THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT GULU

[INTERNATIONAL CRIMES DIVISION]

HCT-00-ICD-SC-02 OF 2010

UGANDA.....PROSECUTOR

VERSUS

KWOYELO THOMAS alias LATONI.....ACCUSED

BEFORE: **1. HON. MR. JUSTICE MICHAEL ELUBU (PRESIDING JUDGE)**
2. HON. MR. JUSTICE DUNCAN GASWAGA
3. HON. MR. JUSTICE STEPHEN MUBIRU
4. HON. JUSTICE DR. BASHAIJA K. ANDREW
(ALTERNATE JUDGE)

REGISTRAR: **HW JULIET HARTY HATANGA**

REPRESENTATION:

PROSECUTION: **1. GEORGE WILLIAM BYANSI D/DPP**
2. CHARLES RICHARD KAAMULI A/DPP
3. AKELLO FLORENCE OWINJI A/DPP
4. LILLIAN OMARA ALUM CSA

DEFENCE: **1. CHARLES DALTON OPWONYA**

2. CALEB ALAKA

3. EVANS OCHIENG

4. GEOFFREY BORIS ANYURU

VICTIMS: **1. ROBERT MACKAY**

2. MARY MAGDALANE AMOOTI

3. HENRY KILAMA KOMAKECH

ASSESSORS: **1. ODONGKARA FRANKLINE**

2. AJOK NIGHTY

3. OCEN DANIEL

COURT

INTERPRETORS: **1. MR. ROBERT ADONGAKURU ROBERT**

2. MR. OTTO DAVID LABEJA

3. MR. OCAN ROBERT

COURT CLERK: **1. MR. KITANDWE PAUL**

RESEARCHERS: **1. HW. OKOTO JORAM, GI MAGISTRATE.**

2. HW. KAMULI PAULINE MARTHA, GI MAGISTRATE.

3. HW. JOANITAH NAGADDYA, GI MAGISTRATE.

4. HW. KHALAYI MOREEN, GI MAGISTRATE.

TRANSCRIBER: **MS. MUSABA JOYCE**

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Introduction

1. This is a national or domestic trial of numerous alleged violations of international criminal law, committed during the armed conflict that engulfed a sizeable part of the Northern and North-Eastern region of Uganda from the mid-1980s to around the year 2006. The nature of this trial, conducted by the International Crimes Division (ICD), a specialised division of the High Court of Uganda, incorporates international and national features, i.e. aspects of domestic and international law (a mixed or hybrid trial). It may be aptly described as a national or domestic trial of international crimes, which effectively requires resort to a combination of national and international law. International criminal law is founded on the notion that individuals have international duties which transcend national obligations of obedience imposed by individual states, in order to foster accountability for the most serious crimes of concern to the international community as a whole.

2. Although the majority of the charges preferred in the indictment, such as the offence of murder, are generally punishable under existing domestic penal law, the hybrid nature of the trial is borne out of the specification of the international dimension of the alleged crimes, actively sought by the prosecution in the indictment. This notion that domestic prosecutions should take precedence over international prosecution can be found in the principle of complementarity underlying the creation of the Rome Statute of the International Criminal Court (Rome Statute). The principle of complementarity holds that national jurisdictions should be the first choice to investigate, prosecute and punish individuals suspected of committing crimes falling under the International Criminals Court's (ICC) jurisdiction.

The International Crimes Division

3. The International Crimes Division is a specialised Division of the High Court of Uganda. It was initially established in 2008 and designated as the "War Crimes Division." Subsequently in 2011, it was re-designated as the International Crimes Division by the ***High Court (International Crimes Division) Practice Direction, 2011 (Legal Notice***

No.10 of 2011). ***The International Criminal Court Act, Cap 14*** (the ICC Act) was enacted to give effect to the ***Rome Statute of the International Criminal Court***, to provide for offences under the laws of Uganda corresponding to offences within the jurisdiction of the ICC. The objectives of the ICC Act, Cap 14, include:

a. To implement Uganda's obligations under the Rome Statute of the ICC.
b. To make further provision in Uganda legal regime for the punishment of international crimes of genocide, crimes against humanity, war crimes and other international crimes.
c. To enable Uganda courts to try, convict, and sentence persons who have committed crimes referred to in the ***Rome Statute*** (Section 2 of the ICC Act, Cap 14).

4. The establishment of the War Crimes Division in 2008 followed ***The Juba Peace Agreement on Accountability and Reconciliation*** (The Juba Peace Accord) between the Government of Uganda and the Lord's Resistance Army (LRA). The Juba Peace Accord recognized that during the conflict in Northern Uganda, war crimes, crimes against humanity, serious and gross abuse of human rights were committed, and that there was need for accountability and to bring the perpetrators to justice. Considering the civil wars and a series of other internal conflicts which Uganda had experienced in the recent past, it was thus decided to establish the War Crimes Division to try perpetrators of war crimes, crimes against humanity, genocide, and other serious and gross abuse of human rights. The perpetrators included commanders of the LRA. It was also intended that the ICD would fulfil the principle of complementarity as provided for under Section 2 of the ICC Act (supra) with the International Criminal Court (ICC) at The Hague, in the Netherlands.

5. ***The High Court (International Crimes Division)(Practice Directions,2011 (Legal Notice No.10 of 2011)*** under Direction 6 (1), it is provided that,

> "Without prejudice to Article 139 of the Constitution, the ICD shall be mandated to try offences relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other international crime as may be provided for

under The Penal Code Act, Cap 128, The Geneva Conventions Act, Cap 349, The International Criminal Court Act, Cap 14, or under any other penal enactment".

The ICD does not have universal jurisdiction. However, it has jurisdiction over the relevant crimes committed within the Uganda territory, as well as over crimes committed partly within and partly outside the Uganda territory (extraterritorial). The ICD also has jurisdiction to try international crimes, as specified under the ICC Act, i.e.: genocide, crimes against humanity and war crimes; and also, crimes under ***The Geneva Conventions***, which was domesticated in Uganda by ***The Geneva Convention Act,*** Cap.349.

Historical background to the armed conflict

6. The accused, Thomas Kwoyelo alias Latoni, alleged to be a Colonel in the Lord's Resistance Army, was originally charged with 93 counts. The offences are alleged to have been committed between 1993 and 2005. These charges stem from the situation in Northern Uganda where from around 1986, an armed conflict had raged between the government of Uganda and different military groups, including what eventually came to be known as the Lord's Resistance Army.

7. The Court received evidence from a number of witnesses including P.W.1, P.W.2, P.W.52, and the accused (D.W.1) from whom the historical setting of the trial can be discerned. It all began from around the year 1986 when the National Resistance Movement (NRM), under Yoweri Kaguta Museveni, took over the reins of Government in Uganda. The NRM had been engaged in a five-year guerrilla war against with both the Milton Obote - led Uganda Peoples Congress (UPC) government and later the Tito Okello led - Military Commission. Both leaders were ethnically from the northern region of the country. After the fall of these regimes, there was military rebellion against the NRA in parts of Northern Uganda, and specifically in the Acholi sub region.

8. The first military group that emerged was the Uganda Peoples Democratic Army (UPDA) which comprised of mostly armed forces loyal to the fallen governments. Thereafter, the

Holy Spirit Movement led by Alice Auma "Lakwena," a spirit medium, emerged. She practiced a blend of Christian extremism and indigenous Acholi religious practices. Lakwena recruited soldiers and built an army. In November 1987, the army was defeated at Magamaga as it attempted to march on the capital city Kampala.

9. Following the defeat of the Holy Spirit Movement, Joseph Kony, rose as a spirit medium and formed an army that started out as the United Holy Salvation Army and later the Uganda Christian Army Movement. Its stated goals were to rule Uganda according to the Biblical "ten commandments". At the time, the Uganda Peoples Defence Army (UPDA) rebel group was still active in the area, and some of its the combatants did not give up in rebellion. One of its leaders, Odong Latek, persuaded Joseph Kony to adopt guerrilla tactics as a military strategy. In 1989 the Holy Spirt Movement restructured itself creating a command structure called the 'Trinity'. At this time Joseph Kony's forces resorted to abductions as a means of recruitment. In addition, they raided villages, military establishments, schools and government facilities for food, medication, ammunitions among other things.

10. In 1991 the government forces then, National Resistance Army (NRA), embarked on a large-scale military offensive dubbed 'Operation North' against the LRA. It was a two-pronged approach with the first aim of this operation being a military onslaught on the LRA and secondly, to cut off support from the general population. However, the conduct of this military operation was brutal, and essentially alienated the NRA from the population. As part of this operation, the NRA created the "Arrow Groups"- local militia groups, drawn from the community and armed with bows and arrows to fight and or defend against the LRA.

11. In 1994, Betty Oyella Bigombe, a Minister of State for the pacification of Northern Uganda initiated face-to-face talks with LRA representatives. The LRA asked for general amnesty for its combatants and a return home. This initiative was, however, hampered by disagreements over the credibility of the LRA negotiators and political infighting. Joseph Kony asked for six months to regroup, however, the tone of the negotiations turned

increasingly acrimonious, and in January 1994 the negotiations deteriorated altogether, with the LRA accusing the government of a plan to entrap them.

12. On the 2nd February 1994 the LRA moved to Southern Sudan and set up camps there. They received support, in the form of weapons and supplies, from the government of Sudan ostensibly in retaliation for the Uganda Government's support to South Sudanese rebels (SPLA). The LRA engaged in mass atrocities such as killing and abductions of civilians. This compelled the Uganda Government to move the civilian population into Internally Displaced Peoples (IDP) camps. Owing to the population's growing hostility towards the LRA responded by targeting and attacking these camps. It was also during this period, specifically in 1995, that the Holy Spirit Movement formally changed to the Lord's Resistance Army and combatants were commissioned and given military ranks.

13. In March 2002, the NRA, under the new name; "Uganda People's Defence Forces" (UPDF), launched a massive military offensive code-named "Operation Iron Fist"against the LRA. The objective was rout out LRA from their bases in Southern Sudan. However, the attempted military solution failed. Within months of the operation, the LRA was carrying out attacks with a brutality unseen since the mid-90s. The war spread to Langoand Teso sub-regions, which had hitherto not been affected. Several LRA combatants were nonetheless either killed, captured or surrendered. The force splintered into several smaller units and spread out of Sudan. From 2004, the LRA activity in Uganda had lessened, but the retaliatory attacks on the civilian population continued. In 2005, the Uganda Government referred the situation in Uganda to the ICC at The Hague; resulting in warrants being issued on 8th July, and 27th September, 2005, respectively; for five top commanders of the LRA, including the overall commander, Joseph Kony.

14. In 2006, the new Government of Southern Sudan invited the Uganda Government to hold peace talks with the LRA. On 4th August 2006, the LRA declared a unilateral ceasefire. Consequently, the government and the LRA signed the Cessation of Hostilities Agreement in 2006. In July 2006, the Juba Peace Talks started in Southern Sudan, with the main agenda being the criminal charges brought against Joseph Kony and four LRA leaders by

the ICC. They ranged from the killing and mutilation of civilians to the abduction of and sexual abuse of children. The LRA claimed they would sign a peace deal after the charges were dropped. On the other hand, the Government of Uganda negotiators demanded that a peace deal be in place before they discussed the drop of charges. The peace agreement did not come to pass. At this time, the IDP camps were also being decongested with people moving into satellite camps, and slowly back to the community.

15. In 2008 an operation known as "Lightening Thunder" was launched the UPDF, against the LRA, who now in Democratic Republic of Congo (DRC) in the Garamba region. The UPDF destroyed several LRA camps which forced the rebel combatants to splinter into small units and to move farther out into DRC and the Central African Republic. In reprisal against the offensive, the LRA attacked Eastern Equatoria in Southern Sudan killing hundreds of the civilians they suspected of supporting the operation.

16. It was in these circumstances that, on the 2nd of March 2009, the accused was captured in the Garamba forest in DRC, and eventually brought to Uganda to stand trial.

Procedural History

17. The accused, Thomas Kwoyelo, was captured by the Uganda Peoples' Defence Forces (UPDF) in the Garamba National Park in the Democratic Republic of Congo on 3rd March 2009. He was subsequently brought back to Uganda and detained at the Upper Prison, Luzira. On 12th January 2010, while in detention, the accused made a declaration before the Officer - In - Charge of the prison that he was renouncing rebellion and seeking amnesty. The declaration was submitted to the Amnesty Commission, which in turn, on 19th March 2010, forwarded the accused's application to the Director of Public Prosecutions (DPP) for consideration in accordance with the provisions of ***The Amnesty Act, Cap 294 (now 316)***.

18. Nevertheless, on 6th September 2010, the DPP preferred criminal charges against the accused before the Chief Magistrate's Court at Buganda Road, in Kampala. The charges

were in respect of various offences under ***The Geneva Conventions Act, Cap 363 (now 349)***. The accused was subsequently committed to the High Court for trial, and on 11th July 2011, he appeared before the ICD on an amended indictment containing 50 counts. The Accused, through his lawyers, then requested for a reference of his case to the Constitutional Court, which the High Court granted.

19. In ***Thomas Kwoyelo v. Uganda, Constitutional Petition No.036 of 2011 (Reference)***, the Constitutional Court had to determine three issues:

    a. 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 Constitution of the Republic of Uganda.
    b. 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 Convention 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, and 287 of *The Constitution of the Republic of Uganda*, and Directives 111 and xxviii (b) of the National objectives and Directives Principles of State Policy, contained in the 1995 *Constitution of the Republic of Uganda*.
    c. 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*.

20. On 22nd September, 2011, the Constitutional Court upheld the accused's reference, holding that although ***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 had been submitted by the Attorney General. The Court also held that the accused had been discriminated against, contrary to the provisions of Article 21 (1) (2) of ***The Constitution***. The Court thus, made an order for the case to be returned to the ICD, with the direction that the accused person's trial must cease forthwith.

21. The Attorney General appealed to Supreme Court against the decision of the Constitutional Court. In its decision, delivered on 8th April 2015, in ***Constitutional Appeal No. 01 of 2012; Uganda v. Thomas Kwoyelo,*** the Supreme Court found that ***The Amnesty Act*** does not impinge on the prosecutorial powers of the DPP, and it is not inconsistent with the Constitution in that regard. The Supreme Court further found that ***The Amnesty Act*** is not inconsistent with Uganda's international obligations, as it does not grant blanket amnesty for all crimes. Farther, that ***The Geneva Conventions Act*** still applies, and the indictment of the accused under Article 147 of ***The Geneva Conventions Act*** does not violate ***The Constitution of Uganda***. The Court also found that the accused had not suffered discrimination or unequal treatment under the law, and that the DPP was acting within its powers not to certify the accused for grant of amnesty and to commence prosecution against him under ***The Geneva Conventions Act***. Following that decision, the accused was arraigned before the ICD, and the indictment was read to him again, on 14th of March 2017.

22. On 25th January 2017, the indictment had been amended, bringing the final number of counts to 93 counts. These included criminal charges based on international law, with those based on municipal (domestic) law being preferred in the alternative. The international law charges consisted of crimes against humanity of murder, enslavement, rape, torture, imprisonment, and other inhumane acts. In a cumulative manner, the indictment also contained charges of serious violations of Common Article 3, of ***The Geneva Conventions***, applicable to internal armed conflict. The Common Article 3 charges in the indictment included murder, hostage taking, cruel treatment, outrages upon personal dignity, violence to life and person, as cruel treatment and torture, and pillage. The alternative charges, under the municipal law, based on ***the Penal Code Act Cap 120 (now Cap 128)***, are murder,

kidnapping with intent to murder, aggravated robbery, attempted murder, procuration of unlawful carnal knowledge, and rape.

23. The DPP preferred alternative charges under ***The Penal Code*** alongside cumulative charges, i.e. crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction. The Court was tasked with finding whether the said alternative charges and cumulative charges, are presented with evidence sufficient to sustain them, and the issue of resolving questions regarding the concurrence of charges and which one, if any, of the confirmed alternative charges is relevant, was a question left for a full trial.

24. In a ruling delivered on 30th August, 2018, the pre-trial Judge found that the prosecution had adduced sufficient evidence to establish substantial grounds to believe that the accused person was responsible for the crimes brought against him. The Court accordingly confirmed all charges in the amended indictment. Subsequently, the accused person's case was transmitted to the Trial Panel for trial on the charges as confirmed.

25. On 12th November 2018, the trial against the accused commenced in the High Court of Uganda sitting at Gulu in Northern Uganda. The prosecution presented a total of 53 witnesses. On 18th December 2023 the Trial Panel found that the accused person had a case to answer in respect of 78 Counts out of the initial 93 Counts. On 15th April 2024, the accused person opened his defence and presented a total of 4 witnesses, inclusive of himself. Hearing of evidence was concluded on 8th May, 2024.

Preliminary questions of law

In their final submissions, the lawyers for the accused person raised a number of points of procedural and substantive criminal law, which alongside other points of law, the Court considered convenient to resolve, before evaluating the evidence adduced regarding the substantive charges. These are: (i) The alleged violation of the principle of legality; (ii)

Joining the "main," "primary," "principal," or "substantive" charges with alternative charges in the indictment; (iii) Preferring cumulative charges in the indictment.

Alleged violation of the principle of legality.

26. The lawyers for the accused submitted that the principle of legality is provided for under Article 28 (12) of ***The Constitution of the Republic of Uganda, 1995*** as amended. The only exception to this principle is the offence of contempt of court, which is left to the court's interpretation. That the framers of the Constitution did not envisage the application of non-codified offenses such as offences under Customary International Law, and where any law contravenes the Constitution, then the provisions of Article 2 of the Constitution come into play and becomes inconsistent with the Constitution. Therefore, the treaties and the frameworks on Customary International Law which were in existence at the time of promulgation of the Constitution constitute international law which is not codified. That as such, national courts cannot prosecute a person based on customary international law alone. That charging the accused under Customary International Law alone, prejudices him in that the offence is vague, the ingredients are not clear, and it infringes on his right to a fair trial.

27. The lawyers further submitted that the offences in Count 71, 73 and 74, of crimes against humanity, pursuant to customary international law, are not precisely defined and the punishment thereof not prescribed. That they are not provided for under international conventions and treaties to which Uganda has acceded, and that the case law being imported from the International Criminal Tribunal for the former Yugoslavia (ICTY) to provide the ingredients of the offence, like that of ***Prosecutor v. Dario Kordi*** **and** ***Mario Cerkez***[1] are not applicable, as they were based on the statute creating the Yugoslavia Tribunal. These statutes are not applicable in Uganda. By importing this case, it amounts to charging the accused under the International Tribunal for Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law in Former Yugoslavia Treaty of 1991, which prejudice the accused.

[1] *IT-95-14/2-A*

28. In reply, the prosecution submitted that the defence had previously raised the same objection, which was determined by the trial panel in their decision on *a no case to answer*. That the objection was over ruled, and by raising a similar objection again, the defence is technically disguising an appeal as an objection. It cannot be legally sustained, as an appeal emanates from a final and not an interim decision of court.

29. Upon consideration of the preliminary point, this Court indeed found that the same objection was raised at the pre-trial stage. In its ruling delivered on 22nd November 2017 the pre-trial Court found that customary international law is constituted by norms drawn from general and consistent practice of states, reflecting longstanding customary practice of states, followed from a sense of legal obligation (*opinio juris*) and to be so fundamental and non-derrogable that no state can legitimately object to them (*jus cogens*). The offences are constituted by acts condemned by the value judgments of all civilised people, and punishable by every civilised municipal legal system. Since the Nuremberg trials, their existence has been recognised by international tribunals, hybrid tribunals and domestic courts. Since customary international law is not treaty - based, Article 2 (2) of ***The Constitution,*** which stipulates that the Constitution shall prevail over any law that is inconsistent with it, was interpreted to mean that it is applicable in Uganda, to the extent that it is not contrary to the Constitution of Uganda.

30. The same objection was once again raised as part of the defence submission on *a no case to answer*. In its ruling delivered on 18th December, 2023, this court found that the peremptory norms of international law, in so far as they cannot be derogated from or waived by states, have direct application domestically without the necessity of ratification. *Jus cogens* norms protect universally observed, fundamental human rights and so do not rely on the consent of states. Related to this is the *malum in se* crimes which are thought to provide notice by their very nature: the belief being that there is a basic core of offenses that are understandable to any rational human being, even if there is no specific provision

that explicitly prohibits them. For example, in ***Prosecutor v. S̆ainovic´,***[2] it was held that notice was provided by the inherently wrongful character of the charged acts of rape.

31. Before the Rome Statute came into force 1st July, 2002 and introduced a code-based approach to criminal law, with a detailed list of the elements, defences, and penalties that comes quite close to the legality principle in its municipal form, the international criminal law tradition was based on the direct application of customary international law by resting it on pertinent case law, general principles and relevant State practice. Even then, the Rome Statute is more or less a partial codification of the applicable customary international law in its statutory definitions.

32. Customary international law is developed by States mainly through the adoption of treaties and State practice when it is sufficiently dense (widespread, representative, frequent and uniform) and accompanied by a belief among States that they are legally bound to act, or prohibited from acting, in certain ways. Custom is binding on all States except those that have persistently objected, since its inception, to the practice or rule in question. Although there has been some limited form of codification of international criminal law in the statutes of the various international criminal tribunals, for violations of *jus cogens* norms, such codification is in essence not legislation of such crime into existence, but rather a partial recognition of crime already existing as such in customary international law. They are a partial codification of rules that are declaratory of customary law. Such treaties do notset down norms of international law or legislate with respect to those norms. They simply empower the respective tribunals to apply existing customary international law.

33. Suffice it to add, that international criminal law and municipal criminal law evolve differently. While municipal criminal law relies heavily on codification, international criminal law is not generated entirely within treaties. Consequently, legality in the international context is more liberal, broader, more fluid than in the domestic sphere. When attempting to ascertain uncodified (but binding) law from state practice with a view to

[2] *Case No. IT-05-87, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, para 42 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006)*

establishing the existence of a customary rule or a general principle, reliance is primarily placed on such elements as official pronouncements of States, military manuals and judicial decisions. Customary international law then criminalises the most serious violations of human rights; it imposes criminal liability for serious violations of human dignity, i.e. acts which constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.

34. Based on the notion that it is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that they are given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards, *nulla poena sine lege* together with its counterpart *nullum crimen sine lege,* put another way as there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive, forms part of the international legality principle, though with a standard that is very relaxed. In order to enhance the adjudication of serious human rights violations that are subject to an international duty to prosecute, the international scope of the legality principle is interpreted autonomously and more liberally compared to its stricter application in national jurisdictions. All that is required by the international legality principle is that no heavier penalty is imposed than the one available under the written or unwritten law applicable at the time the crime was committed.

35. The principle of *nullum crimen sine lege* requires the Court to apply rules of international criminal law which are beyond any doubt, part of conventional or customary international law at the time relevant to the commission of the alleged offence. It requires that prosecution and punishment be based upon clear provisions of international law existing at the time the crime was committed. The requirements of both specificity and non-ambiguity in domestic prosecutions are met by the jurisprudence of the international tribunals that is declaratory of customary international law, so long as those decisions do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. General principles of law derived from national laws, judicial decisions and the teachings of the most highly qualified publicists of the various nations,' are subsidiary

sources. Treaties do not set down norms of international law or legislate with respect to those norms. They simply empower the respective tribunals to apply existing customary international humanitarian law.

36. The International criminal tribunals have from time to time had to address this issue. For example, the ICTY in its decision in ***Prosecutor v. Delalic´,*** [3] took the view that the accused were on notice via the criminal codes of the Socialist Federal Republic of Yugoslavia. The other approach has been to review international human rights law in order to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity (see ***Prosecutor v. Kupresˇkic´,***[4] and ***Prosecutor v. Blagojevic´***[5]. Alternatively, the tribunals have relied on the offenses containing an intrinsic evil in themselves sufficient notice. For example, in ***Prosecutor v. Hadzihasanovic,*** [6], it was held that the requirement of notice was satisfied because the accused must have been able to appreciate that the conduct was criminal in the sense generally understood, without reference to any specific provision.

37. International customary law is concerned with only the gravest crimes and therefore on this basis, it could be inferred that crimes under customary international law are *mala in se* crimes. Accordingly, the term "crimes against humanity" includes a range of serious human rights abuses committed as part of a widespread or systematic attack by a government or organization against a civilian population, while war crimes are "serious violations of the customs of war." Both represent the determination of civilized man to value human life and dignity and to lessen suffering. They comprise acts or omissions which, at the time when they were committed, were criminal according to the general principles of law recognised by the community of civilized nations. Crimes against humanity under customary international law are generally crimes under national law drawn from state practice, re-characterised as crimes under international law. They are acts and omissions which are

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[3]Case No. IT-96-21-T, Judgement, para 312 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)
Case No. IT-95-16, Trial Judgment, para 563 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000,
Case No. IT-02-60, Trial Judgment, para 625 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005)
Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para34 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 16, 2003)

criminal according to the general principles of law recognised by the community of nations as acts that amount to crime under international criminal law, by reason of constituting criminal offences in the national law of a wide and representative number of States.

38. In absence of a global legislature with oversight over key legal tasks such as gap filling, modernisation of out-dated law, or reworking of bad law, the Courts and tribunals simply gradually clarify further the customary international law based rules of criminal liability, through judicial interpretation from case to case, by identifying as ingredients or elements, the specific indicia of or acts that evidence the crime, which may reasonably be regarded as consistent with the essence of the offence and could reasonably be foreseen by the offender at the material time of the offence. While Customary International Law is declarative of the norms, i.e. the basic structure of a crime which includes both the objective element (*actus reus*) and subjective element (*mens rea*), in a sufficiently precise manner so that the criminalised conduct is clear, national legislation and judicial determinations supply the additional specificity required. The certainty requirement postulates that the criminal conduct be defined in such a manner that "the individual, if need be, with the assistance of pre-existing judicial interpretations of the law and/or the aid of legal counselling, and taking into account possible specific qualifications of the typical addressee, may see from the wording of the definition of the criminal conduct which acts or omissions are prohibited (see ***Kokkinakis v. Greece***)[7].

39. The diversity of definitions of the elements of these offences found in national legislation, statutes of the international tribunals and judicial determinations, is therefore a definitional debate or a mere interpretative finesse, rather than a disparity on the substance of the *actus reus* and *mens rea* of the offences. The differing judicial interpretations do not create materially distinct *actus rei* or *mens rea* for the various offences. Respect for the principle of legality in international criminal matters does not exclude the evolutionary interpretation of a pre-existing criminal law rules. The judicial determinations merely clarify an element of the criminal prohibition, without affecting the essence of the offence. Even before those clarifications, customary international law declares the norms in a sufficiently precise

[7] *No. 260-A, Eur. Ct. H.R. (ser. A) para 52, (1993*

manner so that the acts or omissions prohibited as criminal conduct and render the addressee liable, are so clear. This clarity allows people to foresee the criminality attached to the specified conduct and to avoid the criminal behaviour. In any event, the principle of legality is satisfied for all *mala in se* crimes.

40. In the circumstances, the accused was not placed in the doubly unfair position of confusion regarding what he was charged with and the threat that any imprecisely delimited crime will be extended and his punishment concomitantly expanded. The objection on basis of the principle of legality is accordingly overruled.

Joining the "main," "primary," "principal," or "substantive" charges withalternative charges in the indictment.

41. The defence argued that the offence of murder contrary to section 188 and 189 of ***The Penal Code Act*** as reflected in the 28 counts as alternative charges to murder as a war crime and crime against humanity, are principal offences. That as such, they cannot be charged in the alternative. That the position of the law is that a principal charge is usuallythe most serious charge and an alternative or backup charge is usually less serious. In theirview, subjecting the accused to the alternative counts in their present form has the effect of exposing the accused to double jeopardy. They ***Uganda v. Ojwiya Santo & 4 Others***[8], where court held that;

> ***"The prosecution will often charge a person with a main or principal charge (which is usually the most serious charge) followed by alternative or backup charges (which are usually less serious). In its judgment, the court will first consider evidence in relation to the principal charge. If it finds the accused guilty in relation to that charge, it will dismiss the alternative charge. It is only if it finds the accused not guilty in relation to the principal charge that it will consider the evidence in the light of the alternative charge."***

[8] *H.C. Criminal Appeal No. 0012 of 2017*

42. It is argued that Section 87 of **the *Trial on Indictments Act*** (TIA) as amended, provides that when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. That therefore, Section 87 of The TIA is the nearest penal provision that allows an alternative charge by the prosecution. That since all the 28 alternative counts are not minor or cognate charges, they do not qualify as alternative charges, and they should be struck off to avoid exposing the accused to double jeopardy.

43. The prosecution replied that both in municipal law and international law it is not unlawful to charge a capital offence as an alternative to a substantive charge which is also capital in nature. They maintained that the practice does not amount to double jeopardy. That it is a strategy which the prosecution is at liberty to employ. That what is of relevance, is that the evidence supports all the offences charged. That the strategy is applied when the prosecution decides to charge the same acts by using a different set of crimes, alternatively. Farther, that the substantive count is harder to prove considering it has a greater number of elements or has more difficult elements to establish. Therefore, to lessen the chance of an accused person getting off scot-free, the prosecution will often include charges that are easier to prove as alternative charges or "backups."

44. The prosecution submitted that the offence of murder under ***The Penal Code Act,*** as an alternative count to murder as a crime against humanity or war crime, is one of the elements of crimes against humanity and war crimes. That in event of failure to prove any of the elements of the crimes against humanity and war crimes other than the element of murder, the accused can be lawfully convicted of murder under ***the Penal Code Act*** as a minor and cognate offence to crimes against humanity and war crimes. The prosecution therefore prays that the objection to the 28 alternative counts be over ruled.

45. Under our municipal legal regime, the law regulating charges in criminal law stems from the constitutional imperative in Article 28 (3) (c) which stipulates that;

"every person who is charged with a criminal offence shall be informed immediately, in a language that the person understands, of the nature of the offence".

It is, therefore, the duty of the court to ensure and remain mindful that the accused person's right to a fair trial, is safeguarded at all times.

46. The indictment is the statement containing the charges. Section 22 of ***The Trial on Indictments Act*** stipulates that the indictment shall contain, and it is sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. An accused person is entitled to know the exact nature of the offences brought against him so that (s)he can mount a proper and robust defence. The defence argues that the 28 alternative counts in the indictment are of such a nature that they are themselves principal offences and cannot be charged in the alternative.

47. Firstly, it is a constitutional right under Article 23 (9) of ***The Constitution of the Republic of Uganda, 1995*** that a person who has been tried by a competent Court for a criminal offence and convicted or acquitted of that offence, shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence. Therefore, the prosecution will often charge a person with what it considers to be the "main," "primary," "principal," or "substantive" charge (which is usually the most serious charge) followed by alternative or "backup" charges (which are usually less serious and often have some, but not all, of the same elements as the main charge). This is so in order to reduce the chances of an accused person getting off "scot-free". During the trial, the prosecution usually aims for a conviction in respect of the most serious charges (the ones that carry the most severe penalty) such that in the event that the Court finds an accused person not guilty of the main charge, there is a high likelihood of being found guilty of the backup charge.

48. Therefore, in practice and jurisprudence, the prosecution is well within its mandate when it prefers alternative charges. This position is buttressed in ***Dr. Kamba Samuel Baleke v. Attorney General & Director of Public Prosecutions***[9], where the petitioner was charged with the offence of Embezzlement and an alternative charge of Causing Financial Loss. The petitioner argued that it is illegal for the indictment to contain 2 charges and alternative charges. The Constitutional Court noted that,

> ***"Section 23 (1) of The Trial on Indictment Act provides that: "Any offences, whether felonies or misdemeanours, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are part of a series of offences of the same or a similar character."***

It was held farther that these two provisions of the law show that it is legal for an indictment to have two charges, and that an alternative charge can be preferred in the same charge sheet. It is clear from the above provision that it does not matter whether the charges preferred are felonies or misdemeanours.

49. Charging in the alternative, just like the practice with cumulative charges, allows the prosecution to canvass the full culpability of the offences charged, where evidence establishes multiple legal characterisations of the same facts. The entire extent of the accused persons alleged criminality will be addressed. In the end, it increases the likelihood of accountability by covering the various potential legal interpretations of the accused's actions. That way, impunity is fought. Additionally, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused person will be proven, hence the need for preferring charges in the alternative. Whereas charging in the alternative is not provided for by statute, it is a practice that has been adopted by the prosecution when preferring charges against an accused for the reasons cited herein above.

[9] *Constitutional Petition No. 02 of 2014*

50. That notwithstanding, in order to avoid the occurrence of substantive double jeopardy (repeat prosecutions or punishments for the same offense) where the prosecution charges an accused twice for what is essentially a single crime, when making a determination on alternative charges, courts are reluctant to convict on alternative charges. As was held by the High Court of Kenya in ***Patrick Gitonga v. Republic***[10];

> ***"Once a court has convicted on the main count, it cannot also convict on the alternative charge. It is alternative to the main count. That conviction and sentence on the alternative count are hereby set aside for illegality."***

The same position reaffirmed in ***Uganda v. Ojwiya Santo & 4 Others***[11].

51. The principle of double jeopardy not only prohibits successive trials for the same offence, but also multiple punishment at one or successive trials, for the same criminal conduct. The principle regarding multiplicity of offences during the same trial addresses double jeopardy issues, since the rule against unreasonable multiplication is aimed at preventing prosecutorial over-reaching. Charging offences in the alternative raises questions of double jeopardy only when they are multiplicious, in the sense that one is a lesser-included offence of the other. That determination is made by utilising the elements test. Charges are not multiplicious where one offence requires proof of an additional fact which the other does not, and it is not a lesser included offence. In such cases an acquittal or conviction on one offence does not exempt the accused from prosecution and punishment for the other.

52. Evidenced by the severity of the harm they usually produce, war crimes and crimes against humanity, are ranked differently as compared to the crimes under ***The Penal Code Act***. In the realm of International Criminal Law, the practice to charge in the alternative is now well established. It was held, for example, in ***Prosecutor v. Zoran Kupreskic and five others***, [12] it was held that;

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[10] *[2020] eKLR*
[11] *ibid*
[12] *Case No.: IT-95-16-T 14 January 2000, para 722 – 727*

"Generally speaking, if … the facts allegedly committed by the accused are in breach of only one provision … the Prosecutor should present only one charge. If, in the Prosecutor's view, the alleged facts simultaneously infringe more than one provision …, the Prosecutor should present cumulative charges under each relevant provision. In practice, however, the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions … [The Prosecutor] should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove. For instance, the Prosecution may characterise the same act as a crime against humanity and, in the alternative, as a war crime. Indeed, in case of doubt it is appropriate from a prosecutorial viewpoint to suggest that a certain act falls under a stricter and more serious provision … adding however that if proof to this effect is not convincing, the act falls under a less serious provision. It may also prove appropriate to charge the indictee with a crime envisaged in a provision that is – at least in some respects - special vis-à-vis another … and, in the alternative, with a violation of a broader provision … so that if the evidence turns out to be insufficient with regard to the special provision (the lex specialis), it may still be found compelling with respect to a violation of the broader provision (the lex generalis). However, the Prosecution should make clear that these are alternative formulations by use of the word "or" between the crimes against humanity and war crimes charges, for example, and refrain in these circumstances from using the word "and", to make clear the disjunctive and alternative nature of the charges being brought".

53. It is therefore possible to charge an accused with multiple crimes in the alternative, leaving it to the Court to decide of which crime the accused should be found guilty. It should be noted though that in the case of this indictment, the alternative charges under ***The Penal Code Act*** are neither minor nor cognate to the "main," "primary," "principal," or "substantive" charges preferred as war crimes and crimes against humanity. They are simply a set of charges brought under the domestic or municipal legal regime. They cannot in any way be considered minor because they attract similar or equally serious and in some instances, graver sentences.

54. There is however, a difference that when charges are preferred in the alternative, a conviction for the "main," "primary," "principal," or "substantive" charge precludes a separate conviction for the alternative charge. An acquittal on the former category of charges invites consideration of the possibility of a conviction on the latter. If the Court finds an accused person guilty in relation to the principal charge, it will dismiss the alternative charge. It is only if it finds an accused person not guilty in relation to the principal charge that it will consider the evidence in the light of the alternative charge. Based on these findings, the objection on the use of alternate charges is accordingly overruled.

Preferring cumulative charges in the indictment.

55. The defence also raised an objection to the effect that the accused is charged cumulatively with more than one offence in relation to the same set of facts in all counts. The main thrust of their argument is that accumulation of charges offends against the principle of *double jeopardy* or the substantive *non bis in idem* principle in criminal law. To buttress their objection, they relied the on the case of ***The Prosecutor v. Jean-Paul Akayesu***[13]**,** where the Tribunal held that;

[13] *ICTR-96-4-T*

On the basis of national and international law and jurisprudence, the chamber concludes that it is acceptable to convict the accused of two offenses in addition to the same set of facts in the following circumstances: (1) where the offences have different elements: or (2) where there were provisions creating the offences protect different interests: or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts (a) one offence is a lesser included offence of the other, for example murder and grievous bodily harm, robbery and theft, rape and indecent assault, or (b) where one offence charges accomplice liability and the other offence charges liability as a principle, e.g. genocide and complicity in genocide.

56. On that account, the defence argued that the cumulative charging is precluded and not justifiable in the circumstances and the offending charges ought to be struck out.

57. The prosecution, in reply, maintained the stance that cumulative charges, or cumulative charging is a common practice of prosecution by which an accused is charged with a number of different crimes based on the same acts with the charges expressed cumulatively rather than alternatively. That it implies that an accused may be charged with many different crimes for the same act. That instead of charging alternatively, the prosecution prefers to charge them cumulatively as different crimes even though they are based on the same single act. That, it is a strategy that if an accused is convicted of multiple offenses under the same or different legal regimes for the same conduct, separate sentences may be imposed on him/her for those distinct offenses. That the effect of cumulative charges is that it may result in multiple convictions.

58. Also relying on ***Prosecutor v. Jean-Paul Akayesu***[14], the prosecution argued that the decision of the Tribunal had nothing that prohibits charging of crimes cumulatively on

[14] *ibid*

account that the practice offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. That instead, the decision of the Tribunal supports cumulative charging in instances;

> ***"(1) where the offences have different elements: or (2) where the provisions creating the offences protect different interests: or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did."***

59. Further, that the Tribunal stated the exceptions to cumulative charging in given instances as follows;

> ***"…it is not justifiable to convict an accused of two offences in relation to the same set of facts (a) one offence is a lesser included offence of the other, for example murder and grievous bodily harm, robbery and theft, rape and indecent assault, or (b) where one offence charges accomplice liability and the other offence charges liability as a principle, e.g. genocide and complicity in genocide".***

60. Prosecution then submitted that none of the exceptions are applicable in the instant case and that by charging the accused cumulatively, it did not in any way offend against the principle of double jeopardy.

61. The *Non bis in idem* relates to numerous issues including; the recharging of an accused with the same or another offence, the framing of an indictment, the sentencing of an accused on multiple convictions (double punishment), new trials, appeals, revision, the relationship between courts and between states.[15] *Non bis in idem* protects individuals against multiple punishments for the same offence, so-called double counting, in the

[15] *Tallgren "Ne bis in Idem" in O. Triffterer (Ed) Commentary on the Rome Statute of the International Criminal Court, 1999 (Publisher Baden-Baden: Nomos Verlagsgesellschaft)420*

absence of authorisation by the legislature. It forbids a double sanction of the same person, by the same fact and with an identical basis.[16]

62. In the ***Kayeshema***[17] case, in its judgment the Trial Chamber, ruled that the cumulative charges in this case were "improper" and "untenable in law." In so ruling, the Trial Chamber found that the criminal elements required to prove genocide, extermination and murder in this particular case were the same, and that the evidence used to prove the three crimes was also the same. The Trial chamber held that the counts of extermination and murder (brought as crimes against humanity) were 'subsumed fully' by the counts brought under Article 2 in relation to genocide.

63. Similarly, the Trial Chamber in ***Prosecutor v. Zoran Kupreskic and Others,***[18] the Trial Chamber took the view that multiple offences may be charged on the basis of the same acts in order to capture the full extent of the crimes committed by the accused. The Trial Chamber also cited the Supreme Court of Massachusetts, where a deliberation was made as to circumstances where there has been a violation of one or more statutes. According to the Massachusetts Supreme Court, a single act may be an offence against two statutes and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the person from prosecution and punishment under the other.[19]

64. The general approach to cumulative charging, in particular under the common law traditions, is that it is not an encouraged practice majorly for the reason, among others, that it is considered oppressive as against the accused person. Charges based on same underlying acts or a series of same acts or transactions are hurled at the accused in

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[16] *RN Daniels 'Non bis In Idem and the Rome Statute of the International Criminal Court' International Criminal Law Research Paper: Northwestern University School of Law.*
[17] *Prosecutor v Kayishema and Ruzindana, Case No ICTR–95–1–T (21 May 1999) [627] ('Kayishema').*
[18] *Case No.: IT-95-16-T, the trial of Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, hereafter the "accused", before the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 17 August 1998 and came to a close on 10 November 1998. Para 718-719*
[19] *Morey v. The Commonwealth, (1871) 108 Mass. 433 and 434. See Prosecutor's Brief, pp. 23-24.*

successive and multipronged "ferocious" manner with the effect that it ultimately embarrasses the accused in preparation of his or her defence. Exceptions to this general view nonetheless exist where specific criteria have been developed with conditions for cumulative charging to offer the preferred mode and basis for prosecutorial strategy.

65. In Uganda's domestic legal regime, ***The Trial on Indictments Act***, section 23 (1) (on joinder of counts) provides as follows;

> ***"Any offences, whether felonies or misdemeanours, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character".***

66. Based on that provision, it is in no doubt that the domestic legal regime recognises the practice of multiple charging, as an exception to the substantive *non bis in idem* principle in criminal law, at least at the procedural level. Practically, an accused can be properly charged with a number of different crimes on the same underlying acts, with the charges being expressed cumulatively in the same indictment.

67. The criteria for cumulative charging were yet a subject of determination in ***Prosecutor v. Jean-Paul Akayesu***[20] case, cited by both the defence and prosecution, on the same issue. The Tribunal found that the crucial considerations favouring multiple charging are: (1) where the offences have different elements: or (2) where the provisions creating the offences protect different interests: or (3) where it is necessary to record a conviction for both offences in order fully to describe the nature and extent of what the accused did. Within the realm of this criteria, crimes may be charged together in the same indictment in so far as they are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

68. It cannot be overstated that cumulative charging is practiced both in common law and civil law systems even though the approach differs under each system. In common law systems,

[20] *ibid*

an accused may be charged with multiple crimes, leaving it up to the court to determine which of the crimes the accused should be found guilty of. Under civil law systems the prosecution charges the accused with the crime that has been committed under the law; which does away with the necessity of cumulative charging as a prosecutorial strategy.

69. The issue of cumulative charging has come up before various international tribunals established by their respective statutes. The tribunals' decisions offer useful guidance as sources of law on how cumulative charging is dealt with in the realm of international criminal law under the different legal systems. For instance, in its trial judgement, in the ***Prosecutor v. Akayesu***[21], the International Criminal Tribunal for Rwanda (ICTR) noted that civil law systems allow the use of multiple charges under the principle known as *concours d'infractions*. The ICTR concluded that it is acceptable to convict [an] accused of two offences in relation to the same set of facts.

70. Similarly, the Special Tribunal for Lebanon (STL)in the case of the ***Prosecutor v. Ayyash et al***.[22], also stressed that Lebanese law, which is influenced by French law, also permits the practice of cumulative charging. In the case of the Special Court for Sierra Leone (SCSL), although the statute establishing it does not contain a provision on cumulative charging, in ***Prosecutor v. Charles Ghankay Taylor***[23]**,** and ***The Prosecutor v. Alex Tamba Brima and others***[24] where the Court addressed the matter of cumulative charging, as follows;

> ***"Cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other".***

[21] *ibid*
[22] *STL-11/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging; Appeals Chamber, paras 270–271 (Feb. 16, 2011)*
[23] *Case No: SCSL-03-01*
[24] *Case No. SCSL-2004-16 para 2099*

71. The two tests therefore are; whether the offence charged as a war crime requires proof of facts which the same offence as a crime against humanity does not require, and vice versa. Secondly, whether the prohibition of the offence as a war crime protects different values from those safeguarded by the prohibition of the same conduct as a crime against humanity. Applying the test to the instant case, the same single act of killing of one person during the armed conflict in Northern Uganda renders the accused properly charged cumulatively for instance, for murder as a crime against humanity and as a grave breach of ***The Geneva Convention***, as well as murder under ***The Penal Code Act***; provided it can be demonstrated on the evidence that there is sufficient material to meet all the elements of such crimes in that single act of killing in all legal regimes.

72. It is clear that by raising this particular objection, the prime concern of the defence was cumulative convictions. However, cumulative charges must be distinguished from the concept of cumulative convictions where an accused is convicted of multiple offences under different legal headings for the same conduct. Though they tend to the same point and are often used to mean the same thing, the difference between both concepts is that cumulative charges may result in multiple convictions or a single conviction, but are not determinative of each other.

73. Therefore, cumulative charges in relation to the same conduct; as a violation of the laws or customs of war under common Article 3, and as a crime against humanity under customary international law, is based on the notion that each crime has a special ingredient not possessed by the other. Simultaneous charges and convictions are thus permissible for war crimes alongside crimes against humanity. The focus is ultimately on the indictments bringing out the full criminality of the acts or omission of the crimes and culpability of the accused to the extent possible, and to avoid impunity. Accordingly, this objection too is overruled.

The extraterritorial criminal jurisdiction of this Court.

74. Although not raised by any of the parties, it was deemed necessary to make observations regarding the issue of the extraterritorial criminal jurisdiction of this court, owing to the issues it poses arising out of the facts of the case.

75. It is alleged in some counts in the indictment, that some of the criminal acts were committed in partly in Uganda and partly in "South Sudan". The accused, therefore, faces charges over conduct that is both territorial and extraterritorial. In the Customary International Law scheme of jurisdiction, a state has authority to legislate and adjudicate concerning acts, things, and events in its territory. As a general proposition, the criminal law of a state has no extraterritorial operation. The territoriality principle thus serves as the basic principle of jurisdiction. The territorial theory takes the position that criminal jurisdiction depends upon the place of perpetration, that is; the nation on whose territory the crime was committed has jurisdiction over the offence. Extraterritoriality is generally understood to refer to exercises of jurisdiction by a nation state over conduct occurring outside its borders.

76. Although Article 139 (1) of ***The Constitution of the Republic of Uganda, 1995,*** confers upon this Court, as an integral part of the High Court, unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law, section 5 of ***The Penal Code Act,*** limits its extraterritorial jurisdiction. The extraterritorial jurisdiction only extends to acts which, if wholly done within the jurisdiction of the court, would be an offence against the Code that are done partly within and partly beyond the jurisdiction, by persons who within the jurisdiction do or make any part of such acts. The provisions not only cover crime that is initiated outside and are completed in Uganda and vice versa, but also extend to offences committed in the course of the same transaction or series of transactions in Uganda, some of which occur outside Uganda. Exercise of extraterritorial jurisdiction in the enforcement of our municipal law thus requires a tangible nexus between the criminal conduct occurring outside Uganda, and the criminal conduct by perpetrators within the territory of Uganda.

77. On the other hand, the prosecution of war crimes and crimes against humanity has also heavily relied on the universality principle, based upon the theory that some crimes are so grave as to constitute a threat to international peace and security, that all states are regarded as having a legitimate interest in their prescription and enforcement under the extradite or prosecute rule. International law grants every state the authority to assert jurisdiction over such crimes. In such situations the national court acts as an agent of the international community, in the interest of the international community as a whole, rather than in a narrow domestic capacity. The universality principle is applicable only to certain crimes under international law that have been made subject to universal jurisdiction either by a multilateral treaty or under Customary International Law; such as genocide, war crimes, and torture where the interests protected are not those of the prosecuting State, but those of the international community as a whole.

78. Several international instruments, such as the four ***Geneva Conventions of 1949*** and ***The Convention Against Torture,*** require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution. By virtue of the "extradite or prosecute rule", each state has the obligation to assert universal jurisdiction in certain circumstances, such as in the prosecution of international crimes, with the only nexus with the prosecuting State being the presence of the accused in the prosecuting State. While universal jurisdiction may be asserted over international crimes, the extraterritorial principle contained in section 5 of ***The Penal Code Act*** limits this Court's power in the enforcement of municipal law.

The transfer of the accused from the DRC without undergoing extradition.

79. When the interests of a state have been affected by the criminal conduct of a person who is not within that state's jurisdiction, but is within the jurisdiction of another state, it is ordinarily through extradition, that the requesting state obtains *in personam* jurisdiction of the suspect by means of the requested person's surrender from the requested state. Fulfilling the "extradite or prosecute" obligation cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State

since extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under Article 23 of ***The Constitution of the Republic of Uganda, 1995*.**

80. The principle that has been followed for a significant period of time is the maxim *mala captus bene detentus*, i.e., "although unlawfully taken, nevertheless legally detained." Under this doctrine, although jurisdiction over an accused may have been acquired by the forum state through a violation of international law, such as an excess of enforcement jurisdiction, the forum state may, nonetheless, exercise its jurisdiction lawfully over the accused once he is within its judicial jurisdiction. This means that states will try individuals in their courts even though being taken there by irregular means. While that may be so, some states decline jurisdiction over persons brought in front of the court by irregular means. This diverse state practice has the consequence that there seems to be no uniform state practice to form customary rule binding up on states.

81. One of the justifications for a formal extradition process, is that extraterritorial abduction with state involvement can be a violation of the sovereignty of the state where the abduction took place. States are not allowed, under contemporary international law, to be involved in activity or perform "acts of sovereignty" within the territory of another state or on the sovereign territory of another state, without its consent. A violation of state sovereignty occurs where the operation involving the abduction of the fugitive, is performed by *de facto* or *de jure* state officials in a territory of another state without its consent. In the instant case though, the accused was captured at a battle front during "Operation Lightening Thunder," which was a joint military offensive launched on 14th December, 2008 by the armies of Uganda, the Democratic Republic of the Congo, and Southern Sudan, against the LRA. The operation officially ended on 15th March, 2009 when the UPDF abruptly began what was announced as an eight-day withdrawal from the DRC. The accused had been captured barely a fortnight before, on 2nd March, 2009, in the Garamba region of the DRC and airlifted back to Uganda, nursing a bullet wound in his stomach.

82. In ***Öcalan v. Turkey***[25], the Claimant, who was leader of the Kurdistan Workers Party (PKK), after being expelled from Syria, where he had been dwelling for many years, went from state to state until he ended up in Kenya. He was taken by the Kenyan state officials and handed over to Turkish officials in an aircraft located at the time in the international zone of Nairobi airport. The case came before the European Court of Human Rights (ECtHR) and as part of the judgment the court considered whether Turkey had violated Kenya's sovereignty by its activity. The court came to the conclusions that Kenya's sovereignty had not been violated because Kenyan officials "played a role" in the seizure, and because Kenya did not raise any protests about the activity of Turkish officials in its territory. This was found sufficient to prove that Kenya had participated in the process. Similarly, in the present case, the army of the DRC played a role in the military operation that led to the capture of the accused and the DRC has since then not raised any protests about the activity of the UPDF in its territory. The case reflects contemporary international law, which postulates that limited participation of state officials is sufficient to preclude an otherwise wrongful act, if done in good faith.

83. Be that as it may, the Court is cognisant of the fact that efforts to secure custody of a fugitive where a state's forces are operating extraterritorially, in circumstances where extradition is not available or plausible, may compromise the rights of the individual. Therefore, examination of the issues surrounding extraterritorial abductions is not limited to the confines of state sovereignty but it is also important that a human rights dimension is added to the analysis. Customary International Law will emerge if there is consistent state practice, coupled with *opinion juris* - a belief that such conduct is legally required. The Court has been unable to establish, outside the notion of State sovereignty, the existence of a settled uniform international practice regarding scenarios of this nature, as part of international customary law, of a general right or freedom from extraterritorial arrest or capture.

84. What is evident is that where an individual is unlawfully detained by a state within its borders for the purpose of initiating criminal proceedings, there are often many due process

[25] *Application No. 46221/99 12 March 2003, para. 46*

rights that domestic courts can invoke to censure the Executive, and vindicate the breach of the individual's rights. But where an individual is detained on foreign soil and transferred to another country to face trial, courts have been all too willing to hold that the procedural protections afforded by domestic law do not apply to the individual for the period he or she is not in the country. Moreover, there is no evidence before this Court to show that between the period from 14th December, 2008 to 15th March, 2009 when the UPDF was involved in "Operation Lightening Thunder," it exercised the requisite level of effective control over the accused for Uganda's human rights obligations to apply extraterritorially.

85. Whereas Article 23 of ***The Constitution of the Republic of Uganda, 1995*** has guarantees against arbitrary arrests and detention, the seizure or capture of an armed member of a rebel force at a battle front during extraterritorial hostilities, does not readily lend itself to classification as an arbitrary arrest. This is owing to the fact that capturing and detaining enemy combatants or hostile forces engaged in an armed conflict against the UPDF, is an inherent part of warfare. Section 11 (2) of ***The Human Rights (Enforcement) Act, Cap 12,*** requires this Court to declare the trial a nullity and acquit the accused person where it becomes cognisant of any of the accused person's non - derogable rights and freedoms have been infringed upon. The non - derogable rights are defined by Article 44 of ***The Constitution of the Republic of Uganda, 1995*** as; freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; and (d) the right to an order of *habeas corpus*.

86. The significance of these provisions was demonstrated in ***Dr. Kizza Besigye and Others v. The Attorney General,*** [26]where the petitioners had been granted bail but immediately thereafter were subjected, in the court premises, inside the "Temple of Justice," to humiliating, cruel and degrading treatment, where agents the State invaded the High Court, where the petitioners were beaten, tortured, arrested and taken for continued detention. The Court came to the conclusion that no trial arising from proceedings bearing a history like the one described in the petition could ever be said to be fair within the meaning of Articles

[26] *Constitutional Petition No.07 of 2007*

28 and 44 of ***The Constitution of the Republic of Uganda, 1995***. In the instant case, there is no evidence of violation of any of these rights of the accused, of a non-derogable nature.

87. Furthermore, considering that the special nature of crimes with which the accused is indicted were of joint concern to all states, in the determination of whether jurisdiction should be declined over the accused by reason of him having been captured on the field of battle and returned to Uganda for trial, without first undergoing a process of extradition from the Democratic Republic of Congo, this Court will not decline jurisdiction over a captured person if the accused is a fugitive from international justice, except in the case of egregious violations of his fundamental human rights. In the absence of such violations, the Court has duly exercised jurisdiction.

Observations concerning the indictment

88. In a number of counts, the distinction between "crimes against humanity" and "war crimes" is blurred. The prosecution preferred charges as violations of "Article 3 (1) common to the Geneva Conventions pursuant to Customary International Law," while maintaining others as; "crimes against humanity pursuant to Customary International Law." In this judgment, Court has endeavoured to maintain the distinction.

89. Also to observe, is that reference to "South Sudan" in Counts: 81, 82, 84, 86, 89 and 91 regarding events that occurred from February, 1996 to 2004 is erroneous since that country became a nation on 9th July, 2011 long after the events. In this judgment, the Court instead refers to that territory as Southern Sudan.

The Law applicable

90. In this trial, the applicable law is a blend of both international and domestic law. Penal rules of international law are applied within the national legal order. International criminal law in the context of this judgment refers to the accumulation of international legal norms on individual criminal responsibility found in treaties, custom and general principles. This

involves the direct application of international criminalisation, which incorporates both customary and treaty criminalisation, inclusive of the definition of the crimes and forms of participation, while procedural and evidentiary laws are predominantly domestic.

91. A fundamental rule of international law of treaties, is the maxim; *pacta sunt servanda* set out in Article 26 of ***The Vienna Convention on the Law of Treaties, 1969***. Under this rule, every treaty is binding upon the parties to it, and must be performed in good faith. The implication is that Uganda has a duty to take all appropriate steps to remove or eliminate incompatibilities with obligations arising from pre-existing agreements with other parties to the treaty, and may not invoke the provisions of its internal laws as a justification for its failure to perform, observe and implement the treaty. Both Article 123 (2) of ***The Constitution of the Republic of Uganda, 1995***, and section 4 of ***The Ratification of Treaties Act***, necessitate ratification and domestication of treaty-based law before its application in Uganda. The law of armed conflict as contained in the four Geneva Conventions was duly domesticated on 16th October, 1964, by the enactment and coming into force of ***The Geneva Conventions Act, Cap 363 (now Cap 349***)

92. Protocols generally amend, supplement, or clarify a treaty. Uganda acceded to ***The Additional Protocol II to the Geneva Conventions*** on 13th March, 1991 relating to the protection of victims of non-international armed conflicts, thereby coming into force on 13th September, 1991. The protocol expands and complements the non-international protections contained in Article 3 common to the four ***Geneva Conventions of 1949***, it develops and supplements the brief rules contained in common Article 3, it provides a definition of armed conflict, and further clarifies the fundamentals of "humane treatment," among other aspects. It strengthens protection beyond the minimum standards contained in common Article 3, by including prohibitions against direct attacks on civilians, collective punishment, acts of terrorism, rape, forced prostitution and indecent assault, slavery and pillage. The protocol applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forcesor other organised armed groups which, under responsible command, exercise such control

over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

93. To the extent that the ***Additional Protocol II to the Geneva Conventions*** strengthens protection beyond the minimum standards contained in common Article 3 which is already domesticated by way of ***The Geneva Conventions Act***, and by that enactment of the necessary legislation having given domestic effect to the four treaties, ratification of the additional protocol rendered it directly applicable domestically alongside the Act. In any event, since the principles of international humanitarian law embodied in common Article 3 of ***The Geneva Conventions*** **and** ***Additional Protocol II*** constitute a set of minimum ethical standards applicable to situations of internal conflict and are widely accepted by the international community, they form part of *jus cogens* or the customary law of nations.

94. Consequently, their binding force derives from their universal acceptance and the recognition which the international community of States, as a whole, has conferred upon them by adhering to this set of rules, and by considering that no contrary rule or practice is acceptable. They are a set of standards whose absolute and universal validity does not depend on being enshrined in positive law. Their applicability by domestic courts does not derive from their codification as rules of international law. Respect for these principles does not depend on whether or not States have ratified or acceded to the international instruments enshrining those principles.

95. All armed individuals, whether or not they are part of a state force are, therefore, under the obligation to respect the rules embodying those basic humanitarian principles, from which there is no possible derogation; even in the extreme situation of armed conflict. They may not then legitimately consider that they do not have to respect the minimum standards of humanity in an armed conflict because they are not party to the relevant international agreements, since the regulatory force of international humanitarian law derives from the universal acceptance of its rules by civilised peoples and from the fundamental humanitarian values enshrined in these international instruments.

96. This Court has also examined decisions of some international tribunals such as the Nuremberg or Tokyo Tribunals, the ICTR and ICTY, but is not bound by precedents established by those international criminal tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Court is not bound to rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law. The authority of precedents can only consist in evincing the existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio juris* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law.

97. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e., they may persuade the Court that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case, prior judicial decisions by the international criminal tribunals and national courts adjudicating international crimes, may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight.

Consideration of the evidence

98. The general principle is that evidence is evaluated as a whole, for both the prosecution and the defence relating to each of the ingredients, before coming to a conclusion. The Court is not to consider the prosecution evidence in isolation of that of the accused.

The burden and standard of proof

99. The burden of proof in criminal cases is always on the prosecution. The prosecution has the duty to prove each of the essential elements of the offences charged and generally this burden never shifts onto the accused. The standard of proof is "beyond reasonable doubt." This standard does not mean proof beyond a shadow of doubt. It is achieved if the Court is satisfied, having considered all the evidence from a perspective that is most favourable to

the accused, that any evidence in favour of or pointing to the innocence of the accused, at best creates a mere fanciful possibility, but not a probability that the accused is innocent. To sustain a conviction, the prosecution evidence should leave no other logical explanation save that the accused committed the crime.

The prosecution case

100. The prosecution case is that at all material time the accused was one of the commanders in the LRA. From time to time, he directly and sometimes indirectly participated in the commission of the offences with which he is indicted, as a direct perpetrator, a co-perpetrator or commander. The offences with which he is indicted are structured around multiple episodes presented as "incidents." Each incident revolves around criminal activity that occurred in a course of the same transaction or a series of transactions within a specified temporal and geographical scope.

Incident "E"; the attack of March 1993 at Abera village, Parubanga Parish.

101. It is the prosecution case that sometime in March, 1993, a group of LRA rebels under the command of the accused attacked Abera village in Pabbo sub-county, while armed with guns and aided by torch light. That night, the rebels broke into the house of E1 (a protected witness) who was sleeping and ordered him to lead them to the home of his brother, Albert Obwoya. The witnesses testified that when they arrived at Albert Obwoya's house, the rebels kicked open the door and dragged him out naked. The accused ordered Albert Obwoya to be tied up with a rope but when Albert Obwoya attempted to escape, the accused shot and killed him instantly.

Incident "C"; the attack of 4th Sept 1994 at Abera village, Parubanga Parish.

102. The prosecution's case is that on 4th September 1994, the accused commanded an attack in Abera village, Pabbo Sub County. The accused and other LRA rebels raided several civilian homes including the homes of; C5, C6, (protected witnesses) and Onyac Ben. In the course of the attack, they tortured, maimed and abducted a number of civilians including CA, C5, Cl 9, C20 (protected witnesses), Odong Menya, Okot Charles, Ojok Patrick, Ogena Simon and others.

103. During the attack, the accused and other LRA forces set huts and bicycles on fire. They also looted livestock and foodstuff. The abductees were tied up and forced to carry the looted items. That the accused and his forces then ordered the abductees to trek towards the Sudanese border and rest for the night. Some of the abductees who were unable to move on due to tiredness or sickness, were killed instantly on the orders of the accused person. Upon arrival at the banks of *Ceri* stream, the accused addressed the abductees and a number of them escaped but some abductees including Ogena Simon and Odong Menya remained in rebel captivity under the command of the accused and have never been seen again.

Incident "G"; the attack and killings of February 1996 along Paibi-Atiak Road

104. The prosecution alleged that during the month of February 1996. the accused commanded another armed attack on Abera Village, Pabbo Sub County in the present day Amuru District. In the course of the attack, the accused and other LRA rebels met a group of civilians who were returning home from a funeral. These included; Ojok Martin, Okeny Wilson, Jackamino Oruk alias Jacki Ocoo, G I (a protected witness), and many others. The accused and his forces took all of them hostage, tying up their hands, and forcing them to carry the looted items, as they were ordered to march towards Paibi. Along the way, some of the hostages managed to escape. However, Jackamino Oruk alias Jaki Ocoo, Okeny Wilson, and Ojok Martin, remained under the captivity of a group of the LRA commanded

by the accused. That the following morning, Jackamino Oruk alias Jaki Ocoo, Okeny Wilson and Ojok Martin were found dead along Atiak-Paibi Road, with their hands were tied behind their backs. They also had stab wounds on their back.

Incident "D"; the attack, abductions, killings, and serious assaults on 4 th March, 1996, at Abera village, Parubanga Parish (reprisal attacks following the escape of one Francis Acaba)

105. The prosecution case is that in February 1996, the LRA under the command of the accused, attacked Abera village in Pabbo Sub County in the present day Amuru District and killed Aceng Christine by hitting her several times on the head with an axe. During the same incident, the LRA rebels abducted other civilians including Loum Acupale, Ngwe Julio, Obalo Bicensio, Gwok Paulo, Arop Jeremiah, Obol Vincent, Arop David, DI, D2, "TR" (protected witnesses), and many others. The rebels then forced their captives to carry the loot and marched them for two days up to Arebe hills where the abductees were paraded before the accused who ordered his men to kill all the abductees, except "TR". Along the way, the abductees were made to lie down in a line with their hands tied to their back; hit to death with clubs on the back of their heads. Many died DI and D2 (protected witnesses), regained consciousness the following morning amidst a heap of dead bodies of their colleagues. "TR" remained in rebel captivity. She was subsequently taken to Sudan where she was forced under the direct command of the accused to marry one of the LRA combatants. The forced marriage was with the full knowledge and backing of the accused.

Incident "B"; the attack, abductions, killings, and serious assaults, in the February, 1996 at Abera village, Parubanga Parish (the victims had left the camp and convened at the residence of one of them to perform cultural rituals relating to twins)

106. The prosecution alleged that on 4th March 1996, some of the residents of Pabbo IDP camp were at Obiangic in Abera Village, Pabbo Sub County, performing cultural rites related to twins. They included B1, B2, B4 (protected witnesses), Rodento Ochola, Maurenso Okoya, Okot Antonio, Oryem Quirino, Sabino Obooli Oola, Ocii Doctor, Oyet Samuel, Massimo

Oboma, Onai, and many others. In the course of that ceremony, rebels under the command of the accused attacked and abducted them. The rebels then forced the abductees to carry the loot as they marched to Kilak Hills. Those who failed to keep up with the pace were killed instantly. Later the accused divided the abductees into three groups consisting of women, young men and the elderly.

107. The rebels, thereafter, brutally tortured the women; during which the accused ordered his men to kill all the elderly abductees. The rest of the abductees were grievously assaulted with guns, clubs and axes. In the course of the assaults, the rebels mainly killed the elderly abductees. While some abductees managed to escape, Rodento Ochola, Onai, Massimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obooli Oola, Okot Antonio, Oryem Quirino and Okoya Maurenso remained behind and have never been seen again.

Incident "H"; the attack, murder, pillage, and attempted murder, on 16th May, 2004, at Pagak IDP camp (being a reprisal attack following the escape of a Captain Abola).

108. The Prosecution alleged that on 16th May 2004, the LRA rebels attacked the Pagak IDP camp, under the coordination and command of the accused, together with others, who were at a command centre. During the attack, the rebels set ablaze more than 544 huts, looted food as well as other household items. They also abducted many civilians from the camp, especially women and children, tortured and forced them to carry the looted items. The rebels subsequently ordered the abductees to trek towards Guruguru hills, killing a number of them along the way. Upon reaching Guruguru hills, some abductees were chosen to carry the looted items while the rest were led a few meters away, where they were made to lie face down, and beaten to death by hitting the back of their heads with clubs. The abductees killed included; Nyeko Bosco, Amony Jennifer, Acan Shida, Atoo Suzan, Akwero Harriet, Anena daughter of Aloyo Concy, Martina Awor, Oyella Betty, Edisa Lapobo, Akwero Nancy, Dorothy Akech, Acayo, Josephine, Aciro Rose, Kilama Eric, Amal Ketty, Obita Mateyo, Akwong Christine and Ocira Erick while H34, H35, H36, H37, 1-138, H39, 1-167, H68, H69, H70, H71, and H72 (protected witnesses). The protected

witnesses survived with severe injuries. During the Pagak IDP camp attack, the rebels killed 29 civilians, 17 sustained severe injuries, while 21 were abducted.

Incident "F"; the attack and killings of 6 th January 2005 at Bira village, Parubanga Parish (the killings at Kulu Pa Okal).

109. It is the case of the prosecution that on or about 6th January 2005 at about 10.00 a.m., a group of residents of Pabbo IDP camp left for Bira-Omba village, Parubanga Parish, Pabbo Sub County in the present day Amuru District, to collect firewood. Among them was Ocaya John, Ojara John, Oketayot Lawoko Charles, Acaye Okema Ocuke and a one Ogwok Odong Philip. Along the way, they were attacked by LRA rebels under the command of the accused person who took them hostage. They were taken aside, made to lie face down and their hand tied up with bicycle tube rubber strips and beaten to death. Later in the afternoon of that day, the people mentioned above were found dead at the place where the LRA rebels had attacked them. Their hands were still tied behind their backs and they had injuries on the back of their heads, as well as bruises on their hands where they had been tied.

Incident "A"; the abduction, sexual and gender-based violence from February, 1996, to the year 2005, at Perecu village, in Parubanga Parish; Olinga village and Kilak Hills in Labala Parish; and parts of Southern Sudan

110. It is the case of the prosecution that around from the month of February, 1996 at Perecu, in the case of "TR" and "NS" (protected witnesses); the year 1997 at Olinga in the case of "LW" (a protected witness); the accused abducted and at multiple locations thereafter including the Kilak Hills and parts of Southern Sudan until the year 2005; subjected the said female victims to various forms of sexual and gender-based violence including: rape, sexual slavery, and forced marriage.

The defence case

111. The defence by the accused is that he is a victim of the armed conflict; having been abducted on his way home back from school, at the age of 12 years, while a pupil in primary three at a school in Pabbo. He was, thereafter, indoctrinated by the rebels while in the bush. As such, he is not criminally liable, and that he was not directly involved in any of the incidents. That many of the incidents occurred while he was either an escort to the in-charge of the sick-bays in Kilak, in Kitgum, and in Southern Sudan or when he himself was the in-charge of those medical facilities. He was never engaged in any battles since he was never part of the mobile force or troops (convoy). He did not hold any command position or have subordinate troops under his command, even though now crimes of the LRA have been placed on his shoulders.

The contextual elements of the offences charged as war crimes and crimes against humanity

112. The indictment contains three broad categories of offences; (i) Those that constitute grave violations or breaches of ***The Geneva Conventions*** (war crimes); (ii) Those that constitute violations of Customary International Law (crimes against humanity); (iii) Offences contained in ***The Penal Code Act***. The offences constituted in the first two categories, were preferred as the primary charges in the indictment, while those in the third category were preferred in the alternative. The *chapeau* or contextual elements are the core distinguishing features of the international law crimes against humanity and war crimes, from crimes under ***The Penal Code Act*** and other statutory offences. These must be proven in addition to the ordinary elements of the underlying crime. It is those elements that highlight the collective character of these offences and exclude isolated or random criminal acts.

Existence of an armed conflict of a non-international character in respect of crimes charged as grave breaches of the Geneva Conventions.

113. All four Geneva Conventions although regulating mostly inter-state armed conflicts, in their Common Article 3, extend general coverage to armed conflicts "not of an international character," occurring within the territory of a single state and in which the armed forces of no other state are engaged against the central government. On 13th March, 1991, Uganda acceded to the ***Additional Protocol II*** **to** ***The Geneva Conventions,*** which define such conflicts as those which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

114. However, the Courts have held that this territorial element is not necessary (see ICTY, ***DuŠko Tadic Case, ("Prijedor")***[27], ICTY, ***KupreŠki et al Case ("LaŠva Valley")***[28]; and ICTY, ***Tihomir BlaŠki Case ["LaŠva Valley"]***[29]). It is sufficient that forces, which although not those of the legitimate government, have *de facto* control over, or are able to move freely within defined territory without international recognition or formal status of a *de jure* state.

115. The evidential factors for determining whether or not the armed conflict threshold test has been crossed in "not of an international character" situations, were decided in ***Prosecutor v. Ramush Haradinaj et. al.***[30]**,** and ***The Prosecutor v. Dusko Tadić***[31], to include: "The number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones."

[27] *Judgment of 7 May 1997, Case No. IT-94-1- T, pp. 239-240, para. 654*
[28] *Judgment of 14 January 2000, Case No. IT-95-16-T, p. 220, para. 552*
[29] *Judgment of 3 March 2000, Case No. IT-95-14-T, p. 69, para. 205*
[30] *IT-04-84-T, Judgement of 3 April 2008, paras. 49 and 60*
[31] *IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, para. 70*

116. The defining characteristics were also outlined in paragraphs 25, 26, 27 and 28 of the ruling on *a case to answer*, in this case as follows: (i) sustained protracted armed violence taking place; (ii) conducted by dissident armed forces or other organised and well-disciplined forces or groups under a responsible command; and (iii) not involving the armed forces of any other state. This court finds that as regards the conflict in this case, the evidence shows that the three criteria are satisfied.

117. As regards the non-sporadic nature of the hostilities, P.W.1 presented a research-based report, exhibit P. Ex.1A (the report); and P. Ex.1B (a summary of the report); showing that the hostilities began in January, 1986 and ended in the year 2006. The major incidents of violence included the 1991 attack at Burcoro Parish near Gulu, the Muchwiny massacre in 1997, the attack on Barlonyo IDP camp and the Abiya massacre in Lira District in 2004 that left more than 300 civilians dead. P.W.2 testified about multiple attacks such as the 1998 attack in Morulem for medicine, abductions, solar panels and medicine. The rebels would mobilise between 100 – 400 combatants per attack. P.W.3, testified about plunder in Oceto. By 1999, the rebels were living in South Sudan and she was a wife of Otti. P.W.25, testified that she was abducted in 1996 from Perecu, and was later captured by the UPDF, after being injured on the battlefield in 2002 at Palaro, Achwa County in Gulu district. that during that period, P.W.25 went to different places including Arebe, Guruguru and Kilak hills. P.W.31 was abducted from Paibi village in 1996 and surrendered at Gulu 4th Division in 2004. During that period of eight years, he was with the LRA at places like Kitgum, Patiko, Pajule (in 2003), Adilang, Patidi, and Ogoro Pii. P.W.48 testified that she was abducted on 14th April 1997 from Paibi, and was taken to Kilak, then to Sudan, and that she finally escaped in 2004. P.W.52 testified that he operated from Paibona, then moved to Kitgum, Atiak, Bibia, Palotaka in Sudan. He kept moving between Sudan and Uganda throughout the period.

118. As regards the hostilities having been committed by dissident armed forces under a responsible command, P.W.1 testified that the LRA was an armed force that began in 1987; and Government did not recognise it as a legitimate opposition. P.W.2 testified that the LRA had a top leadership known as Control Altar, divisions, three brigades (Stokree, Gilva

and Twinkle), and battalions. It also had commanders, signallers, sick - bays, a code of conduct, methods of conscription and uniforms. It had different types of arms of different calibres. P.W.3 testified that after abduction, a whistle would be blown and people would gather in the compound, make two lines and begin moving. They kept a close watch over abductees to prevent escape. There was an elaborate process of initiation into the force through cleansing. She participated in caring for the wounded at the sick-bay. P.W.25, testified that the overall commander in Guruguru was Acama, and the accused was in charge of the sick-bay. That Otti Lagony was the field commander, Otti Vincent, Onen Kamdulu and Raska Lukwiya were also commanders. That Joseph Kony was the overall leader, and Otti Lagony was his Deputy. P.W.31 testified that he served as signaller relaying commands and reports. He stated that Joseph Kony was overall leader, and the 2nd in - command was Vincent Otti, Raska Lukwiya was a Brigade Commander. He relayed commands from Joseph Kony, then to Vincent Otti, and then to Kwoyelo; to kill the captives from the Pagak IDP camp attack and the report back to Joseph Kony following the event. P.W.48 lived with Kwoyelo at the sick-bay. P.W.52 was abducted by a group led by Otim Gombe and joined a bigger group commanded by Okot Ambrose. He stated that the Control Altar had departments including, medical, technical, logistics, operational room, and brigades. That ranks were commissioned in 1995.

119. As regards the LRA not having been under the direct control of any other state, it is trite that a non-international armed conflict can be internationalised if a non-state armed group in fact acts under the control or on behalf of a foreign state. P.W.1, stated that at some point contact with Khartoum was established. All the people abducted were taken to Sudan and taught how to assemble guns. The LRA had a base in Sudan where the UPDF attacked them. That they moved to Palotaka where they were still pursued and attacked by UPDF. They then left for Aruu junction in Sudan, where they were armed and trained by government forces in Sudan; P.W.3, stated that as the forces marched towards Sudan they were ambushed at Magwi. Later they proceeded to Pajok through Owiny Kibul, then to Palotaka where Kony was based at the time; In the year 2000, she overheard a radio call message about Kwoyelo having killed his wife for being unable to walk. P.W.25, stated that during the year 1997 they were in Aruu and Jebeleni both in the Sudan. They left in

April, 1998. P.W.31, stated that guns, Rocket Propelled Grenades, bombs and assault rifles were obtained from Sudan. P.W.52 told the court that it was in 1995 that he met the accused, in Sudan, for the first time. The investigating officer, P.W.53, stated there was indirect support from the government of Sudan.

120. Although there is some evidence suggesting that on diverse occasions during the conflict, the Lord's Resistance Army received material support from the Republic of Sudan, there is no evidence to show that the said state attained such a degree of direction and control over the Lord's Resistance Army, as to be considered a military intervention by that state itself. Considering the intensity of combat and the level of organisation of the Lord's Resistance Army, the calibre of weapons involved, the armed conflict exceeded isolated and sporadic acts of violence, internal disturbances, riots or tensions. For all intents and purposes, the armed conflict retained its non-international character. The nature of this conflict triggered the application of International Humanitarian Law.

The nexus between the armed conflict and the crimes charged as grave violations of the Geneva conventions.

121. Under the body of treaty and customary law which provides the legal underpinnings for the war crimes concept and which is referred to variously as the law of war, the law of armed conflict, and International Humanitarian Law, what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment, the armed conflict, in which it is committed. For a war crime, the prohibited conduct must have been committed in the context of an armed conflict, by a combatant against another combatant, a member of the civilian population, a protected person, or a protected target.

122. The "nexus" requirement means that for common Article 3 to apply, the crime charged must have been committed during the time of the armed conflict and the acts of the perpetrator must be closely related to that conflict (see ***Prosecutor v. Kayishema and***

Ruzindana[32],). the crimes need not be committed in the area of armed conflict, but must at least be "substantially related" to this area, which at least includes the entire territory under control of the warring parties. It is essential, however, that a Trial Chamber establish the existence of a geographical and temporal linkage between the crimes ascribed to the accused and the armed conflict (see ***Prosecutor v. Milomir Stakic***[33]).

123. The fact that the crime would not have occurred but for the existence of an armed conflict is not sufficient to make an act a war crime. The nexus need not be a causal link, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. If it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. In most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict.

124. Where the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict (see ***Ephrem Setako v. The Prosecutor***[34]). To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.

125. The offences charged as Grave breaches of the Geneva Conventions are: five (5) Counts of murder being, Counts; 2, 16, 21, 51 and 75; two (2) Counts of pillaging being, Counts 13 and 17; three (3) counts of Cruel treatment, being Counts 43, 48 and 72; two (2) Counts

[32] *Case No. ICTR-95-1-T, Judgement of 21 May, 1999*
[33] *ICTY, T-97-24-A, 22 March 2006*
[34] *Case No. ICTR-04-81-A, 28 September 2011*

of violence to life being, counts 87 and 92; six (6) Counts of Outrages against personal dignity, Counts 44, 49, 73, 82, 86, and 91, making a total of eighteen [18] counts.

The nexus of the offences of murder, to the armed conflict;

126. With regard to Count 2, arising from Incident "E," it was the testimony of P.W.1 that by 1993 the LRA had embarked on abductions, which had started around 1989-1991, as explained at page 98 para. 8.46 of Exhibit P. Ex.1. Kony was operating in the areas of Awach in Aswa and in the Kilak Hills. Hostilities at the time included abductions and by 1988 P.W.52 had been abducted at the age of 12 years. He testified that in the year 1988 the Holy Spirit had revealed to Kony that he would take over the movement at the age of 30 years. In May, 1988 there was fighting and a plan to go to Bibia to attack a government barracks. In 1989 the Holy Spirit Movement was re-arranged; they introduced three leaders who came to be called the Trinity; they were Lukonyomoi, George Owot and Moi. It was after the death of Lokomonyoi in 1990, at the farm of Yona Lukwaay, that Kony took over the command of the Holy Spirit Movement. In 1991 PW52 was wounded during a fight in Lira and was taken to a sick bay in Kitgum. It was also during this period, in 1987, that the accused was abducted. The Court therefore finds that the offence was committed within the geographical and temporal scope of the armed conflict.

127. Concerning the identity of the perpetrators, and their motive, the testimony of P.W.5 and P.W.6 is that the attackers were armed with guns and were dressed in what appeared to be military attire (one described it as camouflage the other plain. That they were wearing gumboots). They asked and searched for money and poured down rice that was in sacks. They found the money which belonged to the deceased and took it. It is one of the assailants that shot the deceased dead. In their final submissions, the defence argued that there is no connection between the death of Obwoya and the armed conflict. That it was an isolated attack that led to the arrest of D.W.4.

128. With regard to Count 16, arising from Incident "G," in respect of the deaths of Jackamino Oruk alias Jacki Ocoo, Okeny Wilson and Ojok Martin, there is evidence of the nature of

rebel activity that was going on within that area at the time. It was the testimony of P.W.2 that before his abduction in 1994 he had relatives in the LRA. He was abducted in September, 1994 from Lamogi sub-county. At the time of his abduction in 1994 Lt. Colonel Otim LaMono was in charge of the operation room. That it was at Gong in 1994 that PW 2 met Kony face to face for the first time. He met him again in 1995 at Palotaka. Other commanders of the LRA at the time included Brigadier Omona Phillips, Major General Joseph Kony; Brigadier Otti Lagony; Colonel Kenneth Banya; Lieutenant Colonel Otti Latim Mono; Lt. Colonel Nyeko Tolbert Yadin; Brigade Commander Odeku Romeo of Gilva Brigade; Lt. Col. Okello Matata Senior Brigade commander; Lt. Col. Raska Lukwiya of Stokree Brigade. Military trainings were going on in Gong Hills in South Sudan. In December 1994 they were attacked by the UPDF. P.W.7 testified that a one Kibwota Andrew had been abducted in July, 1994 from that village. He himself was abducted in 1994. P.W.8 testified that he was abducted in September, 1994. P.W.9 was also abducted in September the same year. It was the evidence of P.W.17 that in the year 1996, in his capacity as L.C II Chairperson in Abera, stated that he received reports that LRA was engaged in abductions in his area. The commanders at the time were Kwoyelo. Following the murder of the three he reported the case to the LCLIII Chairperson.

129. Concerning the identity of the perpetrators, and their motive, P.W.14 testified that the deceased were abducted by rebels as they returned home from a last funeral rites ceremony. One of the survivors, P.W.15 testified that the people who abducted them were Kony Soldiers. She saw Ojok Martin and Jackamino's hands being tied behind their backs. Three of the abductees were tied and stabbed to death by one of the rebel soldiers. The one giving instructions to the rest was wearing camouflage uniform. Each deceased was stabbed by a soldier assigned to him for that purpose. P.W.17 also testified that on 21st February, 1996 the rebels came back to the home of an elderly person and asked for his son who had already been abducted. That elderly man was killed too. The Court therefore finds that the offence was committed within the geographical and temporal scope of the armed conflict, and is substantially connected to the armed conflict.

130. With regard to Count 21, arising from Incident "D," the victims are Aceng Christine, Loum Acupale, Ngwe Julio and Gwok Paulo. P.W.18 stated that the killers of Aceng Christine were Kony soldiers. They were dressed in uniform like that of Local Defence Units (LDUs) and had deadlocks. Six of them were armed with guns. Achieng Christine was killed in the presence of her son and daughters. P.W.19 testified that six rebels were armed with guns and some had dreadlocks and unkempt hair. Besides killing civilians they looted chicken and food. They asked for one Acaba, the son of Achieng Christine and brother-in-law of P.W.26. Acaba had allegedly escaped from the rebels after his earlier abduction. P.W.26 said they were Lakwena soldiers wearing military uniform. They instructed that Aceng Christine should be killed, and indeed she was killed. They asked for Acaba who had escaped from them. This Court, therefore, finds that the prosecution has adduced evidence to the required standard proving that the offence was committed within the geographical and temporal scope, and is substantially connected to the armed conflict.

131. The nature of the rebel activity that was going on within the area, forming the basis of Count 51, arising out of Incident "H," where the named victims are named as Nyeko Bosco, Amony Jenifer, Acaa Shida, Atoo Susan, Akwero Harriet, Anena d/o Aloyo Concy, Martina Awor, Edisa Lapobo, Akwero Nancy, Dorothy Akech, Acayo Josephine, Aciro Rose, Kilama Eric, Amal Ketty, Obita Mateyo, Akwongo Christine and Ocira; and in Count 75 arising from Incident "F," where the named victims are: Ocaya John, Ojara John, Oketayot Lawoko Charles, Acaye Okem Ocuke, and Ogwok Odong Phillip; can be found in the testimony of multiple witnesses.

132. P.W.2 who was a Sergeant at the time, testified that around 1997 the LRA was in Sudan restocking ammunition. That there was an attack at Aruu junction at the beginning of 1997 where he was wounded during a serious battle. He testified that he was punished for retreating. At a battle commanded by one Matata, they captured three tanks. He said the LRA had a barracks next to that the of Sudan army and were receiving uniforms from them. He joined Stokree Brigade from 1995 – 1997. Between 1997 and 1999, he was the in Sudan. The LRA people abducted from Uganda would be trained and would come back toUganda as soldiers to fight. The army commander was Colonel Otti Lagony until 1997

when brigadier Omona Phillips was killed and he became an Assistant to Kony. He became the second in command to Joseph Kony as a Brigadier. He served in that capacity until 1999. Colonel Otti Lagony served until around 1997 towards 1998. Okello Matata replaced him and served until 1999. Vincent Otti replaced him and served until the year 2002. He was replaced by Nyeko Tolbert Yardin who served until 2004 when he died. In 1998 when the LRA settled in the Sudan, they opened up gardens and children would go to school. The Twinkle Brigade was established later in 1998.

133. PW 2 testified further, that he participated in the attack at Morulem in 1998, where they succeeded in looting items from the Catholic Mission and abducting people, both male and female. They had engaged in a lot of attacks before the one of Morulem. The attack at Angagura in Kitgum District was when they first entered Uganda. In 1998 they had a political wing headed by Sam Kolo. In 1998 Dominic Ongwen was the commanding officer of Siniya Brigade in Sudan. In July 1998 the deputy to the overall commander was Otti Lagony. By December, 1998, the Director of operations was Lt. Col. Lakati and was later promoted to Colonel sent to Control Altar to head operation room. From 1998 - 2003 Kwoyelo was in charge of the sick bay. Towards the end of 1998, PW 2 became the Chief Escort to Lubwa Bwone, who was in charge of the political wing.

134. This witness further testified that in 1999 he came to Uganda briefly, in the convoy, with Kony. Between the year 2000 - 2001, he was operating from Sudan. In the year 2000 he was promoted to the rank of Second lieutenant in the Stokree Brigade. It was the year of "Operation Iron Fist." During the year 2001 they were attacked by the UPDF and all of them left for Imatong Hills. Later in 2001 they fled back to Uganda after an attack there by UPDF. Four brigades came to Uganda and entered Kitgum. At the time, Kony was in Gulu. Two brigades later returned to Sudan when UPDF pressed on with attacks. A breakof three days without a fight would be like a public holiday for them. Vincent Otti remainedin Uganda. In 2002 at Palaro, Achwa County in Gulu district bombs landed near him and the shrapnel affected his genitals. In 2003 they attacked Soroti, Katakwi and Kaberamaido.

135. P.W.25 testified that following her abduction by the LRA around February of 1997, they trekked form Uganda to Jebeleni in Sudan where she settled with Loum. They used to walk day and night on foot all the time and anyone who could not keep up would be killed by hitting the back of the head with a log. They settled at Aruu Junction. Otti Lagony was abducted was killed in 1999 at Jabeleni II.

136. P.W.31 and P.W.48 were abducted together on 14th April, 1997. P.W.47 said her sixth and seventh children are Adokorach Grace and Acayo Betty were abducted by Lakwena during the month of April in the year 1997.

137. P.W.31 testified that Vincent Otti was at Pader, Kitgum and Lacekocot in the year 2000. He was sent by Kwoyelo to Vincent Otti. In the year 2000 he fell and was sent to the sick bay from where he went to Kitgum to Vincent Otti and became his escort for two years. The rank of sergeant after was conferred onto him by Thomas Kwoyelo, in 2002. In the year 2003 Thomas Kwoyelo gained that rank Colonel and his area of operation covered Gulu. In the year 2003 they engaged in a battle with the UPDF and he got injured; he was shot in the leg at Pajule. They looted from civilians and attacked the military barracks. They also abducted about 200 young civilians and a chief called Rwot Oywak Ywakamoi. The commander was Raska Lukwiya and Major Bogi. In September, 2003 Vincent Otti promoted him to the rank of second lieutenant. P.W.51 testified that they used to go and farm but rebels would come and kill people. In the hope of being appointed RDC when the LRA took over, he used to deliver supplies to the LRA during that period. In November, 2002 Mego Okee gave them amnesty.

138. P.W.52 testified that between the years 1999 – 2000 they were in Uganda. In July, 2001 they went back to Sudan but Kwoyelo remained in Uganda. Their numbers had been depleted and the decision had been made that they all return to Sudan. P.W.48 testified that during the year 2000 she was in the bush with the LRA where she had her first child with Kwoyelo. P.W.49 testified that in December, 2000 she left Guruguru and went to Sudan with Kwoyelo and returned to Uganda in the year 2002. 2002. In Uganda Kwoyelo was the overall commander of sick-bay. P.W.32 the Pagak IDP Camp leader at the time, recorded

in his notebook that on Monday 8th July, 2002 the UPDF detach fought the LRA while others looted foodstuffs and burnt huts. In total 269 huts were burnt and abducted 2 IDPs injuring 5 UPDF. On Thursday 5th September, 2002 the UPDF who were guarding the camp left Pagak without directing the civilians as to where they should go for protection. This gave the rebels a chance to loot and kill as many as they wanted. On Sunday. 15th September, 2002 rebels again attacked Pagak, looted foodstuff and abducted four children. On Monday 23rd September, 2002 the rebels attacked the IDPs whoever unprotected. Abducted 50 and looted food.

139. Concerning the identity of the perpetrators, and their motive; in Count 51 P.W.35, mother of Aloyo Concy, testified that she was in the IDP Camp when rebels entered the camp from three different groups. She was abducted, ordered to carry their loot as the huts were set on fire. At *Ogoro Pi* the beating began when she passed out. P.W.31 testified that as a signaller he was part of the LRA forces that met at Patidi with some of their commanders when an order came to attack civilians at Pagak because Abola had escaped with a gun. Prepared the army which was sent to attack. Later on, after about two hours they came back with abducted civilians at Paladima in Lamogi. They took them to Ogoro Pi on orders of Vincent Otti. It was Kwoyelo who ordered the young soldiers to do the act around 10:00 pm. P.W.21 documented the injuries. P.W.32 the Camp Commandant listed all the victims in the notebook exhibit P. Ex.11.

140. Concerning the identity of the perpetrators, and their motive, in Count 75 P.W.43 it is the rebels who killed her husband; P.W.44 stated that he was in the camp after fleeing the war due to abductions, killings and pillaging. At times the camp would be attacked. On 6th January, 2005 he took the men to clear the school. All of a sudden after a few minutes, people began fleeing, some towards Pabbo while others scattered in all directions. It was around 11.00 am – 12.00 noon. One woman, Laker Cecirina, went to him and said rebels had killed some men down the valley but had let the women free. He asked her if she recognised any of the rebel soldiers. She said she had recognised Tom Kwoyelo. P.W.45 testified that about ten meters ahead of him, he saw soldiers standing along the road and he

recognised one of them as Tom Kwoyelo. He was wearing an army camouflage and carrying a gun. He fled because he knew that they would kill those they captured.

141. P.W.46 testified that rebels would be identifiable by the dreadlocks, their different types of military attire where some would be wearing civilian clothing and they would have so many young children among them. As she went to her pigeon pea garden, she saw one soldier who emerged from near the stream and pushed her forward. She saw another come out of the bush carrying a gun. He told her to sit down and that if she ran he would kill her. When she sat down, four men whom they had left at the school, came riding bicycles. The soldier who had pushed her forward brought them to where they were and told them to sit down. One soldier untied rubber strings from the bicycle, called a colleague of his from behind and told him to tie the men. When they took the men, they heard them being beaten. Among the rebels who had gone there to kill, one came back to them. He showed them his hand and said "you see my hands; you ring Museveni to come. He will find when we are here." They were wearing military uniform with patches (camouflage) and others plain army green and carried guns.

142. On basis of all that evidence, the Court therefore finds that the offences charged in Counts 61 and 75 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

The nexus of the offences of pillaging, to the armed conflict.

143. Regarding the two Counts of Pillaging, in Count 13 arising from Incident "C," the offence was allegedly committed on 4th September, 1994 during an attack on Kola Abere village, Parubanga in Amuru District during which the accused is alleged to have wantonly and extensively destroyed houses, bicycles, livestock, foodstuff and household property not justified by military necessity. In Count 70 arising from Incident "H," the allegation is that on 16th May, 2004 at Oboo Parish Lamogi, Amuru District, the accused being a colonel in the LRA coordinated, ordered, and directed an armed attack on Pagak IDP and wantonly

destroyed 544 huts, foodstuff and household property being protected property, not being justified by military necessity.

144. The nature of rebel activity that was going on within that area at the time the events forming the basis of the two counts occurred have already been outlined above while addressing the multiple counts of murder. Concerning the identity of the perpetrators, and their motive, in respect of Count 13, it was the testimony of P.W.7 that during the attack, he was abducted by about four men putting on camouflage army uniform with patches and carrying guns. The following morning after crossing *Ceri* Stream the accused, Kwoyelo, came and began talking to them at around 8.00 - 9.00 am. It was that morning that he was able to recognise the ones who abducted them as including Kwoyelo and Kobi. He recognised them as Kony rebels. Kony was the head of the group that Kwoyelo belonged to. It was locally called Lakwena or Lord's Resistance Army. Kwoyelo ordered for his release. He guided them not to take the dangerous path There had been several attacks of a similar nature that had taken place before that day.

145. P.W.8 too testified that around 9.30 pm three people dressed army uniform trousers (camouflage), civilian shirts and gumboots entered the house. All the three were armed with guns. He recognised the abductor by their activities and appearance as "Lakwena." It was an army that stays in the bush, it is different from the government army. These ones operate only at night and abduct people, take people's chicken forcefully, they have a partial army uniform (a trouser or shirt at a time) and their shoes are different. At the home of Acori in Perecu they took millet flour. P.W.9 stated that both assailants who abducted him had torches. They could not let him look at their faces for long. The one holding a gun had an army shirt and the trouser for civilian wear. the one holding a panga had braided his hair and was not putting on army uniform. He believed they were rebels because they spoke Acholi, at the time there were only LRA in the bush, they had dreadlocks while government soldiers were not operating like that. At that time government soldiers used to operate during day time, spoke Swahili and were not abducting people and would not take chicken. were abducted by many rebels, over 100 of them. They scattered around in that area. Some

had one price of army uniform, either a shirt or trouser, some plain clothes, car tyre shoes and dreads.

146. P.W.10 testified that when the soldiers arrived, some had army informs and they had unkempt hair. P.W.11 the area was experiencing a war between the government forces and Lakwena rebels. It involved looting property and civilians were affected. The incident of September, 1994 happened at night. They spoke Acholi, had unkempt hair and were familiar with the area. They were rebels and he recognised a one Kobi. P.W.12 stated it was a period of war at the time. The war was between the LRA and the UPDF. On 21st July, 1994 at around 11.00 pm a man entered the house and flashed a torch and he saw it was someone he knew and he had an army uniform on. Another soldier entered the house and ordered the first one to go out. The torch had brand new batteries and when the assailant flashed the torch the witness saw the accused who was about a meter from him. Kwoyelo flashed the torch not onto himself but around the room, to the floor and clothes which were up on the wall. It is in that process that he recognised him as Thomas.

147. The witness testified further that the assailants were putting on army uniforms and were carrying guns. Along the way to the home of Acori the abductor asked him whether he had recognised him and he answered in the negative. He told him they would be friends for ever and he told him his was Kwoyello Thomas. The witness knew the accused then as Okot Thomas. The witness knew the accused as one of his elder brothers Abed Woko George, married his cousin sister Amito Rose. He used to come to the home of their in-law, Delphino Ogo who is the witness' father's brother, and they could also come to greet them. He had met him at a local dance *Ayije* and at village meetings. P.W.13 was able to recognise the intruders as rebels because when they entered, they had a torch which was not very bright, with a gun with a folded butt. When her husband returned, he mentioned the name Kwoyelo. It is the only name he mentioned. He told her he had known that person before.

148. Concerning the identity of the perpetrators, and their motive, in respect of Count 70, it was the testimony of P.W.35 that on 16th May, 2004 she was at the Pagak IDP Camp. At around

4.00 pm an armed group entered the camp in three different groups; the first had very few numbers. They came shouting. When the second group joined people began fleeing but realised the camp had already been surrounded. She ran back onto the hut. They came to the entrance of the hut where she was. They opened the door and order us to get out. They were rebels. They found a bigger group of rebels. They were ordered to bow their head as a senior commander was coming. P.W.33 testified that at around 5.00 pm she had gone to fetch water from the bore hole within the camp. All of a sudden, she saw so soldiers running toward the camp. They were very many and some were bare chest. They were moving so fast into the camp. She realised they were rebels when they entered the camp and became very aggressive. They began firing guns and people began running. Two of the rebels came and opened the door of the house. After abduction along the way in the direction of Ayugi stream more people kept joining them. Bullets were still flying as some of the rebels were fighting at the barracks.

149. On basis of all that evidence, the Court therefore finds that the offences charged in Counts 31 and 70 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

The nexus of the offences of cruel treatment, to the armed conflict;

150. Regarding the three Counts of Cruel Treatment, in Count 43 arising from Incident "D," the offence is alleged to have been committed in February, 1996 at Abera village, Parubanga in Amuru District when the accused, being a commander in the LRA commanded an attack on a group of civilians and ordered forces under his command to inhumanely assault D1 and D2 (protected witnesses) inflicting severe physical pain and suffering. In Count 48 arising from Incident "B," the offence is alleged to have been committed on 4th March, 1996 at Abera village, Parubanga, Amuru District, when the accused, being a Colonel in the LRA commanded an attack on civilians and ordered forces under his command to inhumanely assault B2, B4 (P.W.27), B6 (P.W.30), B7 (P.W.28) and Anjulina Oryem Ataro inflicting severe physical pain and suffering. In Count 72, arising from Incident "H," the allegation is that on 16th May, 2004 at Oboo Parish Lamogi, Amuru District, being a

colonel in the LRA, the accused coordinated, ordered, and directed an armed attack on Pagak IDP and by inhumane acts intentionally assaulted H34, H35, H36, H37, H38, H39, H67, H68, H69, H70, H71 and H72 (protected witnesses).

151. The contextual facts relating to the rebel activities leading up to the charges preferred in Count 21 are the same as the ones already stated above relating to Count 43 since both counts arise from Incident "D," constituting a reprisal attack following the escape of a one Francis Acaba. Similarly, the contextual facts relating to the rebel activities leading up to the charges preferred in Count 72 are the same as the ones relating to Counts 51 and 70 since both counts arise from Incident "H," being a reprisal attack following the escape of a one Captain Abola. The Court therefore finds that the offences charged in Counts 43 and 72 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

152. On the other hand, on account of having occurred within more or less the same temporal scope, the contextual facts relating to the rebel activities leading up to the charges preferred in Count 48, i.e. 4th March, 1996 are the same as the ones already stated above relating to Count 43 which occurred a month before, in February, 1996 but involving the same village, Abera. They were only a month apart. On that basis, the Court finds that the offence charged in Count 48 was committed within the geographical and temporal scope of the armed conflict.

153. Concerning the identity of the perpetrators, and their motive, in respect of Count 48, it was the testimony of P.W.27 that she was among the victims who had that day left the IDP camp at Pabbo where they were ordinarily resident at the time, and convened at the residence of one of them to perform traditional rituals relating to twins. At the time of that ceremony, the hostilities between the government and the LRA were raging. He knew about three or four leaders of the LRA that operated in that area. They were: Kapere, Kobi, Achili, and Kwoyelo was their overall commander. P.W.30 too testified that she was living in a camp because children would be abducted and adults killed by Lakwena soldiers. She was abducted by Kwoyelo. Their abductors had full army uniform and carried guns.

P.W.28 was the mother of the twins. She testified that the attack involved about twenty rebels during the ceremony. They wore military green army uniform. They were armed with guns. The one they called Kwoyelo had a short stick in his hand. The rebels ordered the abductees to move until they came to a stream. It is during the rest that she came to know the accused as Kwoyelo and as he was referred to by those who knew him, and he was constantly moving around.

154. On basis of all that evidence, the Court therefore finds that the offences charged in Counts 43, 48 and 72 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

The nexus of the offences of violence to life, to the armed conflict.

155. Regarding the two Counts of the offence of violence to life; in Count 87 arising from Incident "A" it is alleged that the offence was committed between 1997 and 2004 at Kilak Hills, Olinga village, Labara Parish Pabbo sub county Kilak County and some parts of South Sudan, whereby the accused being a colonel in the LRA subjected an abductee "LW" (a protected witness), to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her. In Count 92 arising from Incident "A" as well the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills Olinga village, Amuru District and parts of South Sudan, when the accused, being a colonel in the LRA subjected an abductee "NS" to repeated incidents of forceful sexual intercourse, thereby inflicting severe physical and mental suffering on her.

156. The victim in Count 87 identified as "LW" testified as P.W.48 and stated that she was abducted on 14th April, 1997 and taken to the Kilak Hills. "LW" testified that it is Kony soldiers led by a one Okeny, who abducted her. On the night of her abduction, she had taken refuge in a nearby bush together with her siblings in order to avoid the then rampant abductions by the LRA rebels. She was taken to the home of the accused, where she began as a helper carrying Kwoyelo's children, and later she became his "wife". She initially took care of one of the children to one of his wives, a one Layet. She was 14 years old when

gave birth to her first child during the year 2000. That child is named Acan Fatuma alias Atimango, and was 22 years old at the time of her testimony. At a point in time during he stay with the LRA rebels, she lived with the accused in Sudan where she had the opportunity to see Kony. It was during the year 2004 when following an intense battle during which she was injured, she was able to escape and return home with the help of an organisation known as Gulu Support the Children Organization (GUSCO).

157. The victim in Count 92 identified as "NS" was abducted during the month of August, 1996 at the age of 11 years and testified as P.W.49 at the age of 36 years. She stated that she was abducted by a group of more than ten LRA soldiers led by a one Ocan Okwera alias Daban belonging to the battalion of Kwoyelo. She too was taken to the Kilak Hills to the home of the accused where she began to live with him as a helper carrying Kwoyelo's children, and later she became his "wife." She has two children with the accused as a result of that union, one of whom is Lanyero Sharon aged 19 years and born on 20th June, 2002 and the other Atim Oliver aged 17 years, born on 16th November, 2005. She lived with the accused in Sudan during part of the duration of her captivity. She managed to escape in the year 2005 during one intense battle involving an attack by a helicopter gunship. She came across a woman who took her to the authorities and then to World Vision and later back to her mother. She had her first child while in captivity at Kilak Hills. She delivered the second child following her escape and return to her home. She escaped from the bush when pregnant with her second child.

158. On basis of all that evidence, the Court therefore finds that the offences charged in Counts 87 and 92 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

The nexus of the offences of outrages against personal dignity, to the armed conflict

159. Regarding the six Counts of Outrages against personal dignity; in Count 44 arising from Incident "D" the offence is alleged to have been committed in February, 1996 at Abera

village, Parubanga Amuru District where the accused, being a commander in the LRA is alleged to have commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault D1and D2. In Count 49 arising from Incident "B" the offence was committed in 4th March, 1996 at Abera village, Parubanga Amuru District being a colonel in the LRA commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault B2, B4, B6, B7 and Angelina Oryem Atalo;

160. In Count 73 arising from Incident "H" the offence is alleged to have been committed on 16th May, 2004 at Oboo Parish Amuru District whereby the accused, being a colonel in the LRA is said to have coordinated, ordered and directed an armed attack on Pagak IDP camp by inhumane acts intentionally assaulted H34 (P.W.38) Angee Filda Onen, H35 (P.W.42), H36 (P.W.37) Aber Nancy, H37 (P.W.36), H38 (P.W.35), H39, H67 (P.W.39), H68, H69, H70, H71 and H72.

161. In Count 82 arising from Incident "A" it is alleged that the offence was committed between February, 1996 and January, 1998 at Perecu village, Amuru District and parts of South Sudan, whereby the accused, being a commander in the LRA is said to have forcefully taken away "TR" (a protected witness) and forced her to marry one of the LRA combatants under his command.

162. In Count 86 arising from Incident "A" it is alleged that the offence was committed between 1997 and 2004 at Kilak Hills, Amuru District and parts of South Sudan, when the accused, being a commander/Colonel in the LRA is said to have subjected an abductee "LW" (a protected witness) to repeated incidents of forceful sexual intercourse, thereby inflicting severe physical or mental suffering on her.

163. In Count 91 arising from Incident "A" the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills, Amuru District and parts of South Sudan, whereby the accused, being a commander/ Colonel in the LRA is said to have subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical or mental suffering on her.

164. The contextual facts relating to the rebel activities leading up to the charges preferred in the six counts and identification of the perpetrators, are the same as the ones already stated above, relating to the corresponding incidents. Since they are acts committed during the same transaction, but only characterised differently for purposes of attaining the full culpability of the accused, the Court therefore finds that the offences charged in Counts 44, 49, 73, 82, 86 and 91 were committed within the geographical and temporal scope of the armed conflict, and are substantially connected to the armed conflict.

Acts forming part of a widespread or systematic attacks, with regard to crimes against humanity.

165. The other contextual element relates to crimes against humanity. There is no treaty devoted exclusively to crimes against humanity. The concept of a crime against humanity is a twentieth century development and its first application in a criminal setting was in the post-World War II war crimes cases. Under customary international law, a crime against humanity is one which involves: (a) one of the specified prohibited acts, (b) committed as part of a widespread or systematic attack, (c) pursuant to or in furtherance of a state or organisational policy, (d) directed against any civilian population, (e) with knowledge of the attack (see ***Prosecutor v. Tadić, Case***[35]).

166. The definition of a crime against humanity distinguishes it from war crimes in two important aspects. For crimes against humanity, there is no requirement for the existence of an armed conflict. On the other hand, the offence must have been committed as part of a widespread or systematic attack. "Widespread" refers to the large-scale nature of the attack and the number of targeted persons, while "systematic" refers to the "organised nature of the acts of violence."

167. The offences in this category were charged as violations of customary international law. Five (5) Counts are for the offence of murder being, Counts; 1, 15, 20, 50 and 74. Three

[35] *No. IT 94-1-T, Judgment of 7 May 1997, paras. 639-43*

(3) Counts are for the offence of other inhumane acts, being Counts; 42, 47 and 71. Two (2) counts are for the offence of Torture, being Counts 85 and 90. Two (2) Counts are for the offence of Rape, being Counts 84 and 89. One (1) Count is for the offence of enslavement, being Count 81. Lastly, one (1) Count is for the offence of imprisonment, being Count 31, making a total of fourteen [14] counts in all.

168. With regard to the five (5) Counts of murder as a crime against humanity, in Count 1 it is alleged that the offence was committed in March, 1993 at Abera village, Amuru District whereby the accused, being a commander of LRA commanded an armed attack on civilians during which Albert Obwoya was murdered. In Count 15 it is alleged that the offence was committed in February, 1996 along Paibi Atiak Road in Amuru District whereby the accused, being a commander of LRA commanded an armed attack on civilians and killed Jackamino Oruk alias Jacki Ochwo, Okeny Wilson and Ojok Martin. In Count 20 it is alleged that the offence was committed in February, 1996 along Abera village Parubanga Parish in Amuru District, whereby the accused being a commander of LRA commanded an armed attack on civilians and killed Aceng Christine, Loum Acupale, Ngwe Julio and Gwok Paulo. In Count 50 it is alleged that the offence was committed on 16th May, 2004 at Oboo Lamogi in Amuru District whereby the accused, being a commander of LRA coordinated, ordered and directed an armed attack on Pagak IDP camp and killed Nyeko Bosco, Amony Jenifer, Acan Shida, Atoo Susan, Akwero Harriet, Anena D/o Aloyo Concy, Martina Awor, Edisa Lapobo, Akwero Nancy, Dorothy Akech, Acayo Josephine, Aciro Rose, Kilama Eric, Amal Ketty, Obita Mateyo, Akwongo Christine and Ocira Erick.In Count 74 the offence is alleged to have been committed on 6th January, 2005 at Kulu Pa Okal in Bira Omba Parubanga Amuru District whereby the accused being a colonel of LRA commanded an armed attack on civilians and killed Ocaya John, Ojara John, Oketayot Lawoko Charles, Acaye Okem Ocuke, and Ogwok Odong Phillip

169. It is evident that Count 1 arises from Incident "E" (the killing of Obwoya Albert); Count 15 arises from Incident "G" (the killings along the Paibi-Atiak Road); Count 20 arises from Incident "D" (the reprisal following Francis Acaba's escape); Count 50 arises fromIncident "H" (the reprisal attack on the Pagak IDP Camp); and Count 74 arises from

Incident "F" (the killings at Kulu Pa Okal). All these offences are a re-characterisation as crimes against humanity, of the ones respectively charged in Counts 2, 16, 21, 51 and 75 as war crimes. They therefore have the same factual basis already considered before.

170. With regard to the two (2) Counts of Torture as a crime against humanity, in Count 85 it is alleged that the offence was committed between 1997 and 2004 at Kilak Hills Olinga village, Labara Parish Pabbo sub county Kilak County and some parts of South Sudan, whereby the accused being a colonel is said to have subjected an abductee "LW" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her. In Count 90 it is alleged that the offence was committed between 1996 and 2005 at Kilak Hills Olinga village, Amuru District and parts of South Sudan, whereby the accused being a colonel subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her.

171. In the same vein, both counts arise from Incident "A" (the sexual and gender-based violence offences) and are a re-characterisation as crimes against humanity, of the ones respectively charged in Counts 86 and 91 as war crimes. They therefore have the same factual basis already considered before.

172. Regarding the three (3) Counts of other inhumane acts; in Count 42 it is alleged that the offence was committed in February, 1996 at Abera village, Parubanga in Amuru District whereby the accused being a commander in the LRA commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault Ocan Vito Acore and Okello David inflicting great physical pain, suffering and serious bodily injuries. In Count 47 it is alleged that on 4th March, 1996 at Abera village, Parubanga, Amuru District, the accused being a Colonel in the LRA commanded an armed attack on civilians an ordered forces under his command to inhumanely assault B2, B4 (P.W.27), B6 (P.W.30), B7 (P.W.28) and Anjulina Oryem Ataro inflicting severe physical pain and suffering. In in Count 71 it is alleged that on 16th May, 2004 at Oboo Parish Lamogi, Amuru District, the acused being a colonel in the LRA coordinated, ordered, and directed an armed

attack on Pagak IDP and by inhumane acts intentionally assaulted H34 (P.W.38) Angee Filda Onen, H35 (P.W.42), H36 (P.W.37) Aber Nancy, H37 (P.W.36), H38 (P.W.35), H39, H67 (P.W.39), H68, H69, H70, H71 and H72

173. It is evident still that Counts 42 and 47 arise from Incident "D" (the reprisal following Francis Acaba's escape), while Count 71 arises from Incident "H" (the reprisal attack on the Pagak IDP Camp). The three offences are also a re-characterisation as crimes against humanity, of the ones respectively charged in Counts 43, 48 and 72 as war crimes. They therefore have the same factual basis already considered before.

174. With regard to the two (2) Counts of Rape as a crime against humanity, in Count 84 it is alleged that the offence was committed between 1997 and 2004 at Kilak Hills, Amuru District and parts of South Sudan, whereby the accused, being a commander/ Colonel in the LRA is said to have subjected an abductee "LW" (a protected witness) to repeated incidents of forceful sexual intercourse thereby inflicting severe physical or mental suffering on her; in Count 89 the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills, Amuru District and parts of South Sudan, whereby the accused being a commander/ Colonel in the LRA is said to have subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse thereby inflicting severe physical or mental suffering on her.

175. Similarly, both counts arise from Incident "A" (the sexual and gender-based violence offences) and are a re-characterisation as crimes against humanity, of the ones respectively charged in Counts 86 and 91 as war crimes. They therefore have the same factual basis already considered before.

176. As for the one (1) count for the offence of Enslavement as a crime against humanity**,** in Count 81 it is alleged that the offence was committed in February, 1996 and January, 1998 in Perecu village Parubanga, Amuru District and parts of South Sudan, whereby the accused, being a commander in the LRA is said to have forcefully taken away "TR" (a protected witness) and forced her to marry one of the LRA combatants under his direct

command. This Count too arises from Incident "A" (the sexual and gender-based violence offences) and is a re-characterisation as a crime against humanity, of the one charged in Count 82 as a war crime. Therefore, it has the same factual basis already considered before.

177. Lastly the offence of imprisonment as a crime against humanity is preferred in Count 31 where it is alleged that the offence was committed on 4th March, 1996 at Abera village Parubanga, Amuru District, when being a commander in the LRA, the accused commanded an armed attack against a group of civilians and seized, detained and held hostage; Rodento Ochola, Masomo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obwoli Oola, Oryem Qulino, Okot Antonio, Okoya Maurensio, and Onai and threatened to kill, injure or continue to detain them with the intention to compel the government of Uganda to refrain from launching attacks against the LRA as an implicit condition for their safety. This Count too arises from Incident "B" (the twins' cultural ceremony) and is a re-characterisation as a crime against humanity, of the one which had been charged in Count 32 as a war crime, but in respect of which the Court found that the accused had no case to answer. Therefore, it has the same factual basis already considered before.

178. Across the eight incidents, there is sufficient evidence of the LRA engaging, in a systematic manner, in committing abductions, organised violent attacks, and existence of a *de facto* hierarchical structure of superiors and subordinates in the execution of acts of violence, with a general *modus operandi* demonstrating patterns of crimes, whose random or accidental occurrence is most improbable. For example, during incident "G", P.W.14 and P.W.15 witnessed the hands of each of the abductees being tied behind their backs before they were stabbed to death, each by a different soldier. Their leader who was giving instructions was in camouflage army uniform. Similar behaviour was witnessed P.W.2 testified that the civilians abducted during incident "H", had their hands tied at the back before they were beaten to death at the back of their heads. P.W.18 testified too that during incident "G" the rebels tied each one of the abductees' hands behind their backs before beating all to death save, he and his son who were left for dead but regained consciousness the following morning. It was the testimony of P.W.25 that upon her abduction, the rebels

burnt hr parent's hut. They went to another home where the rebels again began burning houses. Thy trekked further and got to Paibe where again the rebels began burning houses.

179. With regard to the widespread nature of the attacks, the assessment of whether the attacks were widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case. Counsel for the accused contested the offence charged in Count 1 as having been part of the widespread attacks. The prosecution in reply argued that the murder of Obwoya was not an isolated event but was part of a widespread or systematic attack against the civilian population. It was part of the broader LRA strategy meant to instil fear in the civilian population. On the basis of the temporal scope (the indictment covers incidents spread over a period of twelve years, from 1993 to 2005) and geographic extent of the attack (stretching from Amuru to the West to Morulem in the East, and from Gulu in the South to parts of Southern Sudan to the North), the Court finds that the eight incidents forming the basis of the indictment were all part of a widespread series of attacks. For the avoidance of doubt, the prosecution only needed to prove either the systematic or the widespread nature of the attacks. In this case there is ample evidence proving both.

The civilian status of the victims of the crimes against humanity.

180. The widespread or systematic attacks must be directed against a civilian population. Neither ***The Geneva Conventions Act*** **nor** ***Additional Protocol II*** contains a definition of "civilians" or "a civilian population" even though these terms are used in several provisions. Literally, a "civilian person" is any individual who is not a member of armed forces or organised dissident armed groups. Common Article 3 to ***The Geneva Conventions*** seeks to protect "persons taking no active part in the hostilities. " Similarly, the protections afforded to civilians in Part IV of ***Additional Protocol II*** apply to persons "who do not take a direct part or who have ceased to take part in hostilities," which may thus be interpreted to mean persons who are neither members of the armed forces nor the dissident armed group, and who do not participate directly in the military hostilities.

Everyone who is not a combatant therefore is a protected civilian, except those taking active participation in the hostilities.

181. The International Committee of the Red Cross convened a series of Expert Meetings leading to its 2009 ***Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,*** based on three cumulative requirements: a threshold of harm, direct causation, and a belligerent nexus. It postulates that in order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: (i) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (ii) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (iii) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

182. The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. Whereas "direct" would speak to the proximity of one's contribution to the conduct in question, and "active" would speak to the intensity of one's participation in the conduct in question, the expressions "direct participation" and "active participation" have been interpreted synonymously (see ***The Prosecutor v. Jean-Paul Akayesu,***[36]). Civilians who take a direct or active part in the hostilities lose the protection from being attacked.

183. Active or direct participation in hostilities thus consists of specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict, including: taking part in combat or military activities related to combat, including sabotage and serving as a decoy, or a courier, or direct support functions related to combat, including transporting supplies to or from the place where the hostilities are taking place, collecting

[36] *ICTR-96-4-T, Judgment of 2 September 1998, para 629*

intelligence, or providing other services. Individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment, outside specific military operations, or to the collection of intelligence other than of a tactical nature, are deemed not to involve direct participation in hostilities, and are not members of that group within the meaning of international humanitarian law. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.

184. There is no requirement of the intent to attack particular civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack. Depending on the circumstances of the case, the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population. Targeting of civilians is absolutely prohibited in customary international law, and that civilian casualties are only legitimate if their deaths are incidental to the conduct of military operations

185. In light of Article 13 (3) of ***Additional Protocol II*** conferring protection to civilians, unless and for such time as they take a direct part in hostilities, whether a victim was actively participating in the hostilities at the time of the offence has to be determined on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party. If a reasonable doubt subsists as to the existence of such a nexus, then the Court cannot convict an accused for

an offence committed against such a victim under Customary International law or section 2 (1) (d) and Article 3 (a) of the Fourth Schedule of ***The Geneva Conventions Act* (*Geneva Convention Relative to the Protection of Civilian Persons in Time of war of August 12, 1949*).**

186. If the victim is a member of an armed organisation, whose status and continuous role and function in the organisation is to take a direct part in hostilities, the fact that he or she is not armed or in combat at the time of the commission of crimes, does not accord him or her a civilian status. The decisive criterion for individual membership in an organised armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities. This includes individuals recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf on a continuous combat function basis, even before he or she first carries out a hostile act. For such category of persons, the loss of protection as a civilian for the limited period of their direct participation in hostilities loses its effectiveness if it serves to support a loss of protection covering the whole period of a conflict. Article 13 (3) of ***Additional Protocol II*** is directed at persons who, although members of an armed organisation, are of a status and play roles that do not involve a continuous combat function.

187. On the other hand, in its ***2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,*** the International Committee of the Red Cross (ICRC) guided that when the participation is temporary, intermittent or occasional, protection is lost only for the duration of the specific hostile acts carried out by such individuals as part of the conduct of hostilities between the parties to the armed conflict. This includes persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and reintegrate into civilian life. Such "reservists" are civilians until and for such time as they are called back to active duty covers both the measures preparatory to the execution of the act and the deployment to and the return from the place of execution. Their active participation depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature

or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.

188. In the case of doubt about whether a person is a civilian or not, a person should be considered a civilian. International humanitarian law therefore excludes any challenge to the protection of civilians based on accusations of support for non-state armed groups or indirect participation in hostilities. However, in such cases, the prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

189. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities. The status of combatant is not recognised by the law of non-international armed conflicts to members of non-state armed groups. Indeed, this would challenge the monopoly on the use of force entrusted to the State by both national and international law. The members of such armed groups, therefore, have a hybrid status. They are considered by national law as civilian criminals because of their use of force. International humanitarian law, however, is silent on the issue of their status. At the moment, it treats them by default as civilians taking part in hostilities. In a non-international armed conflict, an individual whose continuous function involves the preparation, execution or command of operations amounting to direct participation in hostilities on behalf of an organised armed group is considered a member of that group ("continuous combat function") and loses his protection against the dangers arising from military operations for the duration of that membership.

190. Civilians however enjoy the protection afforded by international humanitarian law, unless and for such time as they take a direct part in hostilities (see Article 13 (3) of Part IV of ***Additional Protocol II***). They lose their protection as civilians and become legitimate targets for such time as they take a direct part in hostilities. The Protocol does not establish a clear definition of combatants on one hand and civilians on the other. Instead, it only distinguishes between those who are fighting and those who are not, or no longer, fighting. It assumes that the entire population is civilian and therefore must be granted the protection

established by humanitarian law, "unless and for such time as they take a direct part in hostilities." The implication is that for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Therefore, this provision relating to the direct participation in hostilities by civilians, requires a clear interpretation of the duration of direct participation during which the civilian has lost his or her protection as a civilian and part of its status, but also of the direct participation as opposed to indirect participation in or support for hostilities.

191. The Court should be satisfied that the attack was in fact directed against a civilian "population," rather than against a limited and randomly selected number of individuals (see ***Prosecutor v. Kunarac et al.***[37]). It is sufficient to show that enough individuals were targeted in the course of the attack. In order to determine whether the attack may be said to have been so directed, the Court will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.

192. In their final submissions, counsel for the accused argued that the victim in Count 1 arising from Incident "E," Albert Obwoya, was not a civilian taking no active part in the hostilities. He was an actively involved combatant working as an informer for the military. On their part, the prosecution did not specifically respond to this contention. Upon consideration of the evidence, the Court notes that P.W.5, a brother of the deceased, testified that the deceased was an informer for the army. He was working with the army at Pabbo he was in the army before and used to relate with the army from time to time. He stated further that the deceased was an informer working for government and that is why he was killed. This is corroborated by D.W.4, who served as a "home guard" at the time. He stated that Albert Obwoya had been trained and armed along with the other home guards like himself. That he went out in the community and collected information which he passed on to them.

[37] *IT-96-23 & IT-96-23/1-A, para 90 and 91*

193. “Home guards” were civilians recruited at grassroots level and given a three months’ basic military training. They would then be placed under the command of officers from the regular army, the UPDF, armed and deployed to protect the IDP Camps. Considering that Albert Obwoya was providing intelligence to the military, was under the command of the UPDF and would from time to time be armed when deployed to provide security to the IDP camp, he cannot be described as a civilian who was taking no active part in the hostilities. The prosecution failed to prove this beyond reasonable doubt.

194. On the other hand, with regard to Count 15 which arises from Incident “G” (the killings along the Paibi-Atiak Road) the victims were on their way back to their home from a funeral when they were abducted and killed. In Count 20 which arises from Incident “D” (the reprisal following Francis Acaba’s escape) the victims were abducted from their homes as they went about their domestic business, and later killed. In Count 50 which arises from Incident “H” (the reprisal attack on the Pagak IDP Camp) the victims had sought refuge in an IDP camp, away from the ongoing hostilities, from where they were nevertheless attacked, abducted and killed. In Count 74 which arises from Incident “F” (thekillings at Kulu Pa Okal). P.W.44 had on 6th January, 2005 mobilised people resident in the IDP camp to slash Aber primary School because the government was planning to returnpeople to their homes and they wanted the school to be ready. They were abducted and killed on their way to the garden to collect food and firewood. In all those incidents, thereis nothing to suggest that any of the victims was taking an active part in the hostilities. Theprosecution therefore has proved this beyond reasonable doubt.

195. The victim “LW” (a protected witness) in Counts, 84 and 85; “TR” (a protected witness) in Count 81 and “NS” (a protected witness) in Counts 89 and 90, (all arising from Incident “A” the sexual and gender-based violence offences), were all abducted as juveniles from the homes of their respective parents. Each of these victims testified that she was initiated into the rebel movement by the performance of rituals involving being smeared me with “*moya*” (Shea nut butter) on the chest. Apart from performing domestic chores at the home of the accused and being turned into his wives, there is nothing to suggest that either “LW”

or "NS" were ever involved actively in the hostilities. The prosecution therefore has proved beyond reasonable doubt that both "LW" or "NS" were protected civilians.

196. However, the experience of "TR" involved episodes of active combat. She testified as P.W.25 and stated that when she reached Sudan, she was taught how to dismantle and fire guns. She was later given a gun which she used to exchange fire with when they met resistance during their raids for food. When she returned to Uganda though Palabek, she was part of a group of about fifty rebels commanded and led by Otti Vincent. They met soldiers from the Uganda government and exchanged fire. She was still armed with the gun. They scattered and took the direction of Lango. At Alilwang Centre they went out to rob sugar and soap, clothes, soda, and many other items. Government soldiers came and began shooting at them. They escaped but were again ambushed by government soldiers after a one night. They began shooting at her group. She realised she had been hit by a bomb and fell down. She did not know what happened next. She later realised she was covered in blood and had an injury on the right side of the body, the head, the knees, the buttocks, right side of the cheek and teeth. She crawled and sat near an anthill.

197. Civilians later came and carried her to their home. They called the L.C. to come and interview her. She told them she comes from Gulu and they told her to stay calm since the President had directed that those who escaped from the bush should not be killed. She was taken to the hospital for one night and then she was taken to Lira where she spent one night and she was brought to Gulu Barracks and then to the military hospital where she spent two weeks. She was then taken to GUSCO where escaped abductees were kept. She was taken to hospital where she was found to be pregnant and suffering from syphilis. She was treated and healed. She was at GUSCO for three months and later was taken back home to her father.

198. Despite the fact that she was trained and armed by the rebels and engaged in combat from time to time, the evidence does not show that she was assigned a continuous combat function, most especially at the time when she was first sexually victimised as a juvenile. In accordance with Article 13 (3) of Part IV of *Additional Protocol II*) she was a protected

civilian "unless and for such time as [she took] a direct part in [the] hostilities." The prosecution has proved beyond reasonable doubt that the sexual and gender-based violence offences in respect of which she was victimised, did not occur while she was taking an active part in the hostilities.

The Offences of Murder

Murder as a war crime

The indictment

199. Murder as a Grave breach of ***The Geneva Conventions*** is a violation of section 2 (1) (d) and Article 3 (1) (c) of the Fourth Schedule of ***The Geneva Conventions Act*** (as set out in Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of war of August 12, 1949), and common article 3 (1) (a) of ***The Geneva Conventions*** which prohibits violence to life and person, in particular murder of all kinds. Article 4 (2) (a) of ***Additional Protocol II***, as well proscribes violence to the life, health and physical or mental well-being of persons, in particular murder. Upon conviction, the offender is liable to imprisonment for a term not exceeding fourteen years (see section 2 (1) (f) of ***The Geneva Conventions Act, Cap 363 (Now Cap 349]*).**

200. In count 2 the victim is Albert Obwoya, alleged to have been murdered at Abera village in Amuru district during the month of March, 1993; in count 16 there are three victims alleged to have been murdered at Paibi-Atiak Road in Amuru District and the victims are Jackamino Oruk alias Jacki Ocoo, Okeny Wilson and Ojok Martin alleged to have been murdered during the month of February, 1996; in count 21 the victims are Aceng Christine, Loum Acupale, Ngwe Julio and Gwok Paulo, alleged to have been murdered during the month of February, 1996 at Abera village and Arebe Hills, Amuru District; in count 51 the victims are Nyeko Bosco, Amony Jenifer, Acan Shida, Atoo Susan, Akwero Harriet, Anena d/o Aloyo Concy, Martina Awor, Edisa Lapobo, Akwero Nancy, Dorothy Akech, Acayo Josephine, Aciro Rose, Kilama Eric, Amal Ketty, Obita Mateyo, Akwongo Christine and

Ocira Erick alleged to have been murdered at Obbo Parish, Amuru District on 16th May, 2004; and in count 75 the victims are Ocaya John, Ojara John, Oketayot Lawoko Charles, Acaye Okem Ocuke, and Ogwok Odong Phillip alleged to have been murdered at Kulu Pa Okal in Bira Omba village in Amuru District on 6th January, 2005.

The elements of the offence.

201. The offence of murder is committed in case a person who is taking no active part in the hostilities, is killed as a result of the perpetrator's act or omission. It involves the wilful killing of a human being who is taking no active part in the hostilities. The elements of the offence of murder or wilful killing have been defined in the same way by international tribunals, such as in the case of ***Delalić Case***[38] as follows:

    a. Act or omission causing death.
    b. The act or omission causing the death was wilfully committed.
    c. The death was caused during an armed conflict not of an international nature.
    d. A connection between the killing and the armed conflict.
    e. The victim was not taking an active part in the hostilities.
    f. Participation of the accused.

202. The prosecution must prove each of the essential ingredients beyond reasonable doubt. The contextual elements listed as 3, 4, and 5 have already been addressed before in this judgment.

The evidence

203. The evidence regarding the killing of Albert Obwoya was adduced by P.W.5, who is a brother and P.W.6, who is the wife of the late Obwoya. In his testimony, P.W.5 stated that

[38] *IT-96-21-Abis, Appeal Judgment 20 Feb 2001, para. 423,*

on the fateful night at around 2.00 am, armed men in army uniform broke into his house. They flashed a torch directly at him. He was ordered to lead them to the home of his brother, Obwoya which was about 80 metres from his. When they got there, the accused ordered Obwoya to come out and when he did not, he kicked the door open. Obwoya was brought out and attempted to escape, the accused fired three shots that killed him.

204. The evidence concerning Count 16 was from P.W.5 (protected witness "E1"), P.W.14 (protected witness "G14") and P.W.15 (protected witness "G4"), is to the effect that in February 1996, there was a funeral in Paumo. A one Okeny Wilson and Ojok Martin along with P.W.14, P.W.15 and several other people were also at the funeral. At around 6.00 pm as they walked back home with Okeng Wilson and Ojok Martin, they saw a group of rebels ahead of them. All the people scattered and ran in different directions upon seeing the rebels. P.W.5 and P.W.14 recognised Okot Thomas (Kwoyelo) among the rebels they saw. They had dread locks and had put on camouflage army uniform. P.W.14 was able to recognise Okot because it was still daylight and he was only about 4 metres away, and at the time it was only the rebels active in the area because the UPDF was confined to the trading centre. P.W.15 (protected witness "G4"), the wife of Ojok Martin was among the people returning home from the funeral in the company of her late husband. Both were abducted together with other people. The rebels removed the shirts of the men and used them to tie the hands the captured men behind their backs. The entire group was told to walk along the Juba Road to a place called Paibi. When they got to that point, the abducted men were told to lie face down, then one of the rebels called for the 'RP' to come and do "their work". Three rebel soldiers were picked and one assigned to each of the men lying on the ground. The rebels then started stabbing the men through the back, the sides and knees with bayonets. P.W.15 stated that her husband, Ojok, who was one of those stabbed, called out her name and pleaded with her to take care of their children as he was about to die. After the stabbing, the rebels asked whether what they had done was good and then chased P.W.15 and the rest away. They ran from the scene and spent that night in the bush. The next morning, with others, she returned to the scene.

205. P.W.5 and P.W.14 upon receiving the news of the murders went to Paibi, where they found three bodies with hands tied behind their backs. They had stab wounds concentrated around the mid rib area of the body. The three bodies lying along the road were of Jakamino Oruk, Ojok Martin and Okeny Wilson. The bodies were carried to Abera where they were buried. P.W.17 (protected witness "G7") was the LC I chairman of the area in 1996. He stated that when he received information regarding the killings he went to the scene where he found their bodies lying along the main road. He too saw the bodies of Jakamino Oruk, Okeny Wilson and Ojok Martin and reported the matter to the authorities. He obtained information from those abducted with the deceased persons, who told him that the rebel commander leading the people who killed the deceased persons was Kwoyelo. There had been abductions in his village and when the abductees returned, they stated that they had been abducted by the Kony rebels.

206. In relation to Count 21, there was testimony from P.W.18, P.W.19, P.W.25 and P.W.26. *P.W.18* testified that he was 68 years old. He first knew Kwoyelo in 1962 when they were together in Pabbo Boys School. The accused is his blood relative because the accused person's father is an uncle to his mother. The witness was once LC 2 chairman. He added that the LRA was active in Abera, Parubanga parish where they were abducting individuals. On the fateful day, the rebels, who had with them four other abductees, came to his compound and took him away from his home as an abductee. He was tied to the other abductees and they were taken to the home of one Oyet. There they found, Achieng Christine, Oyet's wife. The rebels struck Achieng Christine to death with an axe. After that they moved the abductees and crossed the Ayugi stream and went to Arebe hill before moving to Ngeto. At that point they were divided into groups. Those without wives were placed in one group and the others in a separate group. It was after that division that they got a stick and beat Loum to death. His dead body was left there and eaten by a pig. The group left that point where Loum was beaten and continued walking towards Ceri River. Along the way, Julio, one of the abductees told the rebels that he could not proceed any farther. It was then that he was beaten with a stick on the head and killed. When they got to a nearby hill he saw the accused, who was standing about 15 meters away. He saw Kwoyelo standing on the hill where he issued an order saying, '*askari, cut the sticks and*

beat these people and kill all of them.' At that point the rebels tied the hands of all the abductees behind their backs and each was beaten severely and lost consciousness.

207. When he regained consciousness, PW 18 he was joined by his now deceased son, David Okello. The two returned home via Ceri River. On their way they passed by the dead body of Julio Ngwe. P.W.18 was told by abductees who were returning home from later abductions that the rebels had said that they would be returning for him because he survived the attack. P.W.19 stated that on the fateful day, she was at home in Parubanga with her mother, Achieng Christine. At about midday they heard that rebels under the command of Kwoyelo were coming in their direction. No sooner had they received that information than the rebels arrived at the home of P.W.19 who ran away to the bush and hid. At about 2.00 pm, when they thought the rebels had left, they returned home. Immediately they got there, about 12 rebel soldiers, who were hiding nearby, emerged. They were dressed in mixed army uniform and some had dreadlocks. Everybody was ordered to sit down and two rebels assigned to watch over them. The time then was 5.00 pm. The rebels then asked P.W.19 for her brother called Acaba Francis who had earlier been abducted. They said that Acaba had escaped from their ranks and they had come to collect him. Acaba's mother, Achieng, told them that he had not returned. On hearing this, the rebels consulted their commander, Kwoyelo, who P.W.19 knew well, and could recognise both by voice and appearance. She heard him say, "that woman should not be left alive she should be killed." The commander got an axe and hit Achieng on the back of the head and she died. P.W.19 also stated that she lived near the home of the accused person's mother in a place called Ocitaka. She knew his grandfather who was called Lapel. The other people abducted that day who were with the rebels when they came to their home included Gwok, Loum Acupule, Kinyera and Kagwa. The next day they received information that all those abducted, with the exception of Acori Vito and Okello, were murdered.

208. P.W.25 (protected witness "TR/D3") stated that Achieng Christine was her mother. On the day of her abduction, she saw the accused direct three young men to hit her mother with an axe on the head. She knew the accused well because he used to visit her home and she was subsequently abducted and spent a long time with him as a combatant. On that day,

the accused was wearing camouflage, black boots and army cap. They were abducted with a number of people and taken to a river near Arebe. At that point the older men were taken to the river and P.W.25 heard them being beaten to death. P.W.26 (protected witness "D4") is a daughter in law of Achieng Christine. She stated that at 3.00 pm on the fateful day in February 1996, three men in military uniform came to her home, where she was inside the house while her husband, David Okello, was outside sitting under the granary. Both were abducted and directed to walk to the home of Achieng Christine, her mother-in-law, where she heard the rebels ask for Acaba. She was present when the order to kill Achieng was made. She saw Achieng struck down with an axe. When the perpetrators left, the body was put under the mango tree and the next morning buried. The rebels left with Loum Acupale, David Okello, and others. Two days later, Acori Vito and David Okello returned but told her that all the others were beaten to death using a log cut from the '*Odugu'* tree. The soldiers who were disturbing the area at the time were the Lakwena soldiers. She stated that she identified the accused person at the scene of crime.

209. The witnesses in respect of count 51 are P.W.2, P.W.31, P.W.33, P.W.35, P.W.36, P.W.37, P.W.38 and P.W.39. P.W.2 testified that around 15th May 2004 he was under a commander called Sam Kolo. He stated that he first met Kwoyelo in Jabelen in southern Sudan. That he went along with Kolo to Guru Guru hills to meet Vincent Otti who was then assisted by Kwoyelo. At that point, Senior officers had gathered to plan for the attack on Pagak IDP camp as a reprisal for the escape of one Captain Abola, an LRA combatant, who had surrendered to the UPDF and was warmly received by the people in Pagak. The commanders included Otti Vincent, Rasta Lukwiya, Sam Kolo, Kwoyelo, Dactar Onen and others. P.W.31 (protected witness "H73") was a signaller in the LRA attached to Otti Vincent. It was through his radio that a message from Joseph Kony was received. Kony, at that time, was based in the Sudan. He was particularly angered because Abola had left with several guns and combatants. The attack was planned from Kwoyelo's residence and he then briefed the soldiers who were going to launch the attack explaining the plot to abduct civilians and attack the UPDF. A commander called Onen Dactar was chosen to command the raid. At the time of departure, Kwoyelo and some of the other commanders from

Headquarters, went along with the soldiers up to a place called Corner *Ogoro Pii*, which is 3 km from the Pagak Camp. They arrived at 6.00 pm.

210. P.W.33, 35, 36, 37, 38 and 39 testified that the rebel soldiers entered the camp attacking from several directions. The resulting fire fight went on up to 9.00 pm. The soldiers were divided into different roles with some engaging the UPDF while others abducted civilians some of whom were hiding in their houses. The rest of the military were looting property. Thereafter they left the camp with the abductees carrying the looted property. There was a pregnant woman who was forced to carry the dead body of one of the LRA soldiers. She got tired and was told to lay the body down and lie next to it. Thereafter her belly was slit open. Both the woman and her unborn baby died. The abductees were taken to the Headquarters. Onen Dactar and Kwoyelo briefed Otti Vincent about the attack. It was Otti who issued the order that all the abducted civilians were to be killed. Kwoyelo addressed the abductees by telling them that they would each be given ten strokes of the cane. Twenty young soldiers were selected to execute this order. The hands and legs of the abductees were tied before they were all made to lie face down. Those with young children on their back were directed to adjust the children higher on their backs so that the soldiers hit their buttocks. The soldiers quickly cut '*Odugu*' tree logs and used them to hit the abductees on the back of their heads. Both babies and their mothers were beaten. P.W.33 lost her baby and was also severely injured on the head. Some of the severely injured victims survived and made their way back to the camp. A number of the abducted people, men, women and children as young as 2 years old were killed. The bodies were left by the road side. The next morning all the soldiers left. The camp commandant went to the scene the following day and found several dead bodies. There were also some who had passed out and were slowly regaining their consciousness. Altogether there were 31 people killed. 29 at *Ogoro Pii* and 2 in the camp. PW 32 saw a club at the scene. He took a record of all the dead by listing them in an exercise book which was tendered in evidence PEX11. The bodies were retrieved and brought to the camp where they were distributed to the bereaved families.

211. Three days later the police came and exhumed the bodies for post mortem examinations. P.W.21 a medical doctor tendered a list of names deceased persons whose bodies were

exhumed and examined and what the cause of death was established to be. The list was tendered as exhibit P. Ex.10. The names and the page of the exhibit on which it appears is as follows: page 7 Nyeko Bosco (gunshot wound); Amony Jenifer (occipital lacerations with fractures) page 7; Acaa Sida (strangled) at page 7; Atoo Susan (lacerations, shattered occipital right skull) at page 7; Akwero Harriet (stabbed on the head and beaten to death) page 7; Anena d/o Aloyo Concy (beaten on the head – fractured vault) page 8; Martina Awor (beaten on the head – cut wound on frontal bone) page 7; Edisa Lapobo (shattered skull – cut on the head) page 7; Akwero Nancy (fractured vault) page 8; Dorothy Akech (cut on the head – laceration and fractured occipital bone) page 7; Acayo Josephine (beaten on the head; cut occipital fractures on bones) page 7; Aciro Rose (hit on the head with a heavy object – multiple fractures on the head) page 7; Kilama Eric (hit on the head – occipital bone fractures) page 7; Amal Ketty (fractured bone – beaten on the head) page 7; Obita Mateyo (cut on the right side of the head) page 7; Akwongo Christine (cut left occipital and right scalp region) page 7; Ocira Erick (beaten on the head – fractured bone).

212. In respect of Count 75, the witnesses to this incident are P.W.43, P.W.44, P.W.45 and P.W.46. It was stated that at 10.00 am on the 6th of January 2005, at Bira Omba village in Amuru District, men were collected to go and slash the compound of Abera School, in preparation for the return home of people from the camp. Amongst them were John Ojara, Acaye Ocuke, Ogwok, Oketayot and Oryem Simon. John Ojara was carrying P.W.43 on his bicycle. All the men were captured and their hands tied. After they were cornered, three rebels, a woman and two girls, were assigned to watch over them. One of these rebels mentioned Kwoyelo as being the vicious head of the group. She complained about Kwoyelo's brutality. The men were taken into the bush and were heard wailing in pain. Ojara had been wearing a pair of slippers. One of the rebels came back from the bush with the slippers. Kwoyelo was said to be the one who emerged from the bush with the slippers. All the men were killed. All these witnesses saw their bodies and participated in the burial. They had all suffered injuries to the back of the head. P.W.44 was a leader of one ward and stated that he was told by a woman at the scene that the perpetrator was Kwoyelo Thomas.

213. P.W.45 testified that the five deceased persons were ahead of him on that day. At a distance of about ten metres away, he saw Kwoyelo standing near a culvert. P.W.45 ran away because of the activities of the rebels who would kill when they abduct. He had recognised Kwoyelo as he was wearing camouflage army uniform and was holding a gun. He stated that he threw down his bicycle and run into the bush and straight to the office of the GISO to report the incident. He also testified that he knew Kwoyelo's father's name as Ajok and his brother was called Ojori.

214. In his defence as D.W.1 the accused denied having committed any of these offences. He stated that at the time of the killings in Kulu Pa Okal, the strength of the LRA was diminished and they were moving to towards the Democratic Republic of the Congo, so the evidence adduced against him is a lie. He raised an alibi. He stated that by 1996 he was not a commander but an escort to a one Ocii at the sick-bay. Because of this, he could not have gone out in the convoy. That all the witnesses who gave evidence against him in these incidents were telling lies. The accused added that the witness who said that they had both been in P.2. in 1970 was telling lies. That was because it was in 1986 when the accused was in P.2 and he was subsequently promoted to P.3 in 1987. Additionally, that none of the witnesses stated that they found Lakwena soldiers at the scene. He also testified that the witnesses also stated they had seen him at courtship dances or marriage ceremonies were lying because he was too young at the time to have attended such ceremonies.

215. The accused, denied being involved in the attack on the Pagak IDP camp. He stated that he was throughout this time confined to the sick-bay. He only heard the radio communication between Otti and Joseph Kony who was at that time based in the Sudan. He heard Kony being informed by Otti that a one Abola had escaped from the convoy with a number of soldiers and guns. He then heard Joseph Kony instruct Otti to prepare soldiers to go and raid the camp. It was after about two weeks that Kwoyelo heard Otti make a radio communication reporting back to Kony that he had accomplished the mission which was commanded by an Officer called Onen Dactar. The weapons were recovered and two of their soldiers injured. That Kwoyelo was eventually asked to pick the two injured soldiers and take them for treatment.

Submissions of Counsel

216. The defence argued that Albert Obwoya was actively involved in collecting intelligence for use by the UPDF. He was also a home guard and was supposed to carry a gun. The defence argued farther that there was no direct or circumstantial evidence placing the accused at the scene of crime. P.W.5 was a single identifying witness and could not, in the factual circumstances of this case, have recognised the accused. The defence also submitted, that because a bright light was flashed into the eyes of P.W. 5 he was not able to see clearly. In any event, P.W.5 only had a fleeting glance of the perpetrator. That he did not have sufficient time to properly recognise his attacker. It was also argued that thereare contradictions in the evidence of P.W.5 regarding the period he is alleged to have beena school mate of the accused. The contradictions arise because different prosecution witnesses have stated inconsistent times regarding the exact period when they were at school with the accused. P.W.5 stated that they were early primary schoolmates in 1972. On the other hand, P.W.18 stated the accused was with him in P.2. in 1962. That these contradictions are grave and point to the witnesses being liars.

217. The defence submits that the death of Oruk was not shown to be part of a widespread systematic attack on the civilian population. It was argued further that there was no proof that it was the accused who killed the deceased persons. In addition, there was no evidence led to show that the accused was in a command position at the time the attacks were made. That in the Ongwen trial where the accused was part of the same force, there was evidence led to show that the LRA was structured into different military units including Sinia, Stockree and Trinkle brigades. Evidence was adduced in that case to show that Ongwen was the commander of the Sinia Brigade. There was no evidence in the present case to show that the accused belonged to any of these brigades. In any event the accused had stated that he spent this entire period in the LRA sick-bay as an escort to Brother Ocii.

218. That in the case of ***The Prosecutor v. Enver Hadzihasanovic Amir Kubura***[39]**,** the trial Chamber laid down the several indicia developed to determine the existence of a commander's effective control over his forces including: (i) the power to give orders and have them executed; (ii) the conduct of combat operations involving the forces in question; and (iii) the absence of any other authority over the forces in question. There was no evidence to show that it was the accused who gave orders so as to create a nexus between the attacks and the armed conflict. Instead, the evidence was that it was Joseph Kony issuing all orders. That P.W.17 was a leader in the area and stated that he did not know Kwoyelo. If he was indeed a leader and did not know Kwoyelo, then those who said they knew him, were telling lies. That the only witness who claimed he knew Kwoyelo was P.W.14. However, this witness only had a fleeting glance in difficult circumstances. His familiarity with the accused was questionable. It is argued further that P.W.14 who said he knew the accused in 1970s has had his memory eroded by passage of time. It is difficult to see how he could vividly recall events that happened between 6.00 pm and 7.00 pm twenty years ago.

219. There are also grave contradictions regarding the various testimonies of the different witnesses as to when the accused was in primary school. One prosecution witness, P.W.18 had stated that in 1962 he was in P. 1. with Kwoyelo, then P.W.14 said it was in the 1970s. The accused on the hand said in 1986 he was in P.2. These contradictions diminish the credibility of the witnesses. In regard to the charge of murder, the particulars of offence do not properly describe Murder c/ss 188 and 189 of ***The Penal Code Act***. Secondly the evidence of participation is wanting and has not been proved. It is the submission of the defence that all the victims mentioned are indeed dead and that they were part of the civilian population. They therefore do not contest these particular elements.

220. However, none of the prosecution witnesses was able to place the accused at the scene of crime. The prosecution evidence was contradictory. For example, P.W.18 who stated that he saw the body of Loum being eaten by a pig and yet the group was also ordered to travel

[39] *IT-01-47-T,*

to Arebe hills could not be telling the truth. That P.W.18 did not mention any participation by the accused in the killing of any of these three deceased persons. That the testimony of P.W.18 is also marred by his assertion that he and the accused were in school together in 1962. The defence notes that the testimony of these witnesses was received long after the event. The testimony may have been contaminated by interactions that they have had with others over the years. It is argued farther that the process of recognition must establish identification beyond any alternative conclusion.

221. The defence contends further that P.W.25 made a statement to police in which she did not mention the accused as the killer of her mother. That this impeached her credibility as a witness. The prosecution evidence is full of grave contradictions and riddled with lies. One witness described the accused as a light skinned man. Such a witness could not have been referring to the accused who cannot be described as light skinned. The same witness was unable to make a dock identification, which proves that she told lies.

222. For count 51 there was no evidence adduced to show that the accused coordinated the attacks on the camp. For example, in the *Ongwen case* the prosecution produced evidence to show that there was detailed radio communication between Ongwen and Joseph Kony, Otti and other soldiers. Those logs were produced in court. Command responsibility of the accused has not been established using the parameters set out in ***Prosecutor v. Pierre Bemba Gombo***[40]**.** There was no evidence led to show that the accused commanded or led any battalion or platoon. In the case of Ongwen, evidence was led to show that he led the Sinia Brigade. The accused was in charge of treating the sick. There is ample evidence that the accused did not come to the Pagak camp. In his statement to police, P.W.2 had stated that it was Otti responsible for the attack. He changed this in his testimony to implicate the accused. The previous statement of an accused can be used to impeach evidence in court as stated in ***Kibuka v. Uganda***[41]**.** P.W.2 should be treated as an accomplice whose evidence, in law, requires corroboration. The court should also take into consideration that P.W.32 received a call from Otti Vincent about the attack.

[40] *ICC-01/05-01/08*
[41] *[1969] EA 420*

223. On their part, the prosecution contends that the testimonies provide strong evidence of the crimes. That from the testimony of P.W.14 the accused was placed at the scene of crime. All testimonies on record show that the accused participated in the commission of these offences. In reply, the prosecution submitted that from the evidence adduced, there is strong evidence showing Kwoyelo's involvement in the attack on the Pagak camp. The evidence of the prosecution witnesses highlighted the brutality committed during the attack. There is also ample evidence to show that Kwoyelo was in a position of authority. The attack was not a random act of violence, but a deliberate and organised assault on the civilian population. Besides P.W.17 established that there was a pattern of rebels committing these offences in the area. The witnesses knew the accused well and recognised him as the perpetrator. The evidence adduced established the elements of all the offences in these counts.

224. The prosecution contention is that the accused was responsible for the offences. P.W.43 properly identified Kwoyelo placing him at the scene of crime. P.W.45 was the other witness who knew Kwoyelo intimately going as far as naming some of Kwoyelo's close relatives. This witness placed the accused at the scene. The prosecution argues that this witness could not have been mistaken when he identified the accused at the scene. The witnesses were detailed and consistent. In addition, the evidence establishes the accused person's command responsibility, actual participation and intent in the murders. The prosecution argued that the conditions favoured a correct identification to be made. The perpetrators had very bright torches which enabled P.W.5 to clearly identify the attackers that night. He was able to properly recognise the accused as one of the perpetrators because he knew him well.

The analysis

225. With regard to Count 2, the Court found that Albert Obwoya was at the time of his death, actively participating in the hostilities as an armed "home guard". This puts him out the realm of protected persons as envisaged in the Geneva convention. In which case he would

not be described as a civilian taking no active part in the hostilities. In light of the prosecutions failure to establish this element of the offence, this offence has not been proved. The Lady and Gentlemen advised the Court to acquit the accused. The Court is in agreement. The accused is therefore acquitted of this charge.

226. The prosecution is under duty to prove that each of the named victims is dead. With regard to Count 16, there is ample evidence that the dead bodies of three persons were found lying at Paibi along the road to Juba. All four prosecution witnesses were involved in the retrieval of the bodies of the deceased persons, taking them for burial and actually performing the burial rites. There is nothing on record to dispute the death of the deceased persons. The defence has not contested the fact of death. The Court finds that Jakamino Oruk, Okeny Wilson and Ojok Martin are all dead.

227. The evidence shows further that all three were stabbed multiple times in the mid rib section. This is what led to their death. The prosecution has proved that the death was caused wilfully. That death was a result of an act that was intended to cause death. P.W.15 stated that the rebels directed the deceased persons to lie face down on the road, each of them had his hands tied behind their backs and then they were stabbed several times in the mid rib section, the side of the chest and the knee. This was a deliberate act meant to result in death. The Court finds that anyone stabbing another multiple times in such a manner can only intend the death of the victim of his actions. When the deed was done, the perpetrators asked those present if what they had done was good. This question, asked immediately after the stabbings, is farther evidence indicating a premeditated action by the perpetrators. The factual circumstances properly show that death was caused wilfully and therefore intentionally.

228. Concerning the death of Achieng Christine in Count 21, it has been proved by the evidence of P.W.18, 19 and 26. It is clear that she was targeted because her abducted son, Acaba Francis, had escaped from the LRA and was believed to have returned home. She was asked for his whereabouts and when she could not produce him, the perpetrators hit her at least three times with an axe on the head. The witnesses heard the order issued that the

woman should be killed. Ordinarily the result is intended when it is the actor's purpose.[42] An instruction to kill, closely followed by several strikes on the head with an axeestablishes the intent to kill.

229. Loum Acupale, Gwok and Julio Ngwe were abducted and taken by the rebels. P.W.18 saw Ngwe beaten and killed near Arebe, after Ngwe complained that he could proceed no farther with the trek. It was the evidence of P.W.25 that all those people abducted that day were killed near Ayugi River. P.W.18 saw the bodies of both Loum Acupale and Julio Ngwe. The fact that he stated that the body was eaten by a pig does not dispel the death of the deceased. Although it was not clarified as to whether these bodies were recovered, it is now well established that death can be proved without a dead body.[43] Besides under Section 108 of ***The Evidence Act,*** the presumption of death can be made where a person has not been heard of for seven years or more by those who would naturally have heard of him or her if he or she had been alive. The Burden of proving that the person is alive shifts to the person who affirms it. Here none of these witnesses claimed to have seen Loum Acupale, Ngwe Julio and Gwok Paulo alive since their abduction in 1996. The law therefore presumes them dead.

230. In respect Count 51, the prosecution adduced evidence of P.W.32, the campcommandment, who recorded the names of all the deceased persons and adduced evidenceof a list of those killed. The evidence of all the prosecution witnesses from Pagak confirmedseeing people being beaten to death. The Court viewed the footage recorded during the exhumation and documentation of the bodies of the persons killed. They were properly tagged and named. There is also a list of the names of the bodies of the deceased persons who were exhumed and post mortem examination carried out on them. This evidence proves beyond reasonable doubt, the death of the victims named in count 51.

231. That their death was caused wilfully can be determined by the manner in which the injuries causing their deaths were inflicted. Overall that evidence shows that there was an intention

[42] *Kupreskic et al., (Trial Chamber) para. 561*
[43] *Krnojelac, (Trial Chamber), March 15, 2002, para. 326*

to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death. This is borne out by the manner in which the victims were all properly laid down and then each beaten or clubbed to death. The evidence regarding the woman whose abdomen was slit is also proof of intention to kill. This shows that there was an intentional action to cause death.

232. In respect Count 75, the evidence here shows that these victims were all killed and were buried in various sectors of the camp in Pabbo. Their death is proved by cogent evidence adduced here. The prosecution witnesses saw the dead bodies of Ocaya John, Ojara John, Oketayot Lawoko Charles, Ogwok Odong Phillip, Acaye Okema Ocuke. They then collected the bodies from the scene and arranged for the burial. In light of that the element of death was established. The evidence shows that the death was caused wilfully. The wilful intention is established by the manner in which the deceased persons met their death.Each of the deceased persons' head was smashed. They were heard crying out from the bush where they were taken as the killing started. When the killing was done, one of the perpetrators showed the witnesses his bloodied hands when he returned from that bush. All the above goes to show the wilful intentional nature of the action of the perpetrators.

The findings

233. The Lady and Gentlemen Assessors advised the Court, save for Count 2, to find that all elements of the rest of the offences had been proved. For the avoidance of unnecessary repetition, the last two ingredients addressing the participation of the accused in the commission of the offences, shall be considered at the end of the combined analysis. As regards the rest of the elements, this Court agrees with the assessors. Consequently, the Court finds that save for the last two ingredients concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of murder as a war crime in respect of the five (5) Counts being, Counts; 16, 21, 51 and 75.

Murder as a crime against humanity

The indictment

234. Murder as a crime against humanity requires the presence of a large-scale or systematic attack on the civilian population and the demonstration of a link between the behaviour of the perpetrator and the attack regarding objective and subjective elements.

235. Count 1 arises from Incident "E" (the killing of Obwoya Albert); Count 15 arises from Incident "G" (the killings along the Paibi-Atiak Road); Count 20 arises from Incident "D" (the reprisal following Francis Acaba's escape); Count 50 arises from Incident "H" (the reprisal attack on the Pagak IDP Camp); and Count 74 arises from Incident "F" (the killings at Kulu Pa Okal). All these offences are a re-characterisation as crimes against humanity, of the ones respectively charged in Counts 2, 16, 21, 51 and 75 as war crimes. They therefore have the same factual basis already considered before.

The elements of the offence.

236. A crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population. When committed within this context, what would have been an "ordinary" domestic crime of murder, becomes a crime against humanity.

237. The elements of the offence of murder, as a crime against humanity therefore are;
    a. A wilful act or omission causing death.
    b. The death formed part of a widespread or systematic attack.
    c. The widespread or systematic attack was directed against at a civilian population.
    d. Knowledge of the perpetrator that the killing is part of the systematic or widespread attacks.
    e. Participation of the accused.

The evidence

238. The evidence adduced by the prosecution has already been outlined above constituted by the testimony of the various witness to incident "E" (the killing of Obwoya Albert), incident "G" (the killings along the Paibi-Atiak Road), incident "D" (the reprisal following Francis Acaba's escape), incident "H" (the reprisal attack on the Pagak IDP Camp) and incident "F" (the killings at Kulu Pa Okal).

Submissions of Counsel

239. The submissions of counsel for the accused and those of the prosecution have already been outlined above constituted by the testimony of the various witness to incident "E" (the killing of Obwoya Albert), incident "G" (the killings along the Paibi-Atiak Road), incident "D" (the reprisal following Francis Acaba's escape), incident "H" (the reprisal attack on the Pagak IDP Camp) and incident "F" (the killings at Kulu Pa Okal).

The analysis

240. When analysing the chapeau (contextual) elements, the Court found that the prosecution had proved them beyond a reasonable doubt. On account of the same reasoning as that applied in the determination of the circumstances in which the deaths occurred, the Court finds once again that the prosecution has proved beyond reasonable doubt that the killings referenced in Counts 1, 15, 20, 50 and 74 were wilful. Once again, for the avoidance of unnecessary repetition, the last two ingredients as to whether or not the accused did participate in those killings and if so, whether he knew that they formed part of the systematic or widespread attacks, is deferred, to be considered at the end of the combined analysis.

The findings

241. As regards the rest of the elements, this Court agrees with the assessors. Consequently, the Court finds that save for the last two ingredients concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of murder as a crime against humanity in respect of the five (5) Counts being, Counts; 15, 20, 50 and 74 have been proved.

Murder as an offence under *The Penal Code Act*

242. In view of the findings made above, save for Count 3, the rest of the alternate counts of Murder C/ss 188 and 189 of ***The Penal Code Act***, namely; Counts 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 76, 77, 78, 79 and 80 fail and are hereby dismissed.

The indictment

243. In Count 3 of the indictment, the accused was charged with the offence of **Murder,** contrary to section 188 and 189 of ***The Penal Code Act***, as an alternate charge. It is alleged that in the month of March 1993 or there about at Abera village, Parubanga Parish, Pabbo Sub County, Kilak county, now Amuru District in Northern Uganda, being a Commander in the Lord's Resistance Army commanded an attack on civilians taking no active part in the hostilities and with malice aforethought, killed **Albert Obwoya**.

The elements of the offence

244. For the accused to be convicted of Murder, the prosecution must prove each of the following essential elements beyond reasonable doubt;

a. Death of a human being occurred.
b. The death was caused by some unlawful act.
c. That the unlawful act was actuated by malice aforethought; and lastly
d. That it was the accused who caused the unlawful death.

The evidence

245. The evidence adduced by the prosecution has already been outlined above constituted by the testimony of the various witness to incident "E" (the killing of Obwoya Albert),

Submissions of Counsel

246. The submissions of counsel for the accused and those of the prosecution have already been outlined above in respect of incident "E" (the killing of Obwoya Albert).

The analysis

247. The question here is whether P.W.5 was able to properly identify the perpetrators of the offence.

248. It is the law, that an identification, just like any other fact, may be proved by the testimony of a single witness. This rule however, does not lessen the need for testing, with the greatest care, the evidence of a single witness in respect of identification. It is also the law that where identification is made in difficult conditions, such as at night, caution must be exercised and court should warn itself to examine such evidence closely to avoid a case of mistaken identity (see ***Roria v. R***[44]). Indeed, when this is considered, it is entirely possible that such a mistaken witness can be very persuasive and sincerely believe the mistaken identification they have made to be correct. The court should therefore proceed with extreme caution when dealing with a single identifying witness. The court is required to examine such evidence of identification very scrupulously. It is for this reason that Courts in Uganda have developed guidelines to test the quality of identification evidence by scrutinising the light conditions; the familiarity of the witness with the accused; the length of time observing the incident; and the distance from which such observation is made (see ***Abdalla Nabulere and Others v. Ug***[45]).

[44] *[1967] E.A. 583*
[45] *Cr App 1 of 1978*

249. In this case it appears, overall, that the conditions unfavourable to correct identification overwhelm the favourable ones. Although P.W.5 had known the accused before, he had last seen him as a child many years in the past. The witness stated that a bright light was shone into his eyes when the perpetrators entered the room. In fact, P.W.6 was emphatic in saying that the perpetrators were particular in trying to make certain that they were not identified by the witnesses. She stated that as a result, she was unable to identify any of the perpetrators. The Court also notes that P.W.5 admitted having drunk alcohol that night. While there is no evidence of drunkenness available, there is a doubt cast regarding how that may have affected the identification he made. Any such doubt should be resolved in favour of the accused.

250. The Court further noted that D.W.4 together with others, had soon after that death been arrested and charged on suspicion of having murdered Obwoya. Considering that this was immediately after the commission of the offence when evidence of witnesses should have been fresh, it casts doubt on the accuracy of the identification evidence of P.W.5 now saying that he recognised the accused as the person who killed his brother. The Court finds that the evidence regarding identification has not been proved to be free of the possibility of error and is thus unreliable. There is a significant and reasonable possibility that P.W.5 may have been mistaken. An accused can only be convicted where the evidence points to guilt beyond reasonable doubt. There is substantial doubt here and that doubt has been resolved in favour of the accused.

The findings

251. The lady and gentlemen assessors advised the court to convict. For the reasons stated above, this Court respectfully disagrees and acquits the accused on this count.

Offences constituting a serious threat to life

252. Multiple offences involving serious assaults that did not result into death, which however constitute a serious threat to life, were preferred against the accused both as war crimes and as crimes against humanity, and in the alternative as offences under ***The Penal Code Act.*** The ones charged as war crimes are: three (3) counts of Cruel treatment, being Counts43, 48 and 72; Two (2) Counts of Violence to life being, counts 87 and 92; Six (6) Countsof Outrages against personal dignity, Counts 44, 49, 73, 82, 86, and 91. The ones preferredas crimes against humanity are: Three (3) Counts of Other inhumane acts, being Counts 42, 47 and 71; and two (2) counts of Torture, being Counts 85 and 90; and One (1) Countof Imprisonment, being Count 31. The ones charged under ***The Penal Code Act*** as alternative Counts are; One (1) Count of attempted murder, Count, 45; fourteen (14) countsof Kidnap with intent to murder, being Counts 5, 6, 8, 10, 11, 12, 33, 34, 35, 36, 37, 39, 40, and 41, making a total of [32] Counts in all.

The offence of Cruel Treatment

253. Common Article 3 (1) (a) of ***The Geneva Conventions*** prohibits cruel treatment of persons taking no active part in hostilities and persons *hors de combat*. The ICTY and ICTR have found individuals guilty of violating Common Article 3 by engaging in cruel treatment towards those who are not actively involved in war or are unable to fight. This prohibition includes acts that cause severe physical or mental suffering, or significantly undermine human dignity, but falls short of meeting the criteria for torture.[46]

254. The ICTY has also specified that beating and subjecting individuals to harsh conditions could be considered as cruel treatment if it resulted in intense suffering, physical or mental

[46] *Prosecutor v Ntagerura et al, No. ICTR-99-46-T, Judgment (25 February 2004) at para. 765; See Celebici, Judgment (AC), para. 424. See also Naletilic and Martinovic, Judgment (TC), para. 246; Blaskic, Judgment (TC), para. 186; Jelisic, Judgment (TC), para. 41; Celebici Judgment (TC), para. 552; Tadic, Judgment (TC), paras. 723-726*

harm, or a serious assault on human dignity.[47] This involves prolonged mental or physical harm, the threat of imminent death or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. Serious attack on human dignity occurs when the victim is treated in ways that contravene the recognition and respect he or she is owed by virtue of being human. This definition establishes that "cruel treatment" and "inhumane treatment" serve equivalent purposes within the framework of Common Article 3 of the Statute. This means that for the purposes of prosecuting violations of international humanitarian law, the term "cruel treatment" carries the same weight and legal consequences as "inhumane treatment" in relation to the grave breaches of the Geneva Conventions.

255. In essence, it highlights that perpetrators who engage in acts of cruel treatment can be held accountable and prosecuted under the same legal provisions and standards as those who commit inhumane treatment in the context of armed conflicts. This ensures that severe violations of human rights and humanitarian law are addressed and condemned in a consistent and rigorous manner. The above definition was also followed in the **Blaskic et al,** where the Trial Chamber held that "treatment may be cruel whatever the status of the person concerned," and thus it was not a requirement that the victim be "foreigners in the enemy territory, inhabitants of occupied territory or detainees."[48]

The indictment

256. In the three Counts of Cruel Treatment; in Count 43 the offence is alleged to have been committed in February, 1996 at Abera village, Parubanga in Amuru District where the accused being a commander in the LRA commanded an attack a group of civilians and ordered forces under his command to inhumanely assault Ocan Vito Acore and Okello David inflicting severe physical pain and suffering; in Count 48 on 4th March, 1996 at

Prosecutor v Strugar, No. IT-01-42-T, Judgement (31 January 2005) at para. 261; Prosecutor v Limaj et al, No. IT-03-66-T, Judgement (30 November 2005) at para. 231; Prosecutor v Martic, No. IT-95-11-T, Judgment (12 June 2007) at para. 79 ("Indirect intent, i.e. knowledge that cruel treatment was a probable consequence of the perpetrator's act or omission, may fulfil the intent requirement for this crime.")

[48] *Blaskic et al. ibid*

Abera village, Parubanga, Amuru District, where it is alleged that the accused being a Colonel in the LRA commanded an attack on civilians and ordered forces under his command to inhumanely assault B2, B4 (P.W.27), B6 (P.W.30), B7 (P.W.28) and Anjulina Oryem Ataro inflicting severe physical pain and suffering; in Count 72 on 16th May, 2004 at Oboo Parish Lamogi, Amuru District, being a colonel in the LRA coordinated, ordered, and directed an armed attack on Pagak IDP camp and by inhumane acts intentionally assaulted H34 (P.W.38) Angee Filda Onen, H35 (P.W.42), H36 (P.W.37) Aber Nancy, H37 (P.W.36), H38 (P.W.35), H39, H67 (P.W.39), H68, H69, H70, H71 and H72.

The elements of the offence

257. For the accused to be convicted of Cruel Treatment as a Grave breach of the Geneva Conventions, the prosecution must prove each of the following essential elements beyond reasonable doubt

a. An intentional act or omission.
b. Which causes serious mental or physical suffering, Or a serious attack on human dignity.
c. A nexus between the armed conflict and the act.
d. The victim not actively involved in the armed conflict.
e. The participation of the accused.

The evidence

258. P.W.18 testified that some time in February 1996 while he was seated in his compound at about 05:00 pm he saw two soldiers approaching from opposite sides of the house. That they came with four abducted people. They went away with him into the neighbourhood where they abducted many other people and tied their hands using torn shirts. That they ordered P.W.18 to take them to other homes where they could find people. P.W.18 led them to the home of his brother called Tabil Oyet. There they found Tabils wife, Achieng Christine, and immediately used an axe to assault her on the head and she died. They also

burnt houses including his. The group went on to Adimac's home. Along the way they abducted a young girl who was returning home from fetching water. She was called Akello Margaret, daughter of the woman they had just killed. The abductees were made to carry sorghum, millet grain, chicken and goats together with other food stuffs looted from Adimac and Inyansio Obol's homes. It was also P.W.18's evidence that more abductions happened when they reached a place called Perecu, found in Parubanga parish. They all left the area when it was getting dark, walked and crossed Ayugi stream and at 09:00 pm reached a place called Orungwa stream where they rested for the night.

259. The group left for Arebe hills at 06:00 am. It consisted of twelve abductees and a number of soldiers, six of whom were armed with guns. They walked through the bushes towards Arebe hills and reached a place called Otorokome at 08:00 am. At 10.00 am, they were stopped by a bigger group of rebels at Ngeto. That one of the soldiers ordered those who had a wife to step aside. Nine of them, including P.W.18 stepped aside, leaving the other people in the line of those without wives. One of the unmarried people was Loum Acupale, aged between 60 and 70 years old. They ordered for Loum Acupale's killing immediately. He was pushed to the ground, beaten with sticks on the head and died in the presence of all the others. The group was ordered to carry the luggage and proceed to Arebe, abandoning Acupale Loum's body at that point. After crossing Ceri River at 04:00 pm, one abductee called Julio could not proceed anymore and said "kill me here". He was beaten on the head using a gun barrel and later using a stick and he died. His body was abandoned there. That upon reaching Arebe hills at about 05:00 pm the accused shouted while giving orders to the soldiers who had captured the abductees that; '*askari, cut the sticks and beat these people and kill all of them.*' The accused was standing at a higher point fifteen meters away. P.W.18 recognised the accused very well as a person he had interacted with during their childhood. Further, that as soon as the orders were given the soldiers tore the abductees shirts and used the material to tie their hands at the back. Save for the only girl who was in the group, the rest of them were pushed aside and each allocated a soldier to beat them on the head using the *odugu* tree sticks until they lost consciousness and died. P.W.18 regained his consciousness at dawn and heard his son, Okello David who had also regained his consciousness calling out his names that "*Acori, come and help me*". P.W.18 managed to

untie himself since the strings around his hands had loosened during the beating exercise. He pulled his son out of the pile of dead bodies. P.W.18's son tried to carry him but failed since one of his arms had been badly injured and got paralyzed. The two walked back home since their captors had already left. Okello went ahead as P.W.18 was moving slowly supporting himself with a walking stick. P.W.18 saw the dead body of Julio before he crossed the Ceri stream. By that time, the body of PW 18 was full of blood and flies and he decided to wash himself in the stream. Save for the young girl and the boy in the group, all the other abductees died and their bodies were abandoned at that very place. P.W.18 and Okello were treated at Pabbo health Centre and later Lacor hospital where they spent a full month before being discharged. P.W.26 continued to look after them from home until they fully recovered. Unfortunately, Okello did not testify as he was struck dead by lightening a few years later.

260. The testimony of PW 18 was corroborated by P.W.19 who witnessed the attack by the rebels and subsequent abduction of the twelve people, including her husband Okello and P.W.18. She also confirmed witnessing the killing of Christine Achieng, mother to Acaba the boy who had escaped from abduction and was being looked for by the rebels. After the killing of Achieng, P.W.19 was beaten by the rebels using a pestle. She was saved by the accused who commanded those assaulting her to stop but by then she had already been hit on the shoulder.

261. P.W.27 was living in the IDP camp at Pabbo together with her family in 1996. On 4th March, 1996 she went out to the village about 3 miles away to perform a ritual for twins and for one of the girls who had been defiled. That LRA soldiers including Kobi, Kapere and Acili all led by Kwoyelo attacked and abducted them at midday. They walked with them westwards for three hours. They reached Olinga between 03:00 pm and 04:00 pm. Here, they divided them into three groups of the elderly, women and the youth. P.W.27 was placed among the youth. The rebels were armed with pangas, sticks and guns. They threatened to kill them. It was also P.W.27's evidence that at that point Kwoyelo who was the commander of the group started beating them and all the others joined in the beating. That as Kwoyelo was hitting one old man, Rodento Ochola, with an axe on the head, all

the youth decided to run away, scattering in different directions, because they were going to be the next targeted group. No person from the old people's group has ever come back. They included Masimo Oboma and Onayo. In cross examination, the witness confirmed that he first came to know the accused way back in 1980 and recognised him because his face was not disguised during the attack. Further, that the accused was older than him although he could not tell his actual age. The witness also knew the accused person's parents.

262. P.W.28 corroborated the testimony of P.W.27 right from the time of celebrating the twins' ceremony and all through to the abduction. P.W.28 in whose home the ceremony was being conducted was also the mother of the twins. She added that all her valuables and foodstuffs in the house were taken by the rebels. She stated that she did not know Kwoyelo before that day. It was her first time to see him at her home and he was holding a short stick and coordinating and commanding the rest of the soldiers. That while on the way taking some temporary rest for the night P.W.28 was shown Kwoyelo again. This time, he waspatrolling around and overseeing the whole operation and the soldiers were responding tohis orders quickly. That it was the other abductees, including Adoch Anjulina who confirmed Kwoyelos identity to the witness. P.W.28 also stated that the next morning theywalked and reached Olinga where they found a woman pounding cassava and Kwoyelo told her that *"you people whenever we pass here you report us to the governmentsoldiers…"* That he then used the same pounding stick to hit her at the back of the head and she died.

263. It was also her testimony that the rebels cut sticks from *Odugu* tree about the size of her forearm, and told them to lie in a circle with their heads touching. Their group consisted of ten women. They were told to lie facing down but those with children ahead of them. That she too lay on her stomach despite being pregnant. The beating began. Since she was pregnant, she was told that she was going to give birth to a male child who would become a 'home guard' to disturb and shoot them. She was then ordered to open her palms for them to be cut with a panga. They were told to lie down again and beaten four strokes of the machete. The skin on their backs was torn and felt like it was on fire. As a result of the

beating, PW 28 stated that even now she cannot do much work. The women were also told that they would never see their husbands again.

264. P.W.30 corroborated P.W.27 and P.W.28 on how rebels carrying guns abducted them from P.W.28s home and led them to the bush where they caned them seriously with *Odugu tree* sticks. That they were later told to get up and then to lie down again. They began beating them afresh using pangas. P.W.30 felt a lot of pain. Her muscles felt like they were vibrating. Her body was covered in blood. The injuries were on her entire back which was covered with wounds. They then told them to get up and begin running without looking back. That she was limping and could not run fast. She, together with Anjulina Oryem Ataro and others managed to run back to the camp.

265. P.W.31, the signaller, testified that he had the codes for all the commanders, including Kwoyelo, and heard them when they were planning on how to attack Pagak IDP camp. He was also present when the abductees were brought to the accused who gave orders for the abductees to be killed. They were beaten with sticks on the head and they cried in different languages. P.W.31 knew the accused very well as they had lived together for a number of years at the sick-bay after his abduction.

266. P.W.32 the IDP Camp Commandant saw the victims of the attack upon their return and listed their names and age in the notebook exhibited as P. Ex.11. He also listed all those that were injured as well as those killed (and where they were buried). He participated in the burials and in locating the relatives of the victims. P.W.33 testified that they had been collected by the government to go and live in the camp. That it would have been difficult to protect them if they were scattered in their homes since the rebels were operating all over.

267. The rebels would come, loot things like chicken and other foodstuffs and take abductees with them. Some would be injured and others killed. That after P.W.33 being captured, they began beating them, some to death. They were put in two lines. In the line to the east, the legs faced the east and the head faced the west. Those in the line to the west faced the east and the legs faced the west. They all lay down and were not supposed to look at anyone.

Those without children would be beaten on the back; and for those with children they would start by hitting the kid. P.W.33 had a child strapped on the back when they began hitting her. They hit the child once and on the second strike she died. They then proceeded to the woman next to her. They continued hitting the others. She was lucky that they skipped her. They threw their clubs down and left thereafter. P.W.33 eventually got up, jumped over the dead bodies and walked in the direction of a nearby anthill where she hid under a shrub.

268. P.W.35 was also one of the victims. She testified that she had a child on her back when she was a captive of the rebels. They told her and the others to adjust the children higher on their backs and leave their bottoms exposed. They carried the children on their backs and lay down. They began flogging them on the head instead. She fainted after she saw two people being beaten. That they were using *Odugu tree* logs the size of her forearm (about three inches in diameter). After two weeks she regained her consciousness at Lacor Hospital.

269. As for witness P.W.36 she stated that they were told to lay down. That the rebels cut logs and used them to beat them on the head. Others were killed and others like her became unconscious. This was at 01:00 am. She was the first to regain consciousness at around 06:00 am and returned to the camp while carrying her child. She was admitted in Lacor hospital for the next six months. The witness displayed the scars at the back of her head. The injuries affected her health; She is no longer as healthy as she used to be. She still feels pain in her head even up to now. She had to undergo skin grafting to heal the woundon the head. The pain comes every now and then. She now has to soak her head with waterbefore she goes to the garden to dig.

270. P.W.37 testified that on 16th May, 2004 at around 6.00 pm as she prepared to take a bath, bullets began flying and they were abducted. One of the soldiers had died. The body was given to a pregnant lady to carry. The lady's father-in-law pleaded with their abductors to release her because she had left a child at home. They threatened to kill her if he insisted and he gave up pleading for her. The pregnant woman was directed to untie the body and

it fell down. She was asked to lie facing up beside the body. The witness was ordered to stand on the side. They took a knife and slit open the belly of the lady from the chest downward. The baby became exposed and the witness passed out while standing. The woman died and the baby survived for a short while but died shortly thereafter. They ordered the rest to move on. That their captors began cutting branches of sticks and preparing a whip out of them. They said at the count of ten they would begin to flog them. By the time they came to beat PW37 she had lost consciousness. Her caretaker told her that it was after two weeks that she regained consciousness while in Lacor hospital. The witness had severe injuries on her head.

271. P.W.38 narrated that on that day she returned from the garden from fetching firewood between 5.00 pm and 6.00 pm. That the rebels began beating people; hitting them on the back of the head, and killing others. They were all lying down. After she was hit she died and did not know what followed. That on regaining consciousness while at Lacor Hospital, she felt pain in the head. Her right eye had ben pierced with a bayonet. They had also pricked her ear. The witness tried but failed to get up and walk. Her thigh had been beaten and she has a constant headache.

272. P.W.39 stated that at around 8.00 pm some armed group entered the camp. There was a general alert that an armed group had entered the camp. That they came to her and asked her whether she was not the sister of the camp commandant, Lemoi Denis. When she did not confirm they began beating her. They hit her child whom she was carrying on her back and then hit her on the head. She had a nine months old child strapped on her back; Ocira Derick. The kid died instantly and she too died. That she "resurrected" after some heavy rainfall fell on her but she was left with a scar. It took about three weeks before she regained consciousness. She had a wound at the spot on the back of her head and even now hair does not grow there anymore. The court viewed the scar measuring about 6 cms by 1.5 cms. The witness had been admitted at Lacor Hospital for a month.

273. It was the evidence of P.W.42 that on 16th May, 2004 while coming from cutting trees for burning charcoal the rebels captured him. They had cleared an area and driven poles of

about six inches in diameter and one-foot-long into the ground. They tied their victims' hands with wires and made them to bend and place their head on the poles with the mouth onto the pole. PW42 was in the second row. The people on the first line were beaten and died as he watched. He was the third person in the line. They had cut logs and sharpened at the head into the shape of a mingling stick. That they would use the stick at the flattened end to hit the victims on the back of the head. PW42 stated that he was hit on the back of the head and was only saved by the grace of God. He lost consciousness. That he had to be taught how to speak all over again. He has never recovered fully up to now. If he is exposed to the sun beyond 10:00 am he feels pain in the head. He was admitted in hospital for one month and two weeks and at trial, the court viewed a scar at the back of his head in the shape of letter "H" measuring nine cms long on the left, 4.5 cms in the middle and 4 cms on the right.

Submissions of Counsel

274. The submissions of counsel for the accused and those of the prosecution have already been outlined. In their final submissions, counsel for the accused did not state any position regarding this category of offences apart from a general denial and an alibi.

The analysis

275. During cross examination, P.W.18 stated that his medical report from Lacor hospital regarding the injuries sustained and treatment received got burnt some years ago. Even without the medical report the Court believes P.W.18's testimony especially that he and Okello suffered the said injuries. The Court sees no motive for him to lie. The court viewed the scars on his body and P.W.19 confirmed to have seen them when they were still fresh because she nursed both P.W.18 and Okello, first at Lacor hospital when and where they were initially admitted, and secondly, at home after being discharged. P.W.26 the wife to Okello also confirmed having continued to wash and nurse her husband's wounds when he returned home from hospital. Moreover, in 2000 P.W.18 had taken the police to the scene where he and Okello together with the other seven people who died, had been assaulted.

He was then asked to write a statement by the police. All this evidence was never challenged by the defence.

276. The witness described how the beatings inflicted on him, his son Okello and the others were done and also showed the scars on the body, especially the head, which were viewed by the court. He stated that he had been kicked on the mouth and lost two front teeth from the upper jaw and the gap is still visible. That the scar on the forehead was sustained as a result of injuries inflicted by using a gun bayonet. The same bayonet was used to pierce and tear the left ear.

277. From the above evidence, it is clear that the physical assaults, bodily injuries and suffering inflicted on the victims, Ocan Vito Acore P.W.18 and Okello David was an intentional act calculated at causing serious mental and physical suffering upon them. They were kept for a prolonged period under captivity where they witnessed a series of heinous crimes being committed on people whom they knew very well and had lived with. The brutal murders of Julio Ngwe and Loum Acupale, as well as the beatings on the head that followed, was a serious attack on human dignity and a threat of imminent death.

Findings

278. In addition, the victims suffered further mental torture and anguish as they continued to witness the desecration and profanation of dead bodies abandoned in the forest. Some were eaten away by pigs. The victims also extracted themselves from a heap of dead bodies when they regained their consciousness. Because of the permanent physical injuries caused on his body, P.W.18 was no longer able to dig or work and earn income to sustain himself. In all this, the victims were treated in ways that contravene the recognition and respect owed to them by virtue of being humans. This was cruel treatment. The defence made no submissions in respect of the first three elements which we find the prosecution to have proved beyond reasonable doubt.

279. Through the testimonies of P.W.18, P.W.19 and P.W.26 the prosecution demonstrated that the victims herein, Ocan Vito Acore P.W.18 and Okello David, enjoyed a protected status as they never took part in the armed conflict. During cross examination P.W.18 confirmed that he had served as Chairman Local Council (LC) I and II at some point in time. He also assisted Local Defence Units (LDUs) officials in distributing food stuffs but never gathered intelligence for government or Uganda People's Defence Forces (UPDF). Instead, P.W.18 asserted that it was the local chief 'Rwot – Kweri' who provided intelligence to the government. This testimony was not challenged by the defence. Accordingly, we find the fourth element proved.

280. There is sufficient evidence on record to prove beyond reasonable doubt that the attack on the victims and the subsequent beatings inflicted on them by the accused and other soldiers were intentional. As described by all the witnesses, even without medical reports, the court is convinced that serious physical and mental suffering was occasioned on the victims. The accused personally used an axe and sticks from the *odugu* tree to hit the victims on the back of the head (occiput). This was a well calculated act. P.W.28 (B7) and P.W.30 (B6) were lucky to have survived after the kind of assault they suffered. They will however treat the injuries sustained forever as they will never fully recover. The other abductees did not survive; they were beaten to death in the same way. P.W.27 (B4) and other youths witnessed the imminent death and ran away. But all the witnesses, and the other victims that later died, were traumatized while in captivity and as they walked long distances witnessing the atrocities their captors committed along the way. This was evidence of mental torture and a serious attack on human dignity.

281. There was no evidence adduced to suggest that the victims herein were participating in an armed conflict. Instead, all the evidence available points to the fact that the victims were civilians who had fled their homes to go and live in the IDP camp at Pabbo due to the insurgence that was being experienced in the region at the time. Considering the above evidence and analysis of the relevant testimonies, it is clear that the accused participated in the commission of this crime directly, and also commanded other soldiers to beat and kill their victims. That was cruel treatment occasioned on the victims. Kwoyelo should

therefore be held liable for the deliberate targeting of civilians, extrajudicial killings, beatings and killings of abductees, forced labour and mistreatment, looting, and the psychological impact inflicted by rebels under his command. We find that the prosecution has proved all the elements of this offence beyond reasonable doubt. The accused person's alibi is rejected as the prosecution has satisfactorily connected him to the offence and also firmly placed him at the scene of crime at the material time.

282. All the witnesses said that this attack on Pagak IDP camp was a revenge against the people for celebrating and jubilating over the return of Captain Abola who had escaped from the rebels and carried along with him some other people and weapons. There was no evidence called for the defence regarding this offence. After due consideration of the above testimonies of the witnesses, the court finds that save for H70 and H72, the victims listed herein and others still at large were intentionally assaulted by their captors. From the descriptions of the weapons used, and the manner in which they were applied in targeting delicate parts of the body i.e. the back of the head, we have no doubt that this was a serious attack on human dignity. The permanent scars, injuries and general effects on the victims' bodies are a clear manifestation of the grave assaults they were subjected to. The rebels forced the abductees to carry heavy loads and subjected them to physical abuse. These assaults together with the inhuman treatment of beating and fatally wounding, and killing human beings in the presence of the victims caused them serious mental and physical suffering. Moreover, the victims were not involved in any armed attack. The evidence shows that the victims were part of the community that was kept and guarded in an IDP camp by government forces to save them from the rebel attacks. Ample evidence has been adduced to the satisfaction of the court to show that indeed the accused was involved in the planning and execution of this whole attack. He was aware of what was going to take place and he monitored and also commanded the operation from a distance. He even accompanied the attackers up to some point. When they returned after the attack, they reported to him and after the debriefing he also updated Joseph Kony who, according to P.W.31 the signaller, ordered him to kill all the abductees that had been brought to him. Indeed, the accused promptly executed those orders and instructed soldiers to kill them. The soldiers obliged, and following his orders killed the abductees. Once again, for the

avoidance of unnecessary repetition, the last ingredient as to whether or not the accused did participate in these acts, is deferred, to be considered at the end of the combined analysis.

283. No evidence has been adduced to maintain the victimisation of H70 and H72. As regards the rest of the elements, this Court agrees with the assessors. Consequently, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of Cruel Treatment as a grave breach of the Geneva Conventions in respect of the three (3) Counts being, Counts; 43, 48 and 72.

The offence of Other Inhumane Acts

284. Crimes against humanity typically include acts such as murder, extermination and enslavement but also the rather enigmatic catch-all clause of, "**other inhumane acts**." The concept was coined in the Nuremberg Statute, but its extent has changed significantly as has that of international criminal law as a whole. Case law suggests that at least certain types of sexual violence, forcible transfer of people, desecration of corpses, attempted murder, extensive destruction of property and the practice of, "forced marriage," could have in various courts been deemed, "other inhumane acts." This provision therefore allows for flexibility in prosecuting crimes that may not have been foreseen but are nonetheless egregious, ensuring that justice can be served even as the nature of conflicts and atrocities evolves.[49] In the case of ***The Prosecutor v. Milomir Stakic,***[50] The Appeals Chamber while disagreeing with the Trial Chamber's concerns about the principle of *nullum crimen sine lege* noted that the concept of *"other inhumane acts"* is well established in customary international law and serves as a necessary residual category to capture a range of egregious behaviours that might not be specifically enumerated.

[49] *https://link.springer.com/chapter/10.1007/978-94-6265-443-3_5*
[50] *Case N.: IT-97-24-A*

285. The offence of "other inhumane acts" as a crime against humanity under customary international law includes several key elements:

i. Act or Omission: There must be an act or omission that is of similar seriousness to other crimes against humanity, such as murder, extermination, or enslavement,[51]

ii. Intent: The perpetrator must have intended to commit the act or omission, knowing it would cause great suffering or serious injury to the body or mental or physical health of the victim,

iii. Context: The act or omission must be part of a widespread or systematic attack directed against a civilian population, and

iv. Knowledge: The perpetrator must have known that the act or omission was part of a widespread or systematic attack against a civilian population[1].

The indictment

286. Regarding the two Counts of other inhumane acts; in Count 42 the offence is alleged to have been committed in February, 1996 at Abera village, Parubanga in Amuru District, the accused being a commander in the LRA commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault Ocan Vito Acore and Okello David inflicting great physical pain, suffering and serious bodily injuries; in Count 47 it is alleged that on 4th March, 1996 at Abera village, Parubanga, Amuru District, the accused being a Colonel in the LRA commanded an armed attack on civilians an ordered forces under his command to inhumanely assault B2, B4 (P.W.27), B6 (P.W.30), B7 (P.W.28) and Anjulina Oryem Ataro inflicting severe physical pain and suffering; in Count 71 it is alleged that on 16th May, 2004 at Oboo Parish Lamogi, Amuru District, the accused being a colonel in the LRA coordinated, ordered, and directed an armed attack on Pagak IDP and by inhumane acts intentionally assaulted H34 (P.W.38) Angee Filda Onen, H35 (P.W.42), H36 (P.W.37) Aber Nancy, H37 (P.W.36), H38 (P.W.35), H39, H67 (P.W.39), H68, H69, H70, H71 and H72.

[51] *https://www.hrw.org/reports/2004/ij/icty/5.htm*

The elements of the offence

287. Inhuman treatment has been defined as treatment which causes severe mental or physical suffering but which falls short, or lacks one of the elements of, torture (e.g., being done for prohibited purpose or with official sanction. Whether a given conduct constitutes inhuman treatment is ultimately a question of facts.[52] For the accused to be convicted of having committed other inhumane acts, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

    a. Great suffering, or serious injury was inflicted by an inhumane act;
    b. it was done under the control of the perpetrator;
    c. As part of a widespread or systematic attack directed against a civilian population.
    d. The participation of the accused.

The evidence

288. Evidence has been led by P.W.18, P.W.19 and P.W.26 in count 43 to show how the accused commanded an attack and many people abducted, beaten and others killed. Property, foodstuffs and livestock was also looted and the people made to carry. The survivors herein, Acori Vito (D1) and David Okello (D2) witnessed a range of egregious behavioursand horrendous acts and acts of extreme violence committed by the rebels along the way which caused them fear and mental suffering. These included the abduction of civilians, the killing of children, women, and elderly individuals like Loum Acupale. P.W.18 described how he and the other abductees, under Kwoyelo's orders, were forced to carry luggage including looted items.[53] The incident took place during dry season, and at the time people had just harvested sim sim and sorghum grains, which the rebels took. They also took chicken (from the home of Adimac) and cassava flour[54] Oyet's wife.

[52] *The Trial Chamber, in the Delacic et al, the Trial Judgment, para. 542*
[53] *Record of Proceeding Vol. 2 Part 4, page 124*
[54] *Record of Proceeding Vol. 2, Part 5, page 118*

289. Cogent evidence was presented by P.W.27, P.W.28 and P.W.30 regarding the twins' ceremony (incident B) that happened on the 4/03/1996 at Abera Village, Parubanga Parish, Pabbo Sub County, Kilak County, now Amuru District. This evidence been evaluated when considering the factual basis in count 48. It shall not be recounted here. The witnesses narrated how the rebels attacked them at P.W.27s home at about 01:00 pm as they were concluding the ceremony. The accused was commanding the rebels.

290. During the attack on Pagak, the rebels looted and destroyed property, beat up the victims and killed some of them. Even young children were killed in front of their parents. Save for victims H70 and H72 whose alleged victimization is not supported by any evidence**,** the rest i.e. H34, H35, H36, H37, H38, H39, H67, H68, H69 and H71, were intentionally assaulted, by inhumane acts, using pangas, knives, *Odugu* tree sticks and guns, thereby occasioning them great suffering and serious injury. This operation was part of a widespread and or systematic attack directed against a civilian population that were taking no active part in the hostilities.

Submissions of Counsel

291. The Prosecution submitted that assaulting civilians and subjecting them to witness the beatings and killings of other abductees, burning their houses and destroying their property caused severe physical and or mental pain or suffering, amounting to torture.[55] The cruel, inhumane, degrading treatment was carried out to intimidate and or punish the civilian population for their perceived support for the government.[56] Furthermore, this treatment was carried out when the victims were under the control of the LRA attackers.

292. However, the defence in its submission argues that the prosecution failed to specify the international legal framework under which this charge is brought, rendering the charge ambiguous and warranting its dismissal. The defence asserts that the charges violate Articles 28 (12), 28(1), and 44 of ***The Ugandan Constitution***, claiming that the offense is

[55] *D1, D2, TR, B2 REDACTED*
[56] *TR, REDACTED*

not clearly defined and the punishment is not provided for, thus lacking legal certainty. It should be noted that this objection has already been dealt with by the court herein above.

The analysis

293. Flowing from the above evidence and discourse, the court is satisfied that the great suffering and or serious injury caused to the victims was inflicted by an inhumane act, as demonstrated by the witnesses, and as part of a widespread or systematic attack directed against a civilian population. The victims were part of the wider civilian community that was living in the IDP camp. They were not taking an active part in any armed conflict. Accordingly, the prosecution has proved all the ingredients of this offence beyond reasonable doubt. The court is in agreement with the prosecution that the assaults, beatings and killings inflicted on the victims as described by the witnesses were intentional and amounted to great suffering and or serious injury. These deeds were inflicted by an inhumane act.

294. Moreover, it was done as part of a widespread and or systematic attack directed against a civilian population which is a violation of customary international law. These victims were civilians. Acori Vito (D1) and Okello David (D2) also were civilians, father and son, who the rebels just picked from their homes while going about their usual routines. They were beaten and left for dead in a pile of dead bodies where they only managed to extract themselves upon regaining consciousness. These acts caused serious mental and physical suffering and injury and therefore constituted a serious attack on human dignity. The rebels committed a series of heinous acts of abducting women, children and men, including old ones. They used pangas, guns and sticks to severely beat and sometimes kill their victims. Looting and forcibly taking property, foodstuffs and livestock, burning houses and destroying their property caused severe physical and or mental pain or suffering. Specifically, B2, B4, B6 and B7 were beaten and left for dead while Anjulina Ataro was killed. The survivors have scars and suffered lifelong effects. Once again, for the avoidance of unnecessary repetition, the last ingredient as to whether or not the accused did participate in these acts, is deferred, to be considered at the end of the combined analysis.

The findings

295. No evidence has been adduced to maintain the victimisation of H70 and H72. As regards the rest of the elements, this Court agrees with the Assessors. Consequently, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of Other inhumane acts in respect of the three (3) Counts being, Counts; 42, 47 and 71.

The offence of Outrages against personal dignity

296. Article 3 (1) of ***The Geneva Conventions*** specifically addresses "outrages upon personal dignity," which includes acts of humiliating and degrading treatment. This provision is part of the common Article 3, which applies to non-international armed conflicts and mandates humane treatment for all persons not actively participating in hostilities. According to ***Black's Law Dictionary*** 'outrage' means an act of wanton cruelty or violence; any gross violation of law or decency. It could also mean to arouse fierce anger, shock or indignation in someone. The term "outrages upon personal dignity" encompasses a range of actions that violate the inherent dignity of individuals, such as physical or mental abuse, sexual violence, and other forms of inhumane treatment[23]. These acts are strictly prohibited under international humanitarian law and are considered serious violations that can constitute war crimes.[57]

297. The Appeals Chamber at ICTY in the ***Kunarac case***[58] found that the Trial Chamber was not obliged to define or list the specific acts which may constitute outrages upon personal dignity. Instead, it properly presented the criteria which it used as a basis for measuring the humiliating or degrading character of an act or omission. The scope of this war crime has been defined by the International Criminal Tribunal for the former Yugoslavia (ICTY).[59] The Trial Chamber had correctly defined the objective threshold for an act to constitute an

[57] *See also Prosecutor v. Musema (ICTR-96-13-T), Trial Judgment, 27 January 2000, para. 285*
[58] *IT-96-23 & IT-96-23/1-3*
[59] *See also Prosecutor v. Musema (ICTR-96-13-T), Trial Judgment, 27 January 2000, para. 285.*

outrage upon personal dignity. It was explained that outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity".[60] While referring to the ***Aleksovski*** case, it was further stated that the humiliation of the victim must be so intense that any reasonable person would be outraged.[61]

298. The *mens rea*[62] of the offence of outrages on personal dignity requires only a knowledge of the possible consequences of the charged act or omission i.e. that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the actual consequences of the act.

299. With respect to the *actus reus*, the ***Aleksovski*** Trial Chamber defined outrages upon personal dignity as particularly intolerable forms of inhumane treatment that cause 'more serious suffering than most prohibited acts falling within the genus'.[63] It further stated that to be considered as an outrage upon personal dignity, the act or omission 'must cause serious humiliation or degradation to the victim".[64] Since the level of seriousness of humiliation or degradation is subjective (sensitive persons would be more prone to perceive their treatment as humiliating), the Chamber added an objective element and specified that 'the humiliation must be so intense that the reasonable person would be outraged'.[65] This approach of the *actus reus* was confirmed in the ***Kvočka*** *case*, but the *Kvočka* Trial Chamber also approved the inclusion of the victim's temperament or sensitivity, in addition to the 'reasonable person' standard, when assessing whether the act is an outrage upon personal dignity.[66] Finally, the Kunarac Trial Chamber asserted that the humiliation or degradation inflicted upon the victim did not need to be lasting for the act to be qualified as an outrage upon personal dignity.[67]

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[60] *Aleksovski Trial Judgement, para 56, quoted in Trial Judgement, para 504*
[61] *Aleksovski Trial Judgement, para 56, quoted in Trial Judgement, para 504*
[62] *Kunarac, Appeal Judgment, para 156 - 160*
[63] *Prosecutor v. Aleksovski (IT-95-14/1-T), Trial Judgment, 25 June 1999, para. 54. Ibid., para.56*
[64] *Ibid., para. 56*
[65] *Ibid*
[66] *Prosecutor v. Kvočka et al. (IT-98-30/1), Trial Judgment, 2 November 2001, para. 167*
[67] *Prosecutor v. Kunarac et al. (IT-96-23 & 23/1-T), Trial Judgment, 22 February 2001, para. 501,*

The indictment

300. Of the six Counts of Outrages Against Personal Dignity, three relate to life threatening situations; in Count 44 the offence is alleged to have been committed in February, 1996 at Abera village, Parubanga Amuru District where the accused being a commander in the LRA commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault D1and D2; in Count 49 the offence is alleged to have been committed on 4th March, 1996 at Abera village, Parubanga in Amuru District where the accused being a colonel in the LRA commanded an armed attack against a group of civilians and ordered forces under his command to inhumanely assault B2, B4, B6, B7 and Angelina Oryem Ataro; in Count 73 the offence was committed on 16th May, 2004 at Oboo Parish Amuru District being a colonel in the LRA coordinated, ordered and directed an armed attack on Pagak IDP camp and by inhumane acts intentionally assaulted H34 (P.W.38) Angee Filda Onen, H35 (P.W.42), H36 (P.W.37) Aber Nancy, H37 (P.W.36), H38 (P.W.35), H39, H67 (P.W.39), H68, H69, H70, H71 and H72.

The elements of the offence

301. For the accused to be convicted of having committed Outrages Against Personal Dignity, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

a. There was a serious humiliation, degradation or a serious attack on the human dignity of the victim;
b. The nexus to the armed conflict of a non-international nature.
c. The act was committed with the knowledge of the possibility of that effect.
d. The participation of the accused.

The evidence

302. The circumstances in which the events occurred have been stated in detail previously in this judgment when considering the respective incidents. There is sufficient evidence to show that the LRA attackers humiliated civilians and subjected abductees to physical and mental trauma as some were forced to kill their fellow abductees while others were killed in their presence to instil fears.[68] Weapons such as pangas, sticks, knives and guns were used to inflict injuries and killings. This evidence was discussed in detail in counts 42 and 43, to which the court makes reference.

303. The evidence regarding the twin's ceremony of 4th March, 1996, was adduced through the testimonies of P.W.27, P.W.28 and P.W.30 and has been analysed mainly in counts 48 and 47. Briefly, the witnesses narrated how the rebels attacked them at P.W.27s home at about 01:00 pm as they were concluding the ceremony.

The submissions of Counsel.

304. The prosecution contends that there is sufficient evidence to show that LRA attackers humiliated civilians and subjected abductees to physical and mental trauma as some were forced to kill their fellow abductees while others were killed in their presence to instil fears.[69] Weapons such as pangas, sticks, knives and guns were used to inflict injuries and killings.

The analysis

305. Acori Vito (D1) and Okello David (D2) were civilians, father and son, who the rebels just picked up from their homes while going about their usual routines. They took no active part in the hostilities. They were beaten and left for dead in a pile of dead bodies where they only managed to extract themselves upon regaining consciousness. That brutal

[68] *See evidence of PW32, PW35 REDACTED and many others*
[69] *See evidence of PW32, PW35 REDACTED and many others*

behaviour outraged all civilized standards. No doubt, these assaults were a serious humiliation, degradation and or a serious attack on their human dignity. The rebels committed a series of heinous acts of abducting women, children and men, including old people, using pangas, guns and sticks to severely beat and sometimes kill their victims. Looting and forcibly taking property, foodstuffs and livestock, burning houses and destroying their property caused severe physical and or mental pain and suffering.

306. Specifically, B2, B4, B6 and B7 were beaten and left for dead while Anjulina Ataro was killed. The survivors have scars and suffered lifelong effects. These were intolerable forms of inhumane treatment that caused more serious suffering to the victims. The victims in the Pagak attack H34, H35, H36, H37, H38, H39, H67, H68, H69 and H71 were intentionally and inhumanely assaulted using pangas, knives, *odugu* tree sticks and guns thereby occasioning them great suffering and serious injury. That brutal behaviour outraged all civilized standards and amounted to serious humiliation, degradation and attack on the human dignity of the victims. By using such weapons and methods of assault on civilians taking no active part in the hostilities, the perpetrator had knowledge of the possible consequences of the charged act or omission i.e., that it could cause serious humiliation, degradation or affront to human dignity. Once again, for the avoidance of unnecessary repetition, the last ingredient as to whether or not the accused did participate in these acts, is deferred, to be considered at the end of the combined analysis.

The findings

307. As regards the rest of the elements, this Court agrees with the assessors. Consequently, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of Outrages against personal dignity in respect of the three (3) Counts being, Counts; 44, 49 and 73.

The offence of Kidnap with intent to murder

308. The accused is indicted with fourteen (14) Counts of Kidnap with intent to murder, being Counts 5, 6, 8, 10, 11, 12, 33, 34, 35, 36, 37, 39, 40, and 41; **Section 243 (1) (a) of The Penal Code Act** provides that,

> "Any person who by force or fraud kidnaps, abducts, takes away or detains any person against his or her will, with intent that such person may be murdered or may be so disposed of as to be put in danger of being murdered; […] commits an offence and is liable on conviction to suffer death.

Subsection (2) of the same section provides that

> Where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused person shall be presumed to have had the intention and knowledge stipulated in subsection (1) (a) […].

309. Kidnapping means, "the taking away or transportation of a person against that persons will, usually to hold that person in false imprisonment, or confinement without legal authority. This may be done for ransom or in furtherance of another crime" (see ***Uganda v. Musimami Wilson Kiviri and 2 others***[70]**)**.

The indictment

310. Regarding the fourteen Counts of Kidnap with intent to murder, in count 5 the victim is C4, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th September, 1994; in count 6 the victim is B4, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th September, 1994; in count 8 the victim is C5, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru

[70] *Criminal Session Case No. 31 of 2011 and Wikipedia-The Free Encyclopaedia*

district on 4th September, 1994; in count 10 the victim is Okot Charles, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th September, 1994; in count 11 the victim is Ojok Patrick, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th September, 1994; in count 12 the victim is Ogena Simon, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th September, 1994; in count 33 the victim is Rodento Ochola, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 34 the victim is Massimo Oboma, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 35 the victim is Oyet Samuel, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 36 the victim is Ocii Doctor, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 37 the victim is Sabino Obooli Oola, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 39 the victim is Okot Antonio, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 40 the victim is Okoya Maurencio, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996; in count 41 the victim is Onai, alleged to have been abducted by force as to be put in danger of being murdered at Abera village in Amuru district on 4th March, 1996.

The elements of the offence

311. For the accused to be convicted of having committed the offence of Kidnap with intent to murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:

    a. There was the unlawful taking of the victim;

b. The taking was by the use of force, fraud, or coercion;
c. With the intention of killing or exposing the victim to death; and
d. That the accused participated.

The evidence

312. Evidence from seven prosecution witnesses: P.W.7 to P.W.13 (C1, C2, C4, C5, C6, C7 and C19 testified explaining the events during the incident which happened in September, 1994 at Abera village, Parubanga Parish, Pabbo Sub County, Kilak County in Amuru District. All the victims had been forcefully taken away from their homes to different places including Ayugi stream, Ceri stream, Kilak Hills and surrounding areas where the rebels continued to carry out abductions and lootings. The attacks were violent and committed at night by the rebels who were armed with guns, pangas and sticks. The victims were tied with ropes around their waists and made to walk in a single file. They were warned not to try to escape because they would be killed. Indeed, those who tried to escape on the way, just like those who became tired and could not walk any farther, were either killed by their abductors or badly beaten and left unconscious along the way. C5 tried to run away but the rebels fired gunshots at him and he surrendered.

313. From the evidence, during the attack some victims were threatened with death. They faced the danger of death as they walked from their homes through the bush, because the rebels committed heinous crimes along the way. This also instilled a lot of fear in them that they could be murdered or disposed of as to be put in danger of being murdered. C1 was hit with a stick and injured on the back of his head. He has a visible scar on that spot. When he and the others escaped, the kidnappers fired gunshots in an attempt to murder them but fortunately, the bullets missed the targets. C6 and C7 were badly beaten by the Kidnappers, C6 for wasting food and C7 when he got tired and could not walk any farther. C7's head was cut using the blade of a small hoe (*Koyo*). He was hit multiple times on the chest with the barrel of a gun barrel and left unconscious by the road. He was later discovered and rescued the following day by other abductees who had been set free by the kidnappers. The kidnappers attempted to kill C6 when he escaped from them, gunshots were fired after him

but fortunately none caught him. All the abductees were made to walk for a long distance while carrying heavy luggage. **Okot Charles, Ojok Patrick, Ogena Simon and others** were kidnapped or abducted in 1994. It's over 29 years since they were kidnapped and their whereabouts are not known or heard of.

The submissions of counsel

314. The defence contends that the inclusion of the accused's position as a commander in the charge sheet is unnecessary and that the particulars of the offense are defective. However, the prosecution argues that these details are crucial for providing context and demonstrating the accused's role in the crime. The charges were framed under Section 243 (1) (a) of ***The Penal Code Act***, which addresses kidnapping with intent to murder, and the evidence supports the prosecution's claims. The court notes however, that including or excluding the accused's position as a commander in the indictment would not render the indictment defective.

315. The defence asserts farther, that the prosecution has failed to prove, to a standard beyond reasonable doubt, that the accused had the intent to murder the victims in the alleged kidnappings. That the evidence points to a different motive, such as recruitment into the rebel ranks or to carry out tasks for the rebels. Additionally, they insist that the alibi presented by the accused casts doubt on the prosecution's case and urge the court to acquit the accused of the charges, as the essential ingredients of the offence of kidnap with intent to murder have not been established. The defence argues that the prosecution did not establish contemporaneous intent to murder, citing the case of ***Mukombe Moses Bulo v. Uganda***, which requires such intent at the time of the kidnap.

The analysis

316. The court is in agreement with the prosecution's submission that contemporaneous intent to murder can be inferred from the actions and statements made by the accused and his associates during the kidnapping incident. The victims were all forcefully taken to Ceri

river. They had gone to Ocii's home to perform the ceremony. The evidence of P.W.27 (B4), P.W.28 (B7), P.W.29 (B1) and P.W.30 (B6) proves that the rebels ordered them not to run, gathered them in the compound, made them to carry luggage including foodstuffs forcefully taken from the home where the ceremony was held and from other homes around. The rebels continued abducting more people along the way as they moved for the next two days. P.W.27, P.W.28, P.W.29 and P.W.30 returned but the rest have to this day not come back home. P.W.28 and P.W.30 were beaten with sticks and machetes. Just like the other women, they sustained injuries on their backs, which never healed completely. At the time they testified, twenty-six years after the incident, they still experience pain from the beaten parts of the body. Some of the abductees who returned developed mental problems and died. Others developed weakness and suffer severe pains. Some of those abducted that day escaped from the rebels and returned to the camp. They include P.W.27 (B4) and P.W.29 (B1). Those who have to this day not returned are Rodento Ochola, Masimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obooli Oola, Oryem Quirino, Okot Antonio, Okoya Maurensio and Onai**.**

317. There is cogent evidence on record to the effect that C1 identified the accused as the leader of those who kidnapped him. They interacted directly and C1 was able to recognise him because of their shared past. C1 did not reveal this to the accused which demonstrates farther, the nature of the coercive environment and the implicit threats present during the abduction. C4 identified the accused at *Ceri* Stream where the accused divided the abductees into groups, explicitly stating that one group would be allowed to return home while the other would remain with the rebels. The selective release indicated a conscious decision by the accused about the fate of the abductees, including the decision whether to dispose of them. In addition, the victims, including Okot Charles, Ojok Patrick, and Ogena Simon, were not seen again, leaving one conclusion, a fatal outcome for those not released, supporting the intent to murder.

318. According to the defence the intent behind the kidnappings was not to murder the victims but to conscript them into the LRA or use them for carrying luggage. However, the prosecution has provided ample evidence demonstrating that the intent was, in fact, to

torture and kill many of the abductees. That is evidenced by the brutal killings that occurred during and after their abduction as well as the promise to kill the husbands. The prosecution's evidence clearly shows that on March 4, 1996, the accused commanded an LRA group that abducted individuals, including Rodento Ochola and the others, and subsequently ordered their killings. That evidence is not consistent with merely bolstering ranks or using the abductees for logistical support.

The findings

319. As regards the rest of the elements, this Court agrees with the assessors. Consequently, the Court finds that save for the last ingredient concerning the mode of participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved the rest of the ingredients beyond a reasonable doubt. The circumstances of the violent actions, killings, direct orders, and the prolonged disappearance of several abductees treated and considered together fully support the charge of kidnap with intent to murder contrary to Section 243 (1) (a) of ***The Penal Code Act.***

320. Accordingly, apart from the differed element, the prosecution has proved the rest of the elements constituting the fourteen (14) Counts of Kidnap with intent to murder, being Counts 5, 6, 8, 10, 11, 12, 33, 34, 35, 36, 37, 39, 40, and 41.

The offence of Imprisonment.

321. Imprisonment as a Crime against humanity is understood as arbitrary imprisonment, that is, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.

The indictment

322. The accused is indicted in count 31 with Imprisonment as a Crime Against Humanity pursuant to customary international law. It is alleged that the accused, Kwoyelo Thomas

alias Latoni and others still at large on the 4th March,1996 at Abera village, Parubanga Parish, Pabbo Sub County Kilak County, now Amuru district in Northern Uganda, being a Commander in the Lord's Resistance Army commanded an armed attack, against a group of civilians taking no active part in the hostilities, and seized, detained and held hostage Rodento Ochola, Masimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obooli Oola, Oryem Quirino, Okot Antonio, Okoya Maurensio and one Onai while he was aware of the factual circumstances that established such protected status and the existence of an armed conflict, and threatened to kill, injure or continue to detain the said Rodento Ochola, Masimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obooli Oola, Oryem Quirino, Okot Antonio, Okoya Maurensio and Onai**,** with intention to compel the government of Uganda to refrain from launching attacks against the Lord's Resistance Army, as an implicit condition for the safety of all the persons named herein above.

The elements of the offence

323. Imprisonment in this context "should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law,[71] as part of a widespread or systematic attack directed against a civilian population."[72] Detention is arbitrary when there is no legal basis to justify it.[73] Therefore, the crime against humanity of imprisonment consists of an act or omission that results in arbitrary deprivation of physical liberty or that is reasonably likely to effect that result. In response to the heinous acts committed against innocent civilians who were not actively involved in hostilities by the rebels, Kwoyelo Thomas, who had command over the group, has been charged with a crime against humanity: imprisonment i.e., the unlawful confinement or detention of individuals on a widespread or systematic scale, as part of a broader and systematic attack on a civilian population. The group forcefully abducted, beat and assaulted some individuals, segregated the captives into different groups based on age and

[71] *Kordic, Trial Judgment, par 302.*
[72] *Prosecutor v. Kordi et al., case no. IT9514/2T, Judgment, February 26, 2001, para graph 302).*
[73] *Krnojelac, Trial Judgment, para 14. See Prosecutor v. Krnojelac, case no. IT9725T, Judgment, March 15, 2002, paragraph 115; Prosecutor v. Kordi et al., case no. IT9514/2T, Judgment, February 26, 2001, paragraphs 302–303*

gender, with specific intents to inflict injuries on the elderly men, forced the captives to remain confined and created an uncertainty about the fate of the other captives, particularly the elderly men who were left behind with high risk of harm and potential death.

324. In ***The Prosecutor v. Kordic and Cerkez***[74]**,** the court confirmed the conviction of Kordic for planning, instigating and ordering crimes including persecutions, unlawful attacks on civilians, and civilians' objects, murder, inhumane acts, imprisonment, wanton destruction not justified by military necessity, plunder and destruction or wilful damage to institutions dedicated to religion or education.

325. For the accused to be convicted of Imprisonment as a violation of Customary International law, the prosecution must prove each of the following essential elements beyond reasonable doubt:

a. the perpetrator deprived the victim of physical liberty;
b. in circumstances that constituted a violation of fundamental rules of international law;
c. it was part of a widespread or systematic attack directed against a civilian population;
d. that the perpetrator knew that it was part of such a widespread or systematic attack on the civilian population
e. Participation of the accused.

326. **In *Kordic & Cerkez***[75] the Appeal Chamber agreed with the Trial Chamber's finding that the terms of imprisonment **…** "should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population**.**" The elements of the underlying offence of imprisonment as a crime against humanity are the same as the elements of unlawful confinement as a war crime.

[74] *ibid*
[75] *ibid*

The evidence

327. This count is based on the testimonies of P.W.27, P.W.28, P.W. 29 and P.W.30, who provided clear accounts of their encounters with abductions and violence at the hands of rebels of the Lord Resistance Army. Their evidence has already been outlined in detail above. On the 4th of March 1996 the accused commanded a group of LRA and invaded a group of people who had left the camp to Abera village to perform cultural rituals for twins and a girl who had been defiled.

The submissions of Counsel

328. Prosecution submits that LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape and later subjected them to physical torture. This court is invited to find that there is sufficient evidence that the forceful abduction of individuals, including women, youth, and older men, and forcing them to carry food and belongings, constitutes a grave violation of human rights. Besides the individuals involved, subjected the captives to physical violence, including the beatings with canes and pangas, which resulted in severe physical and psychological harm. The testimonies also highlight the lasting impact on the survivors and their communities, including widows and orphans struggling to cope with the loss of family members and the absence of husbands. The perpetrators, particularly Kwoyelo should be held responsible for this conduct which constitutes crimes against humanity, as he was involved in the planning, ordering, or committing these acts. Court should find that this count is proved to the standard required.

329. In their reply, the defense raised preliminary objections that the offense of Imprisonment as a crime against humanity is not explicitly provided for under Ugandan law or any international law to which Uganda is a party, and that the testimonies used to support the charge are inconsistent and unreliable.

330. These objections however, overlook key aspects of both customary international law and the specific facts of this case, as established by credible evidence. Additionally, the objection has been resolved earlier on in this judgment. In sum however, the evidence sufficiently proves the accused person's culpability.

The analysis

331. The testimonies of P.W.27, P.W.28, P.W.29, and P.W.30 collectively establish a consistent narrative of the events on March 4, 1996. The minor inconsistencies in their accounts are typical in eyewitness testimonies and do not undermine the core facts. P.W.28's inability to identify the accused in court does not negate the prior identification and the broader context provided by other witnesses. P.W.29 and P.W.30 corroborated the arbitrary detention and assault on the victims, providing specific details about the accused person's involvement. Taken together, the testimonies, meet the threshold for proving the crime beyond a reasonable doubt. The consistency in the depiction of the accused person's actions, and the circumstances of the victims' detention and assault, confirm the arbitrary deprivation of liberty and the physical and psychological harm inflicted. That satisfies the elements of the crime under Customary International Law. The prosecution has provided substantial evidence that the accused not only deprived the victims of their liberty but did so with the intent to compel the government of Uganda to alter its military strategy, thereby fitting the definition of a crime against humanity. The testimonies and specific details of the accused's actions—ordering killings, using an axe and sticks on a victim's head, and commanding the physical assault of others—are indicative of a deliberate and systematic campaign of terror, fitting within the broader context of the LRA's activities.

The findings

332. In their joint opinion, the Lady and Gentlemen Assessors advised that all the essential elements regarding the offence of imprisonment in Count 31 were proved beyond reasonable doubt. This court agrees with the opinion of the Assessors in regard to the first

elements of the offence. The last ingredient regarding the participation of the accused, has for convenience, has been deferred.

Property-Related Offences.

333. A couple of counts involving damage to property, were preferred against the accused as war crimes and in the alternative as offences under ***The Penal Code Act.*** There are two (2) Counts of pillage i.e.; Counts; 13 and 17, and in the alternative, one (1) Count of Aggravated Robbery, being Count 14.

The offence of pillaging

334. The accused is indicted in two (2) counts of pillage, as a violation of Article 3 (1) common to the Geneva Conventions**.** It is observed at the outset, that the prosecution charged the offence of pillage as a violation of Article 3 (1) common to the Geneva Conventions, in what they termed as; *"pursuant to Customary International Law*". As already stated in this judgment, violations under the Geneva Conventions are distinctive breaches not under the realm of Customary International Law. Breaches under the Conventions are mainly codified, whereas Customary International Law is essentially rooted in general principles of law, norms and practices that are widely accepted by states, as binding, and non-derrogable. They derive their sources in *jus cogens,* norms, opinions, jurisprudence, and writings of prominent authors and jurists, among others. Thus the proper approach should have been for the prosecution to prefer charges for grave breaches under the ***Geneva Conventions*** distinctively from, and not pursuant to Customary International Law.

335. ***Black's Law Dictionary 8th Edition*** at p. 1185 defines pillage to mean the forcible taking of private property by an invading or conquering army from the enemy's subjects. When an armed group illegally appropriates resources in order to finance a conflict, it may be committing pillage, that destroys civilians' lives.

336. Section 2 (1) (d) of ***The Geneva Conventions Act, Cap 349***, in Article 147 (Schedule 4) thereof; specifies prohibited grave breaches of the Geneva Conventions. Of particular

relevance to the instant case, is the provision for the *extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,* which embeds the essential elements of pillage. The prescribed punishment for the breach under the Act, is imprisonment for a term not exceeding fourteen years. By the same Act, Uganda domesticated the Geneva Conventions, on 16th October 1964. The position has already been stated on applicability, to the instant case, of the subsequent Additional Protocols acceded to by Uganda.

337. The ***Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (of 12 August 1949)*** in Article 33, pillage is a prohibited act. Also, the ***Protocol Additional to The Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I1), of 8th June 1977***, Article 4 ***(2)*** (g) requires that pillage shall remain prohibited at any time and in any place whatsoever. Article 14 thereof, accords protection to objects indispensable to the survival of the civilian population. It is prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, among others. In 1991, Uganda, acceded to ***the Additional (Protocol 11) to the General Convention of 1977.***

338. In the ***Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda[76])***,; and ***Prosecutor v. Simic[77]***, the terms "pillage", "spoliation", "looting" and "plunder" were used interchangeably as applied to the unlawful appropriation of property in armed conflict. It covers both organised, systemic pillage and individual acts of pillage committed without consent of military authorities. See ***The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused[78]***.

[76] *Judgment of 19 December 2005*
[77] *Case No. IT-95-9-T, Judgment, para. 98*
[78] *Judgment (SCSL-04-16-T, 20 June 2007), para. 754*

The indictment

339. In Count 13, it is alleged that the accused and others still at large, on the 4th September 1994, being a commander in the LRA commanded an armed attack on Abera village, Parubanga Parish, Pabbo Sub county Kilak county, now Amuru District in Northern Uganda, and extensively and wantonly destroyed houses, bicycles, livestock, foodstuff and household property, such destruction not being justified by military necessity, and while he was aware of the factual circumstances that established such protected status, and the existence of an armed conflict.

340. In Count 70, it is alleged that the accused and others still at large, on 16th May, 2004, at Oboo Parish, Lamogi Sub county, now Amuru district in Northern Uganda, being a Colonel in the LRA coordinated, ordered and directed an armed attack on Pagak Internally Displaced Peoples Camp (IDPC) and extensively and wantonly destroyed 544 huts, foodstuff, and household property, all being protected property under the 4th Geneva Convention of 12th August 1949, such destruction not being justified by military necessity, and while he was aware of the factual circumstances that established such protected status, and the existence of an armed conflict.

The elements of the offence

341. Based on the stated principles and sources, pillage as a grave breach of the ***Geneva Conventions***, has the following essential elements:
    a. The perpetrator(s) appropriated and or destroyed certain property.
    b. Without the consent of the owner.
    c. In the context of; and associated with armed conflict not of an international character.
    d. Appropriation not justified by military necessity.
    e. Involving grave consequences for the victims.

The evidence

342. In respect of Count 13, the prosecution called the evidence of P.W.7 who stated that around 8.00 pm, he saw about four men in camouflage army uniform, carrying guns and they entered his home. They took about 20 goats belonging to his paternal uncle Delfino Ogwok. They also found three bicycles, one belonging to him and others to Odong Omoyo and Ocete Ouma John. They tied the bicycles, together and placed a grass thatched roof of a granary upon them, and set them on fire. He also witnessed houses being burnt and goats killed by the attackers, who then instructed him and other abductees to carry the meat in polythene bags. The following morning at around 8.00 - 9.00 am after crossing Ceri stream, the accused came and began talking to them, and P.W.7 recognised the attackers as rebels who included Kwoyelo and Kobi. They were locally called "Lakwena" or Lord's Resistance Army, a group headed by Joseph Kony, to which Kwoyelo belonged. Kwoyelo then ordered for the release of P.W.7 and some other abductees. He instructed them to return to their homes, not taking the path they had come through as it was dangerous due landmines. P.W.7 stated that there had been several other similar attacks before that day.

343. P.W.8 stated that around 9.30 pm, three people armed with guns, dressed in army uniform trousers (camouflage) and civilian shirts and gumboots, came and entered into his house. They took two basinful of dry cassava from the house of Okot Charles, and grabbed 12 goats from the home of Massimo Oboma. They then killed the goats by beating them, and carried them without skinning them. They also removed tubes from bicycle tyres, which they said were good for lighting fires, and took them away, and then burnt the bicycles. They also took chicken from a roost in a tree at the home of John Ouma. At the home of Acore Vito in Perecu, the attackers took millet flour and ordered P.W.8 and the other abductees, who had been tied up and made to squat, to get up and carry the loot and follow the direction the attackers were telling them to take. He recognised the abductors as "Lakwena" by their activities and unique appearance. He described them as being an army that stayed in bushes and operated at night, abducted people, and forcefully took their property. They wore partial army uniform of either a trouser or shirt at a time, and their shoes were different; which distinguished them from the government army.

344. P.W.9 stated that while he slept at night, two people entered his house. One held a panga (*machete*) and the other had a gun, and both had torches, but they could not let him look at their faces for long. The one with a gun was in an army shirt and civilian wear trousers, while one holding a panga had braided hair and was not in army uniform. They picked hens, which belonged to his mother, numbering to approximately 30 from their roost on the tree, and also looted food from his house. At the home of Onyac Ben, his paternal uncle, the attackers took about three basins of dry cassava, while at John Ouma's home they looted goats and abducted more people. From the next place, the attackers also looted more goats which they beat to death and packed them in polythene bags. He also saw them tie three bicycles together and placed a granary roof on top of them, and set them ablaze, as they proceeded to the home of an old man, Acore Vito, where they looted more food stuff. He recognised the attackers as rebels of the LRA because they only spoke Acholi and had dreadlocks. Some of them wore one piece of army uniform, either a shirt or trouser, and some plain clothes and wore car - tyre sandals. That at the time, there were only the LRA in the bush. He could distinguish the rebels from government soldiers, because rebels had unique appearance and manner of operation and spoke Acholi. Government soldiers operated during day time, spoke Swahili, and never abducted people or looted their property.

345. The testimony of P.W.10 was that at around 4.00 - 5.00 pm, he saw people who came running, and he tried to hide some of his household property by dumping it in the bush. The attackers in partial army inform and unkempt hair, arrived and ordered him to retrieve the bag he had thrown into the bush. After they had picked out items they wanted, they ordered him to carry the bag and start moving. Around 7.00 pm, as they moved, they encountered some people on a road with a car who had been injured, and the attackers shot at them and began looting food items from the car. On arrival at Pawel Lalem at around 7.30 pm, the attackers directed the abductees to search for food in that village, and started chasing after hens, ducks, and goats, while others entered houses and picked maize flour. An abductee Abwola, son of Ogik, tried to escape but was apprehended, tied up and severely beaten with canes, to serve as an example to anyone who planned to escape.

346. P.W.11 testified that at the time, the area was experiencing war between the government forces and Lakwena rebels. He witnessed rebels looting property and that civilians were greatly affected. That sometime in September1994, at night, rebels with unkempt hair, speaking Acholi and familiar with the area, attacked the area and he recognised one Kobi among them. They looted his goats and burnt his bicycle and two others left at his home by a neighbour and by his friend. They ordered civilians to bring all the food stuffs that had been looted from other homes to his home and distributed them among the abductees who they ordered to carry it and start moving. Upon his release and return to his home the following day, P.W.11 found that all the property which he had left at home including goats, clothes, foodstuff like maize, rice, groundnuts and chicken, was looted by the rebels.

347. In respect of Count 70, concerning the 16th May, 2004 attack on Pagak IDP camp, P.W.22 testified that a week after the attack, along with a team, they went to the scene on 23/05/ 2004 and he saw burnt huts. He tendered in court 11 photographs, (2) of burnt and (9) of unburnt houses as Exhibit P. Ex.5C. He also filmed the huts, part of Exhibit P. Ex.6. Another eye witness P.W.31, testified that as the attack was going on, he saw smoke rising from the Pagak IDP camp. The abductees were made to carry luggage of looted property and food stuffs, which were removed from them after walking for a long distance, and then the captors started beating the abductees. In the process, some people lost their lives, others were injured, and others have never been seen again.

348. P.W.32 the Camp Commandant, testified that on the day of the attack, the World Food Programme had just distributed food to the IDPs. He listed 544 huts which were set on fire by the attackers, mostly in Zone "B1," Zone "A" and some in Zone "D" in the notebook-Exhibit P. Ex.11. P.W.33 testified that the rebels were disturbing them at the time, and used to come and loot chicken, goats and other food stuff. That whenever the rebels were few in number, they would attack and pick food from the outskirts of the camp, but in big numbers, they would even go to the centre of the camp. On the night in issue, the rebels made a multi-pronged attack on the camp and looted food the IDPs had just received as rations from the UN. They then ordered the civilians to get out of their houses and carry

food stuffs and cooking oil on their heads. She was made to carry basins of maize grain. When they reached Ayugi stream, P.W.33 looked back and saw fire at the camp and could hear gunshots as the huts were being torched by the said attackers. Upon her return to the camp, she found that their huts had been burnt down and the environment was quite traumatic. P.W.35 testified that on the day of the attack on Pagak IPD camp, the rebels ordered her to carry luggage of 50 kilograms of maize and 3 litres of cooking oil. They collected food from the camp since it had just been distributed shortly before by UN.

349. The accused in his unsworn statement, as D.W.1, mainly advanced a defence of alibi, and a general denial. He maintained that the prosecution's evidence was total lies. He stated that he was not at the scene of the crimes, and he could not have participated in any of the attacks or the acts attributed to him, in the pillaging of livestock, foodstuff and household property as alleged. Similarly, that he did not command or order an attack or cause any destruction of property, houses and bicycles at either Abera village, in Parubanga parish or at the Pagak IDP camp, as alleged. That from 1993 to 1994, he was an escort to one Brother Occi who was the head at the sickbays in the LRA, located at Nyono in Kitgum. In addition, that at the time of the alleged incidents, he was still a junior officer without any command responsibility, and that neither did he have soldiers under him, subject to his control, command or direction.

350. The accused denied having played any part in the attacks insisting that his duties involved strictly moving between sickbays at Kilak and Koch, and that the rules of operation in the LRA did not permit him to move out of the sickbay and to go with convoys, which were tasked with responsibilities of attacks and other war operations. That even those in the convoys were not permitted to go to the sickbay or near it, in order not to blow up the cover of the sickbay and expose it to attacks by the enemy.

The submissions of the defence

351. In their submissions, the defence asserted the accused's alibi, that he was never placed at the scene of the crimes by evidence of any of the prosecution witnesses. In addition, that

the particulars in Counts 13 and 70, respectively, are defective in so far as they allege that the accused ordered and directed an armed attack and wantonly and extensively destroyed houses, bicycles, livestock, foodstuff, and household property. That it shows that the alleged property was not appropriated or converted to personal use by the accused, but rather was destroyed. That as such the particulars of the offence in the current form, cannot sustain the offence of pillage. That pillage is akin to robbery, and destruction of property is not an element of the offence of pillage.

352. The defence also submitted that no person named as owner of the property alleged to have been pillaged, was called as prosecution witnesses to confirm the fact of the destruction. That one cannot impute the lack of an owner's consent as an ingredient of the offence of pillage when such owners are not mentioned or even produced in court to testify. That no evidence was led to prove that the owners ran away or that the properties were appropriated for either personal use or other uses.

353. The defence also submitted that even if P.W.11 was to be believed regarding the burning of the bicycles, he did not identify the accused as one of attackers, but rather, that it was one Kobi whom he said entered his house. That P.W.11 testified that as they walked carrying the loot, he heard some of the abductees like Okidi Pyerino saying that it was Kwoyelo's group that led the attack. That this renders evidence of P.W.11 hearsay as no such abductee like Okidi Pyerino was called to testify to confirm the allegation, and that it does not satisfy the permissible threshold of hearsay evidence in International Law, and should be disregarded.

354. Further, the defence submitted that P.W.7 who testified about the abduction and how they moved across Ceri stream, claimed that the following day the accused addressed them and then ordered for their release. That despite the witness alluding to the events of 1994, he did not report this incident to any police until 2009, when the investigators went to him looking for evidence to pin the accused who was in custody by then. That his evidence is an afterthought and deliberately choreographed to falsely implicate the accused.

355. The defence also submitted that there was no evidence that the accused coordinated, ordered or directed an attack on Pagak IDP camp as alleged in Count 70 of the indictment. That rather, the evidence of P.W.2 was that the attack was ordered by the rebel leader, Joseph Kony, who directed his 2nd – in – command, Vincent Otti, to attack the camp for purposes of recovering his weapons taken by a deserter called Captain Charles Abola. That the person in charge of the group that attacked Pagak IDP camp was Dacta Onen. That the evidence that the accused directed or ordered the attack, which in any case is not an essential ingredient of pillage, is without basis.

356. The defence further submitted that P.W.32 testified that Vincent Otti, the 2nd- in -command of the LRA, called him informing him of the attack, warning the civilian to keep away;' meaning that the intention of the impending attack was not to harm civilian. That as such, the particulars in Counts 13 and 70, do not constitute or support any ingredient of pillage as provided under the law within the ingredients set by this court in its ruling of ***Uganda vs Thomas Kwoyelo***[79].

357. For their part, prosecution vehemently asserted that the evidence of its witnesses, in particular; P.W.7, P.W.9 P.W.11 and P.W.12, proved that the LRA rebels took three bicycles from the house of P.W.11 and burnt them. That P.W.7 also testified of rebels taking goats and chicken belonging to P.W.11 and from other people. That P.W.11 testified that foodstuffs looted by the rebels were given to the abductees who were forced to carry them. That this evidence duly proved, beyond reasonable doubt, that LRA fighters stole food and household items from the homes of civilians in respect of charges in Count 13.

358. That given the witnesses who testified in respect of elements of pillage, in Count 70, the accused participated as an overall commander and coordinated the attack, the theft, transportation, and distribution of items looted. That the charge of pillage is a grave violation under international humanitarian law, specifically Article 3 (1) (a) common to the ***Geneva Conventions***. That it encompasses the unlawful appropriation of property during armed conflict, causing significant harm and suffering to victims. That pillage is

[79] *HCT-00-ICD-SC-02 OF 2010*

recognised as a serious international crime due to its impact on both individuals and communities, often involving acts of violence, intimidation, and deprivation of essential resources. That charging the accused with pillage underscores the international community's commitment to upholding humanitarian principles and ensuring accountability for war crimes, and it sends a strong message that violations of this nature will be prosecuted vigorously, reflecting the gravity of the offence.

359. In reply to the submission that charges of pillage are materially defective, particularly questioning the demonstration of intent for private use and lack of military necessity, the prosecution contended that the evidence from C1, C4, C5, and C6, clearly demonstrated the appropriation of property without consent and the use of violence, hence proving the elements of pillage. That the appropriated items were used for personal benefit by the rebels, not justified by military necessity, thereby also satisfying the mental element (*dolus specialis*) required for pillage.

360. On the submission that the accused was not identified or placed at the scene of crime, the prosecution argued that on the contrary, witness C1 positively identified the accused as one of his abductors as he knew him well before the incident. That P.W.7 also identified the accused at Ceri stream when the accused addressed the abductees. That in addition, P.W.8 heard other rebels reporting to the accused and mentioning his orders for punishment and potentially killing of the victims.

361. Regarding P.W.7's delay in reporting the incidents to the police, the prosecution argued that it does not necessarily negate the validity of his evidence. That the witnesses eventually came forward and provided testimony against the accused and should not be dismissed as an afterthought or deliberate fabrication. In addition, that the prosecution highlighted the specific instances where witnesses, such as C1 and PW7 identified the accused at the scenes of the crimes, and that these identifications along with the corroborating evidence from other witnesses, provided a strong basis for prosecution and refute the defence's attempts to discredit the testimony.

The analysis

362. Court has carefully evaluated the evidence, and analysed the submissions of the prosecution and defence, as a whole; in respect of the two counts. It is observed that the defence was justified to contend that the essential elements; *appropriation of property, and without the consent of the owner*, do not arise out of the substance of the particulars of the offence of pillage in the indictment.

363. In their current form, the particulars of the offence only allege that the perpetrators, *wantonly and extensively destroyed property*, but they are silent on, *appropriation of the property without the owner's consent*, which the prosecution strived hard to prove, though not borne out of the particulars. Nonetheless, court further observes that the charges cannot be rendered defective only on that account, especially that the particulars of the offence disclose allegations of, *extensive and wanton destruction of property*, as an additional/alternative essential element of pillage. The onus remains on the prosecution to adduce evidence supporting the essential element disclosed by the particulars of the offence.

364. The above aside, court found that the prosecution proved, to the required standard, the essential element of, *extensive and wanton destruction of property,* in both counts on pillage. The testimonies of P.W.7, P.W.8, P.W.9, P.W.11, P.W.12 and P.W.13, respectively, pertaining to the 4/09/1994 attack on Abera village, - all attest to houses, granaries and bicycles being set on fire. Their evidence further shows that even some foodstuff that was not looted, was destroyed in the attack. This triggers Article 14 of the ***Additional Protocol (11) to the Geneva Convention, 1977,*** which accords protection to objects indispensable to the survival of the civilian population, and that it is prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs. Court finds that that evidence of the prosecution, in that regard, establishes to the required standard the essential element of the extensive and wanton destruction of property, which falls squarely within the realm of the prohibited grave breaches under ***The Geneva Convention Act Cap 363 (Now Cap 349)***.

365. The extent and manner of destruction of property is further demonstrated in evidence of the prosecution witnesses of the 16th May, 2004 attack on Pagak IDP camp. P.W.2 who participated in the attack, as an LRA combatant, personally witnessed and confirmed that they attacked and set houses on fire in the camp, abducted and also killed civilians. P.W.22 filmed the burnt houses, as per P. Exh 6. P.W.32, the camp commandant, listed 544 huts which were burnt, as per P. Exh. 11. P.W.33 stated that upon reaching Ayugi stream, during the abduction, looked back at the camp and saw the rebels setting houses on fire. Although P.W.2 is an accomplice, his evidence has been taken into account on basis of the principles relating to accomplice evidence explained farther in the judgment.

366. Evidence of the said witnesses also proved that some of the property destroyed belonged to some of witnesses who testified. Some other property also belonged to persons who did not testify in court. Such included bicycles which had been left by their owners in the care of others. Those others, were known to the particular witnesses who witnessed the destruction and testified in court. Therefore, the defence submission that the actual owners of the bicycles destroyed did not testify, lacks merit. It is not a requirement in the offence of pillage that only the evidence of the particular owners of the property destroyed, can prove the element of extensive wanton destruction of property. Witnesses who had custody of the property and those that witnessed the destruction, at the time of the attack, are competent to testify to the fact in issue, regardless of the ownership of the property destroyed. Their evidence is reliable and well corroborated on the issue of extensive and wanton destruction of property. On the other hand, other than his defence of alibi, the accused did not give any evidence on the issue. That left the defence without offering any challenge to those particular witnesses, who remained steadfast under cross-examination, and court believed their evidence. Accordingly, the prosecution has proved, to the required standard, the essential element of extensive and wanton destruction of property.

367. As to whether the appropriation or destruction was *not justified by military necessity*, it calls for briefly restating of the basic principles attaching to the issue and examination of the evidence adduced pertaining to those principles. For the appropriation or destruction of property to be lawful, it must be imperatively demanded by the necessities of war. There

must be some reasonable connection between the destruction and or appropriation of property and the overcoming of the enemy forces. For instance, it would be lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Even private homes and churches may be destroyed if necessary for military operations. It does not admit of wanton devastation of an area or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone. Destruction and appropriation as an end in itself is a violation of International Law. See: ***Prosecutor v. Pavle Strugar***[80]**.**

368. What amounts to "military necessity" as understood in modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war. The principles of distinction and proportionality must be observed. The principle of distinction requires that parties to an armed conflict must at all times distinguish between civilian population and combatants and between civilian objects and military objectives, and accordingly, shall direct their operations only against military objectives. On the other hand, the principle of proportionality provides that even if there is a clear military target, it is not possible to attack it if the expected harm to civilian, or civilian property, is excessive in relation to the expected military advantage. It prevents attacks on targets or victims not linked to specific military objective (unnecessary) those that do not distinguish between military targets and civilian objects (indiscriminate) and those that are aimed at spreading terror among the civilian population.

369. Applying the test as it pertains to the essential element of, *not being justified by military necessity*, in both counts of pillage, the inference drawn from the evidence on record, is that the basis, manner and extent of the acts of the attackers, failed to meet the threshold in test. Neither the accused's evidence nor the defence submissions, made any attempt to justify or deny that there was destruction of the property in the attacks at Abera and Pagak IDP camp. They only maintained the defence of alibi, aimed at exculpating the accused from what transpired at both scenes of crime. This defence has, nonetheless, already been discounted in this judgment for the reasons that were assigned. Be that as it may,

[80] *, Case No. IT-01-42-T, Judgement (TC), 31 January 2005, para. 295*

prosecution evidence sufficiently portrayed the perpetrators' conduct of destruction of properties and burning of houses, in both incidents, as not in any way imperatively demanded by the necessities of war. On that account, court believed the prosecution's version, and drew an inference that the destruction of property was for the sake of it, or as an end in itself. It could only have been intended merely to strike terror among the civilian population. Not even remotely, was there any reasonable connection between the destruction of property, with the effort of the LRA in overcoming of the UPDF, against which they were fighting. The destruction of the property, coupled with abductions and killings of civilians attested to by the prosecution's witnesses; buttressed court's finding that there was no distinction by the perpetrators, of the civilian population and combatants, and between civilian objects and military objectives. In light of the evidence of the indiscriminate manner of attack on civilians employed by the perpetrators in the two instances, the credible inference would be that the extensive and wanton destruction of property was not justified by military necessity, and it violated International Law. The essential element was thus proved to the required standard.

370. On the essential element, "*involving grave consequences for the victims",* neither the prosecution nor the defence addressed the issue. The evidence of P.W.7 shed light on actions of the rebels of raiding civilians for food and destroying properties, and that there had been several similar attacks previously. P.W.8 also testified that the rebels stayed in bushes and would emerge at night, abduct people, and forcefully take their property. That during one of the attacks, civilians were tied up and ordered to squat, and then forced to carry the loot and trek long distances. P.W.11 explained that the period in issue, was an insecure time when the area was experiencing a war between the government forces and the Lakwena rebels. That he witnessed the rebels looting property, and that civilians were affected. That on return to his home upon release from abduction, he found that all the property had been looted by the rebels. P.W.22 saw burnt huts on 23/05/ 2004, a week after the Pagak IDP camp attack. P.W.31 witnessed attackers burning huts in Pagak IDP camp, and that it was a distressing environment. Also, that the abductees were made to carry luggage of looted property and food stuff, which were removed from them after walking a long distance, and then they were beaten. In the process, some people lost their lives or got

injured, and others have never been seen again. P.W.33 confirmed that the rebels were disturbing them at the time, and used to come and loot food and livestock. That they would attack from the outskirts of the camp, and would even go to the centre of the camp. That on the night of the attack in issue, the rebels attacked the camp and looted food the IDPs had just received as rations from the UN.

371. The inference drawn from the above evidence, is that the attacks amounting to the offence of pillage, *involved grave consequences for the victims*. That is so particularly given that the attacks had the net effect of destroying, removing or rendering useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs and other supplies, particularly those that had just been supplied by the UN to the IDPs. The attacks also had the effect of destroying livelihoods of the civilians as it is evident in the evidence of P.W.32 the Camp Commandant, that government was compelled to move civilians into the camps to ensure their security against similar attacks. The mere fact of encamping civilians, who had hitherto lived freely and at large in their respective communities, had repercussions *involving grave consequences for the victims*. This was besides those civilians who lost their lives or suffered sustained severe injuries in the attacks by the rebels. To that end, the prosecution evidence proved, to the required standard, the particular essential element of pillage. Once more, for the avoidance of unnecessary repetition, the last ingredient as to whether or not the accused did participate in acts, is deferred, to be considered at the end of the combined analysis.

The findings

372. In their joint opinion, the Lady and Gentlemen Assessors advised that all the essential elements regarding the grave breaches amounting to pillage in Count 13 and Count 70, were proved beyond reasonable doubt. Court agrees with their opinion. The last ingredient concerning the participation of the accused in the commission of the offences will be handled later in this judgment. The prosecution has therefore proved, to a standard beyond reasonable doubt, the rest of the ingredients constituting the offence of Pillaging Counts 13, and Count 17, respectively.

Aggravated Robbery

373. In light of the findings made regarding the offence of pillage, the offence of Aggravated Robbery under the ***Penal Code Act***; which was charged in the alternative, has been rendered redundant. Accordingly Count 14 fails and is hereby dismissed.

Sexual and Gender-Based Violence Offences

374. A number of counts involving sexual and gender-based violence, were preferred against the accused as war crimes, crimes against humanity and in the alternative, as offences under ***The Penal Code Act.*** There are two (2) Counts of the offence of Violence to life (rape) as a war crime, being Counts; 87 and 92; Three (3) counts of Outrages against personal dignity (rape) as a war crime, being Counts 82, 86 and 91; Two (2) Counts of Torture as a crime against humanity (Rape), being Counts 85 and 90; One (1) Count of enslavement as a crime against humanity (Rape), being Count 81; Two (2) Counts of Rape as a crime against humanity, being Counts 84 and 89; and in the alternative, two (2) Counts of Rape contrary to ***The Penal Code Act,*** being Counts 88 and 93, making a total of twelve [12] Counts.

375. These generally are offences of rape and other forms of sexual violence, that solely or disproportionately affect women and girls, particularly during armed conflict, hence their gendered nature. The indictment classifies wartime sexual violence, depending on the circumstances, as a grave breach of the Geneva Conventions and as a crime against humanity,

The offence of violence to life as manifested by rape

376. The offence of violence to life is a broad offence which includes murder, mutilation, cruel treatment and torture. It encompasses all similar acts constituting grave and abhorrent forms of ill-treatment which may result in the death or great suffering of the victim. The offence of violence to life is in contravention of section 2 (1) (d) and Article 3 (1) (a) of the Fourth Schedule of ***The Geneva Conventions Act, Cap 363 (Cap 349)*** (as set out in Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in

Time of war of August 12, 1949), and common Article 3 (1) (a) of ***The Geneva Conventions*** which prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Article 4 (2) (e) of Additional Protocol II, also proscribes violence to life, health and physical or mental well-being of persons, inparticular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment. Upon conviction, the offender is liable to imprisonment for a term not exceeding fourteen years (see Section 2 (1) (f) of ***The Geneva Conventions Act, Cap 363 (Now Cap 349)***.

The Indictment

377. Regarding the two Counts of the offence of violence to life, it is alleged in Count 87 that the offence was committed between 1997 and 2004 at Kilak Hills at Olinga village, Labara Parish Pabbo sub county Kilak County and some parts of South Sudan, whereby the accused, being a colonel in the LRA subjected an abductee, "LW", to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her. In Count 92 the allegation is that the offence was committed between 1996 and 2005 at Kilak Hills Olinga village, Amuru District and parts of South Sudan, whereby the accused, being a colonel in the LRA subjected an abductee, "NS," to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her.

The elements

378. Article 27 (2) of the Fourth Geneva Convention states that "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." While ***The Geneva Conventions Act*** does not explicitly mention rape or other forms of sexual violence under the prohibition of "violence to life and person," Article 4 (2) (e) of Additional Protocol II specifically adds "rape" and any form of indecent assault to this list. It follows that rape and other forms of sexual violence can be a constituent element of the offence of violence to life and person under the Act.

379. Therefore, for the accused to be convicted of the offence of Violence to life as a Grave breach of the Geneva Conventions, the prosecution must prove the acts were committed in the context of the armed conflict, and were not "individual domestic crimes." For the accused to be convicted of rape as a form of the offence of violence to life, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. An intentional act or omission in particular, rape.
b. Affecting the physical or mental well-being of the victim.
c. The nexus to the armed conflict of a non-international nature
d. The victim being a person not taking active part in the hostilities.
e. The participation of the accused in that conduct.

The evidence

380. "A2" (a protected witness) who testified as P.W.47 stated that her daughter, "LW" was during the month of April 1997 abducted by the LRA rebels, at the age of 12 years. In July, 2004, she was rescued and returned home with a three-year-old child, named Acan Fatuma. She was 14 years old when she gave birth to that child whose father is Kwoyelo. The witness stated; "On learning that she gave birth at such a tender age I first died and later returned to life. I almost became mad and up to now I have not stabilised fully. It broke my heart but eventually I settled a bit ..." One night, a person went to their home and said he had been instructed by Kwoyelo to kill P.W.47, the child and the husband of "LW". He was instructed to pick the child, Acan Fatuma, and take her back to the bush. With the help of one Lacam Bel, a presenter on Mega radio, she was able to talk to Kwoyelo on phone on three occasions and he told her he would not kill "LW" because she was his wife, but that he would kill her husband and the child she had had with that man. That P.W.47 also asked Kwoyelo how "LW" was his wife and he said he married "LW" before any other man married her.

381. "LW" (a protected witness) who testified as P.W.48 stated that she was abducted on 14th April, 1997 and taken to the Kilak Hills. She said it is the rebels led by a one Okeny, who

abducted her. That on the night of her abduction, she had taken refuge in a nearby bush together with her siblings in order to avoid the then rampant abductions by the LRA rebels. She was taken to the home of the accused, where she began as a helper carrying Kwoyelo's children, and later she became his "wife". She initially took care of one of his children, a child he had with one Layet. That she was 14 years old when she gave birth to her first child in 2000. That child is named Acan Fatuma alias Atimango, and was 22 years old at the time of P.W.48's testimony. At a point in time during her stay with the LRA rebels, she lived with the accused in Sudan where she had the opportunity to see Joseph Kony. That on arrival in Sudan with Kwoyelo, they stayed together for a year and then she began living with him as his wife. She was fourteen years old at the time. That one day he called her to his house and told her that she should be his wife. She then stated,

> ***"the way I was, I accepted to be his wife. When I was his wife, he began living with me. At that time, I did not know anything about affairs of a man and woman. I conceived as a result of the sexual intercourse."***

In 2004, following an intense battle P.W.48 got wounded and was able to escape and subsequently return home with the help of an organisation known as Gulu Support the Children Organization (GUSCO).

382. The second victim was "NS" (a protected witness) who testified as P.W.49, stated that she was abducted during the month of August, 1996 at the age of 11 years. That she was abducted by a group of more than ten LRA soldiers led by a one Ocan Okwera alias Daban belonging to the battalion of Kwoyelo. She too was taken to the Kilak Hills to the home of the accused where she began to live with him as a helper caring for Kwoyelo's children. Later, she became his "wife." She now has two children with the accused as a result of that union. One of the children is Lanyero Sharon aged 19 years born on 20th June, 2002 and the other is Atim Oliver aged 17 years born on 16th November, 2005. P.W. 49 lived with the accused in Sudan during part of of her captivity. That she managed to escape in 2005 during an intense battle involving an attack by a helicopter gunship. By that time, the UPDF had been fighting the LRA for two weeks. That as a result there was nothing to eat and

they were hungry and thirsty. When the UPDF soldiers encountered them, they began shooting. “NS” and her colleagues had no gun and had been abandoned by the other rebel soldiers. The UPDF fired about two magazines of bullets at “NS” as she fled but they missed. However, a child belonging to one of the other lady soldiers who was near “NS” was hit by a bullet. Along the way, P.W.49 joined Layet and Auma Evaline and together they escaped and returned home. P.W.49 met a woman who took her to the authorities and then to World Vision offices. Later she was taken back home to her mother. P.W.49 had her first child while in captivity at Kilak Hills and later delivered the second child following her escape and return to her home. She was pregnant with her second child when she escaped from the bush.

383. “TR” (a protected witness) was the next victim and she testified as P.W.25. That she was 12 years at the time and her mother was Achieng Christine. That she was abducted on the day her mother was killed. That day in February, 1996, rebels led by Kwoyelo, made a reprisal attack on their home. The rebels made them trek to the Arebe Hills. The following morning, some of the abductees were executed by a riverside. They spent one night at the Arebe Hills and the following day she was taken to “Siniya Brigade” by one of the rebel leaders they called “Teacher.” He smeared her with “*moya*” (Shea nut butter) on the chest only and then told her to go to a man who was to be her husband. It was the “teacher”, who had smeared her with oil, who told her that she had been given to Loum as a husband. That this Loum was the same man who had come to their home and struck her mother with an axe on the head. That evening Loum took her to sleep in his house. That she entered the hut-like tent together with him. On entering, Loum told her, “now you are my wife.” He said she should sleep with him and he put a gun near her. That he then told her that if she did not remove her clothes he would kill her. She undressed and he slept on her. That she sustained serious tears in her vagina and bled profusely. That Loum had sexual intercourse with her three times that night. She also sustained some swellings. It was her testimony that she had never had sexual intercourse with any man before and had not yet begun menstruation. In the morning, Loum told her to pick the blood stained clothes and take them for washing. After she washed the clothes, Kwoyelo called her to go to him. That Kwoyelo then told her that two people, Ocan Vito Acore and Okello David, who were

among those who had been clubbed to death the previous evening had "resurrected" and gone back home. During that one month she spent at the sick-bay, she used to boil water for nursing the wounded. She also participated in looting and cooking food as well as abducting civilians. PW 25 also stated that some abductees would not be allowed to return home but would be killed using logs. She witnessed and participated in some of the killings. That one time she and another girl were forced to beat two boys to death. The boys had attempted to escape. She hit one boy and her colleague hit the other in the back of their heads. Some boys were standing behind them with pangas. That if P.W. 25 had refused to hit the boys she would have been killed by the boys holding the pangas. At that time the rest of the girls had also been given out to other men. Some of them were about her age and others older.

384. After four months she managed to escape and return home. She was abducted once again after two days. That she was in the house with four other girls aged around 14 – 18 years' old when at around 5.00 pm they were ordered to come out of the house. When she got out of the house she saw Kwoyelo who said to her, "is this you? You escaped and thought we would not get you? This time we are going to kill you." Other soldiers came and wanted to kill her instantly but later decided to take her with them. Upon her return to the rebel hideout, the rebel soldiers brought many sticks with which two soldiers flogged her seriously asking why she had escaped. They said they were supposed to kill her but now would just beat her. Kwoyelo told her that he was taking her back to Loum. At Guruguru Hills, she was handed back to Loum who said that as her husband, he was going to teach lesson. He then also caned her seriously. They continued to live as husband and wife. That she was not living with him willingly. He was just forcing her to be his wife. TR added that she could not refuse because there was nowhere else to go. She feared for her life, because if she resisted or refused he would kill her. That he often beat her for resisting. They lived there for about four months and then began moving to Sudan.

385. When she reached Sudan, "TR" was taught how to dismantle and fire guns. She was later given a gun which she used in fire exchanges when they met resistance during their raids for food. When she returned to Uganda through Palabek, she was part of a group of about

fifty rebels commanded and led by Otti Vincent. It took them three days. They met soldiers from the Uganda government and exchanged fire. She was still armed with the gun. They scattered and took the direction of Lango. At Adilang Centre they went out to rob sugar, soap, clothes, soda, and many other items. Government soldiers came and began shooting at them. They escaped and after a night and were again ambushed by government soldiers who began shooting at her group. She realised she had been hit by a bomb and fell down. She did not know what happened next. She later realised that her body was covered in blood with an injury on the right side of the body, the head, the knees, the buttocks, the right side of the cheek and teeth. She crawled and sat near an anthill.

386. Civilians later came and carried her to their home. That they called the Local Council (LC) officials to come and interview her. She told them she comes from Gulu and they told her to stay calm since the President had directed that those who escaped from the bush should not be killed. She was taken to the hospital for one night and then to Lira where she spent another night. Thereafter, she was brought to Gulu Barracks and then to the military hospital where she spent two weeks. She was taken to GUSCO where escaped abductees were kept. It was established in hospital that she was pregnant and suffering from syphilis. She was treated and healed. She stayed at GUSCO for three months and was later taken back home to her father.

387. In his defence as D.W.1, the accused stated that for the time that he served in the LRA he suffered a lot of pain and even now he experiences a lot of pain because ever since he was born, he has never enjoyed life. No sooner had he started life than he was abducted, taken to the bush and began experiencing very difficult life. That the claim that he abducted "TR" and forced her to marry a soldier of the LRA was a lie. Because of working in the sick-bay, the rules did not allow him to abduct anybody. The right to assign anybody anywhere was not in his hands as Kwoyelo. That mandate was with Joseph Kony. He is not sure whether "TR" was in the sick-bay with him. The rules did not allow any new person abducted to be brought to the sick-bay. Who then allowed her to be abducted and brought to him? The LRA also had its rules. Whenever any young girl was abducted, they would be handed over to mothers to act like baby sitters. Such an order would come from Joseph Kony for the

young girls to be deployed with mothers of young children. They would also carry the bags of mothers of little children, carrying saucepans of the little children as the mothers could not carry the baby, bags and saucepans at the same time. They would also train the girls militarily since they were still too young to live with a man. Battle would erupt anywhere and one could not tell when it would erupt. Therefore, even woman would be involved in gun fights. Such a girl would therefore live as a soldier, not a wife.

388. The rules set by Joseph Kony himself stated that when a widow's hair is shaved after the loss of a husband, she was supposed to stay for six or nine months so that she grows back her hair to the extent that when she places a comb in it, it does not fall. It is only then that she can begin talking to another man. When at the end of that period a woman grows back her hair, she can choose any man to woo her but the choice was that of the woman; it could be a recruit or senior officer, the choice of who to relate with would be hers. When a woman is in a new relationship, that information would be relayed to the immediate commander who would in turn relay it to the next in line until it reached Joseph Kony himself. Kony would issue the order that they get married and that is when the man would begin living with the woman. The rule was that when a new woman or girl came and you force yourself on her as a man, you would be shot at a firing squad.

389. For instance, when the wife of one Abudema Buk had a sexual relationship with another soldier, a sergeant, both of them were shot at a firing squad. The same thing happened when the wife of one Ocan Bunya slept with a soldier known as Ongwen and both of themwere shot. The rules in the bush were so stringent that even if a soldier went to battle and left his wife with you, you would not touch her for fear of being shot. No one would toucha woman. That in 2000, Kwoyelo wooed and took two widows, Lanyero Rose and AlwochFilder. His first wife Lanyero Rose was a widow of one Abira who was shot dead at a shopat Anaka by the shop owner who had a pistol. Alwoch Filder had a deceased husband calledJohn Ociti. Kwoyelo stated that the women were the property of the movement. As a result,Joseph Kony could transfer the woman creating tensions to another unit. If therefore any widow claimed that she was threatened, that would be a big lie because it was the widowswho chose the men and then the men would marry them. A woman who is taken to the

bush and trained to be a soldier and is given a weapon would not be distributed to anyone. Such a woman would not be distributed but would choose a husband because she was armed just like any other soldier. When returning from Sudan to Uganda, Kwoyelo came back with three women and children. They are his wife Lanyero Rose, the mother of his children, together with Lakot Betty and Auma Evalyne. He stated that these were three of his wives who had children and who came back with him and even now are still his wives. However, Kwoyelo said that he was not sure if they are at his home or have since moved on.

390. On abduction, "NS" and "LW" were placed in the houses of the commanders where they gave assistance to the women in whose homes they lived. They lived there until the year 1999 when Kwoyelo was sent to the Sudan. That all the women and the girls whose husbands had died during battles were collected so that he could take them to Sudan. On arrival in Sudan, he handed them over to Joseph Kony, who anointed them, dipped then in the river and when they came out, he shaved their hair. He directed that for the next six to nine months, no one should woo them because widows are not just given, they should be wooed. Kwoyelo also stated after the widows were anointed, he as Kwoyelo, was able to get some and in 2000 he married them. He got children with these women. Kwoyelo stated that he does not deny having been with these girls because they became his wives. He stated farther, that he prayed for forgiveness from the court if he had erred. That it is true they had been taken as girls but they had become women and that is when he married them.If it was an error, he requested the court to be kind to him. That in the event he was released,he would be able to go back home and prepare for the welfare of his children.

Submissions of Counsel

391. Concerning Count 87, the defence submitted that "LW" who testified as P.W.48 was completely camouflaged leaving the accused highly prejudiced, as he was limited in instructing his counsel on questions to ask in cross examination. That affected the outcome in that he could not properly challenge her evidence. Counsel also invited court to assess the conditions prevailing at the time. That the victims were young adolescents, who were

abducted at a tender age. The accused in his testimony acknowledged his mistake on this aspect, and sought reconciliation. For Count 92, the lawyers argued that there is no evidence from the prosecution to show that the victim was forced into sexual intercourse. That P.W.48 stated the accused called her in his house and asked her to be his wife, and she accepted.

392. In reply, the prosecution submitted that sexual abuse of girls and women by the LRA was one of the weapons used against civilians who were taking no active part in the hostilities. Girls were used as domestic servants in the households of commanders. At the age of thirteen to fifteen, many were forced into sexual slavery as "wives" of LRA commanders and subjected to rape, unwanted pregnancies, and the risk of sexually transmitted diseases, including HIV/AIDS. These instances can be classified as rape as a crime against humanity committed by Kwoyelo for the following reasons: Witness "NS" testified that she was forced into a sexual relationship with Kwoyelo after being abducted and taken to his household. Despite initially being taken as a "baby-sitter" for his children and because she was just 13 years, Kwoyelo exerted control and made her his wife against her will.

393. In addition, the prosecution also submitted that P.W.48 described how she was married off to Kwoyelo as his third wife at the age of 14 without a formal ceremony. This is considered child marriage, which involves a lack of informed consent and the violation of the rights of the child. Engaging in a sexual relationship with a child is a crime, making it rape in this context. Furthermore, that P.W.48 had also stated that Kwoyelo initiated a sexual relationship with her when she was 14 years old. Because of the power dynamics and the absence of consent due to her age, that would constitute rape. Besides, witness P.W.47 mentioned the abduction of her daughters by Kwoyelo, one of whom gave birth while in captivity. This implies that the daughter was subjected to sexual violence or coercion by Kwoyelo, resulting in a forced pregnancy. This forced pregnancy is a violation of the victim's bodily autonomy and is considered a crime against humanity. It is the prosecution's argument that these cases involve instances of rape committed by Kwoyelo, where he exerted control and force over the victims' bodies and violated their consent. These acts fall under crimes against humanity due to the systematic nature of the sexual

violence committed against multiple victims, as well as the severe physical and psychological harm inflicted upon them. The evidence adduced by prosecution has established the case against the accused.

394. The prosecution argued farther, that P.W.49 -"NS", testified that she was abducted when she was 11 years old in February 1996. She stated that she was forced at the age of 13 years to have sexual intercourse against her will. That the assailant told her not to go anywhere but to be his wife since she was being looked after. The assailant had a weapon, held her by force and had sex with her. She failed to walk after the act, her vagina was injured and she nursed the injury with warm water as she had begun smelling. In cross-examination, the witness was consistent and stated that the assailant called her into his tent and when she went there, his penis was already out and erect and he put her down. He had sex with her as she bled from her private parts. That she cried but the assailant threatened to kill her and went on to have sexual intercourse with her thrice that night. She restated that she did not consent to the act but was forced into it.

The analysis

395. Both counts 87 and 92 are founded on alleged acts of sexual and gender-based violence. From the testimony of the three victims, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25, it is evident that their abduction was followed by their being kept in captivity against their will, with the constant threat of death if one were to attempt to escape. This created a permanent environment that deprived the victims of their right and capacity to say "no" thereby eroding the sexual dignity that goes with that right. Considering that "LW" was fourteen (14) years old, "NS" was thirteen (13) years old, while "TR" twelve (12) years old when each of them was first sexually assaulted, none of the victims had attained the age of majority to have the capacity to give consent. The assaults were committed against persons who were, legally, incapable of giving consent. Even if they were to have such legal capacity, the acts were committed within the context of an extremely coercive environment against persons incapable of giving genuine consent. It is

for that reason that the Court disagrees with the opinion of the assessors which considered the fact that "LW" accepted to be a wife, as constituting valid consent.

396. To the extent that rape is less about sexual pleasure but more about violence and power, wherein the perpetrator inundates the victim through coercion and/or brute force, caused with an intention to harm a person and their body, it constitutes violence to life. This is because the sexuality of the victim is seen as a tool used to subjugate and control them. Many studies show that one of the factors that predicts a victim's resistance to sexual assault is the fear of death. The victims "LW" and "NS," after abduction, were coercively socialised in such a manner that they also started to believe that conceding to sexual encounters with their captors was the best way to survive. Had they been of age, that still would not be valid consent.

397. Sexual and gender-based violence, as a form of violence to life, has been pervasive throughout the history of armed conflict; committed for different reasons and in different circumstances, such as for policy purposes (strategy of war), a practice (tolerated although not specifically ordered) or it is committed opportunistically (private reasons mostly). Whatever the reason for its commission, the consequences of sexual violence are multiple and long-lasting. Sexual violence leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. It can affect all dimensions of a person's physical, psychological and social well-being, sometimes enduring across different stages of life, and can also affect families and communities. The physical consequences of sexual violence include death, physical injuries, pain resulting from physical violence, sexually transmitted infections, pregnancy, infertility, and subsequent health problems. Longer-term consequences may include distress or anxiety which impacts on a person's dignity affecting all aspects of life including the capacity to work and to provide care for their family. Pregnancy resulting from rape may result in high-risk delivery, especially for adolescent and young girls.

The findings

398. In their joint opinion, the Lady and Gentlemen Assessors advised that all the essential elements constituting the offence of violence to life in Count 87 have not been proved while those in Count 92 have been proved. They were of the view that "LW" consented to the acts of sexual intercourse. In partial disagreement with the assessors, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of violence to life in the two (2) Counts, i.e. Count 87, and Count 92, respectively.

The offence of outrages against personal dignity as manifested by rape

399. Out of the six Counts of outrages against personal dignity, three relate to sexual and gender-based violence. The offence of outrages against personal dignity is in contravention of Section 2 (1) (d) and Article 3 (1) (c) of the Fourth Schedule of ***The Geneva Conventions Act, Cap 363 (Now 349)*** (as set out in Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of war of August 12, 1949), and common Article 3 (1) (c) of ***The Geneva Conventions*** which prohibits outrages upon personal dignity, in particular, humiliating and degrading treatment. Article 4 (2) (e) of Additional Protocol II, also proscribes outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Upon conviction, the offender is liable to imprisonment for a term not exceeding fourteen years (see section 2 (1) (f) of ***The Geneva Conventions Act***).

The indictment

400. In Count 82 the offence was allegedly committed between February, 1996 and January, 1998 at Perecu village, Amuru District and parts of South Sudan, where the accused, being a commander in the LRA, is alleged to have forcefully taken away "TR" (a protected witness) and forced her to marry one of the LRA combatants under his command; in Count 86 the offence is alleged to have been committed between 1997 and 2004 at Kilak Hills,

Amuru District and parts of South Sudan, where the accused being a commander, namely a Colonel in the LRA is alleged to have subjected an abductee "LW" (a protected witness) to repeated incidents of forceful sexual intercourse, inflicting severe physical or mental suffering on her; in Count 91 the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills, Amuru District and parts of South Sudan, where the accused being a commander, namely a Colonel in the LRA is alleged to have subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical or mental suffering on her;

The elements of the offence

401. In order to be considered as an outrage against personal dignity, the act or omission must cause serious humiliation or degradation to the victim (see ***Prosecutor v. Aleksovski***[81]). The humiliation must be so intense that a reasonable person would be outraged. The offence requires knowledge of the accused that his act or omission could cause serious humiliation, degradation or otherwise be a serious attack on human dignity, but such humiliation or degradation inflicted upon the victim need not be lasting for the act to be qualified as an outrage upon personal dignity (see ***Prosecutor v. Kunarac et al.,***[82]). The perpetrator must have intended to commit the act concerned while aware that the act would humiliate, degrade or violate the dignity of the victim. ***The Geneva Conventions Act*** explicitly proscribes rape as one of the outrages against personal dignity. Rape is therefore generally recognised inherently as a violation of dignity (***Prosecutor v. Akayesu***[83]). Sexual assault is something more than a simple act of violence, it is an assault upon human dignity (see ***R v. Osoli***[84]). The victim need not personally be aware of the existence of the humiliation or degradation or other violation.

[81] *IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 54*
[82] *IT-96-23 & 23/1-T, Trial Judgment, 22 February 2001, para. 501*
[83] *Case No. ICTR-96-4-T, Judgement, Sept. 2, 1998 para 688*
[84] *[1993] 4 S.C.R. 595 at 669*

402. For the accused to be convicted of the offence of rape as an outrage against personal dignity, the prosecution must prove each of the following essential ingredients of the offence to a standard beyond reasonable doubt;

a. There was an act of rape as a form of serious humiliation, degradation or a serious attack on the human dignity of the victim;
b. The act was committed with the knowledge of the possibility of that effect.
c. The nexus to the armed conflict of a non-international nature.
d. The participation of the accused.

The evidence

403. This is an offence based on Incident "A", the details of which have been outlined above, when considering Counts 87 and 92, in the testimonies of "A2" (a protected witness) who testified as P.W.47, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25.

Submissions of Counsel

404. The prosecution and defence counsel opted to rely on the same submissions they made with regard to Counts 87 and 92 above.

The analysis

405. Dignity posits the inherent and equal worth of all by virtue of being human; it is this personhood, humanity, or subjectivity that is denied when a rapist disregards non-consent and, thereby, objectifies the victim. Rape not only impinges on the right to freedom from physical violence, but also on the freedom to flourish as a self-defined, subjective self. The intrinsic worth of persons requires that they are treated not as means to an end, but as ends in themselves, placing particular emphasis on subjectivity and autonomy, thereby respecting their autonomy and personhood. The offence is centred around the right of

persons not to be seen as sexual subjects and the right to experience fulfilment and self-worth in sexual interactions. Inherent in the act of rape is serious humiliation, degradation or a serious attack on the human dignity of the victim which very often have the most long-lasting psychological consequences for victims, including feelings of shame and degradation of selfhood. It strikes at a woman's power and autonomy, seeks to degrade and destroy her; its goal is domination and dehumanisation. It is an unlawful invasion of the body, mind and spirit of the victim; the very existence of the victim as a person.

406. From the testimony of the three victims, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25, it is evident that the abducted women were held in a climate of generalised and institutionalised violence; in a state of extreme vulnerability, without any respect for their subjective self. Their right to experience fulfilment and self-worth in sexual interactions was violated causing then serious degradation.

The findings

407. In their joint opinion, the Lady and Gentlemen Assessors advised that all the essential elements constituting the offence of violence to life in Count 82, unlike those in Count 92 have not been proved. They were of the view that "LW" consented to the acts of sexual intercourse. In partial disagreement with the assessors, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved, to a standard beyond reasonable doubt, the rest of the ingredients constituting the offence of outrages against personal dignity as a war crime, in the three (3) Counts, namely Count 82, 86 and Count 91, respectively.

The offence of Torture as a crime against humanity, as manifested by rape;

408. The prohibition against torture is well established under customary international law as *jus cogens*; that is, it has the highest standing in customary law and is so fundamental as to

supersede all other treaties and customary laws (except laws that are also *jus cogens*). Criminal acts that are *jus cogens* are subject to universal jurisdiction, meaning that any state can exercise its jurisdiction, regardless of where the crime took place, the nationality of the perpetrator or the nationality of the victim. The prohibition is further codified in Article 5 of ***The Universal Declaration of Human Rights***. It is also contained in Article 7 of ***The International Covenant on Civil and Political Rights, The Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*** and in Article 5 of ***The African Charter on Human and Peoples' Rights***. Customary international law protects the ordinary person from prohibited conduct with sufficient definiteness and puts an accused on notice of conduct prohibited not only in this country, but in much of the civilised world.

409. Domestic and international courts have conceptualised rape and other forms of sexual violence, as torture when the acts meet the legal elements of torture. A reference to torture was included in the definition of crimes against humanity comprised within Control Council Law No. 10, which was adopted in December, 1945, for the purpose of governing prosecutions that were subsequent to those overseen by the International Military Tribunal and were carried out under the auspices of allied military tribunals and German national courts (see ***Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*** Art 2, § l (c), Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). It was this more expansive enumeration of acts of crimes against humanity, including torture, found in ControlCouncil Law No. 10, that was drawn upon by the United Nations Security Council when itadopted the Statute of the International Criminal Tribunal for the former Yugoslavia. A year later, the Security Council included the act of torture as a crime against humanity in the somewhat modified definition found in the Statute of the International Criminal Tribunal for Rwanda.

410. Under Article 1 of ***The Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment,*** torture is defined as the infliction of severe pain or suffering, whether physical or mental, intentionally inflicted on a person for such purposes

as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The three elements evidently are: (i) the relative intensity of pain or suffering inflicted: it must not only be severe, it must also be an aggravated form of already prohibited (albeit undefined) cruel, inhuman or degrading treatment or punishment; (ii) the purposive element: obtaining information, confession, etc.; and (iii) the status of the perpetrator: a public official must inflict or instigate the infliction of the pain or suffering.

411. The definition of torture in customary international law as it appears in ***The Torture Convention***, covers any such person whether acting in peace time or in a situation of armed conflict. By that definition, exercise of governmental functions is a core requirement, which should be distinguished from purely military ones. A person acting in a public capacity includes those acting for an entity with *de facto* effective control over an area and exercising governmental functions. The question will be whether the entity has established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers, as opposed to a rebel faction or a mere military force. Finding a governmental authority means examining the circumstances to assess whether the entity had sufficient organisation and actual control over the area in which the conduct occurred and whether it exercised the kind of functions that a government would be expected to fulfil. The entity in issue must have exercised certain prerogatives that are comparable to those normally exercised by legitimate governments.

412. In the same vein, the rubicon separating the state and the non-state orbit was crossed by the United Kingdom Supreme Court in ***R v. Reeves Taylor***[85]interpreted "a public official or person acting in an official capacity" as covering any person who acts otherwise than ina private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population

[85] *[2019] 3 WLR 1073; [2021] AC 349; [2020] 3 All ER 177; [2020] 1 Cr App R 19*

in the territory which it controls and in which the relevant conduct occurs. According to the Court, official torture is as objectionable and of as much concern to the international community when it is committed by a representative of a *de facto* governmental authority as when it is committed on behalf of the *de jure* government. In this decision, the requirement of a nexus with a *de facto* governmental authority expanded the scope of the prohibition to acts performed by or on behalf of an entity exercising governmental control over a population in a territory over which it holds *de facto* control. International criminal law has thus developed to guarantee that crimes committed under the guise of state authority (or its acquiescence) do not go unpunished.

The indictment

413. Regarding the two Counts of the offence of torture; in Count 85 the offence is alleged to have been committed between 1997 and 2004 at Kilak Hills Olinga village, Labara Parish Pabbo sub county Kilak County and some parts of South Sudan, whereby the accused being a colonel in the LRA is alleged to have subjected an abductee "LW" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her; in Count 90 the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills Olinga village, Amuru District and parts of South Sudan, whereby the accused being a colonel in the LRA is alleged to have subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical and mental suffering on her.

The elements of the offence;

414. In ***Prosecutor v. Tadic***[86] the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia determined that, under customary international law, crimes against humanity could be committed in peacetime and that war crimes were punishable when

[86] *Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 70 (Oct. 2, 1995*

committed in non-international armed conflict. However, in ***Prosecutor v. Akayesu***[87], the Tribunal interpreted the word "torture", as set forth in Article 3 (f) of its Statute, in accordance with the definition of torture set forth in ***The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.***

415. Although the ICTY in ***Prosecutor v. Furundžija***[88]**,** initially considered that there was a requirement in respect of torture during an armed conflict that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, it later took the contrary view in ***Prosecutor v. Kunarac***[89]**,** holding that there is no such requirement in the case of war crimes or crimes against humanity in international humanitarian law.

416. In ***Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic***[90]**,** the Court observed that ***The Torture Convention*** was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Convention deals with the acts of individuals acting in an official capacity, as a limitation of the engagement of States. States are under an obligation to prosecute acts of torture only when those acts are committed by "a public official ... or any other person acting in a non-private capacity." The definition of torture in that context reflects customary international law as far as the obligation of States is concerned, but it does not wholly reflect customary international law regarding the meaning of the crime of torture generally. Therefore, the public official aspect is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of ***The Torture Convention***.

417. That position was re-affirmed in ***Prosecutor v. Miroslav Kvocka et al***[91]**.** Considering that the protection of the inherent dignity of the person is the rationale which underpins or ought

[87] *Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998*
[88] *IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para 162*
[89] *IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, para 496*
[90] *(IT-96-23 & 23/1), Appeals Chamber Judgement of 12 June 2002, para 146 -148*
[91] *(IT-98-30/1-A), Appeals Chamber Judgement of 28 February 2005, para 284.*

to underpin, the rules prohibiting torture rather than looking at torture committed as a matter of state policy, this Court is persuaded to follow this more progressive approach to its interpretation which looks at torture as an international crime beyond the Convention.

418. Torture is the ultimate expression of abuse of power regardless of the status of the perpetrator. It erases an individual's personality and integrity and is the complete opposite of treating an individual with dignity. It is thus necessary to protect human beings from torture by drawing attention to the need to uphold the rule of law and to address the powerlessness experienced by the victim, whether the perpetrator is a public official or not, otherwise members of armed groups, opposed to a state, can commit torture with impunity. The *jus cogens* norm prohibiting torture requires no state nexus. The seriousness of the infringement of the victims' rights and the egregious nature of the conduct itself, justifies the involvement of the international community.

419. Moreover, international customary law continues to exist besides norms regulated in treaty law. In the law of armed conflict, there is no requirement for state, or quasi-state, involvement for conduct to constitute torture. Therefore, the approach to the definition of torture adopted in ***Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*** and ***Prosecutor v. Miroslav Kvocka et al.*** does not require any particular nexus, but rather recognises that the prohibition of torture requires the mere existence of an effective power over a victim; a significant power imbalance between torturer and victim, where the perpetrator uses his or her position of authority to disempower and terrorise the victim, regardless of a state-nexus or a nexus with a *de facto* governmental authority.

420. Considering that the protection of human dignity is the inherent aim of the prohibition of torture, what matters becomes the fact that the victim has suffered a serious violation of her dignity. As a consequence, the status of the perpetrator as a public or private actor is not relevant. Therefore, for the accused to be convicted of torture as a violation of Customary International Law, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. The perpetrator inflicted severe physical or mental pain or suffering on someone'.
b. The victim was in custody of or under the control of the perpetrator;
c. The severe physical or mental pain or suffering was not inherent or incidental to lawful sanctions;
d. It was part of a widespread or systematic attacks directed against a civilian population; and
e. the perpetrator knew or intended it to be part of a widespread or systematic attacks directed against a civilian population.

The evidence

421. This is an offence based on Incident "A" the details of which have been outlined above, when considering Counts 87 and 92, in the testimonies of "A2" (a protected witness) who testified as P.W.47, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25.

Submissions of Counsel

422. Defence Counsel opted to rely of the submissions they made in respect of Counts 87 and 92 above. On their part, the prosecution submitted that the conduct described in the testimonies of "LW" and "NS," including abduction, confinement, rape, coerced sexual relationship, and forced marriage of minors, is considered acts of torture as a crime against humanity. These acts involve severe physical and psychological suffering inflicted on these individuals, which are intentionally perpetrated as part of a widespread or systematic attack directed against a civilian population where the two victims belong. Torture as a crime against humanity is defined by international law, including ***The Rome Statute of the International Criminal Court*** **(ICC)** and ***The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*****.** These instruments establish that acts of torture as a crime against humanity include severe pain or suffering, whether physical or mental, intentionally inflicted by or at the instigation of a government official

or other person acting in an official capacity. Different judgements from the ICTY and ICTR have deemed torture as severe violations of the Geneva Conventions, transgressions of the laws or customs of war (a distinct classification in the ICTY Statute), and as crimes against humanity. Except in the ICC, the definition of torture remains unchanged regardless of the specific category of atrocity crime it is accused under.

423. From the statement of "NS," she was subjected to repeated incidence of forceful sexual assault, conduct which, inflicted severe physical, mental and sufferings upon her. Similarly, LW suffered the same fate. In the light of the statements of offence, the prosecution contends that the accused and his subordinates committed the said offences as part of a wider attack on the civilian population, which suggests that the conducts were pre-planned. There is also evidence to show that Kwoyelo Thomas alias Latoni had discriminatory intent to attack civilians and he attacked them on the basis that they supported the government of Uganda against the LRA and for the victims of the sexual and gender-based violence as a policy of the LRA to subject such victims as sexual servitude and domestic workers.

The analysis

424. Torture as a crime against humanity under customary international law is the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, with the aim of obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person, as part of a widespread or systematic attacks directed against a civilian population. It is the contextual element of the act forming part of a widespread orsystematic attacks directed against a civilian population which introduce an organisational or institutional dimension to torture as a crime against humanity and thus elevates the actsof torture to international crime.

425. The accused must have had the specific intent to inflict severe pain or suffering. The mental state of the accused is almost inevitably proven through circumstantial evidence. Once the

act of rape or other form of sexual violence is proven, the Court may infer the *mens rea* requirement of specific intent from the facts and totality of the circumstances. For example, specific intent to inflict severe pain or suffering may be inferred from the conduct of the accused or the victim's injuries and other signs of sexual violence. The acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial (see ***Prosecutor*** v. ***Kunarac***[92]**)**.

426. In proving the pain or suffering element, the actions of the accused must have resulted in severe physical or mental pain or suffering. The victim's prolonged mental harm may be demonstrated through witness testimony, expert testimony, or medical evidence. Even without physical injury, rape and other forms of sexual violence inevitably involve mental pain or suffering caused by prolonged mental harm. Rape is a violation of bodily or psychological integrity. It inflicts both physical and emotional pain, and invokes prolonged feelings of shame, loss of self-esteem, and creates a sense of violation and objectification.

427. Rape is a form of aggression which necessarily implicitly involves severe pain or suffering, both physical and psychological, so as to constitute torture (see ***Prosecutor v. Delacic***[93]***)***. The assumption that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act since pain or suffering is a logical consequence of such conduct (see ***Prosecutor v. Kunarac***[94]). Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. In ***Prosecutor v. Zejnil Delalic and others***[95]**,** it was held that rape "strikes at the very core of human dignity and physical integrity." The trial chamber emphasised that when such violence is committed against a woman because of her gender, the perpetrator's intent triggers the prohibited purpose of

[92] *IT-96-23-T and IT-96-23/1-A at para 155*
[93] *Case No. IT-96-21, at paras 440, 494 (Nov. 16, 1998)*
[94] *IT-96-23-T and IT-96-23/1-A at para 150*
[95] *IT-96-21-T Judgement of 16 November 1998*

discrimination as an element of the crime of torture, just as discrimination based on ethnicity does.

428. From the testimony of the three victims, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25 it is evident that rape was used as part of the acts of intimidating or coercing the abducted girls into submissiveness. It involved the wilful causing of great suffering or serious injury to body or health of both victims "LW" and "NS." Rape is understood to be an act of torture and inhuman treatment. It is a form of torture on the basis of gender discrimination.

The findings

429. In their joint opinion, the Lady and Gentlemen Assessors advised that not all the essential elements constituting the offence of Torture in Count 85 had been proved, however they were all established in Count 90. In partial disagreement with the assessors, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of Torture as a violation of Customary International law in Counts 85 and 90 respectively.

The offence of Rape as a crime against humanity;

430. Sexual violence against females that takes place during armed conflict or systematic persecution is a clear violation of international law.

The indictment

431. Regarding Count 84 it is alleged that the offence was committed between 1997 and 2004 at Kilak Hills, Amuru District and parts of South Sudan, when the accused, being a commander/Colonel in the LRA subjected an abductee "LW" (a protected witness) to

repeated incidents of forceful sexual intercourse inflicting severe physical or mental suffering on her; in Count 89 the offence is alleged to have been committed between 1996 and 2005 at Kilak Hills, Amuru District and parts of South Sudan, when the accused, being a commander/Colonel in the LRA subjected an abductee "NS" (a protected witness) to repeated incidents of forceful sexual intercourse inflicting severe physical or mental suffering on her;

The elements of the offence;

432. In ***Prosecutor v. Akayesu***[96] the Chamber defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. Therefore, for the accused to beconvicted of rape as a violation of Customary International Law, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

    a. The sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator;
    b. It was by coercion or force or threat of force against the victim or a third person;
    c. It was part of a widespread or systematic attacks directed against a civilian population; and
    d. The perpetrator knew or intended it to be part of a widespread or systematic attacks directed against a civilian population.

The evidence

433. This is an offence based on Incident "A" the details of which have been outlined above, when considering Counts 87 and 92, in the testimonies of "A2" (a protected witness) who

[96] *ibid*

testified as P.W.47, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25.

Submissions of Counsel

434. The prosecution and defence counsel opted to rely on the same submissions they made with regard to Counts 87 and 92 above.

The analysis

435. From the testimony of the three victims, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25 it is evident that they were subjected to acts of sexual intercourse. Considering their age at the time, coupled with the taking advantage of the coercive circumstances, their consent was negated even without relying on physical force. The perpetrator had the intention to effect the prohibited sexual penetration with the knowledge that the victims had not given consent.

The findings

436. In their joint opinion, the Lady and Gentlemen Assessors advised that not all the essential elements constituting the offence of Rape in Count 84 have been proved while those in Count 89 were proved. In partial disagreement with the assessors, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of which has been deferred, the prosecution has proved the ingredients constituting the offence of Rape as a violation of Customary International Law in Counts 84 and 89, respectively to a standard beyond reasonable doubt.

The offence of Enslavement

437. The prohibition against enslavement is well established under Customary International Law as a *jus cogens* norm. ***The Convention to Suppress the Slave Trade and Slavery, 1926*** proscribed what is identified as "sexual slavery." The convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Furthermore, Article 1 of the 1956 ***Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and PracticesSimilar to Slavery (1956 Supplementary Convention)*** prohibits four enumerated servile statuses: debt bondage, serfdom, forced marriage, and child exploitation. Article 4 of the 1948 ***Universal Declaration of Human Rights*** provides that no one is to be held in slaveryor servitude in all their forms. Similarly, Article 6 of the 1945 ***Charter of the International Military Tribunal (Nuremberg)*** provides that enslavement is a crime against humanity. Article 5 (c) thereof established individual responsibility for crimes against humanity, including "enslavement." Article 8 of the 1966 ***International Covenant on Civil and Political Rights*** abolishes slavery in all its forms and the holding of persons in servitude. In the same vein, Article 4 (2) (f) of the 1977 Additional Protocol II provides that "slavery and the slave trade in all their forms" are and shall remain prohibited at any time and in any place whatsoever. Article 5 of the 1981 ***African Charter on Human and Peoples' Rights*** states that "All forms of exploitation and degradation of man, particularly slavery, slave trade … shall be prohibited."

438. Sexual slavery constitutes part of the *actus reus* of enslavement as a crime against humanity since sexual control could be the means by which to carry out enslavement (see ***Prosecutor v. Hissène Habré***[97], ***Ministère Public v. Hissène Habré***[98]). The Extraordinary African Court acknowledged that sexual slavery constitutes part of the actus reus of enslavement as crime against humanity and of slavery as a war crime. Similarly, in ***Prosecutor v. Kunarac***[99], the ICTY convicted several accused for enslavement as a crime against humanity based upon the accused persons sexual control of detained female Bosnian

[97] *Judgement (Extraordinary Afr. Chambers May 30, 2016*
[98] *Judgment 30 May 2016*
[99] *IT-96-23-T and IT-96-23/1-T*

Muslims during the war in the former Yugoslavia. Therefore, international customary law recognises sexual slavery as a factual indicator of the crime of enslavement.

The indictment

439. Regarding the single Count of the offence of Enslavement; in Count 81 the offence is alleged to have been committed in February, 1996 and January, 1998 in Perecu village Parubanga, Amuru District and parts of South Sudan, whereby it is alleged that the accused, being a commander in the LRA forcefully took away "TR" and forced her to marry one of the LRA combatants under his direct command.

The elements of the offence

440. For the accused to be convicted of enslavement (rape) as a violation of Customary International law, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a. The perpetrator exercised any or all of the powers attached to the right of ownership over one or more persons.
b. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
c. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
d. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
e. The perpetrator's conduct was deliberate and the perpetrator: (i) meant to cause the consequence; or (ii) was aware that it would occur in the ordinary course of events.

The evidence

441. This is an offence based on Incident "A" the details of which have been outlined in the testimonies of "A2" (a protected witness) who testified as P.W.47, "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25 when considering Counts 87 and 92 above.

Submissions of Counsel;

442. The prosecution and defence counsel opted to rely on the same submissions they made with regard to Counts 87 and 92 above.

The analysis

443. Slavery is a status or condition to which a person is reduced. Ownership over a person enslaved extends to whatever labour or service the master forces the person to render; thus, enslavement includes complete sexual and reproductive proprietorship. By objectifying his victim, the perpetrator represents himself as master and the victim as inferior object. The essence of sexual enslavement is the exercise of powers of ownership based upon sexual access to an enslaved person. It is an attack on the sexual integrity of the victim based on gendered roles of women, girl, men and boy-victims of sexualised violence and slavery, based on an unequal and hierarchical relationship. Sexual slavery occurs whenever sexualised violence is integral to the exercise of powers attaching to the right of ownership over a person, most especially by the subordination of women to men as objects of sexual use. Sexual access and reproductive control may be the indicia of the slavery in question where the woman or girl is treated as an object with a sexual function. Sexual access is a mode of exercise of the power of ownership. It perpetuates and entrenches the belief that women are for men: to be used, dominated and treated as objects. It objectifies women's bodies by treating them as if they had no feelings, opinions, or rights of their own. In other

words, the perpetrator denies the victim's autonomy and, thus, personhood, casting her as a mere object for his use.

444. Sexual slavery involves practices restrictive of liberty so far as they may occur in connection with gender relations. The aspect of sexual slavery requires the Court to be satisfied that the accused exercised the powers associated with property rights over the victim, and that the accused deliberately forced the victim to have sex with him, conscious of the fact that the victim, held captive, over a considerable time, with no ability to escape, had no autonomy over her life, and that the accused exercised power over the victim such that, in reality, she was under his complete control, including control over her reproductive capacity.

445. From the testimony of "TR" (a protected witness) who testified as P.W.25 it is evident that she was "given" to a one Loum who thereafter subjected her to forceful sexual intercourse. Even when she escaped, she was brought back to the same man to serve as his "wife." Taking into account various factors, such as control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter her escape, use of force or threats of use of force or other forms of physical or mental coercion, the duration of her captivity, assertion of exclusivity to Loum, subjection to cruel treatment and abuse by Loum and other members of the LRA, control of her sexuality, forced labour, and the victim's vulnerability, what the LRA practiced and referred to as "wife" was the enslaving of abducted girls disguised as baby sitting and subsequently marriage. By that conduct, there was exercise of the right of ownership over the victim "TR."

The findings

446. In their joint opinion, the Lady and Gentlemen Assessors advised that all the essential elements constituting the offence of Enslavement in Count 81 have been proved. In agreement with the assessors, the Court finds that save for the last ingredient concerning the participation of the accused in the commission of the offences, the consideration of

which has been deferred, the prosecution has proved beyond reasonable doubt the rest of the ingredients constituting the offence of Enslavement in Counts, 81.

The offence of Rape under *The Penal Code Act.*

447. In light of the findings made regarding Counts 82, 84, 85, 86, 87, 89, 90, 91 and 92 the offence of Rape charged in Counts 88 and 93 has been rendered redundant. Accordingly Counts 88 and 93 fail and are hereby dismissed.

Modes of Perpetration

448. Responsibility in International Criminal Law arises both when a person materially commits a crime, and when he or she engages in other modes of criminal conduct. There are various modes of liability that are recognised under the Customary International Law, three of which are relevant to this trial. The notion of Joint Criminal Enterprise provides that where a crime is committed by a plurality of persons acting together in pursuance of a common criminal purpose, every member of the group is criminally liable (as a principal) for the group's actions.

Culpability as a direct perpetrator or co-perpetrator, JCE 1.

449. The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. There must be a plurality of persons involved, a common plan or purpose must exist, and the accused's level of participation can range from actually committing the crime to assisting in or contributing to its commission. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime is individually responsible for the crime. The requisite elements are that; - (i) the accused must voluntarily participate in one aspect of the common design and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

450. In Incident "A" at Perecu, Kilak and Sudan (the sexual and gender-based violence offences, of February 1996 - 2005), Incident "C" at Abera (the attack of 4th September 94), Incident

"G" at the Paibi-Atiak Road (the Roadside incident February, 1996), Incident "H" at Wiyanono, Pagak (the attack of 16th May 2004), Incident "D" at Abera (the Acaba reprisal attack of February, 1996), Incident "B" at Abera (the twins' ceremony of 4th March 1996), and Incident "F" at Kulu Pa Okal (of 6th January 2005), the accused was identified by multiple eyewitnesses.

451. In Incident "A" at Perecu, Kilak and Sudan (the sexual and gender-based violence offences, of February 1996 - 2005), all three victims, being; "LW" (a protected witness) who testified as P.W.48, "NS" (a protected witness) who testified as P.W.49, and "TR" (a protected witness) who testified as P.W.25, knew the accused very well and their identification evidence has not been contested. Moreover, it is corroborated by "A2" (a protected witness) who testified as P.W.47, to whom the accused made an admission. In agreement with the assessors, the Court finds that the participation of the accused in all counts arising under this incident has been proved beyond reasonable doubt.

452. For Incident "B" at Abera (the twins' ceremony of 4th March 1996) P.W.27 and the accused were village mates and during this encounter the witness recognized him. Just like P.W.28 and P.W.30 all the witnesses spent ample time with the accused as they walked close to him. He also addressed them and gave orders to the other soldiers in their presence. Even P.W.28 who was encountering the accused for the first time gained familiarity during that time. Although the witnesses were under captivity, the period and circumstances during which the accused was under their observation were conducive to favour a correct identification. The court finds these witnesses credible as there are no inconsistencies in their identification and other evidence. It cannot be said that they were motivated to give such evidence by anything. Their evidence withstood the rigors of cross examination mounted by the defence.

453. The accused was properly identified and placed at the scene at the material time and the victims corroborated each other in describing what he did all the way until they returned. Even before she died, Anjulina Ataro had pointed out the accused to P.W.28 and confirmed to her that he was called Kwoyelo. P.W.27 knew the accused very well and recognized him

as they had interacted as village mates. The prosecution, as well as the defence adopted their submissions made under count 48. The same objection raised under count 48 was reproduced here. As indicated while resolving count 48, the court has already dealt with these matters herein above. In addition, the court rejected the defence's submission that the accused was at the sick-bay when these offences were being committed.

454. All the four witnesses P.W.27 (B4), P.W.28 (B7), P.W.29 (B1) and P.W.30 (B6) identified the accused person. P.W.27, P.W.29 and P.W.30 identified the accused as Thomas Kwoyelo (Tom) among the rebels who abducted them from Abera. The accused was the leader and commanded the abduction and what followed after. He was with other rebels who included Acilli (Silivano) and Kapere. The accused moved closely with the abductees including the four witnesses up to a place where P.W.28 and P.W.30 were released. After some time P.W.27 and P.W.29 escaped.

455. P.W.27, P.W.29 and P.W.30 all knew the accused as Thomas Kwoyelo well before the accused and the others abducted them. The accused grew up in the same village with the witnesses. P.W.27 attended local dances with the accused while growing up, he knew the accused's parents and where the accused stayed. Similarly, P.W.28 grew up with the accused in the same or nearby village(s). P.W.30 knew the accused before from the same village. The three witnesses identified the accused in court. P.W.28 did not know the accused before the incident but had heard about him, he saw the accused for the first time when they were abducted. Fellow abductees showed her the accused and told her that he was Thomas Kwoyelo.

456. The accused ordered the women to be beaten and participated in their beating with other rebels using an axe and sticks. He had addressed the abductees and divided them into three groups; the women, youth and elderly men. The women were released, the youth all boys escaped and the rebels fired gunshots at them but fortunately, they were unhurt. The elderly men and some youth have never returned or been heard of since the accused abducted them. They include Rodento Ochola, Masimo Oboma, Oyet Samuel, Ocii Doctor, Sabino Obooli Oola, Oryem Quirino, Okot Antonio, Okoya Maurensio and Onai.

457. All the four witnesses P.W.27 – P.W.30 placed the accused at the scene of the crime and described the role he played in abducting the victims. Their evidence was not discredited in cross-examination. The witnesses were consistent and truthful. That between 01:00 pm to 02:00 pm the accused participated in the abduction of the victims, moved with them up to Alinga where they spent a night. The following day, he moved with them to a place after *Ceri* river. At about 1:00 pm or 2:00 pm the accused Thomas Kwoyelo addressed them and promised to teach them a lesson for always reporting them to the Government soldiers.He divided the abductees into three groups, ordered for the beating of the women. He also participated in their beating. He released the women and ordered them to return to their homes and look after the children, assuring them that their husbands were not returning back home. The men have never returned to date.

458. Witness testimonies of P.W.27, P.W.28, P.W.29, and P.W.30 consistently describe the violence inflicted upon the abductees, including the direct order by the accused to kill certain individuals. The fact that these victims have not been seen since strongly supports the prosecution's case that the intent was to murder them. P.W.27 stated she saw the accused with a gun and identified him as a participant in the abduction and subsequent violence. P.W.28 and P.W.29 provided consistent accounts of the accused's presence and role in the events, describing how the accused and other rebels separated the abductees and subjected them to brutal treatment. P.W.30 confirmed the involvement of the accused person, contradicting the claim by the defence that the accused was not present or did not participate in the attack. The defence argues that the testimonies of P.W.27, P.W.28, P.W.29, and P.W.30 are inconsistent and unreliable. However, minor discrepancies in witness accounts are typical especially in traumatic events such as this one and do not undermine the overall consistency and credibility of their testimonies regarding the key facts of the case. Despite minor variations, all witnesses consistently identified the accused as a key figure in the abduction and killings. The descriptions of the events, particularly the separation of abductees and the brutal assaults, align across different testimonies, and strengthen their reliability.

459. The defence asserts that the LRA initially had support from the population, which only changed later, leading to kidnappings for conscription rather than murder. This claim overlooks the specific context of the March 4, 1996, incident, where the evidence shows the attack was not merely for conscription but involved intentional killings ordered by the accused. The attack on Abera village targeted civilians who were not supporting the LRA, and the killings were a punitive measure for their perceived lack of support. The violent nature of the attack, including the killing of the accused person's own relatives, indicates a clear intent to murder, contradicting the defence narrative of mere conscription. The context of the attack, targeting both relatives and other villagers, demonstrates that the accused was acting under orders from the LRA and following its brutal tactics, irrespective of personal relations.

460. The charges of kidnapping with intent to murder are therefore well founded based on the evidence provided. The accused's command role, the testimonies of eyewitnesses, and the specific circumstances of the attack all point to a clear intent to murder the abductees. The arguments of the defence do not refute the prosecution's case. All the elements of this offence are proved beyond a reasonable doubt.

461. Regarding participation in Incident "C", Section 19 (1) and (2) of ***The Penal Code Act*** renders any person who aids or abets a crime is a Principal offender. The section provides that;

> When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it—
>
> a. Every person who actually does the act or makes the omission, which constitutes the offence;
> b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
> c. Every person who aids or abets another person in committing the offence.

(2) Any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part, is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the act or made the omission; and he or she may be charged with doing the act or making the omission.

462. ***In Sgt. Baluku Samuel and PC Walusa Joshua v. Uganda***[100] the court held that "section 19 (1) of ***The Penal Code Act*** defines a principal offender to include persons who aid or abet in the commission of crime". Aiding a crime means intentionally helping someone else commit a crime. The crime must have been committed and the assistance or help must have enabled the offense to be committed. This means the aider should have known that the person being helped is trying to commit a crime, and the aider voluntarily acts in a way that helps the person commit it. The physical presence at the scene of the crime is not a requirement but it may be treated as a factor in determining whether you were aiding in the offense.

463. Abetting a crime means encouraging or supporting it (advise, counsel, or induce). The support can be active, in the form of instigation. It can also be passive. If you know the offense is happening and are present for its commission, you can be liable for abetting, or knowing it is happening and doing nothing, can be support for the commission of the offense. Proof of a shared intent to commit a crime with the perpetrator is still required for the offence of abetting. Procuring is persuading or inciting or causing someone to commit the offence. In ***Uganda v. Teddy Ssezi Cheeye***[101] it was held that:

"***A procurer uses the hands and eyes of the person procured to commit a crime as his own. The actions of the person procured become the actions of the procurer. In fact, the section says, not***

[100] *Criminal Appeal No. 21 of 2014 (SC)*
[101] *High Court Criminal Case No. 1254 of 2008*

merely that a person who procures another to commit an offence may be convicted of the offence but that "he or she may be charged with doing the act or making the omission".

464. While testifying, most of the victims stated that they did not know who their kidnappers were. C1 however identified the accused as the person who kidnapped him from his house. He interacted with the accused when he joined other abductees and was being taken by the kidnappers. The accused asked C1 whether he knew him but, C1 denied knowing him out of the fear that the accused would kill him if he revealed that he knew him. The accused afterwards introduced himself to C1 as Kwoyelo, the accused told C1 that they would be friends. He had known the accused for a long time when they were growing up. They would compete in football matches with a team from the accused's village. They would also attend traditional dances with the accused. So, the accused was not a stranger to him. The accused committed these acts with other people whom he was commanding, and as discussed above, he should be held liable.

465. C4 identified the accused when they had reached *Ceri* Stream where they sat to rest. That the accused addressed them and told them that some people would be lucky because they would be allowed to return to their homes while others would not be lucky as they would remain with the rebels. That the accused released some of the abductees, including C4, C6 and C19 and detained Okot Charles, Ojok Patrick, Ogena Simon among others. When C7 complained of being tired and could not walk any further, he heard the rebel who was walking behind him convey the information to teacher Kwoyelo. Shortly after, he learnt that Kwoyelo had ordered that C7 be beaten, killed and left at that place. He was beaten and left unconscious by the roadside. In view of the preceding evidence, the accused person's alibi is effectively destroyed by consistent and credible witness testimonies, firmly placing him at the scene as a commander orchestrating the kidnappings and associated violence.

466. In respect of Incident "D" at Abera (the Acaba reprisal attack of February, 1996), it was argued by the defence that P.W.25 did not mention Kwoyelo in the police statement she

made earlier. Because of that, his participation is brought into question. This Court relies on the decision in ***Emmanuel Rukundo v. The Prosecutor***[102] where it was stated that a Court has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his or her previous statements. It is up to the Court to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned. The Appeals Chamber observed that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or amongst witnesses' testimonies. Farther, it is within the discretion of the Court to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.

467. In view of the above, we find that the discrepancy between the Police statement of P.W.25 and her testimony in court is not material. Her testimony that Kwoyelo was at the scene of crime is corroborated by all the other eye witnesses. As the court trying the facts therefore, we consider this inconsistency minor. P.W.26 also remained consistent despite the rigorous cross examination she faced. This incident happened within the scope of attacks in the Abera area. P.W.26 stated she had been abducted on a previous occasion. P.W.25 was an abductee who went on to become a combatant living and operating in the LRA ranks. P.W.18 was a victim and a leader who knew about the rebels operating within the area under the command of one Kobi and the accused Kwoyelo. It is clear from the testimonies of these witnesses, that Kwoyelo had the ability to issue commands that were obeyed without question. Additionally, other witnesses like P.W. 17 testified that Kwoyelo was an active LRA commander in the Abera area.

468. All eye witnesses state that the accused was at the scene when Achieng was hit with an axe. One of those witnesses, P.W.18, had stated that he was in school with Kwoyelo in 1962. Considering the totality of evidence on record, this testimony appears to discredit him. However, the court has the discretion to sever the contradictions or inconsistencies and utilise the credible aspects of the evidence of witness a witness. In this case, the identification evidence placing Kwoyelo at the scene of crime should be examined in that

[102] *ICTR-2001-70-A, paras. 86 and 207*

context. At the same time, the court will remain mindful of the principles governing evaluation of identification evidence. The testimony by all witnesses at the scene should be examined closely as one whole, particularly in light of the alibi raised by the accused. In spite of this caution, the identification has not been discredited. The accused was properly placed at the scene thereby discrediting his denials. In the result the Court finds that the accused participated directly in the commission of this offence.

469. The Lady and Gentlemen Assessors advised the Court to find the accused guilty of these offences. In agreement with them the Court convicts the accused of counts 20 and 21. In view of that the alternate charges in Counts 22, 23, 24, 26 and 43 are hereby dismissed.

470. Regarding participation in Incident "F" at Kulu Pa Okal (of 06.01.2005), it is true that there are inconsistencies in some aspects of the prosecution evidence. The Court has already stated the manner in which it will deal with such inconsistencies and contradictions. That notwithstanding, the prosecution evidence remains credible and reliable. It is not disputed that the rebels were active in the area. The evidence on record points irresistibly to the positive identification of the accused. The defence challenged the credibility of some witnesses based on discrepancies regarding the school history of the accused. In the view of the Court, these discrepancies are minor in the circumstances. The Court finds that PW 45 positively recognised Kwoyelo. It is clear from his evidence that he knew Kwoyelo well and could name many of the relatives in Kwoyelo's home. As such, any discrepancies regarding when PW 45 and the accused were together in school will be regarded a minor discrepancy. The court is alive to the fact that the witnesses testified to traumatic events that happened more than 20 years ago.

471. In view of the above, the denial and alibi set up by the accused that he not have been in Kulu Pa Okal, because at the time he was shifting with the LRA forces to DRC is disproved. In the result the trial Court finds that the accused was positively placed at the scene of crime and he participated in killing the deceased persons.

472. For Incident "G" at the Paibi-Atiak road (the Roadside incident February, 1996), the defence also contested the participation of the accused. They submitted that the conditions favouring correct identification were absent. The question whether there was a proper identification made should be reviewed in light of the alibi that was set up by the accused. This court looked at the circumstances that favour correct identification as enunciated in ***Abdulla Nabulere***.[103] P.W.5 and P.W.14 testified that saw and recognised the accused at the scene of crime. The latter said that he identified one of the rebels as Okot Thomas. By Okot Thomas he meant Kwoyelo. According to this witness it was broad-day light and the accused was standing four metres away from him. He also stated that he knew the accused well before this incident. This should ordinarily make for very good identification evidence.

473. The defence submitted that there were inconsistencies in the evidence of PW 14 regarding when he had last seen Kwoyelo. The test to be applied should be whether PW 14 was trying to mislead the court. The ICTR Appeals chamber considered the question ofinconsistencies in ***Georges Anderson Nderubumwe Rutaganda v. The Prosecutor***[104], where the chamber stated that,

> ***"it should also be stressed that with regard to the assessment of the credibility of a witness and the reliability of testimony, the Court may accept a witness's testimony despite the existence of contradictory statements. It therefore falls to the Court to assess the contradictions pointed out and determine whether the witness, in the light of his entire testimony, was reliable, and his testimony credible. To be sure, the Court should take account of any inconsistencies in a witness's testimony. The Appeals Chamber, however, emphasised that it falls to the trier of fact to assess the inconsistencies highlighted in testimony and determine whether they impugn the entire testimony. Moreover, the jurisprudence of both Tribunals recognises that a Court has the discretion to accept a witness' evidence, notwithstanding inconsistencies between said***

[103] *Abdulla Nabulere ibid*
[104] *ICTR-96-3-A*

evidence and his previous statements, as it is up to the Court to determine whether the alleged inconsistency is not sufficient to substantially cast doubt on the evidence of the witness concerned".

The Appeals Chamber recalled that,

"where there are two conflicting testimonies, it falls to the Trial Chamber before which the witness testified to decide which of the testimonies has more weight and/or whether the discrepancies are such as would cast reasonable doubt and/or establish that the alleged acts did not occur."

474. This Court notes those inconsistencies. It is the finding however our that those are not material inconsistencies when taken in light of the entire body of evidence adduced against Kwoyelo. For example, the period when P.W.14 saw Kwoyelo in school, does not go to the root of the identification made or render his evidence mistaken or deceitful. The circumstances under which he made the identification of Kwoyelo during the incident on the Payibi –Atiak road favoured correct and proper identification. P.W. 5 and P.W.14 established their familiarity with the accused. He was not a stranger. It is not true that the witness had only a fleeting glance of the accused. Secondly, the abductions happened in broad day light. It was stated that it was at 6.00 pm when the deceased persons were abducted. All those coming from the funeral saw them and was the reason why they all ran scattering in different directions. It is also true that there was a rebel presence in the Abera area. It was also well known that there were rebels who were under the command of Kobi and Kwoyelo. In this case PW 15 stated that her husband and the two other deceased persons were killed by rebels. P.W.17, who was a local leader, testified that it was well established that rebels were operating in this area and that they were under the command of both one Kobi and Kwoyelo. P.W.17 also stated in his testimony to Court, that he was informed by other abductees and persons who were at the scene of crime on Paibi Atiak road, that the person responsible for the stabbings was Kwoyelo. The Court notes this is hearsay evidence. The fact that the evidence given to P.W.17 was hearsay does not render it completely inadmissible.

475. For example, the appeals chamber in the ICTY held that hearsay evidence, including anonymous hearsay, may be admitted in evidence and relied on by the court. However, caution must be exercised in the manner such evidence is treated.[105] The rationale for the relaxed rules of admissible evidence in international criminal courts as opposed to domestic ones stems partly from the difficulty of gathering evidence on international crimes that occur in the context of conflict or repressive circumstances. International Criminal Courts, including the ICC shoulder the heavy burden of establishing incredible facts by means of credible evidence[106].

476. The evidence of P.W.17 will be treated with this precaution in mind. The people who spoke to P.W.17 are the ones who were at the scene. They were abducted with the deceased persons and witnessed the incident. They gave what was a first-hand account to PW 17, a third party, in this case. That evidence was properly corroborated in the totality of the facts in this matter. PW 14, PW 15 gave eyewitness accounts of how the deceased persons were stabbed to death. This piece of evidence demonstrates how difficult it is for a court of this nature to collect credible eyewitness accounts several years after such traumatic events. The Testimony of PW 17 is therefore corroborated by these two witnesses.

477. In light of all the above, the abductions were made by rebels commanded by the accused. Three of those abducted were stabbed to death and killed by their rebel abductors. The accused was identified as the one leading the band of rebels that day. He was also known to be the rebel commander in the area. In this case, the accused was at the scene of crime. His alibi is dispelled by the prosecution evidence placing him at the scene of crime as a direct participant. The lady and gentlemen assessor advised this court to find the accused guilty on the counts arising in this incident. In light of the above, this court respectfully agrees. The accused is convicted on counts 15 and 16. Consequently, the alternate count in Count 17 is hereby dismissed.

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[105] *Prosecutor v Tolimir IT-05-88/2-A*

[106] *Prosecutor v. Kupreskic and others, IT-95-16-T Judgment of 14 January 2000 758*

478. For Incident "H" at Wiyanono, Pagak (the attack of 16th May, 2004), the defence challenged the discrepancies in the testimony of P.W.2, and the statement he gave to the police. It was alleged that in his police statement P.W.2 stated that the attack on the Pagak IDP camp was organised by Otti. However, when testifying before this court, his evidence was that it was Kwoyelo who responsible for the planning of the attack. This Court has already laid out the principle governing inconsistencies between former statements and evidence given in court. In principle, the statement is not automatically excluded. It falls to the court trying the facts to determine whether the witness testifying is credible and reliable. With regard to the testimony of P.W.2, there is no material contradiction between his police statement and his testimony in court. The witness did not discredit the role played by Otti when he testified. Rather, he mentioned that Joseph Kony issued orders to Otti who was the higher ranking officer to launch a reprisal attack on the Pagak IDP camp, and recover all the weapons that had been taken by Captain Abola who had escaped from the LRA. PW 2 stated that Otti directed Kwoyelo to execute the orders that he had received from Joseph Kony. In those circumstances, both accounts are consistent in naming Otti as the overall commander. P.W.2 expounded and gave greater detail when he testified. He explained that it was Kwoyelo who effected the execution of Otti's order. He chose the soldiers, commanders and laid out the plans.

479. The defence challenged key evidence relied on by the prosecution. They argued that two of the prime witnesses to the attack on Pagak are P.W.2 and P.W.31. That both gave detailed accounts of the actual planning and execution of the attack on the IDP camp. Because of their active participation in the attack however, they were both accomplices. Section 132 of ***The Evidence Act*** provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The Supreme Court of Uganda in ***Nassolo v. Uganda*** defines an accomplice in the following terms:

> ***"In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the***

clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial".[107]

480. Although both P.W.2 and P.W.31 were not tried or convicted for the offences here, it is their evidence they were both LRA combatants. P.W.2 actually participated in the raid on the Pagak camp as a combatant. He engaged in the firefight with the UPDF. In this case he is an accomplice. The same would apply for P.W.31, the radio signaller. He played a crucial role as a signaller on the day of the attack. He was a key element in transmission of communication between the units of the LRA, their commanders and the headquarter. As a signaller, P.W.31 is a principal in the commission of the raid on Pagak. In the result both witnesses are accomplices.

481. When dealing with accomplice evidence, the provisions of Section 132 of ***The Evidence Act*** notwithstanding, Ugandan Courts have held that;

"***In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge or the magistrate to warn himself that, although he might convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law and where a judge or magistrate has failed to warn himself in accordance with it, the conviction would be quashed…"***
(See ***Ayor and another v. Uganda)***[108]

[107] *[2003] EA 181*
[108] *[1968] E.A.303*

482. Similarly, the Supreme Court of Uganda in ***Rwalinda John v. Uganda,*** stated that;

> ***"… the evidence of an accomplice must be confirmed not only to the circumstances of the crime but also to the identity of the prisoner... (it) does not mean that there must be confirmation of all circumstances of the crime, as we have already stated, that is not necessary. It is sufficient if there is confirmation as to the material circumstances of the crime and the identity of the accused in relation to the crime. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection to the crime".***[109]

483. From the above, the position of the law on accomplice evidence in Ugandan jurisprudence is that, it is mandatory to establish that there is corroboration of the accomplice testimony before a court can act on it.

484. The international tribunals take a more liberal approach and the position is not as rigid as it holds in its application in Ugandan courts. In ***Prosecutor v. Milan Lukic and Sredoje Lukic***[110];

> "***The Appeals Chamber recalls that a trial chamber has the discretion to rely upon evidence of accomplice witnesses. However, when weighing the probative value of such evidence, the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie. This does not***

[109] ***S.C. Criminal Appeal No. 3 of 2015*** *cited the case of* ***R. v. Baskerville (1916) 2 KB 658***
[110] *IT-98-32/1-A, the Appeals Chamber of the ICTY, para 128*

mean that corroboration is required. However, a trial chamber must explain the reasons for accepting the evidence of an accomplice".

485. Similarly, in ***Austin Bizimungu v. The Prosecutor***[111] it was held:

"The Appeals Chamber recalls that it is within a trial chamber's discretion to rely on the evidence of accomplice witnesses. However, the trial chamber must exercise appropriate caution in assessing such evidence and carefully consider the totality of the circumstances in which it was tendered. Of the several factors relevant to a cautious assessment, consideration should be given to circumstances showing that the witness may have motives or incentives to incriminate the accused or to lie".

486. In principle, accomplice evidence may be relied on in both municipal and international courts. The departure arises regarding how strictly the court will apply the test of corroboration. This Court will apply a middle position. In view of the nature of offences tried in conflicts of this nature, strict application of the common law position will exclude evidence required to render the full justice of the case. It is possible that the only evidence that speaks to a particular fact is that of an insider or accomplice. In that regard, the Court will exercise its discretion to rely on P.W.2 and P.W.31, their role as accomplices notwithstanding. Both witnesses played key roles during the attack on the Pagak camp. However, the Court is cautious in its approach and will examine the entire body of evidence in its totality. It is noted that both P.W.2 and P.W.31 made no attempts to obscure or downplay the roles they played in the attack. They both fully implicated themselves illustrating the character of the part each played in attacking the Pagak camp. In the same vein they explained the role of the accused in planning the attack. That he also ordered the heinous assault on the abductees. The Court finds as a fact that P.W.2 was a combatant who participated in engaging the UPDF who were guarding the camp. P.W.31 was the

[111] *No. ICTR-00-56B-A, the Appeals Chamber of the ICTR at paras: 63-64*

signaller who relayed radio communication between Vincent Otti and Joseph Kony who was in the Sudan. Consequently, we find them to be reliable and credible witnesses. As such, there is no need for corroboration of their evidence in explaining the role played by the accused in the attack. Be that as it may, there is sufficient corroboration of their testimony from the evidence other witnesses particularly P.W.33, P.W.35, and P.W.37. In the circumstances the court finds that the accused participated directly as a principal offender in the crimes committed during the attack on Pagak IDP Camp.

Culpability under JCE 2

487. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. It holds responsible all those who knowingly and voluntarily participate in a criminal group as co-perpetrators of that group's war crimes, even if there is no evidence that the accused physically committed the war crime themselves. For example, JCE II may apply to guards, administrators, or cooks within the group, even if they did not personally harm the victims of the group. The requisite elements are the accused person's active participation in the enforcement of a system of violence or repression, together with; (i) knowledge of the nature of the system, and (ii) the intent to further the common concerted design of criminal acts against civilians. What is important in JCE II cases is that both the physical act and mental intent may be inferred from the accused's position of authority.

488. In his defence, the accused stated that in 1993 he was an escort to brother Ocii. In 1999 the rank of Captain was bestowed upon him. In 2001 he was promoted to the rank of Major and in the year 2003 to the rank of Lieutenant Colonel. It is in the year 2007 that he became a colonel in the LRA. Implicit in these promotions is the accused's personal knowledge of the system of ill treatment of civilians within a scheme of criminal behaviour and the intent to further such a scheme. The accused testified how his superiors were proud of his contributions, hence the promotions.

Culpability under Command responsibility

489. Criminal liability here issues from ordering and failing to prevent, halt, and punish grave violations of the Geneva Conventions. It is based on knowing or having reason to know that atrocities were being or about to be committed; while holding positions of military or civilian authority, Direct command responsibility attaches where one explicitly ordered while indirect command responsibility attaches where there is conclusive evidence that he knew or should have known of the atrocities being committed. There should have existed a superior-subordinate relationship, and effective control.

490. It was argued that in respect of Incident "H" at Wiyanono, Pagak (the attack of 16th May, 2004), Kwoyelo did not command the strike. That it was carried out by Otti. Command as a mode of responsibility has already been outlined by the Court. Here the Court accepts the evidence that the accused was a Colonel in the LRA. That the planning for the attack was done at his post or home. He had effective control over the troops and was in fact the one who briefed Otti about the outcome of the raid. It was also the accused who directed that soldiers be chosen to assault the abducted victims. He was also the one who addressed the victims before they were beaten.

491. These factual circumstances established the accused person's command during the raid on Pagak. In the circumstances the court finds that the accused fully participated in the manner outlined.

492. For Incident "D" at Abera (the Acaba reprisal attack of February, 1996), where Achieng Christine was killed with an axe and several people abducted, there is satisfactory evidence to prove that the act was done under the direct control of Kwoyelo. He was the perpetrator, and he also had knowledge of the probable effects of his actions. It was the accused commanding the rebels that day. At the material time, he was properly identified and placed at the scene of crime. As a result, there is satisfactory evidence to prove that this act was done under his direct control. As the perpetrator, he also had knowledge of the probable effects of these acts.

The Attendant State of Knowledge;

Knowledge of the contextual aspects of the offences against humanity.

493. To meet the *mens rea* requirement for crimes against humanity, the accused must have intended to commit the underlying offense. He must have also known that there was an attack on the civilian population and that the underlying offense comprised part of that attack, or at least must have risked committing an act that was part of the attack. This requirement does not entail knowledge of the details of the attack. Knowledge of the attack may be actual or constructive. Circumstantial evidence may lead to an inference of knowledge, examples of which include the accused person's position in the military or civilian hierarchy, participation in the takeover of villages, claims of superiority over an enemy group, and so on. Knowledge may also be inferred from public knowledge, relying on the extent of media coverage, the scale of the attack, or the general historical or political environment in which the attack occurred.

494. To impose criminal liability, the motivations of the accused are irrelevant. A crime against humanity can be committed for purely personal reasons. It is not necessary that the accused share the purpose or goal behind the attack. Whether the accused intended to harm the targeted population or just the victim is also irrelevant. The attack, and not the act of the accused, must be directed against the civilian population; the accused need only actually or constructively know that the act is part thereof. We are satisfied that in none of the incidents was the accused unaware of the widespread or systematic nature of the attacks. Because of his position in the hierarchy, on multiple occasions he was part of the planning and execution of the various atrocities. The prosecution has proved that at all material time the accused had the requisite knowledge and his actions were directed at furthering that purpose.

Knowledge of the civilian status of the victims

495. The *mens rea* requirement for the war crimes is met if it is shown that the acts of violence which constitute the offences charged, were wilfully directed against civilians, that is, either deliberately against them or through recklessness. The intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack particular civilians; rather, it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.

496. In all the seven incidents, having excluded the eighth which involved the death of Albert Obwoya, there is nothing to suggest that the LRA and the victims were caught up in an ongoing combat activity. These were all deliberate acts that target civilians taking no active part in the hostilities, found either in their homes, in camps or along the road. It is not possible that circumstances existed that rendered it impossible for the accused to distinguish between military and civilian targets and objects. In addition, there were no military objectives involved in any of the actions. They were mainly driven by a motive of reprisal against civilians for not supporting the scheme of the LRA. The prosecution has proved beyond reasonable doubt that in the circumstances that prevailed at the time of each of the seven incidents, the accused was capable of establishing the civilian status of the population targeted in the attacks that took place.

Knowledge of the serious consequences of humiliation, degradation or a serious attack on the human dignity of the victim.

497. The *mens rea* of the crimes against humanity involving torture and serious degradation does not require that the accused had a specific intent to humiliate or degrade the victims, that is, that he perpetrated the act for that very reason. The act or omission must, however, have been done intentionally and the accused must have known "that his act or omission could cause serious humiliation, degradation or otherwise be a serious attack on human dignity." The Chamber considers that there is no requirement to establish that the Accused knew of the "actual consequences of the act", but only of its possible consequences." Considering the grievous nature of the attacks, the prosecution has proved beyond reasonable doubt that in the circumstances that prevailed at the time of each of the seven incidents, the accused knew or must have known that his actions would cause serious humiliation, degradation or otherwise constituted a serious attack on human dignity.

The Verdict

In the final result, having considered all the evidence adduced, and for the reasons set out in this judgment, this Court finds the accused, **Thomas Kwoyelo alias Latoni,**

In **Count 5**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 6**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 8**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 10**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 11**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 12**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 13**, where the accused is charged with the offence of **Pillaging as A Violation of Article 3 Common to The *Geneva Conventions***, committed in Abera village Amuru District, on the 4th of September 1994, ***Guilty*** and hereby ***Convicts*** him.

In **Count 15**, where the accused is charged with the offence **Murder as A Crime Against Humanity**, committed along Paibi-Atiak road Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 16**, where the accused is charged with the offence of **Murder as A Violation of Article 3(1) (a) Common to The Geneva Conventions**, committed along Paibi-Atiak road Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 20**, where the accused is charged with the offence of **Murder as A Crime Against Humanity**, committed in Abera village Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 21**, where the accused is charged with the offence of **Murder as A Violation of Article 3 (1) (a) Common to The Geneva Conventions**, committed in Abera village Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 31**, where the accused is charged with the offence of **Imprisonment as A Crime Against Humanity**, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 33**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 34**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 35**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 36**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 37**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 39**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 40**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 41**, where the accused is charged with the offence of **Kidnap with Intent to Murder**, contrary to **Section 243 (1) (a)** of the ***Penal Code Act***, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 42**, where the accused is charged with the offence of **Other Inhuman Act as A Crime Against Humanity**, committed in Abera village Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 43**, where the accused is charged with the offence of **Cruel Treatment as A Violation of Article 3 (1) (a) Common to The Geneva Conventions**, committed in Abera village Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 44**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva conventions**, committed in Abera village Amuru District, in the month of February 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 47**, where the accused is charged with the offence of **Other Inhuman Act as A Crime Against Humanity**, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 48**, where the accused is charged with the offence of **Cruel Treatment as A Violation of Article 3 (1) (a) Common to The Geneva Conventions**, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 49**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva Conventions**, committed in Abera village Amuru District, on the 4th of March 1996, ***Guilty*** and hereby ***Convicts*** him.

In **Count 50**, where the accused is charged with the offence of **Murder as A Crime Against Humanity**, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 51**, where the accused is charged with the offence of **Murder as A Violation of Article 3(1) (a) Common to The Geneva Conventions**, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 70**, where the accused is charged with the offence of **Pillaging as A Violation of Article 3 Common to The *Geneva Conventions***, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 71**, where the accused is charged with the offence of **Other Inhuman Act as A Crime Against Humanity**, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 72**, where the accused is charged with the offence of **Cruel Treatment as A Violation of Article 3 (1) (a) Common to The Geneva Conventions**, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 73**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva Conventions**, committed in Oboo parish Amuru District, on the 16th of May 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 74**, where the accused is charged with the offence of **Murder as A Crime Against Humanity**, committed in Bira Omba village Amuru District, on the 6th of January 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 75**, where the accused is charged with the offence of **Murder as A Violation of Article 3 (1) (a) Common to The Geneva Conventions**, committed in Bira Omba village Amuru District, on the 6th of January 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 81**, where the accused is charged with the offence of **Enslavement as A Crime Against Humanity**, committed in Perecu village Amuru District and parts of South Sudan, between the months of February 1996 and January1998, ***Guilty*** and hereby ***Convicts*** him.

In **Count 82**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva Conventions**, committed in Perecu village Amuru District and parts of South Sudan, between February 1996 and January1998, ***Guilty*** and hereby ***Convicts*** him.

In **Count 84**, where the accused is charged with the offence of **Rape as A Crime Against Humanity**, committed in Olinga village Amuru District and parts of South Sudan, between 1997 and 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 85**, where the accused is charged with the offence of **Torture as A Crime Against Humanity**, committed in Olinga village Amuru District and parts of South Sudan, between 1997 and 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 86**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva Conventions**, committed in Olinga village Amuru District and parts of South Sudan, between 1997 and 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 87**, where the accused is charged with the offence of **Violence to Life and Person, In Particular Cruel Treatment And Torture As A Violation Of Article 3 (1) (a) Common To The Geneva Conventions**, committed in Olinga village Amuru District and parts of South Sudan, between 1997 and 2004, ***Guilty*** and hereby ***Convicts*** him.

In **Count 89**, where the accused is charged with the offence of **Rape as A Crime Against Humanity**, committed in Olinga village Amuru District and parts of South Sudan, between 1996 and 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 90**, where the accused is charged with the offence of **Torture as A Crime Against Humanity**, committed in Olinga village Amuru District and parts of South Sudan, between 1996 and 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 91**, where the accused is charged with the offence of **Outrages Upon Personal Dignity as A Violation of Article 3 (1) (c) Common to The Geneva Conventions**, committed in Olinga village Amuru District and parts of South Sudan, between 1996 and 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 92**, where the accused is charged with the offence of **Violence to Life and Person, In Particular Cruel Treatment And Torture As A Violation Of Article 3 (1) (a) Common to the Geneva Conventions**, committed in Olinga village Amuru District and parts of South Sudan, between 1996 and 2005, ***Guilty*** and hereby ***Convicts*** him.

In **Count 1**, where the accused is charged with the offence of **Murder as A Crime Against Humanity**, alleged to have been committed in Abera village Amuru District, in the month of March 1993, ***Not Guilty*** and hereby ***Acquits*** him.

In **Count 2**, where the accused is charged with the offence of **Murder as A Violation of Article 3 (1) (a) Geneva conventions**, alleged to have been committed in Abera village Amuru District, in the month of March 1993, ***Not Guilty*** and hereby ***Acquits*** him.

In **Count 3**, where the accused is charged with the offence of **Murder** contrary to **Section 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of March 1993, ***Not Guilty*** and hereby ***Acquits*** him.

Following the ruling of this Court on the preliminary question of law regarding charges preferred in the Alternative[112], and in light of its findings on the substantive charges, the following Counts are Dismissed:

Count 14, where the accused is charged with the offence of **Robbery with Aggravation** contrary to **Sections 285 and 286(2)** of the ***Penal Code Act***, alleged to have beencommitted in Abera village Amuru District, on the 4th of September 1994.

Count 17, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in along Paibi-Atiak road Amuru District, in the month of February 1996**.**

Count 22, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of February 1996.

Count 23, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of February 1996.

Count 24, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of February 1996.

Count 26, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of February 1996.

Count 45, where the accused is charged with the offence of **Attempted Murder** contrary to **Section 204 (a)** of the ***Penal Code Act***, alleged to have been committed in Abera village Amuru District, in the month of February 1996.

[112] *Para 54 of this decision*

Count 52, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 53, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 54, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on 16th of May 2004.

Count 55, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 56, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 57, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 58, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 60, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 61, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 62, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 63, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 64, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 65, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 66, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 67, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 68, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004, is hereby ***dismissed***.

Count 69, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Oboo parish Amuru District, on the 16th of May 2004.

Count 76, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Bira Omba village Amuru District, on the 6th of January 2005.

Count 77, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Bira Omba village Amuru District, on the 6th of January 2005.

Count 78, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Bira Omba village Amuru District, on the 6th of January 2005.

Count 79, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Bira Omba village Amuru District, on the 6th of January 2005.

Count 80, where the accused is charged with the offence of **Murder** contrary to **Sections 188 and 189** of the ***Penal Code Act***, alleged to have been committed in Bira Omba village Amuru District, on the 6th of January 2005.

Count 88, where the accused is charged with the offence of **Rape** contrary to **Sections 123 and 124** of the ***Penal Code Act***, alleged to have been committed in Olinga village Amuru District and some parts of South Sudan, between 1997 and 2004.

Count 93, where the accused is charged with the offence of **Rape** contrary to **Sections 123 and 124** of the ***Penal Code Act***, alleged to have been committed in Olinga village Amuru District and some parts of South Sudan, between 1996 and 2005.

In sum, the accused, **Thomas Kwoyelo alias Latoni,** is hereby ***Convicted*** on **44 Counts**;

He is ***Acquitted*** on **3 Counts**;

And **31 Counts** stand ***Dismissed***.

Delivered at Gulu on this 13th Day of August 2024

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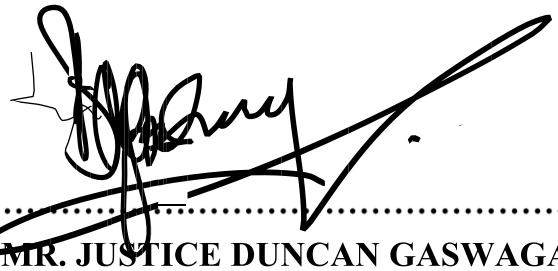
HON MR. JUSTICE MICHAEL ELUBU

JUDGE

(PRESIDING JUDGE)



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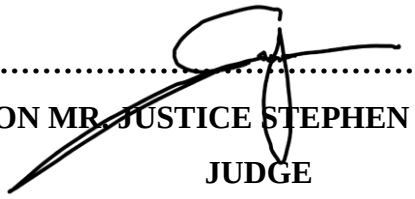
HON MR. JUSTICE DUNCAN GASWAGA

JUDGE



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HON MR. JUSTICE STEPHEN MUBIRU

JUDGE

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HON DR. JUSTICE BASHAIJA K. ANDREW

ALTERNATE JUDGE