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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE; ODOKI; TSEKOOKO; OKELLO; KITUMBA; JJ.SC.).

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CONSTITUTIONAL APPEAL NO. 01 OF 2012

B E T W E E N

UGANDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

THOMAS KWOYELO ::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

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[Arising from the Ruling of the Constitutional Court, (Twinomujuni, Byamugisha, Nshimye, Arach-Amoko, Kasule, JJ.A) dated 22nd September 2011, in Constitutional Petition No. 36 of 2011 (Reference)]

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JUDGMENT OF KATUREEBE, JSC.

This appeal raises issues as to the Constitutionality of the Amnesty Act, (Cap 294, Laws of Uganda), whether the respondent is entitled to amnesty under that Act, and whether the respondent has suffered discrimination in the course of implementing that Act.

25

BACKGROUND.

The background to this case is as follows:-

The respondent was a commander in a rebel force known as the Lord’s Resistance Army (herein referred to as LRA). He was captured by the

Uganda Peoples Defence Forces in Garamba National Park in the Democratic Republic of Congo in 2005.

5 The respondent was subsequently brought back to Uganda and detained at Upper Prison, Luzira. It is while in detention at Luzira that, on 12th January 2010 he made a declaration before an officer in charge of the prison that he was renouncing rebellion and seeking amnesty. This declaration was submitted to the Amnesty Commission under the Amnesty Act.

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The Commission, on 19th March 2010, forwarded the respondent's application to the Director of Public Prosecutions (DPP) for his consideration in accordance with the provisions of the Amnesty Act. In the stated view of the Commission, the respondent qualified to benefit from the amnesty under the provisions of the Amnesty Act. The DPP did not respond to that application.

20 On 6th September 2010, the DPP preferred criminal charges against the respondent before the Chief Magistrate's Court at Buganda Road in Kampala. The charges were in respect of various offences under The Geneva Conventions Act. He was subsequently committed for trial to the International Crimes Division of the High Court on an amended indictment containing 50 counts.

25 The respondent, through his counsel, requested for a reference to the Constitutional Court, contending that the offences for which he was

indicted qualified him for amnesty under the Amnesty Act. He further contended that other LRA Commanders like Kenneth Banya, Sam Kolo and 26,000 other rebels who had been captured under similar circumstances were granted certificates of amnesty by both the DPP and the Commission. He contended, therefore, that the refusal by the DPP to certify him for amnesty and instead charge him with criminal offences, was discriminatory in so far as it deprived him of equal protection of the law under Article 21 of the Constitution. Accordingly the following questions were formulated and referred to the Constitutional Court for determination to wit:-

1) Whether the failure by the Director of Public Prosecutions (DPP) and the Amnesty commission to act on the application by the ACCUSED person for grant of a Certificate of Amnesty, whereas such Certificates were granted to other persons in circumstances similar to that of the Accused Persons, is discriminatory, in contravention of, and inconsistent with Articles 1, 2, 20(2), 21(1) and (3), of the 1995 Constitution of the Republic of Uganda.

2) Whether indicting the Accused Person under Article 147 of the Fourth Geneva Conventions Act, Cap. 363 (Laws of Uganda), of the offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with, and in contravention of Articles 1, 2, 8 (a) and 287 of the 1995 Constitution of the Republic of Uganda, and objectives 1 and XXVIII (b) of the National Objectives and Directive

**Principles of State Policy, contained in the 1995
Constitution of the Republic of Uganda.**

5 **3) Whether the alleged detention of the Accused in private
residence of an unnamed official of the Chieftaincy of
Military Intelligence (CMI) is in contravention of, and
inconsistent with Articles 1, 2, 23 (3), 4(b), 24 and 44 (a) of
the Constitution of the Republic of Uganda.**

10 The Constitutional Court upheld the respondent's reference, holding
that the Amnesty Act did not offend Uganda's International Treaty
obligations, nor did it take away the prosecutorial powers of the DPP
given under the Constitution as submitted by the Attorney General.
The Court further held that the respondent had been discriminated
15 against contrary to the provisions of Article 21(1) (2) of the
Constitution. It is against the above decisions that the DPP,
represented by the Attorney General, has brought this appeal.

THE GROUNDS OF APPEAL.

20 Although only three issues had been framed for decision by the
Constitutional court, in this Court the Attorney General filed 13 grounds
of appeal as follows:-

25 **"1. The Constitutional Court erred in law in holding that
Sections 2 and 3 of the Amnesty Act are not
inconsistent with Articles 120 (3) (b), (c) and (d), 120
(5) (6), 126 (2) (a), 128 (1) and 287 of the Constitution.**

2. The Constitutional Court erred in law and fact in finding that the impugned sections of the Amnesty Act do not infringe on the prosecutorial powers of the DPP or interfere with his independence.

5 **3. The Constitutional Court misdirected itself and erred in law and fact in interpreting the plea of pardon as recognized under Article 28 (10) in relation to the independence of the DPP in conducting prosecutions.**

10 **4. The Constitutional Court erred in law and in fact in failing to consider the status, and effect of the Geneva Conventions Act in relation to the Amnesty Act, and wrongly decided that the DPP can only prosecute persons declared by the Minister to be ineligible for amnesty.**

15 **5. The Constitutional Court erred in law and in fact in holding that the Respondent acquired a legal right to be granted amnesty or pardon under the Act.**

20 **6. The Constitutional Court erred in law in holding that the Amnesty Act addresses Uganda's obligations under international treaties and conventions.**

25 **7. The Constitutional Court misdirected itself and erred in law and fact when it concluded that it had not come across any uniform international standards or**

practices which prohibit states from granting amnesty and that the learned State Attorney did not cite any either.

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- 8. The Constitutional Court misdirected itself and erred in law and fact when it failed to consider both the purpose and effect of the Amnesty Act in determining the Constitutionality of the Act.**
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- 9. The Constitutional Court erred in law and fact in finding that the Director of Public Prosecutions did not give any objective and reasonable explanation why he did not sanction the Respondent's application for amnesty.**
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- 10. The Constitutional Court erred in law in holding that the Amnesty Commission and the Director of Public Prosecutions did not accord the Respondent equal treatment under the Amnesty Act, and that their actions were inconsistent with Article 21 (1) and (2) of the Constitution.**
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- 11. The Constitutional Court misdirected itself and erred in law and fact when in the absence of evidence it found that the DPP had sanctioned the grant of amnesty to 24,066 people and that 274 people were**
- 25

granted amnesty in 2010 which was “apparently sanctioned by the DPP”, and it wrongly relied on this finding to decide that there was unequal treatment of the Respondent.

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12. The Constitutional Court erred in law in failing to find that the Amnesty Act was inconsistent with Article 21 (1) (2) after it had found that the Act permits prosecution of government officials or UPDF personnel for grave breaches of the Geneva Conventions, but prohibits prosecution of rebels for the same offences.

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13. The Constitutional Court erred in fact in finding that there was no affidavit in reply by the Respondent.”

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Representation:

At the hearing in this court, the appellant was represented by Ms. Patricia Mutesi, Principal State Attorney, together with Ms. Joan Kagezi, Senior Principal State Attorney from the DPP’s Office. The respondent was represented by Mr. Caleb Alaka together with Mr. Nicholas Opio and Mr. Francis Onyango.

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Arguments of Counsel for the Appellant.

Ms. Mutesi, counsel for the appellant first argued grounds 6 and 8 which she contended to be the crux of the matter. She then argued grounds 1 and 5 jointly; 3, 9, 10 and 11 jointly; 12 and 13 separately.

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Grounds 6 and 8:

On these two grounds, counsel argued that Article 287 of the Constitution recognizes International Treaties that have been ratified by Uganda, and that the National Objective 28 of the Constitution states
5 that Uganda’s foreign policy shall be based on respect for International Law and Treaty Obligations. That **Section 2 of the Amnesty Act** establishes a general Amnesty, defines it and **Section 3 (1) (c)** enables Amnesty for all War Crimes committed by rebels, so it excluded all crimes, grave breaches inclusive from being prosecuted by any
10 Court. Uganda is a party to, ratified and domesticated the Geneva Convention whereby it agreed to enact legislation that punishes grave breaches of the Convention. In the Geneva Conventions Act, grave breaches are considered criminal offences.

15 She further contended that the Rome Statute that set up The International criminal Court that was ratified and domesticated by Uganda into the ICC Act defines International Crimes as the most serious crimes of concern to the International Community that must not go unpunished and their prosecution must be ensured.

20 Article 8 of the Rome Statute defines such war crimes to include:
“Willful killing, serious injury to body or health, hostage taking and willful destruction of property.” Article 9 considers crimes against humanity to include murder, torture and unlawful deprivation of
25 liberty. She argued that the respondent is being accused of committing some of these crimes against the civilian populations for which crimes

he must be prosecuted at national level. The same crimes are connected to the violation of rights that are spelt out under Chapter four of the Constitution of the Republic of Uganda like the right to life under Article 22, right to protection from torture, inhumane and degrading treatment under Article 214, right to liberty under Article 23 and to property under Article 26. She cited **Article 20 of the Constitution** which provides that “**rights and freedoms of the individual and groups in this Chapter shall be respected, upheld and promoted by all organs of Government and all Persons.**” She contended that this was to show that under International Law, Amnesties for certain crimes should not be allowed.

She further argued that the same rights are emphasized under Human Rights Treaties like **International Convention of Civil and Political Rights (ICCPR)** that was ratified by Uganda. **Article 2** of this convention requires State Parties to respect the rights therein and adopt laws which give effect to those rights and ensure that people enjoy them, which provisions are also highlighted in the **Uganda Human Rights Commission’s General Comment No. 31**. The general comment thus allude to State Parties being tasked with investigations, prosecuting and punishing human rights violation which are criminal offences in the country which provisions were also emphasized in the **United Nationals Basic Principles and Guidelines on the right to remedy and reparation for victims of International Human Rights Law and International**

Humanitarian Law and The JL00S Amnesty Law (2000) Issue Paper.

It was counsel's contention that the lower Court considered the purpose but not the effect of the Act. The purpose was considered when it
5 stated that the Amnesty Act was intended to restore peace and reconciliation but was silent to its effect of granting blanket amnesty to all crimes and those which amount to gross violation of human rights including the non-derogable rights that are guaranteed. The Act also protects all rebel groups in Uganda that could arise against
10 Government.

She argued that the DPP to-date cannot prosecute any rebel for war crimes neither can the International Division that was set up to try such crimes because under **Section 2 and 3 of the Amnesty Act**, if a
15 rebel signs a declaration form, they are entitled to Amnesty.

Counsel cited a lot of jurisprudence from the Inter American Court of Human Rights, and The American Convention of Human Rights. She relied on the case of **VALASQUEZ RODRIGUESZ, INTER-AMERICAN**
20 **COURT OF HUMAN RIGHTS, NO.4 OF 1988** where it was stated that if an illegal act violates human rights, the State has a duty to prevent such violation by investigating, prosecuting and punishing the perpetrator.

Counsel further cited the case of **Barrios Altos v. Peru, Inter-**
25 **American Court of Human rights of 14th March, 2001** and quoted the following statements from the judgment:

5 **“All Amnesty provisions designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violation such as torture, arbitrary execution and forceful disappearance of persons. All of them are prohibited because they violate non-derogable rights recognized by International Human Rights Law.”**

10 **“Self Amnesty laws lead to the defenselessness of the victims and perpetuate impunity therefore they are manifestly incompatible with the aims and the spirit of convention. And this type of law preclude identification of individuals who are responsible for human rights violation because it obstructs the investigation and the access to justice and prevents the victims and their relatives from knowing the truth and such laws lack legal effect and may continue to obstruct the investigation that was of relevance.”**

20 She pointed out that the same principle was stated in **Almonacid-Gomez v. Chile, Inter American Court of Human Rights, and 26th September, 2006 at page 115** which considered crimes against humanity as those which are not eligible for amnesty.

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Counsel also relied on **The United Nations Commentary on the Rule of Law Tools for Post-Conflict States** which provides the UN standards on Amnesties. It states that; **“Amnesties are now regulated by a substantial body of International Law, most importantly Amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and gross violation of Human Rights are inconsistent with the States’ obligations under various widely ratified treaties as well as the UN policy.”**

10 It also requires States to investigate, prosecute and punish individuals who commit such crimes.

In conclusion she submitted that the Amnesty Act prevents Uganda from fulfilling its obligations under the Geneva Convention under which the respondent was charged. The Amnesty Act is also inconsistent with Article 20 of the Constitution which obliges the State to uphold people’s rights.

Ground 4:

20 Under this ground the appellant’s counsel argued that the Constitutional Court held that the Amnesty Act meets International obligations because Section 2 (a) therein allows the Minister on Internal affairs by statutory Instrument to declare a person ineligible from being granted amnesty. The Minister has never declared any person ineligible which subjects Uganda’s obligation to some personal discretion. Counsel submitted that it was erroneous for the

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Constitutional Court to hold that the DPP can only prosecute only persons declared by the Minister to be ineligible for amnesty. This compromised the prosecutorial powers of the DPP under the Constitution.

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On ground 2:

The appellants counsel argued that **Article 120 of the Constitution** states the functions of the DPP which include power to institute criminal proceeding. **Article 120 (6)** provides that the DPP is not subject to
10 any control or direction of any person or authority while exercising those functions. She stated that the Minister’s power of declaring a person ineligible in **Section 2 (a) of the Amnesty Act** interferes with the independence of the DPP as spelt out in **Article 120 (6)** because he is subjected to the effective control and direction of the Minister.
15 She contended that in that respect the Amnesty Act is inconsistent with **Article 120 (6) of the Constitution.**

Grounds 1 and 5:

Submitting on the above grounds, counsel argued that arising from her
20 previous arguments, Section 2 and 3 of the Amnesty Act are inconsistent with the Constitution, thus null and void to the extent of that inconsistency. The respondent therefore, cannot have a legal right to be granted Amnesty or Pardon under the Amnesty Act.

25 **Ground 3:**

On this ground, counsel went on to argue that the Constitutional Court equated Amnesty to Pardon under Article 28(10) which error worked on their minds in making their decision that the Amnesty Act does not affect the DPP's powers to prosecute. The plea of pardon under Article 5 28(10) should have been read together with Article 120 on the powers of the DPP. She prayed that the Court holds otherwise.

Grounds 9, 10, and 11:

Counsel explained that these grounds were argued jointly because they 10 were all related to the DPP subjecting the Respondent to unequal treatment under the Act.

She argued that the Constitutional Court relied on unreliable evidence that the DPP had sanctioned the grant of amnesty to over 24,000 15 people, yet there was no evidence on record to show that the amnesty certificates had been sanctioned by the DPP. It is the Amnesty Commission Annual Report which indicated that over 24,000 people had been granted amnesty.

20 She said that under Section 4 (1) of the Amnesty Act, rebels can be granted amnesty if they report to an LC, Church Leader, and the DPP only comes in Section 4 (2), (3) and (4) of the Amnesty Act, that is if the rebel is in lawful detention or when he has been charged in Court for offences under Section 3 of the Amnesty Act.

25

With regard to the assertion by the respondent of discrimination and unequal treatment, counsel argued that since unequal treatment implies treating people in similar circumstances differently, there should have been evidence that there were people who were charged,
5 and were under lawful custody, facing charges of grave breaches, and that the respondent was being treated differently. There was no evidence to warrant that conclusion.

Ground 12:

10 On this ground, counsel criticized the Constitutional Court for not finding that the Amnesty Act was inconsistent with Article 21. To counsel, the Act does not protect Government or UPDF soldiers for grave breaches committed when fighting but shields rebels from being punished for the same crimes. Government soldiers are prosecuted
15 without any precondition of the Minister's declaration.

Ground 13:

On this ground, Counsel only set the record straight by stating that the Affidavit in Reply was filed, and was to be is found on page 101 of the
20 Record of Appeal, so it was just a slip of the pen.

She concluded by praying that Court allows the appeal, set aside the Constitutional Court decision, and that Court orders that the trial of the Respondent resumes forthwith.

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Arguments of Counsel for the Respondent.

Mr. Alaka, counsel for the Respondent, in reply, reduced his arguments into three (3) issues. First, whether the Amnesty Act violated Uganda's obligations under International Laws and Covenants. The second issue is to whether the Amnesty Act is unconstitutional. And whether the
5 respondent is entitled to Amnesty under Article 21 of the Constitution?

Counsel invited Court to consider the principles of state policy mainly Principle 1 on implementation of objectives. He argued that there are no uniform international standards or practice which prohibits States
10 from granting Amnesty. He relied on the case of **Azanian People's Organisation & 7 Ors. V. The President of South Africa & Ors (CCT 17/96) [1996] ZACC 16.**

He particularly cited the following quote from that case;

15 **“South Africa is not alone I being confronted with the historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to and consolidation of an overtaking democratic order Chile, Argentina and Elsalvador are among the**
20 **countries that have in modern time been confronted with a similar need. Although the mechanism adopted to facilitate that process have differred from country to country and from time to time, the principle that the amnesty should, in appropriate circumstances be accorded**
25 **to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all**

these countries and truth commissions were also established in such countries.”

He submitted that Uganda has experienced political strife and invited
5 Court to refer to the preamble of the Constitution of the Republic of
Uganda which states that;

***“The people of Uganda recalled first of their history which
has been characterized by political and constitutional
instability. Recognizing the struggles against the forces of
10 tyranny, oppression and exploitation but most importantly
it being committed to building a better future by
establishing a social economic and political order through
a popular and durable national Constitution based on the
principles of unity, peace, equality, democracy, freedom,
15 social justice and peace.”***

He also cited Directive 3 of the National Objectives and Directive
principles of State Policy. It reads;

**“All organs of state and people shall work towards the
20 promotion of national unity, peace and stability.”** It further
states that, **“there shall be established institutions and
procedures for the resolution of conflicts fairly and peacefully.”**

Counsel stated that the Amnesty Act was enacted to address a specific
25 historical problem of resolving the Northern conflict or crisis as such, it
is not unconstitutional. He invoked Directive 28 of the Constitution of

the Republic of Uganda which states that; **“Uganda shall participate in International and Regional Organizations and stand for peace and for the wellbeing and progress of humanity.”** He submitted that the International Conventions signed by Uganda should be considered alongside Uganda’s local circumstances. He also noted that, Article 79 (1) of the Constitution enables Parliament to make laws, and that is why the Amnesty Act was enacted and is continuously extended.

10 He cited Statutory Instrument No. 18 of 2013, by which the operation of the Amnesty Act was extended until the 25th day of 2015. Counsel noted that the Constitutional Court considered the effect of the Amnesty Act in that, Uganda’s obligation under International Treaties and Conventions which it had ratified and domesticated, addressed provisions of the Act in so far as not all rebels were granted amnesty, since the Minister can declare some ineligible for amnesty.

He also submitted that the amnesty is not a blanket amnesty because Uganda can choose to take rebels before the ICC. That was for example, done for top Commanders like Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Rasca Lukwiya. Uganda can also through the Minister choose to declare a rebel ineligibility for amnesty.

He also drew Court’s attention to the Respondent’s affidavit, where he stated that, he had made several attempts to escape from captivity but it was futile because his colleague who tried to escape was killed. The

affidavit further stated that, **“as a child, I was forcefully introduced, indoctrinated and trained into a culture of brutality in the Lord’s Resistance Army like all other abducted children.”**

5 Counsel contended that denying abductees’ amnesty would be condemning very many innocent souls because they were not responsible for becoming rebels of LRA, which is the mischief the Amnesty Act intended to cure. He drew Court’s attention to the document from the Amnesty Commission which stated that 26,162
10 people reported back from the bush and were granted amnesty some of which had been released by the DPP which allegation, he asserted, was not rebutted at the Constitutional Court.

He invited court to look at the affidavit of the respondent where he
15 stated that; **“while taking part in rebel activities leadership of Lord’s Resistance Army, I met other rebel commanders such as Brigadiers Sam Kolo and Kenneth Banya now enjoying Amnesty in Uganda.”**

20 The affidavit further stated that, **“I was also made aware that Brigadier Kenneth Banya had been captured by the UPDF while fighting the Government of the Republic of Uganda.”**

He also stated that, **“I was also made aware that subsequently in 2005 Brigadier Sam Kolo was also captured by the UPDF while fighting the Government of The Republic of Uganda.”**
25

Counsel Alaka submitted that these Brigadiers were in higher ranks than the respondent who, was a colonel at the time he was captured.

5 He cited the Amnesty Commission Report which indicated that 26,162 reporters/persons had been granted amnesty. He stated that the Amnesty Act was enacted by Parliament in 2000 to provide for amnesty for Ugandans involved in acts of war like nature in various parts of the country. He noted that amnesty was subject to renouncing rebellion
10 which is what the respondent did. The Amnesty Act also set up institutions to implement its provisions, provided for resettlement packages, demobilization and reintegration programs all of which are aimed at attracting people to come back home.

15 He went on to distinguish **Almonacid** and **Barrios Case** that were relied on by the appellant from the instant case arguing that **Barrios' case** was about self amnesty where persons in power would sit, do wrong things and grant themselves amnesty because they did not want to be charged as opposed to this case where the Government had
20 prosecuted an individual.

He concluded on this point with the submission that the powers of the DPP under Article 120 were not affected. He stated that the Amnesty Act enabled the DPP to investigate cases of persons charged with or
25 held in custody for criminal offences that were not covered by the Amnesty Act.

On the issue of pardon, he cited the interpretation section of the Amnesty Act where pardon is defined to mean; **“a pardon,**

forgiveness, exemption or discharge from criminal prosecution

5 **or any other form of punishment by the State.”** He thus said that to restrict pardon under Article 121 would not be a proper construction since this one is expressly defined under the Act. He prayed that the appeal be dismissed.

10 He stated that the cases relied upon by the appellant were of individual complaints. In those cases, individuals would complain against the grant of the amnesty by their state. In the instant case however, it is the State that enacted an Act, but has now petitioned Court to declare it unconstitutional. He drew Court’s attention to the principle of good
15 faith under Article 26 of the Vienna Convention on the Law of Treaties and the United Nations Committee in General Comment No. 31. In both authorities, obligations under treaties and covenant must be given effect in good faith by all State parties. He stated that the actions of the appellant did not depict good faith since the case came to Court. He
20 alleged that the State has done all it can in its powers to defeat the Amnesty Act.

He prayed that Court finds the Amnesty Act Constitutional.

25 Counsel then went on to argue that the respondent was subjected to unequal treatment when the DPP rejected his amnesty application. He

noted that he was also not afforded equal protection and the DPP failed to justify the differential treatment. He cited Article 7 of the Universal Declaration of Human Rights which states that; **“All people are equal before the law and are entitled without discrimination to equal protection of the law”** and Article 21 (1) of the Constitution which states that;

“All persons are equal before and under the law in all spheres of political economic socio cultural life and in every other aspect and shall enjoy the protection of the law.”

He drew Court’s attention to Articles 26 and 27 of the International Covenant on Civil and Political Rights on equal protection before the law. He cited the case of **MULLER & ANOR. v. NAMIBIA 2002 AHRLR 8 HRC 2002** where it was held that any sort of discrimination must be justified.

He further submitted that in as much as the Rome Statute of the International Criminal Court and the ICC Act prohibits amnesties, this case does not fall in any of these statutes because The International Criminal court Act was enacted in 2010 and commenced in June the same year while the Rome Statute takes effect from 2002. The allegations against Respondent stretch from 1996, so this Act is not applicable to these proceedings.

Counsel Onyango also for the respondent contended that the Geneva Conventions also provide for Amnesties. He relied on the case of **Azanian People' Organization & 7 Ors. v. The President of South Africa & Ors (CCT117) /96 [1996] ZACC 16** (supra). In this case, a group of persons of South Africa challenged the Constitutionality of their Truth and Reconciliation Commission's Act. The judge in arriving at his decision relied on Article 6(5) of Additional Protocol 11 of the Geneva Convention, which provides as follows;

“At the end of hostilities, authorities in power shall endeavor to grant the broadest possible amnesties to persons who have participated in the armed conflict.”

He thus submitted that amnesty in Customary International Law is crystallizing but has not yet crystallized. That there is no agreed position on the applicability, constitutionality or legality of amnesties in International Customary Law.

Ultimately, counsel also prayed that the appeal be dismissed. That this Court be pleased to order the release of the accused from custody and that costs of this appeal and constitutional reference at the Constitutional Court be borne by the Attorney-General.

The Issues:

Despite the numerous grounds of appeal filed by the Attorney General, in my view, the appeal raises only three substantive issues. The first is whether the Amnesty Act is inconsistent with the Constitution on the

grounds that it impinges on the prosecutorial powers of the DPP. The second issue is whether the Amnesty Act is inconsistent with the Constitution of Uganda and Uganda's international law obligations on account that it purports to grant blanket amnesty for all crimes including those stipulated in the Geneva Conventions Act. The third issue is whether the respondent was discriminated against contrary to the provisions of the Constitution. In that regard I agree with Mr. Alaka who has also identified the above as the issues to be resolved by this court.

10

CONSIDERATION AND RESOLUTION OF ISSUES.

In considering the issues, I will as much as possible relate them to the grounds of appeal and submissions thereon, but not necessarily in the order counsel for the appellant argued them. The grounds of appeal are, in my view overlapping and subsets within the issues for decision, and a disposal of the issues will have disposed of the grounds of appeal.

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PROSECUTORIAL POWERS OF THE DPP VIS-A-VIS THE AMNESTY ACT.

I will start with the issue of the prosecutorial powers of the DPP vis-à-vis the provisions of the Amnesty Act. The Constitution spells out the functions and powers of the DPP. Of particular relevancy are the following provisions:

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25 **Article 120(3) states thus:**

“The functions of the director of Public Prosecutions are the following:-

(a) To direct the Police to investigate any information of a criminal nature and to report to him or her expeditiously.

(b) To institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;

(c)

(d)

120(6) “In exercising his or her powers under this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

120(6) “In the exercise of the functions conferred on him or her by this Article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.”

As earlier indicated, Ms. Mutesi for the Attorney General argued that in so far as the Amnesty Act granted a blanket amnesty for all crimes committed during the rebellion, it had deprived the DPP of his prosecutorial powers and was therefore inconsistent with the aforementioned provisions of the Constitution. She further presented an interesting argument that in so far as the Amnesty Act granted blanket Amnesty for all manner of crimes, it violated Uganda’s

International obligations. Citing a number of authorities to support her arguments, she submitted that Amnesty for all crimes is against international law. She in particular cited the Geneva Conventions which provide for the prosecution by all States of “grave breaches” as defined
5 therein. By implementing the Amnesty Act, she argued, Uganda had failed in its duty to prosecute persons who had committed grave offences, and was therefore in breach of her international obligations.

On the other hand, Mr. Alaka for the respondent, supported the decision
10 of the Constitutional Court that the Amnesty Act did not grant a blanket Amnesty since there was a role for both the DPP and the Minister whereby some people may not be granted amnesty.

Whether the Amnesty Act granted blanket amnesty.

15 I will consider these arguments first. There is need to be clear as to what is meant by “blanket amnesty.” A document titled **“RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES - AMNESTIES,”** published by the Office of the United Nations High Commission for Human Rights, and cited by the appellant, gives us some guidance as
20 to the understanding of the term. It states as follows:-

***“Although frequent, the phrase “blanket amnesties” is rarely defined and does not appear to be used consistently. Still, a working definition can be derived from the way this phrase has been used: blanket amnesties exempt broad categories of serious human
25 rights offenders from prosecution and/or civil liability***

without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis. (Emphasis added).

5 It is now necessary to consider and determine whether the amnesty granted under the Amnesty Act can be regarded as blanket amnesty. In so doing, I think it is necessary first to review the powers of the DPP under the Amnesty Act. The Amnesty act does recognize the special position and constitutional duties of the DPP. Section 4(3) of the Act
10 states as follows:-

"A reporter to whom subsection (2) applies shall not be released from custody until the Director of Public Prosecutions has certified that he is satisfied that:-

15 ***(a) The person falls within the provisions of section 3 of this Act; and***

***(4) Subject to subsection (3) the director of Public Prosecutions shall investigate the cases of all persons charged with or held in custody for criminal offences and shall take steps to cause to be released all persons involved
20 in such cases who qualify for grant of amnesty under this Act, if those persons renounce all activities mentioned in section 3, in which they have been involved.*** (Emphasis added).

25 The legislature would not have spelled out such a role for the DPP if it was not mindful of the Constitutional position of DPP. In carrying

out his prosecutorial duties, the DPP, necessarily, must look at all the laws of Uganda that create prosecutable offences. The Constitution even states that where a prosecution has been commenced by a private person or body, the DPP has powers to take over that prosecution. In carrying out his role under the Amnesty Act, it is imperative, in my view, that the DPP looks at all the relevant laws to satisfy himself that the persons he certifies for grant of amnesty do so qualify not only under the Amnesty Act but also under other laws of Uganda such as the Geneva Conventions Act. The DPP as indicated above, is also enjoined to **“have regard to the Public interest, the interest of the administration of Justice and the need to prevent abuse of legal process.”**

It is noteworthy that the Constitution does not prescribe or define offences that the DPP is required to prosecute. It merely gives him the powers to prosecute. The offences are created, defined and sanctions prescribed therefore in legislation made by the Legislature as per Article 28(12) and 79 of the Constitution. The legislature can abolish offences as it creates new ones, and can, in appropriate circumstances grant pardon or amnesty in a manner consistent with the Constitution and Uganda’s obligation under international law. Therefore the mere fact of passing legislation that grants pardon or amnesty for certain offences would not in itself, in my view, violate the prosecutorial powers of the DPP.

It is now necessary to examine the Amnesty Act as to whether it grants a blanket amnesty for all crimes as argued by the Attorney General. The long title of the Act lays out the purpose of the Act as follows:

5 ***“An Act to provide for an Amnesty for Ugandans involved in acts of war like nature in various parts of the Country and for other connected purposes”*** (Emphasis added).

10 That seems to me to suggest that the target of the Act is first and foremost people who have participated in acts of war or rebellion. Other matters are only incidental to that primary purpose.

15 Section 2 spells out who may be granted amnesty. It is important to quote this section in full as it is the basis of this whole appeal. It states as follows:-

20 ***“2(1) an amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by:***

25 ***a) actual participation in combat;***

b) collaborating with perpetrators of war or armed rebellion;

c) committing any other crime in the furtherance of war or armed rebellion.

d) assisting or aiding the conduct or prosecution of war or armed rebellion.

(2) A person referred to under sub-section (1) shall not be prosecuted or subjected to any form of punishment for participation in the war or rebellion for any crime committed in the cause of war or armed rebellion.

5 (Emphasis added).

Under the laws of Uganda, waging war or armed rebellion against the government would constitute the offence of treason. Any person who aids and abets or hides offenders also commits an offence of either aiding and abetting or misprision of treason. It is also to be assumed
10 that during war or rebellion certain acts are committed – people die and property is destroyed. These, in my view, are the acts that are the subject of amnesty. The question which arises, however, is with regard to paragraph (c) of Section 2 (1).

15 What is that crime which is committed “in the furtherance of war or armed rebellion.”?

And also, in sub-section (2), what is the crime that is committed “in the cause of war or armed rebellion.”

At this point we need to understand the meaning of the term
20 “amnesty”. The Act itself defines “amnesty.” As follows:-

“amnesty” means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State.”

25 In my view, this definition must be read in the context of the purpose of the Act as contained in the long title i.e. granting amnesty to persons involved in acts of war like nature.

BLACK'S LAW DICTIONARY, 6TH Edition defines the word "amnesty" as follows:-

5 **"A sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been guilty of crime or delict, generally political offences - treason, sedition, rebellion, draft evasion - and often conditioned upon their return to obedience and duty within a prescribed time....."** (Emphasis added).

10 The 9th Edition of **BLACK'S LAW DICTIONARY** has defined the word amnesty, using the term "**pardon**" but more or less re-stating the earlier definition. It defines "**amnesty**" as "a pardon extended **by the government to a group of class of persons, usu. For a political**

15 **offense; the act of a sovereign power officially forgiving certain classes of person who are subject to trial but have not yet been convictedunlike an ordinary pardon, amnesty is addressed to crimes against state sovereign - that is, political offenses with respect to which forgiveness is deemed more**

20 **expedient for the public welfare than prosecution and punishment. Amnesty is general, addressed to classes or even communities. Also termed general pardon."**

25 It appears to me that the amnesty as defined both in the Act and by the learned authors cited above is targeted at political crimes and those incidental to such acts or crimes. I do not think the definitions, and

indeed the purpose of the Act, or in its implementation, would include granting amnesty to grave crimes committed by an individual or group for purposes other than in furtherance or in the cause of the war or rebellion.

5

The Legislature could easily have stated without any qualification that any crimes committed during the war are granted amnesty. But, in my view, words were carefully used. The crime must be shown to have been "*in furtherance of war or rebellion*" or "*in the cause of war or*
10 *rebellion,*" for it to qualify for grant of amnesty. This implies that someone had to examine the offences attributed to any person seeking amnesty and determine whether those crimes were in furtherance or in the cause of the war. To this end, that person or authority would need to look at all the relevant laws of Uganda including Uganda's
15 International Treaty Obligations to determine which acts are deemed to be in the cause of, or in furtherance of, war or rebellion.

To me this is the role that was given to the DPP. There are two aspects to the role given to the DPP. If the DPP was not satisfied that a
20 particular crime was not committed in furtherance or in the cause of the war or rebellion, then he would, in my view, exercise his normal prosecutorial powers to charge such a person with a specific offence under a specified law in Uganda. The second aspect is where, under Section 3(3) and (4) a reporter is charged with or held under lawful
25 custody for an offence which is covered by the amnesty under Section 2, i.e. an offence eligible for amnesty. In that case the DPP is required

to investigate the case and satisfy himself that the offence is eligible for amnesty under Section 2. It is then that the DPP may issue a certificate for grant of amnesty. It follows that if the DPP is not so satisfied, he will not so certify, and may commence prosecution proceedings against
5 that person.

Furthermore, under the Amnesty (Amendment) Act, 2006, Section 3 thereof, a new section 2A was added which states thus:-

“2 A Persons ineligible for amnesty; Notwithstanding the provisions of section 2 of the principal Act, a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by Statutory Instrument made with the approval of parliament.”
10

15 This leads me to consider the possible factors that may guide the DPP or the Minister in arriving at their determinations.

To my mind, the fact that the Act provides for the DPP to certify reporters for grant of amnesty upon being satisfied that they so qualify,
20 and the fact that the Minister is given powers to declare certain persons as being ineligible for grant of amnesty, would imply that the Act does not extend a blanket amnesty to all persons and to all crimes as argued by the Attorney General. Furthermore, the DPP in exercise of his prosecutorial power is required to have regard to the law, the national
25 interest and administration of justice. Where the law has granted amnesty or pardon for a particular set of crimes, that law cannot be

said to be inconsistent with the power of the DPP. Parliament has power to make law for the good governance of the country. This law aimed at solving the problem of people waging war against government.

5

Pardon and Amnesty.

The Attorney General argued that ‘pardon’ in Article 121 of the Constitution is granted after trial and conviction of the person, and that it was therefore in error that the Constitutional Court equated it to
10 amnesty. Parliament has clearly stated that for a crime to be eligible for Amnesty, it must have been committed in the cause of the war or in furtherance of the war. I see no inconsistency in the provision relating to the powers of the DPP. In my view, the use of the word “pardon” must be read in context. It cannot be narrowly restricted in the context
15 of Article 121 of the Constitution on the exercise by the President of the prerogative of mercy. Therein the pardon is exercised by the President after a person has been tried and convicted of a criminal offence. In the context of amnesty, the crime is forgiven by the State under the law creating the amnesty or pardon. Again I turn to **BLACK’S LAW**
20 **DICTIONARY** which states thus:-

**“Included in the concept of pardon is “amnesty” which is similar in all respects to a full pardon, in so far as when it is granted both the crime and punishment are abrogated; however, unlike pardons, an amnesty usually refers to a class of individuals irrespective of individual
25 situations.....Amnesty is the abolition and forgetfulness of**

the offence: pardon is forgivenessthe first is usually addressed to crimes against the sovereignty of the nation, to political offences; the second condones infractions of the peace of the nation.”

5

A person who wages war or rebellion against the State may also cause infractions of the peace of the nation as incidental acts to the waging of the war. Giving amnesty or pardon to these people is the purpose of the Act. In my opinion, Article 28(10) of the Constitution which states
10 that “*No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence*” is applicable to persons who have been given amnesty. The provision is wider than the narrow provision of Article 121 (4) by which the President grants pardon after a person has been convicted. In that
15 respect, I do not accept the argument of counsel for the Appellant that pardon as used in the Act is inconsistent with the use of the word under Article 121(4). I also do not accept her argument that because the Minister has been given powers to declare some people ineligible for amnesty, that amounts to direction or control of the DPP.

20

It is my view that in exercise of his powers, the DPP does not have to wait for the Minister to do his own part. His powers are in the Constitution and independent of the Minister. The respondent was in lawful custody. The DPP was required to satisfy himself that the person
25 has committed crimes that are not within the ambit of section 2 of the Amnesty Act. Once so satisfied, I see no reason why the DPP cannot

proceed to prosecute. It is not absolutely necessary for the DPP to give reasons as to why he did not certify for any one individual. The charges preferred are evidence as to why the DPP did not certify for grant of amnesty. The Amnesty (Amendment) Act does not state the factors
5 that the Minister may consider in declaring a person ineligible for amnesty. In any event, if the person is declared ineligible for amnesty, the DPP could prosecute that person if there are prosecutable offences. There is no inconsistency.

10 It is my view therefore that for the reasons discussed above, the Amnesty Act does not grant blanket amnesty for all crimes. I am further of the view that the powers of the DPP to prosecute have not been violated or impinged upon in any way which is inconsistent with the Constitution. Accordingly ground 1, 2, and 3 must fail.

15

WHETHER THE AMNESTY ACT VIOLATES UGANDA'S INTERNATIONAL LAW OBLIGATIONS.

I now turn to the submissions under ground 6 on the issue of whether the Amnesty Act is inconsistent with Uganda's international Treaty
20 obligations. It must be noted from the onset that some of these treaties have been domesticated into the country's municipal law and must be viewed together with the Amnesty Act. The first obligations arise under the Geneva Conventions, domesticated under the Geneva Conventions Act, Cap.363 Laws of Uganda. In discussing these
25 obligations and laws, I must express the view that when a country commits itself to international obligations, one must assume that it

does so deliberately, lawfully and in its national interest. By the time the State goes through all the procedures of ratification and domestication, it must have seriously considered its overall national interest in the context of its role as a member of the United Nations.

5 Therefore, a State should not easily shun its obligations as and when it wishes to. This must particularly hold true when the issue at hand is the massive violations of the human rights of its own people, whether by state actors or individuals or groups of individuals. I note that by Article 287 of the 1995 Constitution of Uganda expressly recognized and expressly continued into force treaties in existence at the time its
10 coming into force. The framers of the Constitution must have been convinced that all these treaties were still in the best interests of Uganda.

15 Uganda is a member of the United Nations. This organization was formed in the wake of the Second World War where untold violations of human rights had occurred. The preamble to the Charter of the United Nations States, in part, that the people of the United Nations **“re-affirm faith in fundamental human rights, in the dignity and
20 worth of the human person, and in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.....”** (Emphasis added)

25

Then came the Universal Declaration of Human Rights which offers a powerful guide as to the interpretation of the UN Charter. The preamble to the Declaration offers insight as to the purpose and background to the declaration. It states as follows:-

5 ***“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the***
10 ***conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.***
15 ***Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.....”*** (Emphasis added)

As indicated above, the world was coming out of the Second World War
20 where barbarous acts had been committed that outraged the conscious of mankind. These declarations were therefore setting a stage for all members of the United Nations to have a common standard with regard to the observance and protection of human rights.

25 It is in this context that the Geneva Conventions were promulgated. In essence, the Geneva Conventions do recognize the fact that wars and

rebellions do occur in the world. But they seek to lay a standard that even during the time of war or armed rebellion, there are certain acts, the sort that outraged the conscious of mankind during World War II, that must never be permitted. These were referred to as grave
5 breaches of the Conventions. Where they occur, states undertake, as an international obligation, to investigate, arrest and prosecute the offenders, provided the offenders are accorded fair trial in courts of law.

Uganda acceded to the Conventions and accordingly enacted The
10 Geneva Conventions Act, Cap. 363, Laws of Uganda which commenced on 16th October 1964. The purpose of the Act is given as ***“to enable effect to be given to certain international conventions done at Geneva on the twelfth day of August, one thousand nine hundred and forty nine…….”***

15 Section 2 of the Geneva Conventions Act sets out the grave breaches of the Conventions, in as far as international conflict is concerned. It states as follows:-

“2 Grave breach of Conventions”

20 ***(1) any person, whatever his or her nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the conventions as is referred to in the following articles respectively of those***
25 ***conventions, that is to say-***

- 5
- a) **Article 50 of the convention set out in the first, schedule to this act;**
 - b) **Article 51 of the convention set out in the second schedule to this act;**
 - c) **Article 130 of the convention set out in the Third Schedule to this Act;**
 - d) **Article 147 of the convention set out in the Fourth Schedule to this act. Commits an offence and is liable on conviction -**
 - 10 e) **In the case of a grave breach involving the willful killing of the person protected by the convention in question, to imprisonment for life;**
 - f) **In the case of any other grave breach, to imprisonment for a term not exceeding fourteen years.”**
- 15

Subsection (2) provides for trial in Uganda even if the offence was committed outside Uganda. Under sub-section (3) proceedings must be instituted either by the DPP himself or on his behalf.

20

The common Article 3 to the Conventions provides for “*Conflicts not of an international character.*” It obliges the parties to such conflict to apply as a minimum, the following provisions:-

25

(1) “To this end the following Acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above - mentioned persons:-

- 5
- (a) **Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;**
 - (b) **Taking of hostages;**
 - (c) **Outrages upon personal dignity, in particular humiliating and degrading treatment;**
 - (d) **The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.**
- 10

The conflict in Northern Uganda may be said to largely be not of an international character and is therefore subject to the above provision. But there were occasions when it spread out to other neighbouring countries, e.g, Sudan and Democratic Republic of Congo thereby taking on an international character. So in any event, the Geneva Convention Act would apply.

15

By analogy, the language of Article 147 of the Fourth Schedule, i.e the Geneva Convention relating to the Protection of Civilian Persons in time of war, is illustrative as to prohibited conduct.

20

Article 147 provides thus:-

“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman

25

treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present convention, the taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” (Emphasis added).

The Uganda legislature must have been conscious of the language of the above provision when they debated and passed the Amnesty Act.

The words “*not justified by military necessity and carried out unlawfully and wantonly*”, in my view help us to understand the provisions of section 3 of the Amnesty Act which provides for crimes “*in furtherance of the war or rebellion.*” And in the “*cause of the war or rebellion.*” Those crimes that are committed but NOT in furtherance of rebellion or in the cause of the war are grave breaches which must be punished.

Whereas one may understand civilians being killed in cross-fire or when cities are bombed by aircraft or artillery, as being deaths while one is carrying out acts in furtherance of the war, it is difficult to see how acts of genocide against a given population, or the willful killing of innocent civilians in their homes when there is no military necessity, can be

regarded as being furtherance of the war or rebellion. These would be acts carried out “unlawfully and wantonly.” This court cannot ignore reports, some well documented, of terrible crimes planned and committed by some people in Northern Uganda against innocent
5 civilians who had nothing to do with government. Those acts, in my view, do not qualify for grant of amnesty under the Amnesty Act. From the definitions of the term “amnesty” discussed above it is clear that personal crimes or crimes committed willfully against individual
10 civilians or communities would not ordinarily be covered by amnesty.

By way of analogy, it is also noteworthy that under the Rome Statute establishing the International Criminal Court, the International Criminal Court has been given jurisdiction to try violations of the laws of war even in non-international armed conflict. The language used in
15 describing the offences covered leaves me in no doubt that the use of the phrases “in furtherance of the war” or in the cause of the war” were carefully and deliberately chosen. Under article 8.2(e) Statute of the International Criminal Court, the offences over which the ICC has jurisdiction include:-

20 ***“(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”***

25 ***(iv) “Internationally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals***

and places where the sick and wounded are collected, provided they are not military objectives.

5 ***(vi) “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violation of Article 3 common to the four Geneva Conventions.***

10 ***(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.***

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand:

15 ***(ix) Killing or wounding treacherously a combatant adversary;***

20 ***(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.*** (Emphasis added).

Clearly these would be acts not in furtherance of the war or in the cause of the war, and whoever commits them is subject to prosecution.

25 These prohibitions are part of the law of Uganda which the Director of Public Prosecutions and the Minister must bear in mind when deciding

whether a person is eligible for amnesty or not. In my view, the Amnesty Act did not foreclose on certain individuals who may have committed these type of offences from being made to account for their actions. Any crimes committed that were not necessitated by the furtherance of the war or rebellion were not a subject of amnesty under the Amnesty Act. They were not political offences but crimes committed on members of society. To allow them, would mean that crimes committed out of malice or even personal vendetta would be granted amnesty. Willful murder of civilians is a crime against humanity which, in my view, cannot be granted amnesty under the Laws of Uganda particularly the Geneva Conventions Act, and the Amnesty Act does not purport to do so. In that regard it is my considered view that the Amnesty Act is not inconsistent with Uganda's International treaty obligations, as, strangely, argued by the Attorney General. Ground 6 therefore should fail.

Whether the respondent suffered discrimination

I will now consider the issue of whether the respondent has been discriminated against by being charged with criminal offences when other rebels were granted amnesty.

Background:

Reference to Juba agreements

It appears to me that both the Government and Lord's Resistance Army fully understood that there would be accountability by certain

individuals who may have committed certain criminal acts. In his affidavit in support of the Reference, the Respondent in paragraph 9 thereof makes reference to accords signed between the Government of Uganda and LRA. He specifically refers to one whereby it was agreed to form a war crimes court. Counsel for the respondent Mr. Alaka in the course of his submissions also made reference to the Juba Agreements. Copies of signed text of the agreements were made available to the Court by the Solicitor General by letter dated 15th May 2014 which was copied to the Advocates for the respondent. I will therefore make reference to these agreements, bearing in mind that the final agreement was never signed, so the agreements that were signed by themselves could not stand. Nonetheless they offer a guide as to the understanding and intentions of the parties.

The agreement on accountability and Reconciliation which was signed on 29th June 2007 is illustrative. Two paragraphs from its preamble illustrate the point that people would have to account for their actions for serious crimes and that there would be no impunity. It states thus:-

“ Conscious of the crimes, human rights violations and adverse socio-economic and political impacts of the conflict, and the need to honour the suffering of victims by promoting lasting peace with justice; COMMITTED to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the International Criminal

Court (ICC) and in particular the principle of complementarity.”
(Emphasis added).

The substantive provisions of this agreement make it clear that
5 individuals should take personal responsibility for grave breaches of the
law, only that such persons should be guaranteed fair hearing before an
impartial Court. (See 3.2 and 3.3). Section 4 on “Accountability”
provides as follows:-

**4.1 “Formal criminal and civil justice measures shall be applied
10 to any individual who is alleged to have committed serious
crimes or human rights violations in the course of the conflict.
Provided that State actors shall be subject to existing criminal
justice processes and not to special justice processes under
this agreement.”**

15
**4.2 “Prosecutions and other formal accountability proceedings
shall be based upon systematic, independent and impartial
investigations.”**

20 Section 6 provides for the jurisdiction of the courts in the above
matters. Section 6.1 states:-

**“Formal Courts provided for under the Constitution shall
exercise jurisdiction over individuals who are alleged to bear
particular responsibility for the most serious crimes, especially
25 amounting to international crimes, during the course of the
conflict.”**

6.2 “Formal Courts and tribunals established by law shall adjudicate allegations of gross human rights violation arising from the conflict.”(Emphasis added).

5 As stated above, I am aware that the main agreement between the Government and the LRA was never signed, and consequently even the signed agreements did not become operational. I have cited their provisions merely as illustrative of what the parties had in mind with respect to gross violations committed during the conflict. The Amnesty
10 Act was in place, but it is clear to me that none of the parties envisaged that it granted amnesty for grave crimes. There appears to have been a conscientious effort to separate acts of rebellion from acts of grave criminal conduct that amounted to commission of international crime. The International Crimes Division of the High Court seems to have been
15 created as a consequence of this.

It has been argued by counsel for the respondent that the amnesty for all crimes was necessary in order to promote peace and reconciliation in the country. Certainly, there is need to do all that is necessary to
20 bring peace and reconciliation to all the communities of Uganda. But, in my view, it is difficult to see how impunity can help bring peace. When people have committed gross crimes that outrage the conscious of the world, these should first be made to account for their conduct. After trial, where necessary and applicable then reconciliation and pardon
25 mechanisms may be put in place for such people.

The Amnesty Act envisaged somebody voluntarily reporting to the authorities. That is why the term “reporter” was used. It should not be stretched to mean that a person who has been captured fighting on the battle field can simply declare that he has now renounced the act of rebellion and get a grant of amnesty for grave crimes that person committed. That, in my, view is not and cannot be a proper interpretation and application of the Amnesty Act. That person can only be entitled to amnesty for his participation in the rebellion which is different from committing serious personal crimes.

10 With this background in mind, I proceed to discuss the issue whether by not being granted amnesty as had been granted to other former rebel commanders, the respondent had suffered discrimination and unequal treatment under the law.

15 As earlier indicated, while supporting the Constitutional Court in its holding that the respondent had suffered discrimination and unequal treatment, Mr. Onyango, for the respondent, contended that in so far as the DPP had sanctioned amnesty to various people even before the respondent had applied for it, and had subsequently sanctioned

20 amnesty for another 29 people after the respondent has applied, was clear evidence that the respondent had suffered unequal treatment contrary to Article 21 of the Constitution. He contended further that the DPP had not given any reason as to why he had denied the respondent amnesty. He further argued that this unequal treatment

25 also was contrary to Article 7 of the Universal Declaration on Civil and Political Rights. He cited the Namibian case of **MULLER & ANOTHER -**

Vs- NAMIBIA (2002) AHRLR 8 (HRC 2002) for the proposition that if there had to be any discrimination under the law it had to be justified.

It is necessary to examine the relevant provisions of the law in considering this issue of discrimination. Counsel cited Article 21(1) of the Constitution but omitted to cite clauses (2) and (3) of the same article which in my view are important for the full appreciation of the import of that Article. I will therefore set it out in full as follows:

10 **21 (1) “ All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.”**

15 **(2) “Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.”**

20 **(3) “ For the purposes of this article, ‘discriminate’ means to give different treatment to different persons attributable only or mainly to their respective description by sex, race, color, ethnic origin, tribe, birth creed or religion, social or economic standing, political opinion or disability.”** (Emphasis added).

The respondent had to show in which sphere he had been treated unequally and how he had been denied enjoyment of equal protection of the law. He had, further, to show on which ground stipulated in the

Constitution he had been discriminated, i.e., whether he was discriminated against on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

5

The Amnesty Act provides in Section 2 (1) that amnesty is declared for any Ugandan who engaged or is engaging in war or rebellion against the Government. This engagement may be by:-

- a) actual participation in combat
- 10 b) collaborating with the perpetrators of the war or armed rebellion
- c) committing any other crime in the furtherance of the war or armed rebellion; or
- d) assisting or aiding the conduct or prosecution of the war or armed conflict.

15

The Act provides further as follows:-

Section (2) (2) “ A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.”

20

I have already considered the question of crimes committed “in furtherance” of the rebellion or war, or crimes committed “in the cause” of the war or rebellion. The framers of the Act avoided using the words “crimes committed in the course” of the war or rebellion.

25

Once again, I emphasize that, crimes like willful murder of peasant women and children amount to the crimes described in the preamble to the Universal Declaration of Human Rights as crimes that “outraged the conscience of mankind” and are the sort of crimes that are envisaged
5 in the Geneva Conventions and the Rome Statute as grave breaches that have to be prosecuted for.

This, to me, is the reason why Section 3 (3) of the Act directs the DPP to satisfy himself/herself the person applying for amnesty falls within
10 the provisions of Section 2 or is not charged or detained to be prosecuted for any offence not falling under Section 2. It follows that if the DPP is satisfied that the applicant has committed crimes that are outside the ambit of Section 2, then he is allowed by the law not to certify that person to be released. Then the DPP has to invoke his
15 prosecutorial powers and prosecute that person for those crimes if he has the necessary evidence.

In this case, the DPP has actually gone ahead to commence prosecution proceedings against the respondent. It is up to the respondent to
20 argue, in his defence, that the crimes he is charged with were crimes he committed in “furtherance” of the war or rebellion or in the “cause” thereof and therefore eligible for grant of amnesty.

In proof of the alleged unequal treatment under the law and
25 discrimination, Counsel relied on the affidavit of the respondent in support of the Reference. In paragraph 6 of that affidavit the

respondent states that while taking part in rebel activities, he met other rebel commanders like Brigs. Sam Kolo and Kenneth Banya who have since been given amnesty.

- 5 In paragraph 7, he cites some of the top Lords Resistance Army Commanders like **KONY, VICENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN** and **PASKA LUKWIYA** who had been indicted by the International Criminal Court.
- 10 In paragraph 8, he stated that neither the parliament nor the Minister of Internal Affairs have declared him ineligible for amnesty.

Paragraph 9 is important where he states:-

- 15 **“THAT between 2006 and 2008 there were peace talks between the Government of the Republic of Uganda and the LRA in Juba in which several accords were signed including one to form a war crimes court to try the indicted commanders.”**

- 20 This paragraph becomes important because it introduces the Agreements signed between the Government and LRA, already referred to, which agreement anticipated prosecutions against some people for grave offences and the establishment of a war crimes court. This was done when the Amnesty Act was in force. In paragraphs
- 25 11 and 12, the respondent states he got to know that Brig. Kenneth Banya and Sam Kolo had been captured in 2004 and 2005 respectively.

Then in paragraph 13, he states, he was captured by the UPDF in Garamba in the Democratic Republic of Congo. He was subsequently detained in several places according to paragraphs 14 and 15. In Paragraph 16 he states that on 6th September 2010 he was arraigned
5 before Buganda Road Court, charged and remanded to Luzira Prison. In paragraphs 17 and 18 he states how he renounced rebellion on the 12th January 2010 and applied for amnesty. The Amnesty Commission then wrote to the DPP to that effect.

In Paragraph 19, he states as follows:-

10 **“THAT I know the Director of Public Prosecutions has never provided a response to this letter and neither has he informed me of which other offences I committed other than those falling under Section 3 of the Amnesty Act, 2000.”**

15 Therein lies the basis of the respondent’s argument about unequal treatment before the law and discrimination. That because other commanders were given amnesty, he too should have automatically been given amnesty. He does not state or allege that those
20 commanders also committed the same crimes as he has been charged with. It must be assumed that the Director of Public Prosecutions studied the cases of the people he certified and satisfied himself that whatever offences they may have committed, were covered by Section 2 of the Act. The law allowed the DPP to do that. If the DPP studied the case of the respondent and was satisfied that the respondent had
25 committed crimes that were not covered by Section 2, the DPP was free to exercise the prosecutorial powers under the Constitution and

commence prosecution. One cannot simply assume, in the absence of evidence, that Brigadier Banya and Kolo committed the same crimes as the respondent is charged with.

5 Perhaps at the commencement of the prosecution the respondent would have raised the point that the crimes he was being prosecuted for were crimes that fall under Section 2 of the Amnesty Act and for which he could not be prosecuted. But it is not, and cannot be, unequal treatment under the law simply because one person has been
10 charged with specific crimes and someone else has not been charged, unless there is evidence that the two committed the same or similar crimes. Participating in the rebellion was specifically given amnesty. It was of course very possible to actively participate in the war and rebellion by attacking Government forces, personnel and installations
15 but without ever carrying out the willful murder of innocent civilians, men, women and children. From the respondent's affidavit, the commonality between him and Kolo and Banya is that they all participated in the rebellion. There is no evidence that those others committed the same crimes as he is alleged to have committed. In my
20 view, this argument would hold substance if the respondent was being charged with treason or waging war or rebellion against the State, yet his fellow commanders were not being charged. This prosecution is about crimes against persons and that were not, in the opinion of the DPP, in furtherance of the war and are covered by the Geneva
25 Conventions Act.

Furthermore, the respondent does not show that he was discriminated against on any of the grounds stipulated in Article 21 (2) and (3) of the Constitution.

5 The respondent's counsel sought to rely on the International Covenant on Civil Rights, with regard to unequal treatment and discrimination. To that end he also cited GENERAL COMMENT 18 of the office of the U.N. High Commissioner for Human Rights, on Non- discrimination. Paragraph 7 of that Commentary states as follows:-

10 **“While these Conventions deal only with cases of discrimination on specific grounds, the committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour,**
15 **sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons , on an equal footing, or all rights and freedoms.”**

20 **“8.The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.”**

“13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the
25 **criteria for such differentiation are reasonable and objective**

and if the aim is to achieve a purpose which is legitimate under the Covenant.” (Emphasis added).

It is noteworthy that the crimes which, in my opinion, cannot be crimes
5 in furtherance of war or in the cause of war are those as described in
the Geneva Convention, to include willful murder of civilians. In that
regard one has to bear in mind Article 6 of International Covenant on
Civil and Political Rights which states;

**“Every human being has the inherent right to life. This right
10 shall be protected by law. No one shall be arbitrarily deprived
of his life.”**

This is echoed by Uganda’s Constitution, Article 22 (1) which also
guarantees the right to life as follows:-

**22 (1) “No person shall be deprived of life intentionally except
15 in execution of a sentence passed in a fair trial by a Court of
competent jurisdiction in respect of a criminal offence under
the Laws of Uganda and the conviction and sentence have
been confirmed by the highest appellant Court”**

These provisions would explain why the Amnesty Act would seek to
20 make a distinction between crimes that do not promote the cause of
the rebellion and those that may be committed in the course of war
by individual offences taking advantage of the situation to indulge in
criminal excesses against an innocent population.

25 Prosecution for such crimes is, in my view, legitimate both under the
Constitution and International law.

With respect, therefore, I do not agree with the decision of the Constitutional Court that the respondent was treated unequally under the law, or that he was discriminated against in any way, simply because other rebels were not prosecuted for the sort of crimes the respondent is charged with.

As to the question as to how many persons the DPP has sanctioned for grant of amnesty, my view is that it is immaterial how many. What is important is that the DPP should have studied each case and was satisfied that they could be granted amnesty. The amnesty granted to those people is therefore proper under the law. The DPP did not have to give any reasons or explanations as to why he did not certify the respondent for amnesty. He commenced prosecution. Accordingly ground 9 fails while grounds 10 and 11 succeed.

Whether there are uniform International Standards for the grant of Amnesty.

The Constitutional Court found that there was no uniform International standards or practices for the granting or withholding or amnesty. This is the basis of ground 7. Learned Counsel for the respondent in apparent reply to that ground, canvassed the idea that there was nothing wrong in a State making law providing for amnesty since this was allowed under Article 6 (5) of the 2nd Protocol to the Geneva Conventions (Supra). He also sought to rely on the case of **AZANIA PEOPLES** to the **ORGANIZATION** and **7 OTHERS -Vs- THE**

PRESIDENT OF SOUTH AFRICA AND OTHERS (CCT 17 OF (1996) [1996] ZACC 16 for the proposition that a State was free to grant amnesty for crimes committed during internal conflict.

5 In that case, the Constitutional Court of South Africa was called upon to determine the constitutionality of certain provisions of the South Africa Truth and Reconciliation Act which established a Commission. The main objective was to promote national unity and reconciliation and to facilitate the granting of amnesty to persons who made full disclosure
10 of all relevant facts relating to acts associated with political objectives. The court upheld those provisions and found them constitutional. The question is whether this could constitute a uniform practice applicable to all States.

15 After discussing the experiences of different countries in South America the Court in the Azania case stated at P. 79:-

**“What emerges from the experience of these and other countries that have ended authoritarian and abusive rule is that there is no single or uniform international practice in
20 relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a State covering up its own crimes by granting itself immunity.**

25 **In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves**

but rather, one of a Constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.”

5

Thus, in the South African context, the court was of the view, that the Amnesty Committee could **“grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts. If the Offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective.”**

10

Later the court concluded that **“the amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorized for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20 (3) of the Act, including the very important relationship**

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which the act perpetrated bears in proportion to the object pursued.” (Page 83). (Emphasis added).

In my view, that situation is different from the Ugandan situation, and
5 that South African case is distinguishable from the case before us. In
the South African situation, there was some degree of accountability.
The person had to make a full disclosure of all the facts and then seek
amnesty. The Uganda Amnesty Act does not provide for full disclosure,
but restricts the type of offences that qualify for amnesty. It does not
10 seek to give amnesty to each and every crime however grave and
unrelated to the furtherance of or cause of the rebellion.

The Uganda context seems to recognize not only the need for peace
and reconciliation but also the need to avoid impunity for specific
15 crimes that constitute “grave crimes” under the law. It is for that very
reason that the Act has made a distinction between acts of rebellion
and crimes committed that are incidental to those acts, as distinct from
crimes committed but not in furtherance or cause of the war.

20 Purpose and effect of the Amnesty Act

As discussed before in this judgment, the Amnesty Act of Uganda is not
a blind Act granting blanket amnesty to cover any crime committed
during the rebellion, however grave such crimes might be. Therefore,
25 neither in its purpose or effect is the Act inconsistent with the
Constitution. In that regard I accept the arguments of counsel for the

respondent that the Act does not grant blanket amnesty because not only has the DPP the liberty to prosecute, as discussed, but the Minister may also declare certain individuals as ineligible for amnesty. That is how Uganda has addressed the issue of persons who have
5 waged war or rebellion against the country, and how such people may be granted amnesty. The issue of discrimination therefore does not arise.

As for the argument by learned counsel for the respondent that
10 amnesty was necessary in order to promote peace and reconciliation in the areas affected, I think it has to be placed in context. Counsel relied on the national objectives of the Constitution. I do agree, as I have already indicated, that when a country is emerging from an internal conflict, there is need for reconciliation so as to bring about peace.
15 Indeed under the 2nd Protocol to the Geneva Conventions, 1949, Article 6 (5) (supra), it is provided that:-

**“ At the end of hostilities the authorities in power shall endeavor to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of
20 their liberty for reasons related to the armed conflict, whether they are interned or detained.”**

The important words here are *“to grant the broadest possible amnesty to persons who participated in the armed conflict.”* In my view this
25 phraseology does not mean that amnesty has to be granted for all crimes irrespective of their gravity both in municipal or international

law. This would mean that people who committed genocide or crimes against humanity would be granted amnesty. In the context of the history of the Geneva Conventions and the background of the crimes that had surfaced during World War II, I do not believe that the framers
5 of the above protocol intended that such crimes would be exempted from accountability.

In the document on Amnesties (supra) the following comment has been made on Article 6.5 above. It is stated therein as follows:-

10 **“Reflecting the drafting history of this provision I C R C has affirmed that article 6.5 “aims at encouraging a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”**
15 **While excluding war crimes, article 6.5 of Additional Protocol II encourages States to grant former rebels Amnesty for such crimes as rebellion, sedition and treason. States can also grant rebels amnesty for legitimate acts of war, such as killing members of the opposing forces under circumstances not**
20 **amounting to a war crime.”** (Emphasis added).

In the Uganda context the National objectives must be viewed in the context of the Constitution as a whole. As provided in Article 8A of the Constitution, the National objectives lays down the principles of
25 national interest and common good. The preamble to the Constitution stipulates the awareness of periods of tyranny and oppression and

instability. There was no rule of law. The Constitution seeks to establish the Rule of law. It envisages that people who commit crimes will be tried but must be accorded fair trials. The Constitution imposes on every citizen the duty to obey Laws of Uganda. The Constitution further
5 provides for a Bill of rights. One of the fundamental rights provided is the right to life which cannot be taken away except under a sentence of death imposed by a competent court after due process of the law.

The Courts are enjoined by Article 126 to administer justice while taking
10 into account the aspirations and values of the people. To my mind, the values and aspirations of the people of Uganda must be to have peace and tranquility based on the rule of law. Peace based on impunity by people who may wish to hold the rest of society hostage and blackmail cannot be the peace envisaged in the Constitution.

15
If a person wages war on Uganda, it is conceivable that the people of Uganda will want that person to come to an amicable settlement of their differences with the Government. Indeed, I take judicial notice of the fact that since 1986 the Government of Uganda has signed a
20 number of peace Agreements with some rebel groups. But, in my view, no person must ever be allowed to kill and maim innocent men, women and children in their homes, and then say to the country that he will go on killing for as long as his political objectives are not met. In my view, this is not what is anticipated by the Constitution. It would not be in the
25 national interest or service to the common good. A law to that effect would not be in terms of Article 79 of the Constitution, i.e. “for the

peace, order and good governance of Uganda.” It would appear that the framers of the Act had in mind the history of Uganda which was characterized by war tyranny, and many times perpetrators of crime did so with impunity. Therefore, it seems to have been the view which I agree with, that accountability for grave crimes is not exclusive of reconciliation and peace. The person who commits such crimes may be eligible for grant of amnesty for the act of rebellion or waging war on Uganda, under the Act, but he is not, in my view, entitled to amnesty for the grave crimes he may have committed.

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The former Secretary General of the UN Kofi Annan in his report to the UN on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, stated that “ **Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another.**”

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The Agreement signed between the Government and LRA would illustrate the desire to have peace based on granting amnesty for war or rebellion, while at the same time demanding accountability by individuals for grave crimes committed against the population.

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It is my opinion, therefore, that there are no uniform standards or practices in respect of amnesty. Each country may put in place appropriate mechanisms with regard to amnesty to solve or address a particular conflict situation it is facing. But there appears to be a

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minimum below which amnesty provisions may not be permitted in respect of grave crimes as recognized in international law.

In view of the foregoing, it is my considered opinion that the Amnesty Act in its purpose or effect, is not inconsistent with the Constitution of Uganda nor with Uganda's international obligations. Ground 4 succeeds and ground 5 partially succeeds. Grounds 6, 7 and 8 should fail.

10 **Good faith of the State.**

Mr. Opio, also Counsel for the respondent further raised the question whether the State was acting in good faith in the handling of the respondent's matter. He contended that it is the State of Uganda that had enacted the Amnesty Act and implemented it over the years by continually extending its operation. He, therefore, argued that it was an act of bad faith for the Attorney General on behalf of the State, to argue that the Act was now unconstitutional. He claimed that the State has done all in its power to defeat the Amnesty Act.

20 I do not agree with Mr. Opio, that the State has not acted in good faith. I think the problem has been in the interpretation and application of the Act. Certainly, if the Attorney General formed the opinion that an Act of Parliament or any of its provisions were inconsistent with the Constitution, one would have expected the Attorney General to advise the Government to cause or seek amendment of the offending Act. One would not expect the Attorney General to come to Court to ask Court to

declare the Act unconstitutional. I also note that the issue of the unconstitutionality of the Act seems to have come in as an afterthought at the Constitutional Court. It had not been one of the issues of reference. This seems to suggest that even the Attorney General was not sure of the status of the Act. It must be assumed that for all the time the Act was being implemented, the Attorney General must have taken it to be constitutional. The trial of the respondent may have caused him to have second thoughts about it. This is normal and does not indicate bad faith.

10

In light of what I have said above, I do not consider it necessary to consider ground 12. Ground 13 is inconsequential and I need not consider it.

15 In conclusion, I would answer the issues raised as follows:-

On the issue of whether the Amnesty Act impinges on the prosecutorial power of the DPP, it is my considered opinion that it does not. The act is therefore not inconsistent with the Constitution in that regard. As to the issue of whether the Amnesty Act is inconsistent with Uganda's international law obligations, it is also my considered opinion that it is not as it does not grant blanket amnesty for all crimes. The Geneva Conventions Act still applies, and the indictment of the respondent under Article 147 thereof does not violate the Constitution of Uganda. With regard to whether the respondent has suffered any discrimination or unequal treatment under the law, I am of the further considered

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opinion that for reasons given in this judgment, the respondent has not suffered discrimination or unequal treatment under the law. The DPP is acting within his powers not to certify the respondent for grant of amnesty, and to commence prosecution against him on specific crimes
5 under the Geneva Conventions Act.

In the result, the appeal succeeds in part. The trial of the respondent by the International Crimes Division of the High Court is proper and should proceed. The respondent is entitled to the presumption of
10 innocence until proved guilty. He must be accorded a fair trial, and should be free to raise any defences available to him.

This appeal involved an issue of great public interest. I would order that each party bears its own costs.
15

As all the other members of the Court agree, this appeal partially succeeds. The trial of the respondent at the International Division of the High Court shall continue. Each party shall bear its costs in this Court.

20 **DELIVERED** at Kampala this.....8th.....day.....
April.....2015.

.....
25 B.M. Katureebe
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

5

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**[CORAM: KATUREEBE; TUMWESIGYE; KISAAYE; JJSC,
ODOKI; TSEKOOKO; OKELLO; KITUMBA; AG. JJSC]**

CONSTITUTIONAL APPEAL NO. 01 OF 2012

10

BETWEEN

UGANDA:..... APPELLANT

15

AND

THOMAS KOWYELO alias LATONI:.....RESPONDENT

20

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Twinomujuni, Byamugisha, Nshimye, Arach-Amoko, Kasule JJA) dated 22nd September 2011 in Constitutional Petition No. 036 of 2011(Reference)

JUDGMENT OF DR. KISAAYE, JSC.

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This is an appeal by the Government of Uganda, hereinafter, referred to as “the appellant”, from the decision of the Constitutional Court, which directed the International Crimes Division of the High Court to cease the trial of the respondent (Kwoyelo). The Constitutional Court had found that the indictment by the DPP of Kwoyelo, for alleged offences he committed while he participated in armed rebellion against the Government of

Uganda was discriminatory, since other LRA rebels had not been indicted but had been granted amnesty under the Amnesty Act.

- The background to this appeal is that on the 12th January 2010, Kwoyelo, who had been captured by the Uganda Peoples' Defence Forces (UPDF) in Garamba Forest in the Democratic Republic of Congo in 2008, as part of the rebels of the Lord's Resistance Army, made a declaration renouncing rebellion and sought amnesty. He made the declaration before Robert Munanura, the Officer in charge of Upper Prison Luzira, where he was being held in detention after his capture. The declaration was submitted to the Amnesty Commission for amnesty under the Amnesty Act (Cap 294, Laws of Uganda).
- 10 On the 19th March 2010, the Amnesty Commission forwarded Kwoyelo's application to the Director of the Public Prosecution (DPP) for consideration, in accordance with the provisions of the Amnesty Act. The Commission, in its forwarding letter, stated that it considered Kwoyelo as one who qualifies to benefit from the amnesty process. The DPP did not respond to the letter of the Amnesty Commission.
- 15 On 6th September 2010, the DPP charged the respondent before Buganda Road Court with various offences under Article 147 of the 4th Schedule of the Geneva Conventions Act. He was later committed for trial to the International Crimes Division of the High Court. On 11th July 2011, the DPP amended Kwoyelo's indictment for offences that he allegedly committed during the LRA rebellion.
- 20 Believing that he was unfairly denied a Certificate of Amnesty by the appellant's agencies whereas such Certificates had been granted to other persons in circumstances similar as his and that his constitutional rights had been violated by the DPP's failure to act on his application for amnesty and the DPP's decision to instead bring charges against him, Kwoyelo requested for a Constitutional Reference on the following 3 questions:

5 **(i) Whether the failure by the Director of Public Prosecutions (DPP) and the Amnesty Commission to act on the application by the Accused person for grant of a Certificate of Amnesty, whereas such certificates were granted to other persons in circumstances similar to that of the Accused person, is discriminatory, in contravention of, and inconsistent with Articles 1, 2, 20(2), 21 (1) and (3), of the 1995 Constitution of the Republic of Uganda.**

10 **(ii) Whether indicting the Accused person under Article 147 of the Fourth Geneva Convention of 12th August 1949, and section 2 (1) (d) and (e) of the Geneva Conventions Act, Cap 363 (Laws of Uganda), of offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with, and in contravention of Articles 1, 2, 8 (a) and 287 of the 1995 Constitution of the Republic of Uganda, and Objectives I and XXVIII (b) of the National Objectives and Directive Principles of State Policy, contained in the 1995 Constitution of the Republic of Uganda.**

15 **(iii) Whether the alleged detention of the Accused in a private residence of an unnamed official of the Chieftaincy of Military Intelligence (CMI) is in contravention of and inconsistent with Articles 1, 2, 23(2), (3), 4 (b), 24 and 44 (a) of the Constitution of the Republic of Uganda, 1995.**

20 When the parties appeared before the Registrar of the Constitutional Court for directions, Ms Patricia Mutesi Senior Principal State Attorney raised the following additional question for the Court's determination, which was accepted by the Court.

25 **“Whether sections 2, 3, and 4 of the Amnesty act were inconsistent with Articles 120(3) (b) (c) and (d), (5), (6), 126(2) (a), 128(1) and 287 of the Constitution.”**

Kwoyelo contended that such actions by the appellant's agencies were discriminatory and in contravention of several provisions of the Constitution of Uganda.

The Constitutional Court heard the Reference and resolved the first two questions framed in Kwoyelo’s favour. The Constitutional Court also directed the International Crimes Division of the High Court to cease the trial of the respondent forthwith.

5 The appellant being aggrieved by the decision of the Constitutional Court filed this appeal on 13 grounds of appeal, which have been well covered by my brother, Katureebe, CJ.

I have had the opportunity to read his Judgment. I agree with his conclusions and proposed orders. I just wish to briefly throw more light on what constitutes grave breaches under the Geneva Conventions Act and what offences Kwoyelo was charged with. I will also focus on the question whether the indictment of Kwoyelo was
10 discriminatory and unconstitutional.

Article 147 of the Fourth Geneva Convention provides for grave breaches, which were incorporated in the Geneva Convention Act, Cap. 363 of the Laws of Uganda as follows:

15 ***“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile
20 Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”***

In the amended indictment dated 5th July 2011, Kwoyelo was charged with several offences both under the Article 147 of the Fourth Geneva Convention of 12th August 1949 as well as under the Penal Code. The twelve counts for which Kwoyelo was charged under section 2 and Article 147 of the Geneva Conventions Act are as follows:

- 5 *Count 1- Wilful Killing*
- Count 2- Kidnap with intent to murder*
- Count 3- Extensive Destructions of Property*
- Count 4- Wilful Killing*
- Count 5- Wilful Killing*
- 10 *Count 6- Taking Hostages*
- Count 7- Causing Serious Injuries to Body*
- Count 8- Inhumane Treatment*
- Count 9- Wilful Killing*
- Count10- Extensive Destruction of Property*
- 15 *Count 11- Causing Serious Injury to Body*
- Count 12- Wilful Killing.*

To provide some specifics about the charges, I cite the Statement and Particulars of Offence that were cited for Count 1.

“Count: 1 STATEMENT OF OFFENCE

20 ***WILFUL KILLING, constituting a Grave Breach under Article 147 of the Fourth Geneva Convention of 12th August 1949, and which is an offence contrary to section 2 (1) (d) and (e) of the Geneva Conventions Act, Cap. 363 of the laws of Uganda.***

PARTICULARS OF OFFENCE

25 ***KWOYELO THOMAS and others still at large in the month of March 1993 or there about at Abera village, Parubanga Parish, Pabbo sub county, Kilak count in present day Amuru District in Northern Uganda, being a Colonel in the Lord’s Resistance Army commanded an attack on civilians taking no active part in the***

hostilities and killed ALBERT OBWOYA a protected person under the 4th Geneva convention of 12th August 1949, while he was aware of factual circumstances that established such protected status, and the existence of an armed conflict.”

5 In addition to the Counts under the Geneva Conventions Act, Kwoyelo was also charged with numerous alternative counts under the Penal Code which include Murder, Kidnap with intent to Murder, Robbery with Aggravation, and Attempted Murder.

10 It therefore follows that the DPP in indicting Kwoyelo, believed that there was enough evidence to charge him for the commission of grave breaches under the Geneva Conventions Act or the Penal Code or both. The question that arises is whether Kwoyelo’s indictment was discriminatory and unconstitutional, since other former rebels of the LRA has been granted amnesty under the Amnesty Act, Cap. 294, Laws of Uganda?

15

Section 2 of the Amnesty Act declared amnesty for persons who had been involved in armed rebellion as follows:

20 “(1) ***An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by—***

- (a) actual participation in combat;***
- (b) collaborating with the perpetrators of the war or armed rebellion;***
- (c) committing any other crime in the furtherance of the war or armed***

25 ***rebellion; or***

- (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.***

(2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.

5 Section 3 of this Act on the other hand provides for grant of amnesty. For purposes of this appeal, I will focus on the provisions of section 3(2), (3) and (4) of the Amnesty Act, as they are the ones that apply to Kwoyelo’s case.

10 **“(2) Where a reporter is a person charged with or is under lawful detention in relation to any offence mentioned in section 3, the reporter shall also be deemed to be granted the amnesty, if the reporter—**

(a) declares to a prison officer or to a judge or magistrate before whom he or she is being tried that he or she has renounced the activity referred to in section 3; and

(b) declares his or her intention to apply for the amnesty under this Act.

15 **(3) A reporter to whom subsection (2) applies shall not be released from custody until the Director of Public Prosecutions has certified that he or she is satisfied that—**

(a) the person falls within the provisions of section 3; and

20 **(b) he or she is not charged or detained to be prosecuted for any offence not falling under section 3.**

(4) Subject to subsection (3), the Director of Public Prosecutions shall investigate the cases of all persons charged with or held in custody for criminal offences and shall take steps to cause to be released all persons involved in such cases who qualify for grant of amnesty under this Act, if those persons renounce all activity mentioned in section 3, in which they have been involved.”

I agree that Section 3 (2) of the Amnesty Act would appear, on the face of it, to grant amnesty to a person who is either charged with or is under lawful detention in relation to offences for which amnesty was declared, if such person declares to the Prison Officer or a Judge or Magistrate his renunciation of activities related to engaging in war or armed rebellion and he declares his intention to apply for amnesty.

However, a closer look at the two following sub-Sections (3) and (4) of the same section, cited above, clearly shows that mere renunciation by a person in detention for participation in war or armed rebellion and intention to apply for amnesty are not sufficient to grant such a person amnesty. The two sub sections require the DPP's
5 Certification that such a person falls under the category of those entitled to apply for and to receive amnesty. Secondly, the sections also require the DPP to ensure that such a person renouncing armed rebellion and seeking amnesty does not have any other outstanding criminal charges against him or her that do not fall under those actions for which amnesty can be granted.

10

I am also mindful of the fact that Article 120 of the Constitution not only established the office of Director of Public Prosecutions. It also vests in the office of the DPP, the right to institute criminal proceedings against any person and also the right not to be subject to the “direction or control of any person or authority”.

15 Consistent with the provisions of Article 2 of the Constitution, which entrenches the supremacy of the Constitution, the provisions of the Amnesty Act cannot override the clear provisions of the Constitution on the powers of the Director of Public Prosecutions.

I therefore agree with my brother, Katureebe, CJ. that the Amnesty Act does not infringe on the powers of the DPP to institute criminal proceedings for persons who may have
20 engaged in war or rebellion unless they have been granted amnesty in accordance with the provisions of Section 2 and 3 of the Amnesty Act. Since under the Constitution, the DPP does not work under the control or direction of any person or authority, it follows that he is the one to make that determination whether to bring charges against a person in detention even though such a person wishes to benefit from the Amnesty Act.

I also agree with him that the mere fact that other former LRA rebels had been granted amnesty under the Amnesty Act, *per se*, did not establish that Kwoyelo had been discriminated against by the DPP, contrary to Article 21 of the Constitution.

Suffice it to say that the DPP is only entitled to bring charges against such a person.

5 Kwoyelo, just like all other accused persons will have the right to invoke all available defences, before the High Court. In his particular case, it may even be possible for him to plead in his defence that the acts for which he is charged entitle him to amnesty under the Amnesty Act, because they were committed in the cause of war or armed rebellion.

10 In conclusion, I find that the respondent was properly indicted and charged before the International Crimes Division of the High Court. I agree that Kwoyelo's indictment was neither discriminatory nor unconstitutional since the DPP was acting under the powers that are vested in that office by virtue of Article 120 of the Constitution and also under Section 3 (2) and (3) of the Amnesty Act, as amended.

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I would therefore partially allow the appeal to succeed, and order that the trial of Kwoyelo by the High Court resumes. He will enjoy his constitutionally guaranteed right to a fair trial and the right to be presumed innocent until he is proven guilty beyond reasonable doubt.

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DATED this...8th.....day of ...April.....2015

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**HON. DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT.**