

TABLE OF CONTENTS

PART I – PRELIMINARY	1
Section 4.....	1
Section 5 (2).....	1
Section 6.....	1
PART II – INTERNATIONAL CRIMES AND OFFENCES AGAINST THE	2
International crimes	2
Offences against the administration of justice	3
Consent to prosecutions	4
Section 17.....	4
Section 18.....	4
General principles of criminal law	5
Section 19.....	5
PART III – GENERAL PROVISIONS RELATING TO REQUESTS FOR ASSISTANCE	5
Section 20 (1) (a) (xiv).....	5
Section 20 (1) (b) (i)	5
Section 20 (2)	6
Section 21 (1).....	6
Section 22.....	6
Section 23 (2).....	6
Section 24.....	6
PART IV – ARREST AND SURRENDER OF PERSON TO THE COURT	7
Section 27.....	7
Section 28 (1).....	7
Section 28 (1) (b)	7
Section 28 (3).....	7
Section 29 (1).....	7
Section 29 (2).....	8
Section 29 (3).....	8
Section 29 (4).....	8
Section 30.....	8
Section 31.....	8
Section 31 (3).....	8
Section 32.....	8
Section 33 (1).....	9
Section 33 (2).....	9
Section 37 (1).....	9
Section 37 (2).....	9
Section 37 (5).....	9
Section 38 (1).....	9
Section 40.....	10
Section 41 (2) and (3)	10
Section 41 (4).....	10
Section 41 (6).....	10

Section 42 (4).....	10
Section 43 (1).....	10
Section 44.....	11
Section 44 (1).....	11
Section 44 (3).....	11
Section 44 (6).....	11
Section 44 (7).....	11
Section 45 (1).....	11
Section 46 (1).....	11
Section 46 (2) and (2)	12
Section 47 (1).....	12
Section 47 (2).....	12
Section 47 (3).....	12
Section 48 (1).....	12
Section 49 (1).....	12
Section 50.....	12
Section 51 (1) (a)	12
Section 51 (1) (b)	13
Section 53.....	13
Section 56 (1).....	13
Section 56 (2).....	13
Section 57.....	13
Section 58.....	13
Section 59.....	14
Section 60 (1) (c)	14
Section 60 (2) (a)	15
Section 60 (2) (b)	15
Section 61 (1) (b)	15
Section 61 (1) (d)	15
Section 62.....	15
PART VI – ENFORCEMENT OF PENALTIES	16
Section 64.....	16
Section 65.....	16
Section 66.....	16
General point concerning Court orders for fines, forfeiture and reparation–	17
Enforcement of sentences in Uganda.....	17
Section 67.....	17
Section 69 (4).....	17
Section 70 (3) (c)	17
Certificates and Removal Orders	17
Section 74.....	17
Section 76.....	18

PART VII – PROTECTION OF NATIONAL SECURITY OR THIRD PARTY
INFORMATION..... 18

 Section 82 (2)..... 18

 Section 83 (4)..... 18

 Section 84 (3)..... 19

 Section 86..... 19

 Section 87..... 19

PART VIII – INVESTIGATIONS OR SITTINGS OF THE COURT IN UGANDA 20

 Section 90..... 20

PART X – MISCELLANEOUS PROVISIONS..... 20

 Section 101..... 20

Uganda

Concerns about the International Criminal Court Bill 2004

PART I – PRELIMINARY

Section 4

The term “offence” is not defined, which leads to problems in various Sections in determining whether a Uganda offence is meant (this term is not always used for such offences) or a crime or offence under the Rome Statute or other international law. Sometimes the term “offence” is used in another sense (see Section 17 (1) – “an offence against any of Articles 7, to 16”).

Section 5 (2)

In the absence of a provision stating that Part 3 of the Rome Statute has the force of law, there should be a provision recognizing the International Criminal Court’s (Court) legal status in Uganda pursuant to Article 4 (2) of the Rome Statute. Section 92 may not be adequate. For example, it does not expressly permit the Court to enter into contracts.

Although Parts 4, 11 and 12 of the Rome Statute does not need to have the force of law, it is disappointing that matters such as the nomination of candidates to be judges of the Court, participation in the Assembly of States Parties and payment of assessed contributions or voluntary contributions are not addressed in the Act.

Section 6

Although this Section does not prohibit other ministers or officials from exercising powers or carrying out duties or functions with regard to Court requests, it does not expressly authorize other ministers or officials to do so. This omission could cause problems with regard to the extensive evidence of crimes under international law committed by Ugandan armed forces and civilian superiors abroad, in particular in the Democratic Republic of the Congo, and possibly in multilateral forces in peace-keeping operations.

PART II – INTERNATIONAL CRIMES AND OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

International crimes

The implementing legislation does not define genocide, crimes against humanity or war crimes, but it incorporates Articles 6, 7 and 8 of the Rome Statute. This is not necessarily to be welcomed, since the Rome Statute does not include certain war crimes (with regard to international armed conflict, one could mention the unjustifiable delay in the repatriation of prisoners of war or civilians, attacks against works and installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage a civilian object, making non-defended localities and demilitarized zones the object of attack, removal of tissue or organs for transplantation, and collective punishments; with regard to non-international armed conflict, one could mention collective punishments, acts of terrorism, slavery and the slave trade in all its forms, starvation as a method of combat, attacks against works and installations containing dangerous forces, and improper use of the distinctive emblems). Some crimes included in the Rome Statute are much weaker than in other international humanitarian law instruments to which Uganda is a party, including Protocols I and II to the Geneva Conventions (see, e.g., Article 8 (2) (b) (iv) of the Rome Statute). However, Section 9 (4) of the legislation states that "[n]othing in this section affects or limits the operation of section (2) of the Geneva Conventions Act".

In addition, referring exclusively to the Rome Statute means that, in certain cases, the bill demonstrates a number of inconsistencies. In Articles 8 (2) (b) (xxvi) and (2) (e) (vii), the Rome Statute specifies that it is prohibited to conscript or enlist children under 15 years of age into the national armed forces, conduct that is considered a war crime in both international and non-international armed conflicts. However, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, ratified by Uganda on 6 May 2002, establishes a higher standard of human protection than this: it determines a minimum age of 18 for participation in hostilities. The Protocol also prohibits all forms of recruitment of children under 18 years of age into the armed forces. If Ugandan law contents itself with referring to the Rome Statute on this point, it will be failing to implement a treaty. On the other hand, if the definition in the Protocol were reproduced or its text referred to, this would satisfy both the Protocol and the Rome Statute. This approach has, moreover, been adopted in the texts of the Argentinean, Brazilian, and Congolese bills to implement the Rome Statute, where this prohibition applies to persons under 18 years of age.

The Rome Statute envisages a number of prohibitions on the use of certain weapons. However, it does not exhaustively list the prohibitions and restrictions on other weapons prohibited or restricted by treaties ratified or adhered to by Uganda. As has been suggested by the International Committee of the Red Cross (ICRC), states enacting laws to implement the Rome Statute should take the opportunity of incorporating the specific provisions on weapons included in other treaties that they have ratified. For instance, the Brazilian draft legislation on the implementation of the Rome Statute (available at: www.amnesty.org/icc), incorporates provisions on weapons not included in the Rome Statute.

The criminal responsibility of persons who conspire or agree with others to commit a crime is incorporated only with regard to genocide, and not to crimes against humanity and war crimes (Sections 7, 8 9 of the legislation).

There does not appear to be an article in the draft legislation corresponding to Article 8 (1) of the Rome Statute. This omission is to be welcomed because Article 8 (1) is designed to suggest that the Prosecutor of the International Criminal Court give priority in preliminary examinations and investigations to war crimes that are not committed as part of a plan or policy or as part of a large scale commission of such crimes. This is neither a jurisdictional requirement nor a part of the definition of war crimes. The omission of an article corresponding to Article 8 (3), which recognises the responsibility of a government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means, is also to be welcomed, as this provision is unnecessary.

Sections 7 (3) (a), 8 (3) (a) and 9 (3) (a) refer to the penalty for murder prescribed by the Penal Code Act. This act permits the death penalty for murder, which is not consistent with the exclusion of this penalty in the Rome Statute, the Statutes of the International Criminal Tribunal for the former Yugoslavia and for Rwanda, the Regulation establishing the East Timor Special Panels for Serious Crimes, the Statute of the Special Court for Sierra Leone, the law establishing the Extraordinary Chambers for Cambodia and most national draft and enacted implementing legislation for the Rome Statute.

Offences against the administration of justice

The offences against the administration of justice are described in the draft Act in a very detailed way. They are broader than the Rome Statute in that Sections 10, 11, 12, 14, 15 and 16 establish the Ugandan jurisdiction over such offences when they are committed in Uganda or elsewhere, whilst Article 70 (4) of the Rome Statute requires states to extend their criminal laws to offences against the administration of justice by the Court only when they are committed on their territory or by one of their nationals

(in fact, there would appear to be no bar to states exercising universal jurisdiction over persons suspected of committing such offences).

On the other hand, Article 70 (1) (c) of the Rome Statute seems broader than Section 16 (a) of the Ugandan legislation, since "influencing" a witness goes further than simply "dissuading" or "attempting to dissuade" him/her. However, Section 16 (c), which criminalizes any other way to obstruct, prevent, pervert or defeat the course of justice, might fill the void. The offence of conspiracy to defeat justice in the International Criminal Court (Section 15) is not expressly included in the Rome Statute. There is no provision in the legislation implementing Article 70 (4) (b) of the Rome Statute, which requires the national authorities to treat cases concerning the administration of justice with diligence and to devote sufficient resources to enable them to be conducted effectively.

It is striking that Sections 10 and 12 give national courts the power to arrest and try Court judges and officials for corruption and bribery. This is not consistent with Article 48 of the Rome Statute, which incorporates the immunities and privileges of the Court's staff and judges, unless it applies only when the Court has waived such privileges and immunities. It also contradicts Section 101 (3) and (4) of the Ugandan draft legislation, which implements Article 48 of the Rome Statute.

Consent to prosecutions

Section 17

Leaving consent to prosecute to the Attorney General, a political official, is not satisfactory, even under the common law doctrine that the Attorney General makes decisions whether to prosecute solely as a professional prosecutor and not on the basis of political considerations of the government of the day. Even if that occurs in reality, the perception that prosecution decisions in cases involving crimes under international law have been made for political reasons cannot be avoided.

Section 18

Although the extraterritorial jurisdiction provision including active personality jurisdiction, passive personality jurisdiction and universal jurisdiction when the suspect is present or the suspect is employed by Uganda is to be welcomed as far as it goes, it is disappointing that it is more restrictive than existing Ugandan universal jurisdiction over grave breaches of the Geneva Conventions. The Uganda Grave Breaches Conventions Act 1957 does not require presence in Uganda prior to trial.

General principles of criminal law

Section 19

It is not clear what “any necessary modifications” means, which seems to give a wide discretion to prosecutors and courts to weaken general principles of law.

Section 19 of the draft Act incorporates the relevant provisions of the Rome Statute. However, Section 19 does not refer to Article 23 of the Rome Statute (the principle of *nulla poena sine lege*), Article 22 (1) (3), Article 24 (1), and, above all, Article 27, which provides for the irrelevance of the official capacity as far as criminal responsibility is concerned. Section 25 of the draft legislation contemplates the irrelevance of the official capacity only with regard to requests of surrender or assistance by the Court. These provisions could already be contained in the Ugandan legislation (Penal Code, Constitution, etc.), but perhaps clarification is needed.

To the extent that Section 19 incorporates the general principles of criminal law defined in Articles 28 and 33, instead of stronger international law principles, this restriction is greatly to be regretted.

Similarly, Article 31 (1) (c) and (d) of the Rome Statute should not have been incorporated without clarifying that they should be interpreted as narrowly as possible. A reformulation of this provision, which clearly rules out the unwarranted defences of military necessity and of duress, would probably have been better.

PART III – GENERAL PROVISIONS RELATING TO REQUESTS FOR ASSISTANCE

Section 20 (1) (a) (xiv)

There is no memorandum accompanying the draft Act indicating what types of assistance might be prohibited by the law of Uganda and there is no indication of a willingness to remove any such prohibitions that may exist.

Section 20 (1) (b) (i)

Section 18 (5) and (6) require states to provide certain information or to permit the Prosecutor to take certain investigative steps when the Prosecutor has suspended an investigation and the Act should require Ugandan authorities to provide such assistance.

Section 20 (2)

Although this section provides that it does not limit or prevent the provision of other assistance, it does not expressly require or authorize the Ugandan authorities to provide such assistance. In the absence of an express requirement or authorization, it may not be possible to provide such assistance, despite the removal of a bar to such assistance.

Section 21 (1)

In contrast to certain other provisions, such as the one in paragraph 2 regarding provisional arrest, this provision does not suggest that the requirement that the request for assistance be made “in writing” can be satisfied by a request in “any medium capable of delivering a written record including facsimile or electronic mail”. It would be unfortunate if the this provision were interpreted narrowly to exclude such means in favour of written requests on paper sent by mail.

Section 22

It would be useful if this provision expressly stated that the aim of the consultations was in all instances to ensure the maximum cooperation possible with the Court.

Section 23 (2)

The requirement that the Uganda agency dealing with a Court requirement shall use its “best endeavours to give effect to that request” is too weak. It should be an unconditional obligation.

Section 24

Unfortunately, in contrast to some other provisions in the draft Act, this Section does not require the Minister in the case of refusals to enter into discussions with the Court to see if a mutually acceptable solution can be reached, although Section 22 appears to be of general application. The only requirement for consultation with the Court is in sub-section 6, which relates to Article 98.

PART IV – ARREST AND SURRENDER OF PERSON TO THE COURT

Section 27

Unfortunately, this Section does not provide that the Court request should, in all cases, have priority over competing state requests for extradition (see comments on Section 41). This Section also does not authorize the Prosecutor or the Pre-Trial Chamber to intervene to make the case for the Court's priority, even if the Court's request concerned genocide and the competing state request involved car theft.

Section 28 (1)

Presumably these are independent grounds, but that is not indicated in the text. Sub-section (b) does not authorize the Prosecutor or the Pre-Trial Chamber to intervene to make the case for the Court's priority, even if the Court's request concerned genocide and the Ugandan investigation or prosecution concerned, for example, burglary.

Section 28 (1) (b)

This provision does not have any guidelines for the Minister to determine which investigation or prosecution should have priority. As drafted, the Minister would have the discretion to give priority to an investigation or prosecution concerning a burglary in Uganda over an investigation or prosecution for genocide by the Court. This provision should be amended to require priority for Court investigations and prosecutions, preferably in all cases, but, at a minimum, in all cases where the crime being investigated or prosecuted by the Court. In addition, there should be sufficient safeguards to prevent the flight of suspects or destruction of evidence in the Court's case.

Section 28 (3)

The same requirement of promptness should apply as in the previous sub-section. There is not a great deal of clarity about the difference in the draft Act between such phrases as "immediate", "without delay" "as soon as possible" (Section 28 (2)), but it is presumed that they are in a decreasing order of urgency. It would be helpful to clarify this point, since there are numerous possibilities in the draft Act for delays to occur.

Section 29 (1)

The Minister should be required to transmit the request for provisional arrest immediately (compare sub-section 5) or without delay.

Section 29 (2)

The Minister should be required to transmit a copy of the direction immediately (compare sub-section 5) or without delay.

Section 29 (3)

The Inspector General of the Police should be required to carry out the direction immediately (compare sub-section 5) or without delay.

Section 29 (4)

The Inspector General of the Police should be required to provide notification immediately (compare sub-section 5) or without delay.

Section 30

This section does not indicate whether the rights that must be respected are those under Ugandan law (including the Act) or under international law. There is no provision in the draft Act that requires the authorities to respect all of the rights guaranteed in Article 55 of the Rome Statute, which could lead to such problems as having statements taken by Ugandan authorities in a manner contrary to Article 55 excluded.

Section 31

It is understood that bail determination in serious cases are normally made by the High Court. Regardless of which court makes the determination on bail, judges and prosecutors should receive effective training concerning human rights law and the International Criminal Court.

Section 31 (3)

This sub-section should also require consultation with the Office of the Prosecutor (sub-section (5) speaks of recommendations by the Court) and it should authorize the Office of the Prosecutor and a representative of the Pre-Trial Chamber to appear before the magistrate to convey their views on the granting of bail.

Section 32

This section appears to prevent the magistrate from considering a request for bail from a person in detention for an inordinately long period of time (60 days or such other indefinite period of time if extended “in the interests of justice”) for reasons entirely unrelated to the merits of the application. The Minister should be required to provide the information required without delay and the Minister and magistrate should be required to inform the Office of the Prosecutor and Pre-Trial Chamber of the

proceedings so that they can supply any necessary information in a timely fashion to avoid both unjust delays in bail determinations and unwarranted releases.

Section 33 (1)

The magistrate should be required to rule on the matters in sub-sections (a) and (b) without delay and to issue the delivery order after making that determination immediately or without delay.

Section 33 (2)

Each of the steps listed in this sub-section should be taken by the magistrate immediately or without delay.

Section 37 (1)

If the magistrate refuses to make a delivery order, the magistrate should be required to inform the Office of the Prosecutor and the Pre-Trial Chamber immediately so that they may take appropriate steps to seek a reconsideration of the decision or to challenge the decision in a higher court. There should either be an omnibus provision (probably the safest method) or separate provisions in each part of the Act requiring that the Office of the Prosecutor and the Pre-Trial Chamber be informed immediately of decisions by the Minister, magistrates or other officials so that they can intervene in the proceedings to present their views or to seek reconsideration or to appeal the decisions.

Section 37 (2)

The Office of the Prosecutor and the Pre-Trial Chamber should be permitted to appeal the magistrate's decision or the Minister should be required to appeal, with the opportunity for the Office of the Prosecutor and the Pre-Trial Chamber to intervene.

Section 37 (5)

The Office of the Prosecutor and the Pre-Trial Chamber should be informed of the decision without delay.

Section 38 (1)

There is a risk that this provision could lead to 60 days of detention pending delivery becoming the norm. One possible way to address this problem might be to require execution of the delivery order without delay.

Section 40

The phrases “a different offence in Uganda” and “a different offence” are ambiguous. Presumably, it is intended to mean a “Uganda offence”, but that term is not used. The first phrase could mean a crime under international law committed in Uganda or a crime under Uganda law in Uganda and the second phrase could mean a crime under Ugandan law committed in Uganda or elsewhere.

Section 41 (2) and (3)

Presumably, these sub-sections refer to competing requests concerning the same conduct. If so, it should be spelled out.

Section 41 (4)

Although the factors referred to in Article 90 (6) would often lead to giving priority to the Court’s request, there should be a presumption of priority for the Court’s request in all cases under this sub-section since the Court will have determined that no state is able or willing to investigate or prosecute. In any event, there should be guarantees that the requesting state surrender the accused person to the Court after completing its proceedings.

Section 41 (6)

This sub-section would permit the Minister to give priority to a competing state request to extradite a person for car theft or burglary over a Court request in a genocide case. The sub-section should give priority to the Court request in all cases or, at a minimum, in all cases where the conduct that is the subject of the Court’s request is of greater gravity than in the competing state request. In any event, there should be guarantees that the requesting state surrender the accused person to the Court after completing its proceedings.

Section 42 (4)

There is a typographical error: “if unless” suggesting that some text has inadvertently been omitted.

Section 43 (1)

This sub-section omits the obligations of states parties under Article 18 (5) and (6). In addition, this provision and numerous other provisions in the draft Act do not have extraterritorial jurisdiction provisions, expressly require that Uganda military and civilian authorities abroad, including armed forces in the DRC or in multilateral peace-keeping missions or diplomats, comply with requests of the Court. The Minister or a magistrate or other ministers, such as the Minister of Defence or the

Minister of Foreign Affairs, should have the power to require all such authorities outside Uganda, particularly in areas under Ugandan jurisdiction and control, but not limited to such areas, to comply with the request.

Section 44

Rights under Article 55 of the Rome Statute are not guaranteed in this Section.

Section 44 (1)

There is no extraterritorial jurisdiction provision and no provision concerning the use of video-conferencing.

Section 44 (3)

The magistrate should have the power to exclude any person from the proceedings, including Ugandan law enforcement officials, in the interests of the Court investigation at the request of the Office of the Prosecutor or the Pre-Trial Chamber.

Section 44 (6)

Evidence should be taken in accordance with the Rome Statute and the Rules of Procedure and Evidence; Ugandan law and rules should apply only to the extent that they are fully consistent with the Rome Statute and Rules of Procedure and Evidence and other international law.

Section 44 (7)

Only those privileges and immunities recognized by the Rome Statute, the Rules of Procedure and Evidence and other international law should be recognized. No provisions concerning national security should apply except to the extent permissible under Article 72 of the Rome Statute.

Section 45 (1)

This sub-section omits the obligations of states parties under Article 18 (5) and (6).

Section 46 (1)

It is not clear whether this sub-section trumps other provisions in the draft Act suggesting or stating that witnesses cannot be compelled to testify before the seat of the Court. Article 64 of the Rome Statute trumps such provisions, at least to the extent of requiring states to compel testimony of witnesses, even if that article is interpreted to permit compelled testimony only in a Ugandan court or in video-conferencing.

Section 46 (2) and (2)

Although sub-section 3 is consistent with the Rome Statute and the Rules of Procedure and Evidence as far as it goes, sub-section 2 could lead to evidence that would be admissible in the Court being excluded.

Section 47 (1)

This sub-section omits the obligations of states parties under Article 18 (5) and (6). It also does not have an extraterritorial jurisdiction provision.

Section 47 (2)

This sub-section fails to provide for the Office of the Prosecutor or the Pre-Trial Chamber to conduct the questioning, thus undermining the effectiveness of the proceeding.

Section 47 (3)

This sub-section fails to guarantee the person being questioned his or her rights under Article 55 (1) of the Rome Statute. In addition, assuming that the Ugandan authorities proceed to question a person before receiving the transmitted request from the Minister, it would appear that the person being questioned would not be protected by this provision. As noted above, the draft Act fails to guarantee all of the rights in Article 55 to all persons covered by that article.

Section 48 (1)

The obligations of states parties under Article 18 (5) and (6) of the Rome Statute are omitted. There is no extraterritorial jurisdiction provision.

Section 49 (1)

The obligations of states parties under Article 18 (5) and (6) of the Rome Statute are omitted. There is no extraterritorial jurisdiction provision.

Section 50

This section is inconsistent with Uganda's obligations under Article 64 (6) (b) to assist the Court to require the attendance and testimony of witnesses.

Section 51 (1) (a)

This sub-section is inconsistent with Uganda's obligations under Article 64 (6) (b) to assist the Court to require the attendance and testimony of witnesses.

Section 51 (1) (b)

There should be a possibility for the Minister to consent to prosecution or detention of witnesses when evidence of genocide, crimes against humanity, war crimes or offences against the Court have been discovered after the witness leaves Uganda.

Section 53

To ensure that the purposes of the Rome Statute are served, at a minimum, this section should provide, in accordance with Uganda's obligations under Article 64 (6) (b) to assist the Court to require the attendance and testimony of witnesses, for compulsory testimony in Uganda by video-conferencing of any prisoner who refuses consent to transfer to the seat of the Court.

Section 56 (1)

The obligations of states parties under Article 18 (5) and (6) of the Rome Statute are omitted. There is no extraterritorial jurisdiction provision.

Section 56 (2)

This sub-section does not provide either for the Office of the Prosecutor or the Pre-Trial Chamber to be present or to conduct the examination.

Section 57

The text of section 57 appears to limit the scope of cooperation to a specifically defined "thing" in the Court's request, although the relationship of this section to Section 56, which speaks of examination of places and sites, is unclear. It is, therefore, unclear to what extent the search powers could be used to uncover evidence and information not known to the Court at the time of the request. To what extent could the Court issue an order with a broad definition of the "thing" it is looking for, e.g. evidence that the person was in a particular place on a specific date (this could include a broad range of things – bank statements / travel tickets / diaries / telephone bills / photographs / newspapers etc. that may not be known until the search takes place.)?

Section 58

Unfortunately, this provision does not establish a victim and witnesses protection and support unit. If not addressed in the Act, it should be addressed in other legislation or in Regulations issued by the Minister pursuant to Section 102.

It is unclear why there is a condition that the assistance must not be prohibited by Ugandan law. It is difficult to imagine measures of victim and witness protection that could fall within the scope of the prohibition. States may not plead national law obligations as a ground for refusing to comply with international obligations.

The Minister should be required to consider any such request “without delay” or “as soon as possible on receipt.”

It is unclear whether Section 58 (2) (b) gives a discretion to the agency not to make a report – such reports should be mandatory and the reports should be “regular” and upon request by the Court.

Section 59

There is no extraterritorial jurisdiction provision, a significant lapse since some persons suspected of crimes under the Rome Statute will be under the jurisdiction of Ugandan courts, but have real or intangible assets abroad.

Identifying, tracing, freezing and seizing assets should not be solely limited to property associated with crime as such measures may also be necessary to enforce orders for reparation, especially following the issuing of an indictment when an indicted person may attempt to hide or dispose of all their assets.

Since tracing and identifying assets require investigation measures, it is too onerous to include the requirement that the Minister should be satisfied that there are reasonable grounds to believe that the property is or may be located in Uganda. In some cases, the Court may decide to ask all states to take identifying and tracing measures to ensure that they all relevant resources are identified.

It is unclear whether “Ugandan agency” extends to guaranteeing the cooperation of banks and other financial institutions in the country. This should be expressly provided.

Paragraph 2 (b) should not be discretionary. Instead it should provide that the agency “shall” apply to a magistrate for freezing or seizing order in accordance with the Court’s request, or be automatically conditional upon having identified or traced assets covered by a Court request.

Paragraph (6) is a matter of concern, in that the national courts will consider discharging or varying an order freezing or seizing assets. This decision should be taken by the Court – states in implementing such requests should do so administratively and not interfere with the Court’s judicial process.

Section 60 (1) (c)

The reference in this sub-section to Article 95 (3) of the Rome Statute is in error and it presumably was intended to refer to Article 93 (5). This sub-section is not consistent with Article 95 (3) or (5) of the Rome Statute because it does not provide that the refusal may be made only if execution of the particular measure of assistance “is prohibited in the requested State on the basis of an existing fundamental legal

principle of general application”, the requested state promptly consults with the Court to resolve the matter and, during consultations, consideration is given to “whether the assistance can be rendered in another manner or subject to conditions”. In addition, it is unfortunate that no effort appears to have been made to identify existing fundamental legal principles of general application that would prohibit compliance with requests of the Court and to eliminate them.

Section 60 (2) (a)

For the reasons explained above, the Act should not permit the Minister to give priority to a competing state request, particularly when the request concerns conduct that is less serious than the conduct addressed in the Court request.

Section 60 (2) (b)

It is not clear why any of the provisions of Part VIII (Investigations or sittings of the Court in Uganda) would be appropriate grounds for a refusal to provide assistance.

Section 61 (1) (b)

This provision would permit the Minister to postpone execution of a Court request that would interfere with an investigation or prosecution in Uganda, even if that investigation or prosecution involved a burglary or a car theft and the Court request concerned a case of genocide, thus incurring delays that could impede the effectiveness of the Court investigation or prosecution. It would be better to permit concurrent investigations to preserve evidence and to postpone the national prosecution until after completion of the Court prosecution.

Section 61 (1) (d)

For the reasons explained above, the Act should not permit the Minister to postpone cooperation in favour of a competing state request, particularly when the request concerns conduct that is less serious than the conduct addressed in the Court request.

Section 62

It would be useful to require that verification be provided whenever it is necessary and that it be provided without delay.

PART VI – ENFORCEMENT OF PENALTIES

Section 64

Although there is no territorial restriction, there also is no extraterritorial jurisdiction provision.

A few general points about reparations to victims: there is no provision in the draft Act defining the right of victims to reparations in Ugandan courts independent of Court cases, providing a procedure for Ugandan courts to award reparations in cases in those courts, providing for contributions to the Trust Fund for Victims or establishing a national trust fund for victims.

The discretion given to the Minister in Section 64 (2) to consider whether reparation is required is entirely inappropriate and inconsistent with the requirements of Rule 219 of the Rules of Procedure and Evidence. In making its order, the Court will already have decided that reparation is required – therefore it must not be subject to review by the Minister. It is unclear why Section 64 (2) (b) is necessary when the methods of enforcement are non-exhaustive in Section 64 (3) (b) (iii).

The Minister should be required to act “without delay” or “as soon as possible on receipt of the order” in the implementation of the order.

Section 65

It would be useful to ask the drafters for a copy of the Trial on Indictment Act referred to. Our organization is not in a position to comment at this time as we do not appear to have a copy in London.

Section 66

The Minister’s discretion in paragraph 2 is a matter of concern. First, the requirement that the order is not subject to further appeal is covered by paragraph (1) (b). Second, the Minister should accept that the Court would not make such a request unless it believes the property may be located in Uganda (the criteria under which the Court shall make such a request is set out in Rule 217 of the Rules of Procedure and Evidence) – this should not be subject to review by the Minister. However, the Act should provide for extraterritorial jurisdiction over Ugandan nationals and residents or other persons subject to Ugandan jurisdiction to enforce forfeiture orders so that they cannot be defeated by the simple expedient of moving the property outside Uganda.

The discretion of the Court to impose a time period for notice of the entry in paragraph 5 is too broad. A reasonable maximum time limit for persons to register an

interest in the property should be included in the legislation to prevent unnecessary delay in exercising the forfeiture order.

Paragraph 13 does not reflect the requirement of Rule 218 (1) (c) of the Rules of Procedure and Evidence that “if the State Party is unable to give effect to the order for forfeiture in relation to the specified proceeds, property or assets, it shall take measures to recover the value of the same.”

General point concerning Court orders for fines, forfeiture and reparation–

An addition provision should be added providing that Uganda will implement decisions of the Presidency on disposition or allocation of property of assets in accordance with Rule 221.

Enforcement of sentences in Uganda

Section 67

This section should specify that any conditions specified in the notification should be fully consistent with the Rome Statute and the Rules of Procedure and Evidence, perhaps through a cross-reference to Section 69 (4).

Section 69 (4)

Although this sub-section states that enforcement of sentences of imprisonment must be in accordance with Part 10 of the Rome Statute and the Rules of Procedure and Evidence, it would be useful to remind authorities in this sub-section of the requirement in Article 106 (1) that enforcement of sentences must “be consistent with widely accepted international treaty standards governing treatment of prisoners” and in Article 106 (2) that conditions of imprisonment must “be consistent with widely accepted international treaty standards governing treatment of prisoners”.

Section 70 (3) (c)

Section 70 (3) (c) should require not only the Court's agreement to the conditions of transfer, but also to the actual transfer itself.

Certificates and Removal Orders

Section 74

This section should require the Minister to inform the President of the Court before cancelling a certificate and issuing a removal order and permit the President to make

representations before such an order is issued and permit the President of the Court to challenge such a decision before a Ugandan magistrate.

Section 76

See comment concerning Section 74.

PART VII – PROTECTION OF NATIONAL SECURITY OR THIRD PARTY INFORMATION

Section 82 (2)

The relationship between Sections 82, 83 and 84 is not entirely clear, but it appears that if the Minister relies on Section 82 (2) as the basis for a refusal, then Article 86 (2) of the Rome Statute would not ensure compliance with a Court request or with decisions by the Assembly of States Parties or the Security Council pursuant to Article 87 (7).

This sub-section should provide that, even if the Minister refuses a request or declines to authorize the production of documents or the giving of evidence, citing Article 72 of the Rome Statute, and the Court makes a finding pursuant to Article 87 (7) of the Rome Statute that the failure to comply with the request is contrary to the provisions of the Statute, the Minister must comply with any decision by the Assembly of States Parties or the Security Council requiring compliance.

Section 87 is not satisfactory. It merely requires the Minister to “take into account the power of the Court to refer a matter to the Assembly of States Parties or to the Security Council in accordance with article 87 (7) of the Statute if the Court considers that a requested State is not acting in accordance with its obligations under the Statute”, but it does not require compliance with decisions of the Assembly of States Parties or the Security Council.

Section 83 (4)

The relationship between Sections 82, 83 and 84 is not entirely clear, but it appears that if the Minister relies on Section 83 (4) as the basis for a refusal, then Article 86 of the Rome Statute would not ensure compliance with a Court request or with decisions by the Assembly of States Parties or the Security Council pursuant to Article 87 (7).

This sub-section should provide that, even if the Minister refuses a request or declines to authorize the production of documents or the giving of evidence, citing Article 72 of the Rome Statute, and the Court makes a finding pursuant to Article 87 (7) of the

Rome Statute that the failure to comply with the request is contrary to the provisions of the Statute, the Minister must comply with any decision by the Assembly of States Parties or the Security Council requiring compliance.

Section 87 is not satisfactory. It merely requires the Minister to “take into account the power of the Court to refer a matter to the Assembly of States Parties or to the Security Council in accordance with article 87 (7) of the Statute if the Court considers that a requested State is not acting in accordance with its obligations under the Statute”, but it does not require compliance with decisions of the Assembly of States Parties or the Security Council.

Section 84 (3)

The relationship between Sections 82, 83 and 84 is not entirely clear, but it appears that if the Minister relies on Section 84 (3) as the basis for a refusal, then Article 86 (3) would ensure compliance with a Court request only when the Court orders disclosure pursuant to Article 72 (7) (b) (i), but it would not ensure compliance with decisions by the Assembly of States Parties or the Security Council pursuant to Article 87 (7).

This sub-section should provide that, even if the Minister refuses a request or declines to authorize the production of documents or the giving of evidence, citing Article 72 of the Rome Statute, and the Court makes a finding pursuant to Article 87 (7) of the Rome Statute that the failure to comply with the request is contrary to the provisions of the Statute, the Minister must comply with any decision by the Assembly of States Parties or the Security Council requiring compliance.

Section 87 is not satisfactory. It merely requires the Minister to “take into account the power of the Court to refer a matter to the Assembly of States Parties or to the Security Council in accordance with article 87 (7) of the Statute if the Court considers that a requested State is not acting in accordance with its obligations under the Statute”, but it does not require compliance with decisions of the Assembly of States Parties or the Security Council.

Section 86

See comments above concerning Sections 82 (2), 83 (4) and 84 (3).

Section 87

See comments above concerning Sections 82 (2), 83 (4) and 84 (3).

PART VIII – INVESTIGATIONS OR SITTINGS OF THE COURT IN UGANDA

Section 90

This section is unsatisfactory in that it fails expressly to authorize the Prosecutor “to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available”, when authorized to do so by the Pre-Trial Chamber pursuant to Article 18 (6) of the Rome Statute, or to authorize the Prosecutor to take the steps outlined in Article 19 (8). Such steps will in many cases be crucial to ensure a successful prosecution and many states have failed to guarantee that the Prosecutor can take these steps, which do not fall within Part 9 or Article 57 (3) (d) of the Rome Statute.

PART X – MISCELLANEOUS PROVISIONS

Section 101

Section 101 on the Agreement on Privileges and Immunities (Agreement) appears to be comprehensive in giving effect to Article 48 and the Agreement, but our organization has not had the benefit of the experience of the UN Office of Legal Affairs in dealing with national legislation implementing the UN Convention on Privileges and Immunities, so we cannot say if such general statutory provisions have proved satisfactory in practice and have been enforceable in national courts.