

# RECENT DEVELOPMENTS – ACTUALITÉS

## PRESIDENTIAL IMMUNITY FROM CRIMINAL PROSECUTION IN THE UGANDAN CONSTITUTION: DRAFTING HISTORY AND EMERGING JURISPRUDENCE

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### I. INTRODUCTION

The practice of the International Criminal Court (ICC) and the Special Court for Sierra Leone makes it clear that presidential immunity is not a defence for those alleged to have committed international crimes, such as war crimes and crimes against humanity.<sup>1</sup> In many African countries a sitting head of state is immune from prosecution in the domestic courts not only for breaking the country's laws but also for breaking international law.<sup>2</sup> Uganda has had a long history of presidential immunity from criminal prosecution. Article 34(2) of the 1966 Constitution of Uganda provided that '[t]he President shall [...] take precedence over all persons in Uganda and shall not be liable to any proceedings whatsoever in any court.'<sup>3</sup> The same provision appeared in article 24(3) of the 1967 Constitution. When Ugandans enacted a new Constitution in 1995, articles 98(4)&(5) were included, and they provide that a president is immune from criminal prosecution but that that immunity expires when he ceases to be president. On 14 June 2002

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1 A warrant for the arrest of the president of Sudan was issued by the International Criminal Court although he was an incumbent president. The former president of Liberia, Charles Taylor, was also prosecuted before the Special Court for Sierra Leone. The current president of Kenya is also on trial before the International Criminal Court.

2 See generally C. B. Murungu, *Immunity of State Officials and Prosecution of International Crimes in Africa*, unpublished PhD thesis, University of Pretoria (2011), pp. 194–278.

3 The Constitution of Uganda, 15 April 1966.

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Uganda ratified the Rome Statute of the International Criminal Court and in 2010 passed the International Criminal Court Act,<sup>4</sup> which, amongst other things, provides under section 25 that the fact that someone is immune from prosecution under domestic law does not mean that he is immune from surrender to the ICC for prosecution for international crimes. There appears to be a direct tension between articles 98(4)&(5) of the Constitution and section 25 of the International Criminal Court Act. This article looks at the drafting history of articles 98(4)&(5) and how they have been interpreted by the Constitutional Court. It thereafter analyses the Constitutional Court's judgments in the light of the drafting history of articles 98(4)&(5). The article argues that the issue of whether a Ugandan president could be arrested in Uganda on the basis of the International Criminal Court Act is contentious. The issue of presidential immunity in Uganda is a live one. In the wake of an allegation in early 2013 that the president could have been bribed by a foreign oil company to secure oil exploration rights, one Member of Parliament said that the president should not invoke presidential immunity to avoid explaining to Ugandans whether or not the said allegations were founded: '[i]t is not enough to say the President enjoys immunity. In the court of public opinion, President Museveni now has to explain himself to Ugandans.'<sup>5</sup> It has also been reported that a Member of Parliament from the ruling party, the National Resistance Movement, Mr Martin Andi Drito, proposed a constitutional amendment draft Bill called the Constitutional Amendment (Immunity for the Outgoing President) Bill 2012, which seeks to amend article 98 of the Constitution to ensure that even after office the president is immune from prosecution because it is 'necessary at this time in the interest of the country to make changes for a smooth transition in future'.<sup>6</sup> This move was opposed by opposition Members of Parliament and it is not clear what the status of the Bill is now. However, the reasoning behind the Bill is that without immunity from prosecution it would be difficult for some people to leave the office of the president in a country where there are no presidential term limits. There have also been reports that presidential immunity was invoked to absolve the president from wrongdoing in a case where he was allegedly personally involved in a scandal in which the government lost billions of shillings in compensating businessmen.<sup>7</sup> It is against that background that the issue of presidential immunity in Uganda must be examined.

4 International Criminal Court Act, No. 11 of 2010.

5 N. Wesonga, 'MPs Want Museveni Defence on Oil Deal', *Daily Monitor*, 19 March 2013, available at <http://www.monitor.co.ug/News/National/MPs-want-Museveni-defence-on-oil-deal/-/688334/1723808/-/1nv347z/-/index.html> (accessed 25 May 2013).

6 See S. Naturinda, 'NRM Legislator to Table Bill on Extending Presidential Immunity', *Daily Monitor*, 22 September 2012, available at <http://www.monitor.co.ug/News/National/NRM-legislator-to-table-Bill-on-extending-presidential-immunity/-/688334/1492602/-/5o8jnyz/-/index.html> (accessed 25 May 2013).

7 Y. Mugerwa, 'Museveni Cleared of Basajja Refund Claims', *Daily Monitor*, 9 March 2012, available at <http://www.monitor.co.ug/News/National/-/688334/1323118/-/b0tjb5z/-/index.html> (accessed 25 May 2013).

## II. THE UGANDA CONSTITUTIONAL COMMISSION

In 1988 the Ugandan government established the Uganda Constitutional Commission, popularly known as the Odoki Commission because it was chaired by Mr Benjamin Odoki, to travel throughout the whole country and gather people's views on what they thought should be included in the new constitution. The Odoki Commission presented this information in a report that was to be debated by the Constituent Assembly in the process of making the new constitution. Presidential immunity was one of the issues on which people made submissions. The Odoki Commission wrote:

Many people have questioned the rationale of the President's immunity from prosecution [under the Constitution]. The President is immune from any proceedings whatsoever in any court. People argue that such a provision has been misused by past presidents. The majority views submitted on this issue were opposed to the immunity. They argued that the President is like any other person and if he or she does commit a crime he or she should face the courts of law like anyone else.<sup>8</sup>

The above quotation shows that most Ugandans were opposed to the inclusion of a provision in the constitution that guaranteed the president immunity from prosecution. Their submissions were based on, amongst other things, the history of Uganda, which was characterised by gross human rights violations.<sup>9</sup> Their hope was that subjecting the president to the same law that governs all Ugandans would be one of the ways of ensuring that the president acted in accordance with the law for fear of prosecution. The above quotation also does not reveal whether there were any Ugandans who made submissions supporting the inclusion of a provision in the constitution on presidential immunity; however, in its report on the issue of presidential immunity, the Odoki Commission wrote:

The immunity is meant to preserve the dignity of the office of the president. Although the consensus is that the President should not be above the court proceedings, it is our considered view that the President should be above prosecution in any court of law. It would be absurd if the President who takes precedence over all people in that country is liable to court proceedings. The office of the president should have dignity, honour and respect from the people. However, the President who has committed serious mistakes could be removed from office by either a vote of no confidence or impeachment by Parliament. He could be taken to court when he is no longer the President. However, while the President should not be taken to court,

<sup>8</sup> *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, Uganda Printing and Publishing Corporation (1992), para. 12.81.

<sup>9</sup> See Commission of Inquiry into Violations of Human Rights, *The Report of the Commission of Inquiry into the Violations of Human Rights: Findings, Conclusions and Recommendations* (1994).

in case of an offence committed by the office of the president (e.g. vehicle accident involving a presidential convoy), the victim should be in position to sue the Attorney-General. The immunity of the President refers to the President as a person and not government property and institutions.<sup>10</sup>

Against that background the Odoki Commission recommended that

The Constitution should provide for immunity of the President from suit and prosecution in any court of law while still President. When, however, the President leaves office he or she shall be personally liable for civil and criminal acts committed while in office and the time of limitation should not begin to run until the President has vacated office.<sup>11</sup>

The above quotations show that at least most Ugandans were opposed to the inclusion of a provision in the constitution which granted the incumbent President immunity from prosecution. However, the Odoki Commission was of the view that it was necessary for the new constitution to include a provision to the effect that the president should be immune from prosecution while still holding office.

### III. THE CONSTITUENT ASSEMBLY

During the Constituent Assembly debates, some delegates argued that the people they were representing supported the provision granting the president immunity from prosecution or any court proceedings. One delegate submitted that the people he represented were of the 'view that the president should, while in office be immune from ordinary prosecutions' but added that his people were 'in agreement that it is a necessity to impinge [sic] the President when he fails to perform, disregard the Constitution or abuses office'.<sup>12</sup> Another delegate argued that although the people he represented supported the draft provision that 'while holding office, the president shall not be liable to proceedings in any court', such President 'should have exemplary behaviour'.<sup>13</sup> What is emerging from the above submissions is that those who supported the inclusion of a provision on presidential immunity in the constitution expected the president to be a law-abiding citizen. The president was not only expected to carry out his functions efficiently, he was also expected to be exemplary. An exemplary president is one who, amongst other things, does not break laws and neither allows nor encourages his officers to break or disregard the law. In cases where a president broke the law, the constitution was to provide for ways through which he could be removed from

10 *The Report of the Uganda Constitutional Commission*, *supra* note 8, para. 12.82.

11 *The Report of the Uganda Constitutional Commission*, *supra* note 8, para. 12.83.

12 *Proceedings of the Constituent Assembly (Official Report)*, Uganda Printing and Publishing Corporation (1994–5) submissions by Mr Omute, 22 July 1994, p. 1105.

13 *Ibid.*, submissions by Mr Chepsikor, 6 July 1994, p. 607.

office. One delegate who supported the provision on presidential immunity did not give the reasons for his position.<sup>14</sup> Another delegate argued that the people he represented supported the provision on presidential immunity because they wanted 'to protect their president against legal harassment' but that 'adequate provisions should be put in place to ensure that the president is not above the law'.<sup>15</sup>

The Constituent Assembly proceedings show that some of those who supported the inclusion of a provision on presidential immunity did not give reasons why they supported such an amendment. One explanation could be that the delegates endorsed the reasons that were included in the Odoki Commission report and therefore saw no need to repeat the same reasons. Another explanation could be that because the delegates were aware that the draft constitution provided for circumstances in which the president could be impeached, there was no reason to oppose the inclusion of such an amendment in the constitution.

Those who opposed the inclusion of a provision in the constitution that granted the president immunity from prosecution argued that the people they represented had asked them to submit to the Constituent Assembly that such a provision put the president 'above the law' and would lead to 'dictatorship';<sup>16</sup> that 'the President [was] being elevated to the position of God' who is not subject to law.<sup>17</sup> One delegate put it compellingly:

On the impeachment of the Presidency, the people of Kween county reject the provisions of Article 101 clause 4 that the President shall not be liable to court and yet under Article 101 clause 5, it states that he or she will only be liable to court action whether it is criminal or civil after leaving office [...] [T]his is an unfortunate provision because it can easily breed dictators in the position of leadership; because whoever is in the position of leadership, if he is the President and he knows he has committed a crime, then that President will be forced to cling to power at all costs using any means available. In other words, it is a disincentive for leaders to leave the office voluntarily.<sup>18</sup>

Another delegate submitted that the provision on presidential immunity 'should be removed because former Presidents committed a lot of crimes against the state and its citizens during their term of office and they could not be taken to court', and that the exclusion of such a provision 'will reduce the tension among the people of Uganda and especially the opponents of the future presidents'.<sup>19</sup> One delegate argued that the inclusion of a provision on presidential immunity was 'not acceptable realizing that we might have a President drunk with power'

14 *Ibid.*, submissions by Mr Byarugaba, 28 June 1994, p. 411.

15 *Ibid.*, submissions by Dr Aniku, 12 July 1994, p. 785.

16 *Ibid.*, submissions by Mr Bamwenda, 14 July 1994, p. 522.

17 *Ibid.*, submissions by Mr Bateganya, 24 June 1994, p. 324.

18 *Ibid.*, submissions by Mr Chebet, 27 June 1994, p. 355.

19 *Ibid.*, submissions by Mr Lukwago, 11 July 1994, p. 750.

and that '[s]afeguards must be made to maintain the security of the people. For example, if a President violates any law or commits atrocities, there must be a provision for impeachment'.<sup>20</sup> What emerges from the discussions is that there were generally three positions on the issue of presidential immunity: (1) some delegates supported the inclusion of a provision on presidential immunity without providing supporting reasons for their submissions; (2) some delegates supported such a provision on condition that there were other ways to hold the president accountable, for example, through impeachment; and (3) some delegates opposed the inclusion of such a provision irrespective of the existence of measures, such as impeachment, should the president break the law.

Although there were submissions to the effect that the constitution should exclude a provision granting the president immunity from prosecution, when the Constituent Assembly delegates discussed draft article 101 none of them expressed the view that the draft provision on presidential immunity should be excluded.<sup>21</sup> The reason for this remains unclear but it should be recalled that at the time draft article 101 was presented for debate to the Constituent Assembly delegates, the Constituent Assembly, because of the need to save time, had changed its mode of operation. Those who wished to propose any amendments to the draft provisions were required to suggest those amendments to select committees instead of moving motions at a plenary session to be seconded, and debated by all the Constituent Assembly delegates. Any amendment that was contrary to the amendments suggested by a select committee had to be included in a minority report that was presented by the select committee to a plenary session for discussion. Many Constituent Assembly delegates were very critical of their colleagues who attempted to move motions from the floor as this was seen as deviating from this procedure.<sup>22</sup> This new mode of operation discouraged those delegates who for various reasons had not had an opportunity to write such minority reports from introducing their suggested amendments at the plenary session.<sup>23</sup> However, what is not clear is why the Constituent Assembly delegates who were opposed to the inclusion of a provision on presidential immunity did not use the established procedure to table their amendments. The select committee made it very clear that no amendments were proposed to draft article 101<sup>24</sup> and on that basis 'recommended that the text of the draft [as suggested by the Odoki Commission] be adopted without Amendment'.<sup>25</sup> As a result, articles 98(4)&(5) were included in the Ugandan Constitution and guarantee the president's immunity from prosecution in the following terms:

- (4) While holding office, the President shall not be liable to proceedings in any court;

20 *Ibid.*, submissions by Mr Bageya, 15 July 1994, p. 891.

21 *Ibid.*, 13 March 1995, pp. 3222-7.

22 *Ibid.*, 13 March 1995, pp. 3222-7.

23 *Ibid.*, 13 March 1995, pp. 3222-7.

24 *Ibid.*, submissions by Mr Mulenga Joseph, 13 March 1995, p. 3222.

25 *Ibid.*, submissions by Mr Mulenga Joseph, 13 March 1995, p. 3223.

- (5) Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.

The civil or criminal proceedings contemplated in article 98(5) are limited to anything done or omitted to be done in the president's personal capacity while still holding office. Therefore, if the president did anything unlawful in his official capacity, he cannot be prosecuted or brought to court, after leaving office, on the basis of such acts or omissions. Should he be brought to court and charged or indicted for anything criminal allegedly done in his official capacity, article 98(5) could be invoked as a defence. Our attention now shifts to the discussion of the jurisprudence of the Constitutional Court on articles 98(4)&(5).

#### IV. JURISPRUDENCE ON PRESIDENTIAL IMMUNITY IN UGANDA

Article 137 of the Constitution of Uganda empowers the Constitutional Court to interpret the Constitution. The first case in which the Constitutional Court dealt with articles 98(4)&(5) was *Brigadier Henry Tumukunde v Attorney General and The Electoral Commission*.<sup>26</sup> The petitioner, who was an army representative in Parliament, argued, amongst other things, that the president's act of forcing him to resign from Parliament as a representative of the army was unconstitutional and therefore challengeable.<sup>27</sup> The respondents argued that the president's actions were unchallengeable in terms of articles 98(4)&(5) of the Constitution.<sup>28</sup> In his separate concurring judgment, Justice Kavuma observed:

The sum total of these provisions is clearly, in my view, to grant the President total immunity against court proceedings both criminal and civil arising out of his/her acts or omissions done or omitted to be done either before or during his/her term in office as President. Any person who wishes to challenge those acts or omissions of the President in court, has to wait until the President has ceased to be one [...] This may appear a hard position but that is what the Constitution says. If the framers of the Constitution had intended that the acts of an incumbent President should be challengeable in court, they would have clearly stated so given the fairly detailed manner in which the Constitution deals with the question of Presidential immunity in Article 98.<sup>29</sup>

<sup>26</sup> *Brigadier Henry Tumukunde v Attorney General and the Electoral Commission* (Constitutional Petition No. 6 of 2005), UGCC 1 (25 August 2005).

<sup>27</sup> *Ibid.*, p. 2.

<sup>28</sup> *Ibid.*, p. 4.

<sup>29</sup> *Ibid.*, p. 30.

Justice Kavuma added that articles 98(4)&(5) make it 'clear that as long as a person remains President, his/her liability to challenges or challenges to his/her acts in courts of law are suspended by the Constitution' and that for courts to allow the president to be sued would erode the presidential immunity granted in the constitution and

[W]ould greatly undermine the rationale behind the article which is to cater for the people's aspirations about the person and office of the President. This is the preservation of the dignity of both the person and the office of the President. The President should be above prosecution and his/her acts above challenge in any court of law save as expressly exempted by the Constitution. It would be absurd if the President, who takes precedence over all people in the country is liable to or his/her acts are easily challengeable in court proceedings. The office of the President and his/her acts should have dignity, honour and respect from all.<sup>30</sup>

Justice Kavuma further added that allowing the president to be taken to court would hamper him from performing his presidential functions and could open the gates to challenges to many of the president's actions or omissions in court, hence imposing an 'unnecessary burden on the President's time and energy that would definitely impair the effective performance of his office'.<sup>31</sup> Justice Kavuma went on to say:

The Constitution puts the question of how to promptly handle the liability to court proceedings by an incumbent President or immediately subjecting his/her acts or omissions to judicial review, beyond the courts' competence. It leaves it to the people who, through the exercise of their sovereignty, either directly or through their representatives in Parliament, may bring an end to the incumbent's presidency thereby opening the door for legal action to be taken against him or her.<sup>32</sup>

Justice Kavuma stated that presidential immunity in terms of article 98(4) does not extend to the people to whom the president has delegated some of his powers. It exclusively applies to the person of the president. He explained:

Article 98 itself, does not impose permanent absolute immunity from judicial review to the person of the President. It only postpones such liability and subjection to legal challenge until such a time the person holding the office of President ceases to so hold the same. The President is, therefore, constantly reminded that when he ceases

<sup>30</sup> *Ibid.*, pp. 31–2.

<sup>31</sup> *Ibid.*, p. 32.

<sup>32</sup> *Ibid.*, p. 34.

to hold that office, he may be called upon to answer for his acts or omissions while holding the office. This keeps the President on his toes.<sup>33</sup>

It is unclear why Justice Kavuma did not refer to the drafting history of articles 98(4)&(5) in his judgment. Had he referred to the Odoki Commission report, he probably would not have come to the conclusion that the people of Uganda wanted the president to be immune from prosecution while still holding office. As indicated earlier, the Odoki Commission made it very clear that most Ugandans were opposed to the inclusion of a provision on presidential immunity in the Constitution and that it is the Odoki Commission which, contrary to the views of the people, decided to recommend that such a provision should be included in the Constitution. The Constituent Assembly proceedings also showed that some delegates indicated that the people they represented had instructed them to state that the new constitution should not include a provision on presidential immunity. The language used in Justice Kavuma's judgment appears to suggest that there was consensus in the Constituent Assembly that such a provision should be included in the Constitution. In fact, as has been shown above, some delegates argued that the inclusion of such a provision in the constitution would put the president above the law and could breed dictatorship. Justice Kavuma's reasoning reflects that the fears which some Constituent Assembly delegates expressed were not unfounded – the president's actions or omissions are beyond legal scrutiny if by scrutinising them the president could be required to appear in court as an accused or defendant. The judgment also appears to be grounded in the belief that in Uganda power easily shifts from one president to another. This appears to ignore the reality that in a country where there are no presidential term limits, one person can rule it for decades. Moreover, by the time the former president is brought to court (let us say after thirty years if elections have been won six times for a five-year term of office), most of the witnesses could have died or forgotten many of the facts that could be essential for the prosecution. Justice Kavuma's reasoning also appears to be based on the assumption that Members of Parliament could easily remove the president from office as provided for by the constitution. This ignores the fact that in Uganda, at present, of the 386 Members of Parliament (the 9th Parliament whose term commenced in 2011 and will end in 2016), 327 belong to the ruling party, the National Resistance Movement, and 59 to the opposition.<sup>34</sup> Recently the president threatened that if MPs continued being assertive, the army could overthrow the government.<sup>35</sup> In other words, Justice Kavuma's reasoning is not supported by the drafting history of articles 98(4)&(5) and the political reality in the Uganda of today.

33 *Ibid.*, p. 36.

34 M. Nalugo, 'Impeaching Museveni Can't Work, NRM Legislators Tell Opposition', *Daily Monitor*, 19 March 2012, available at <http://www.monitor.co.ug/News/National/-/688334/1369156/-/ax97pdz/-/index.html> (accessed 12 April 2012).

35 C. Mwanguhya and R. Kasasira, 'Ugandan Army Wades into Raging Coup Debate', *Africa Review*, 24 January 2013, available at <http://www.africareview.com/News/Ugandan-army-wades-into-coup-debate/-/979180/1673956/-/bcopyc/-/index.html> (accessed 25 May 2013).

Another recent case in which the Constitutional Court dealt with the question of presidential immunity was *Professor Gilbert Balibaseka Bukenya v The Attorney General*<sup>36</sup> in which the appellant, a former vice-president, was being prosecuted for corruption before the Anti-Corruption Court in respect of some of his acts while occupying office. He approached the Constitutional Court and argued that his prosecution was unconstitutional since, amongst other things, the alleged actions were committed in his capacity as a vice-president acting on behalf, and on the instructions, of the president and he therefore was immune from prosecution on the basis of articles 98(4)&(5) of the Constitution. In dismissing his application the Constitutional Court referred to articles 98(4)&(5) and held unanimously:

It is thus clear that the immunity granted protects the holder of the office of the President from civil or criminal liability in his/her personal capacity while in office. It is not a defence to a legal action as the words themselves indicate. It is only a temporary protection which eliminates or postpones the accuser's ability to slap a claim against the immune during the latter's time in office. The immunity is intended to ensure that the exercise of presidential duties and functions are free from any hindrance or distraction, considering that such an office is a job which, apart from requiring all the presidential time, also demands individual attention. It is, therefore, intended to bar any form of inhibition of the President in the performance of his/her duties while in office so that the wheels of governance are not held at ransom under any guise. Were the President to face suits or prosecutions while in office, the stakes would extend far beyond the individual himself/herself. To ignore this fact is to ignore the political context and the potential danger to the nation as a whole.<sup>37</sup>

The Court added that article 98(5) 'underscores the determination of Ugandans as expressed both as a preamble to and in the spirit of the Constitution, to do away with impunity', and that the president is not above the law because he 'is accountable for actions/omissions in his/her personal capacity once he/she leaves office'.<sup>38</sup> The court further added that although '[t]he Vice President's functions include deputising for the President [...] and may perform such other functions as may be assigned to him/her by the President',

[T]he Constitution intended the 'immunity' under **Article 98 (4)** and **(5)** to be the exclusive preserve of the Head of State, Head of Government and Commander-in-Chief of the People's Defence Forces and the Fountain of Honour. The irrefutable presumption here is that the legislature must have intended it that way. It thus emerges

<sup>36</sup> *Professor Gilbert Balibaseka Bukenya v The Attorney General* (Constitutional Petition No. 30 of 2011), UGCC 9 (10 August 2011).

<sup>37</sup> *Ibid.*, p. 11.

<sup>38</sup> *Ibid.*, p. 12.

very clearly that the Vice Presidency is distinct from and inferior to the Presidency. It has no home in the immunity arena.<sup>39</sup>

The Court in the *Bukenya case* correctly finds that the immunity under articles 98(4)&(5) of the Constitution does not extend to the vice-president. Had the court referred to the drafting history of articles 98(4)&(5), it could have avoided basing its finding on a presumption. It was expressly stated during the Constituent Assembly proceedings that this immunity was exclusive to the president. Similar to the *Tumukunde case*, the Court reasoned that the immunity is meant to make sure that the president's busy schedule is not interrupted by endless court actions or proceedings. This reasoning appears to ignore one factor: in countries where presidents or heads of state are not immune from prosecution they do not spend most of their time in courts of law defending themselves. A president, like any other citizen, has to be on the right side of the law to avoid being required to appear before a court to defend himself. In other words, the fear that removing presidential immunity could lead to the president spending too much time in court defending himself is not supported by evidence. If the Court is of the view that the president's trial for allegedly breaking the law could affect the manner in which his functions are executed, arrangements can be made to ensure that his evidence is given at a convenient time but without the administration of justice grinding to a halt.

## V. CONCLUSION

One further issue that should be explored, although not discussed here in detail, is whether the president is also immune from prosecution for war crimes and crimes against humanity. As indicated earlier, Uganda ratified the Rome Statute of the International Criminal Court on 14 June 2002. In order to give effect to the provisions of the Rome Statute, Uganda enacted the International Criminal Court Act.<sup>40</sup> There was a delay in passing this Act because, amongst other things, the Ugandan government wanted a peaceful resolution of the armed conflict in northern Uganda as the rebels had threatened to continue with the fighting if the Bill were enacted into law,<sup>41</sup> and the religious leaders were concerned that

39 *Ibid.*, p. 12 (emphasis in original). The same view had been expressed by Justice Kavuma in the *Tumukunde case* when he held: 'The Presidential immunity provided for in article 98 (4) is to be restrictively interpreted to exclusively apply to the person of the President where he/she personally exercises the powers and duties of the office of President. Where the President assigns any of his executive powers to ministers or other officers, under articles 99 (4), and 113 (3) of the Constitution, that immunity does not extend to such other ministers or officers.' *Tumukunde case*, *supra* note 26, p. 36.

40 International Criminal Court Act, No. 11 of 2010.

41 See Hansard of Parliament of Uganda, 26 May 2005; 21 February 2007 (submissions by Mr Kiyonga Francis and Dr Ruhakana Rugunda); 13 July 2006 (the Prime Minister, Prof. Apollo Nsubambi, informed Parliament that if the peace talks between the Ugandan government and the rebel leaders had been successful the government was willing to handle the ICC issue diplomatically and legally); 22 August 2006 (Ms Betty Amongi on the question of traditional justice practices as an alternative to the ICC prosecution). All the

the threat to prosecute rebel leaders would fuel the war.<sup>42</sup> Section 25 of the International Criminal Court Act provides:

(1) The existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for – (a) refusing or postponing the execution of a request for surrender or other assistance made by the ICC; (b) holding that a person is ineligible for arrest or surrender to the ICC under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.

There appears to be a tension between section 25 of the International Criminal Court Act and articles 98(4)&(5) of the Constitution. Before the president assented to the International Criminal Court Act some politicians argued that the Act was contrary to articles 98(4)&(5) of the Constitution.<sup>43</sup> These concerns were rejected by the Committee that drafted the Bill.<sup>44</sup> In its report on the Bill, the Sessional Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill observed:

The Rome Statute applies equally to all persons without any distinction based on official capacity. Immunities or special procedural rules which may attach to the official capacity of a person, whether national or international law shall not bar the court from exercising its jurisdiction over such a person.<sup>45</sup>

The Committee added that clause 25 of the Bill, which would later become section 25 of the Act, should be deleted because it was ‘inconsistent with Article 98(4) of the Constitution in as far as it does not recognise the immunity of the President from arrest or court proceedings while holding office as President’.<sup>46</sup> It could be argued that section 25 of the International Criminal Court Act may be invoked to arrest a Ugandan president for allegedly committing war crimes, genocide and crimes against humanity. However, to do so would be to ignore article 2 of the Constitution which provides that the Constitution is the supreme of law Uganda and that ‘[i]f any other law [...] is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law

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Hansard references in this article were accessed from the old Parliament of Uganda website in May 2011. The same Hansard can now be accessed on the new website available at <http://www.parliament.go.ug/new/index.php/documents-and-reports/daily-hansard> (accessed 23 May 2013).

42 See Hansard of Parliament of Uganda, 23 March 2005 (when religious leaders met with the ICC prosecutor in The Hague).

43 See for example I. Mufumba, ‘ICC Bill: Why Did MPs Trap Museveni and Trap Kony?’, *The Independent*, 31 March 2010, available at <http://www.independent.co.ug/column/insight/2702-icc-bill-why-did-mps-trap-museveni-and-save-kony> (accessed 12 April 2012).

44 See ‘MPs Pass ICC Bill’, *The New Vision*, 10 March 2010, available at <http://www.newvision.co.ug/D/8/13/712528> (accessed 12 April 2012).

45 See Report of the Sessional Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill, 2006 (March 2010) para. 4(e). On file with the author.

46 *Ibid.*, para. 5.

or custom shall, to the extent of the inconsistency, be void.’ Therefore, there is room for arguing, at least on the basis of the drafting history of the International Criminal Court Act, that section 25 thereof is inconsistent with articles 98(4)&(5) of the Constitution and therefore void and unconstitutional. It has to be noted that the International Criminal Court Act is an Act of Parliament subordinate to the Constitution and that it can be amended at any time to bring it in conformity with the Constitution. Had the International Criminal Court Act been in conflict with another Act of Parliament, one could have argued that the last in time rule applied.<sup>47</sup>

The fact is that section 25 of the International Criminal Court Act leaves articles 98(4)&(5) intact since the International Criminal Court Act does not amend or purport to amend these articles. It would be too optimistic to expect the Constitutional Court to hold that section 25 of the International Criminal Court Act amends articles 98(4)&(5) in the light of the Court’s express position that its duty is ‘to interpret not to amend or re-write the Constitution’ and that ‘[c]ourts should resist the temptation to venture into unnecessary judicial interpretations of the Constitution contrary to its clear provisions’.<sup>48</sup> The drafting history of the Constitution of Uganda shows that:

The vast majority [of Ugandans who made submissions to the Odoki Commission] supported the need for strict procedures on constitutional amendment. The new Constitution, having evolved from people’s active participation, should not be tampered with lightly. Rigid amendment procedures would ensure that constitutional amendments come only when they are really needed and have been carefully evaluated.<sup>49</sup>

Following the Odoki Commission recommendations,<sup>50</sup> article 259(2) of the Constitution requires that the Constitution ‘shall not be amended except by an Act of Parliament— (a) the sole purpose of which is to amend this Constitution; and (b) the Act has been passed in accordance with this Chapter.’ Article 262 of the Constitution provides that a

bill for an Act of Parliament to amend [article 98] of the Constitution [...] shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all members of Parliament.

<sup>47</sup> It has been observed that ‘the later-in-time rule, with respect to statutes [as opposed to treaties] makes sense because a subsequent legislative act of [the legislature], a statute, may overturn an earlier legislative act of [the legislature] since both are of the same type of [legislative] capacity’. See S. A. Penner, ‘Changing the Balance of Power: Why a Treaty-Trump Presumption Should Replace the Later-in-Time Rule when Interpreting Conflicting Treaties and Statutes’, 34 *Hastings Constitutional Law Quarterly* (2007): 355, at 364.

<sup>48</sup> *Tumukunde case*, *supra* note 26, p. 30.

<sup>49</sup> *The Report of the Uganda Constitutional Commission*, *supra* note 8, para. 28.43.

<sup>50</sup> *Ibid.*, paras 28.98–28.116.

The drafting history of the International Criminal Court Act clearly shows that its aim was not to amend article 98 of the Constitution.<sup>51</sup> The inevitable conclusion is that section 25 of the International Criminal Court Act leaves articles 98(4)&(5) intact and, as mentioned earlier, there is room for arguing that in fact section 25 is unconstitutional. Therefore, the applauded assertion by the then Minister of Defence, Mr Amama Mbabazi, in his Ministerial Statement to Parliament on the International Criminal Court's investigation in northern Uganda, that '[s]hould the International Criminal Court come across any information or evidence implicating any Ugandan Government official in the commission of any of the crimes complained of, Uganda shall immediately prosecute such officials (*Applause*)',<sup>52</sup> should be interpreted as applicable to any government official except the president.

Although it could be argued that war crimes and crimes against humanity are international crimes and that therefore the Ugandan government has an international obligation to ensure that people who commit such offences, irrespective of their political status, should be prosecuted in Uganda, the jurisprudence emanating from the Constitutional Court does not appear to inspire optimism in this regard. A recent decision of the Ugandan Constitutional Court on the issue of whether amnesty could be granted to people who allegedly committed grave breaches of the Geneva Conventions shows that the Constitutional Court attaches more value to the provisions of the Ugandan Constitution than to international criminal law treaty obligations. In *Thomas Kwoyelo Alias Latoni v Uganda*,<sup>53</sup> the petitioner, a former rebel leader in the notorious Lord's Resistance Army which has murdered, mutilated, raped and displaced thousands of people in northern Uganda, was indicted before the International Crimes Division of the High Court for grave breaches of the Geneva Conventions. He argued that his indictment was against article 21 of the Constitution which prohibits discrimination on any ground, because thousands of rebels, including rebel leaders and some of his seniors, had been granted amnesty but he had not.<sup>54</sup> It was argued on behalf of the Attorney General, *inter alia*, that because of the fact that the

51 The memorandum to the International Criminal Court Bill made it very clear that the Bill had the following objectives: '(a) to give the force of law in Uganda, to the Statute of the International Criminal Court 1998, (the Rome Statute) adopted on 17th July, 1998 by the UN Diplomatic Conference of Plenipotentiaries and ratified by Uganda on 14th June, 2002; (b) to implement obligations assumed by Uganda under the Rome Statute; (c) to make further provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes; (d) to enable Uganda to co-operate with the International Criminal Court (ICC), in the performance of its functions, including the investigation and prosecution of persons accused of having committed crimes referred to in the Rome Statute; (e) to provide for the arrest and surrender to the ICC of persons alleged to have committed crimes referred to in the Rome Statute; (f) to provide for various forms of requests for assistance to the ICC; (g) to enable the Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Rome Statute; (h) to enable the ICC to conduct proceedings in Uganda; and (i) to provide for the enforcement of penalties and other orders of the ICC in Uganda.'

52 Hansard of Parliament of Uganda, 29 July 2004.

53 *Thomas Kwoyelo Alias Latoni v Uganda*, Constitutional Petition No. 036/11 (judgment of 22 September 2011).

54 Evidence before the Constitutional Court showed that by the time of the petitioner's trial, 24,066 rebels had been granted amnesty from prosecution and that in 2010 when the applicant applied for amnesty, 274 were granted amnesty but the applicant was not. See *ibid.*, p. 17.

petitioner had committed international crimes, granting him amnesty would be contrary to Uganda's international human rights obligations, and that the Vienna Convention on the Law of Treaties made it very clear that a state cannot invoke its domestic law to defeat its international obligations.<sup>55</sup> Although the Constitutional Court held that 'insurgents are subject to international law and can be prosecuted for crimes against humanity or genocide',<sup>56</sup> it held that the prosecution of the petitioner was unconstitutional because it violated article 21 of the Constitution which prohibited discrimination. The Court held that although the petitioner had allegedly committed grave breaches of the Geneva Conventions, it had not 'come across any uniform international standards or practices which prohibit states from granting amnesty'<sup>57</sup> and that by enacting the Amnesty Act the Ugandan Parliament was fulfilling its constitutional obligation to make laws for the peace, order and development of Uganda. It should also be noted that article 27 of the Rome Statute, which, *inter alia*, expressly touches on the issue of presidential immunity from criminal prosecution, was excluded from the International Criminal Court Act.<sup>58</sup> The reason for this could be, as indicated earlier, that the drafters of the International Criminal Court Act were fully aware of articles 98(4)&(5) of the Constitution, and knew that the inclusion of article 27 of the Rome Statute would be contrary thereto. In conclusion, the Ugandan president is immune from prosecution in Uganda for both national and international crimes, and as Bing Bing Jia has argued:

The conclusion of the more recent and relevant case law, national or international, is that immunity still shrouds state officials from even cases involving alleged breaches of *jus cogens*. The reason is probably that immunity as a procedural bar does not allow a forum state's courts to deal with a substantive law issue, such as the existence *vel non* of an international crime.<sup>59</sup>

55 *Ibid.*, p.12.

56 *Ibid.*, p. 17.

57 *Ibid.*, p. 17.

58 Article 27 of the Rome Statute provides: '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

59 B. B. Jia, 'The Immunity of State Officials for International Crimes Revisited', 10 *Journal of International Criminal Justice* (2012): 1303, at 1314–15 (footnotes omitted).