preferment of criminal charges, emphasising the right not to be convicted for an act or omission that was not an offence under national or international law at the time it occurred. ***The Constitution of Rwanda Article 20*** provides similarly. It states:

No one shall be subjected to prosecution, arrest, detention, or punishment on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed.

No one shall be punished with a heavier penalty than the one that was prescribed under the Law at the time when the offence was committed.

Offences and related penalties shall be determined by an Organic Law. [Emphasis is mine].

146. ***The Constitution of the Republic of South Africa, Section 35***, stipulates as follows in subsection 3:

Every Accused person has a right to a fair trial, which includes the right—

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. (Emphasis added).

147. The Constitution Act of Canada, 1982, also emphasises the right not to be found guilty on account of any act or omission unless it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations.

148. In contrast, the Constitution of the Federal Republic of Nigeria, 1999, and the Ghanian Constitution explicitly bar the applicability of international law or any unwritten laws. ***Article 36(12)*** explicitly bars the applicability of international law or any unwritten laws. It states:

*Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law. (*Emphasis added).

149. Similarly, the Ghanaian Constitution, ***Article 19***, requires that the offences are defined and penalties prescribed under Ghanaian written law. It is provided in ***Clauses 5, 6, 11 and 21*** of this article as follows:

(5) A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.

6) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

11) No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.

21) *For the purposes of this article "criminal offence" means a criminal offence under the laws of Ghana*.[Emphasis mine].

150. In the global context, the principle of legality addresses criminal offences in both national and international law. ***Article 11 (2) of the 1948 Universal Declaration of Human Rights*** states:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

151. ***Article 15 of the ICCPR*** reads:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations. (Emphasis added).

152. ***Article 22 of the ICC Statute*** provides:

(1) A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

(2) The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.

153. In other words, the court can only assess behaviour that is defined as a crime under the jurisdiction of the ICC, as outlined in the Rome Statute and further elaborated in the ICC Elements of Crimes. The behaviour does not need to be considered a crime under national law or any other international law apart from the Rome Statute. However, it's important to note that the ICC statute domesticated in our Rome Statute Act, represents a codification of CIL.

154. Similarly***, Article 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms*** states:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. (Emphasis added).

155. The Nigerian and Ghanaian Constitutions explicitly state the applicability of the national version of the principle of legality, while the Ugandan Constitution remains neutral on the matter. Other authorities indicate that the principle encompasses both national and international crimes. A notable disparity between ***Article 24 (4)*** and ***(13)*** of the ***1966 Constitution of Uganda*** and ***Article 15(4)*** and ***(8)*** of the ***1967 Constitution of Uganda***, and our current Constitution (1995) (as amended), is the absence of a mandatory requirement in the current

Constitution for the criminal offence to be a written criminal offence under the laws of Uganda.

156. Based on these provisions, it can be inferred that the previous Constitutions of Uganda and Kenya, as well as the current Constitutions of Ghana and the Federal Republic of Nigeria, adhere to the *nullum crimen, nulla poena sine lege scripta* version of the principle of legality. Meanwhile, the current Constitutions of Kenya, Rwanda, Canada, and the Republic of South Africa uphold the *nullum crimen, nulla poena sine lege praevia version* of the principle of legality. In contrast, our current Constitution does not explicitly provide that the offence should be defined under domestic law. It is neutral, as was observed by State Counsel.

157. The framers of our Constitution clearly departed from the provisions of the previous two Constitutions, which mandated that the offence charged and the punishment should be prescribed by written law. The Constitution does not also demand that the law prescribing the penalty be necessarily "written". It does not also explicitly preclude the direct application of CIL in Uganda.

158. Furthermore, the Constitutional court has held that a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their social, economic and political-cultural values so as to extend the benefit of the same to the maximum possible. See: ***Okello Okello John Livingstone & 6 others v. The Attorney General & Another, Constitutional Petition No. 1 of 2005.***

159. In the case of ***Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962),*** the Israeli Court of Appeal dealt with an appeal that closely parallels the case currently before this court. The Appellant had been convicted under a penal law enacted in 1950 retrospectively. On appeal, the Appellant argued that his conviction violated the principle of legality. The court held that the crimes for which the Appellant was convicted should be considered as part of international law since time immemorial. Therefore, enacting the 1950 Law to facilitate the Appellant's prosecution did not conflict with the principle of *nulla poena* or violate its inherent principle. The court also discussed the moral value of the principle of legality. It held:

As to the ethical aspect of the principle, it may be agreed that one's sense of justice generally recoils from punishing a person for an act committed by him which, at the time of its commission, had not yet been prohibited by law, and in respect of which he could not have known, therefore, that he would become criminally liable. But that appraisal cannot be deemed to apply to the odious crimes of the type attributed to the Appellant, and all the more so when we deal with crimes of the scope and dimensions described in the Judgment. In such a case, the above-mentioned maxim loses its moral value and is devoid of any ethical foundation. One's sense of justice must necessarily recoil even more from not punishing one who participated in such outrages, for he could not contend - even as it was impossible for the Appellant successfully to argue about his share in the implementation of the `Final Solution' - that, at the time of his actions, he was not aware that he was violating deeply-rooted universal moral values.

160. The court quoted Julius Stone, ***Legal Controls of International Conflict (1959) p. 369). pp. 369-370)*** on the relevance of the ethical content of the principle of *nulla poena* to the parallel crimes of which war criminals were convicted in the Nuremberg trials where he states as follows:

161. *...the ethical import of the maxim is confronted by the countervailing ethical principles supporting the courts and sentences. Killing, maiming, torturing, and humiliating innocent people are acts condemned by the value judgments of all civilised men, and punishable by every civilised municipal legal system... All this was known to the Accused when they acted, though they hoped, no doubt, to be protected by the law of a victorious Nazi state from punishment. If, then, the rules applied at Nuremberg were not previously rules of positive international law, they were at least rules of positive ethics accepted by civilised men everywhere, to which the Accused could properly be held in the forum of ethics...*

162. In conclusion, after carefully examining the application of the principle of legality in the present case, it is evident that the said principle, deeply entrenched in both domestic and international law, acts as a crucial safeguard for individual freedoms, fairness, and the division of powers within a state. It

upholds the fundamental principles of justice and due process by necessitating that an act or omission must have constituted a criminal offence at the time it occurred and that penalties must be prescribed by law, which law includes CIL.

163. While the inclusion of charges under CIL in the amended indictment may raise concerns regarding the principle of legality, it is important to acknowledge the evolving nature of both domestic and international legal systems and the role of CIL in shaping legal norms and standards at both levels. Internationally, there is an increasing recognition of CIL as a source of law and its significance in defining criminal conduct and corresponding penalties. Therefore, a balanced approach is essential to ensure that the rights of the accused are protected while also serving the interests of justice for all parties and victims of crime. This is crucial to cultivate a legal environment characterised by fairness and reverence for fundamental legal principles.

164. For these reasons, I am inclined to overrule the defence's preliminary objection and instruct that the pre-trial proceedings continue.

It is so ordered.

Susan Okalany
Judge
22nd November 2017