

UGANDA

## Benchmarks for Justice for Serious Crimes in Northern Uganda

Human Rights Watch Memoranda on Justice Standards  
and the Juba Peace Talks

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# **Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders**

## **Human Rights Watch’s First Memorandum on Justice Issues and the Juba Talks**

May 2007

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## I. Introduction

Human Rights Watch welcomes the resumption of peace talks between the Ugandan government and the Lord's Resistance Army (LRA) which have been taking place since April 26 in Juba, southern Sudan. The talks create the prospect of an end to the 21-year conflict which has had a devastating impact on hundreds of thousands of civilians in northern Uganda.

Human Rights Watch firmly believes that any outcome for northern Uganda must include both a peace agreement and fair and credible prosecutions of those responsible for the most serious crimes committed during the conflict, together with accountability measures for lesser offenses. Ensuring that there is no impunity is not only essential to accountability, but to establishing a durable peace in northern Uganda. This involves addressing serious crimes using procedures that conform to international human rights standards.

Since the conflict began in 1986, serious crimes in violation of international law and other human rights abuses committed by the LRA and to a lesser extent by government forces have been documented by Human Rights Watch and other human rights organizations. There has been a general failure to bring to justice alleged perpetrators.

Arrest warrants issued by the International Criminal Court (ICC) for four LRA leaders provide a real opportunity to ensure justice is done for at least some of the serious crimes committed during the course of the conflict. The men are charged with crimes of the utmost gravity: crimes against humanity including murder, enslavement, sexual enslavement, and rape; and war crimes, including murder, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlisting of children.<sup>1</sup>

Human Rights Watch is aware that various parties with an interest in the outcome of the talks are exploring the possibility of national alternatives to ICC prosecutions to help facilitate a peace agreement. This memorandum enumerates why credible prosecutions of those responsible for the most serious crimes in accordance with international standards are so important. It then gives details of the benchmarks that would need to be satisfied before any national alternative to trial by the ICC of the cases of the four LRA leaders would

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<sup>1</sup> In July 2005 the court issued warrants for the arrest of the top five LRA leaders – Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen – for crimes against humanity and war crimes. However, Lukwiya was killed in August 2006 during a fight between the LRA and Ugandan military forces. See “Warrant of Arrest unsealed against five LRA Commanders,” ICC press release, October 14, 2005, <http://www.icc-cpi.int/press/pressreleases/114.html> (accessed May 7, 2007); ICC, “Statement by the Chief Prosecutor Luis Moreno-Ocampo on the confirmation of the death of Raska Lukwiya,” November 7, 2006, [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20061107\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20061107_en.pdf) (accessed May 7, 2007).

be adequate. These benchmarks are effectively the same standards that should apply for the trial of any person brought to justice for a serious criminal offense, namely: credible, independent and impartial investigation and prosecution; rigorous implementation of internationally recognized standards of fair trial; and penalties on conviction that are appropriate and reflect the gravity of the crime.

Key governments, UN representatives, and the mediation team have a crucial role to play in ensuring that both peace and justice are achieved in northern Uganda. We urge the participants to use all appropriate influence with the parties to pursue such an outcome. This includes advocating that any proposed national alternative to ICC prosecutions – and any other prosecutions of persons alleged to have been responsible for serious international crimes and other human rights abuses – meets necessary benchmarks discussed in this memorandum.

## **II. The importance of credible prosecutions in accordance with international standards**

The conflict in northern Uganda has been characterized by serious crimes under international law and other human rights abuses committed by the LRA and to a lesser extent government forces, which Human Rights Watch and others have documented for years. On the part of the LRA, these have included willful killings, beatings, large-scale abductions, forced recruitment of adults and children, sexual violence against girls whom it assigns as “wives” or sex slaves to commanders, and large-scale looting and destruction of civilian property. On the part of the government, these have included extrajudicial executions, rape, torture and cruel, inhuman and degrading treatment, arbitrary detention, and forced displacement.<sup>2</sup>

In March 2007, Human Rights Watch researchers spoke with people in Uganda who were victims of the massive displacement in northern Uganda due to the conflict. Nearly all those

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<sup>2</sup> Human Rights Watch, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York: Human Rights Watch, September 1997), <http://www.hrw.org/reports/pdfs/c/crd/uganda979.pdf>; Human Rights Watch, *The State of Pain: Torture in Uganda*, vol. 16 no. 4(A), March 2004, <http://hrw.org/reports/2004/uganda0404/index.htm>; Human Rights Watch, *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/reports/2003/uganda0703/>; Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://hrw.org/reports/2005/uganda0905>; Amnesty International, “Uganda: ‘Breaking God's commands’: The destruction of childhood by the Lord's Resistance Army,” AFR 59/001/1997, September 18, 1997, <http://web.amnesty.org/library/Index/ENGAFR590011997?open&of=ENG-UGA> (accessed May 9, 2007); Amnesty International, “Breaking the Circle: Protecting human rights in the northern war zone,” AFR 59/001/1999, March 17, 1999, <http://web.amnesty.org/library/Index/ENGAFR590011999?open&of=ENG-UGA> (accessed May 9, 2007).

we met living in displaced camps expressed an intense desire to return to their homes. A number conveyed real concern that prosecution of LRA leaders could delay their departure and therefore saw the ICC as an obstacle to peace. At the same time, some civil society representatives suggested that a peace agreement based on impunity is unlikely to be sustainable after victims settle back home and realize that the crimes against them and their loved ones have been excused. Moreover, a distinct vocal minority of displaced persons we met with declared a desire to see those most responsible brought to trial.

International law mandates prosecutions for serious crimes, such as crimes against humanity and war crimes, which help to ensure individual victims' rights to truth, justice, and an effective remedy, along with combating impunity.<sup>3</sup> Major international treaties to which Uganda is party – the Convention against Torture, the Geneva Conventions, and the Rome Statute of the International Criminal Court – provide that alleged perpetrators of serious crimes must be fairly prosecuted.

But it is not only international legal obligations that make justice necessary. Human Rights Watch believes that meaningful prosecutions in accordance with international standards of those responsible for the most serious international crimes are a crucial component to achieving a durable peace. Such prosecutions send the message, especially to would-be perpetrators, that no one is above the law. They also help to consolidate respect for the rule of law by solidifying society's confidence in judicial institutions. This in turn helps cement peace and stability.

The UN secretary-general's 2004 report on the rule of law and transitional justice in conflict and post-conflict societies states that: "[E]xperience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."<sup>4</sup>

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<sup>3</sup> See Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles), February 8, 2005, E/CN.4/2005/102/Add.1, preamble, principle 19; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 2(3). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted December 16, 2005, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, preamble and parts VII and VIII.

<sup>4</sup> Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, August 23, 2004, S/2004/616, <http://www.un.org/Docs/sc/sgrepo4.html> (accessed May 5, 2007), para. 2.

Failure to hold perpetrators of the most serious international crimes to account helps to fuel future abuses. In other countries, communities have experienced how measures conferring immunity from prosecution for serious offenses have had devastating consequences. In Sierra Leone in 1999, the rebel leader Foday Sankoh, who had been implicated with his Revolutionary United Front (RUF) in many war crimes, received an amnesty in exchange for signing the Lomé Peace Accord. Only months later, Sankoh's RUF went on to attack government forces and UN peacekeepers, and continued to commit war crimes by taking hundreds hostage and committing rampant sexual assault. The collapse of the accord also brought about a marked increase in human rights abuses by government forces. A return to peace only occurred two years later. Meanwhile, the Special Court for Sierra Leone pursued prosecutions, including of government officials, which helped to marginalize abusive leaders of the warring parties.

In our view, achieving a meaningful, durable peace in northern Uganda will require the prosecution of the most serious crimes in accordance with international standards. Broader accountability efforts for lesser offenses through national and local initiatives that could include trials, a truth telling exercise, and, where appropriate, use of traditional mechanisms, will also be important. As the UN secretary-general's 2004 report further states, "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."<sup>5</sup>

### **III. Benchmarks for assessing possible national alternatives to ICC cases**

Human Rights Watch views the arrest warrants issued by the ICC against LRA leaders and their prosecution by the ICC as an important step to ensuring justice for some of the most serious crimes committed during the course of the conflict.<sup>6</sup> Prosecutions of members of the Ugandan armed forces responsible for the most serious human rights violations must also take place, along with efforts aimed at more comprehensive accountability. Such efforts might include establishment of truth commissions and use of traditional justice measures.

A number of observers have raised the issue of whether national alternatives to prosecutions by the ICC of the four LRA leaders might help the achievement of a peace agreement. Possible alternatives that have been cited by local leaders, civil society

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<sup>5</sup> *Ibid.*, Summary.

<sup>6</sup> Human Rights Watch does not oppose participation of LRA accused at the peace talks, however.

representatives, and persons associated with the peace talks include national trials, traditional justice measures, a truth commission, or some combination thereof.

The Rome Statute of the ICC permits states to investigate and prosecute persons for whom ICC warrants have been issued under article 17. Indeed, the statute favors domestic prosecution of serious crimes where possible.<sup>7</sup> At the same time, the Rome Statute and international human rights standards require that any national alternative which would oust ICC jurisdiction meet substantial benchmarks.

### **A. Credible, impartial and independent investigation and prosecution**

Any national alternative to the ICC would need to involve credible, impartial and independent investigation and prosecution. The updated UN principles for the protection and promotion of human rights through combating impunity specify that a right to justice means: a) “prompt, thorough, independent and impartial investigations,” and b) “appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”<sup>8</sup>

Article 17 of the Rome Statute provides that a national alternative must involve a state genuinely being able and willing to conduct investigation and prosecution. This involves both procedural and substantive elements. In terms of procedure, the Rome Statute requires that domestic investigation and prosecution must be conducted independently and impartially. Investigation and prosecution also must not be undertaken to shield the person from criminal responsibility, nor be conducted in a way that is inconsistent with intent to bring a person to justice.<sup>9</sup> In terms of substance, Rome Statute crimes and theories of individual criminal responsibility should be applied, which requires their substantive incorporation into Uganda law.<sup>10</sup> Incorporation of Rome Statute crimes and forms of responsibility has been an important byproduct of the establishment of the ICC in many states.

War crimes and crimes against humanity, the crimes with which the LRA leaders are charged by the ICC, are among the most serious crimes under international law. Any national

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<sup>7</sup> This is one aspect of what is known as the complementarity principle.

<sup>8</sup> Updated Principles, principle 19.

<sup>9</sup> Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 17.

<sup>10</sup> In Uganda, draft legislation to implement the Rome Statute exists domestically, although it has not yet been enacted into law.

prosecution of ICC cases would need to include charges that reflect these crimes.<sup>11</sup> Prosecutions should also be able to be brought on the same basis of criminal responsibility as before the ICC. This would include command responsibility, and other forms of participation in planning and execution of the crimes including what is known as participation in a joint criminal enterprise. The different forms of responsibility are particularly important when leaders are tried for serious crimes. They are necessary to establish culpability even where the defendant is not accused of directly committing the crimes with which he is charged.

Some local leaders in Uganda have suggested that traditional justice measures, particularly the Acholi measure of *mato oput*, could serve as an appropriate alternative to trials by the ICC. Traditional justice measures may have an important role to play in a comprehensive approach to accountability and community healing. However, traditional justice measures unless they include or are accompanied by fair and credible investigations and prosecutions would not meet the Rome Statute's criteria nor satisfy other international standards to qualify them as possible alternatives to the ICC. *Mato oput*, for example, focuses on confession of crimes and symbolic rituals for reconciliation as opposed to impartial and independent investigation capable of leading to the identification of those responsible, and a determination of liability before an independent tribunal, during which an accused benefits from fair trial guarantees (see below), and, if convicted, appropriate punishment.<sup>12</sup> Ugandans with whom Human Rights Watch researchers met with in March pointed out that traditional justice measures are not generally regarded as substitutes for prosecution of even ordinary criminal offenses in Uganda.

A process which uses traditional justice measures and the possibility of prosecution only in the event the traditional justice measures are not fully complied with would also be insufficient if it precluded criminal prosecution for the most serious crimes. On the same basis, a process which uses a truth and reconciliation commission and the possibility of prosecution only if the commission's terms are not complied with would be inadequate.

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<sup>11</sup> ICC judges have found that a state was not acting on an ICC case where the state had issued arrest warrants that did not refer to alleged criminal responsibility for conduct included in an ICC prosecutor's application for an ICC arrest warrant of the same individual. See Human Rights Watch, *A Summary of the Case Law of the International Criminal Court*, March 2007, <http://hrw.org/backgrounder/ij/icco307/index.htm>, p. 2.

<sup>12</sup> For example, the *mato oput* ceremony has been described to include rituals such as drinking a bitter root and slaughtering animals. For a detailed description of traditional justice practices, see Liu Institute for Global Issues, Gulu District NGO Forum, Ker Kwaro Acholi, "Roco Wat I Acoli Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reintegration," September 2005, <http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-20051.pdf> (accessed May 7, 2007).

## B. Rigorous adherence to international fair trial standards

Internationally recognized fair trials standards would need to be rigorously observed in any national alternative to ICC prosecutions. The Ugandan government would need to demonstrate that any national alternative respects such standards both in principle and in practice. International fair trial standards are largely contained in the International Covenant on Civil and Political Rights (ICCPR) and are crucial to a trial's legitimacy. They include the following rights:

- a fair and public hearing before a competent, independent and impartial tribunal;
- a presumption of innocence;
- adequate time and facilities to prepare a defense;
- not be compelled to testify against oneself or to confess guilt;
- have a lawyer of the accused's own choosing;
- be protected from torture or cruel, inhuman or degrading treatment; and
- have a conviction be reviewed by a higher tribunal.<sup>13</sup>

Uganda is a party to the ICCPR and the above rights are included in its constitution.<sup>14</sup> Moreover, Uganda's judiciary has been praised for its good record of independence in handling controversial trials.<sup>15</sup> Ugandan judges also have served on international or international-national criminal tribunals that prosecute serious crimes, such as the Special Court for Sierra Leone. On the other hand, Human Rights Watch and others have documented attempts by the authorities to intimidate the judiciary, most recently the storming of the High Court building in Kampala by security forces in March 2007, and have voiced concern over politically motivated prosecutions.<sup>16</sup>

Any trial for war crimes and crimes against humanity is politically sensitive, and prosecution of LRA leaders before a Ugandan court would be particularly so. It is therefore especially important that a national alternative to the ICC would have to show that fair trial protections

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<sup>13</sup> ICCPR, arts. 7 and 14.

<sup>14</sup> The Constitution of the Republic of Uganda, 1995, arts. 24 and 28, [http://www.parliament.go.ug/index.php?option=com\\_wrapper&Itemid=78](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=78) (accessed May 11, 2007). Uganda ratified the ICCPR in 1995.

<sup>15</sup> See Human Rights Watch, *In Hope and Fear: Uganda's Presidential and Parliamentary Polls*, February 2006, <http://hrw.org/backgrounder/africa/uganda0206/index.htm>. See also US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2006: Uganda," March 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78763.htm> (accessed May 9, 2006).

<sup>16</sup> See Human Rights Watch, *In Hope and Fear: Uganda's Presidential and Parliamentary Polls*, February 2006, <http://hrw.org/backgrounder/africa/uganda0206/index.htm>; "Uganda: Government Gunmen Storm High Court Again," Human Rights Watch news release, March 5, 2007, <http://hrw.org/english/docs/2007/03/05/uganda15449.htm>; "Uganda: Political Repression Accelerates," Human Rights Watch news release, November 23, 2005, <http://hrw.org/english/docs/2005/11/24/uganda12089.htm>.

can be ensured in practice – it is not enough for them to be provided on paper – in order to demonstrate an ability to conduct prosecutions of the LRA leaders against whom ICC warrants have been issued. Moreover, if alternative national trials were to become politicized or otherwise fail to fully adhere to international fair trial standards, it would be highly damaging to ensuring respect for the rule of law in Uganda.

### **C. Penalties that reflect the gravity of the crimes**

Given the seriousness of the charges brought by the ICC, imprisonment should be the principal penalty for conviction in any alternative national trial. To do otherwise would suggest an intent other than bringing a person to justice (which as already described is what is required under the Rome Statute for a national trial to be an adequate alternative). For example, the ICC's primary penalties include either imprisonment for a specified number of years up to thirty years or life imprisonment when justified by the extreme gravity of the crime and individual circumstances.<sup>17</sup> Other international and international-national tribunals that prosecute serious crimes, such as the ad hoc international tribunals for Rwanda and the Former Yugoslavia and the Special Court for Sierra Leone, provide imprisonment as the principal form of punishment.

Even after a scrupulously fair trial followed by a conviction, a light prison sentence would also be inconsistent with an intent to bring a person to justice for crimes as serious as those with which the LRA leaders have been charged, although any imprisonment must respect the human rights of persons detained. While not addressing particular crimes or number of counts on conviction, a 2002 study of sentencing practice at international criminal tribunals provides some indication of sentences imposed on convictions for serious crimes. The study found that the mean sentence for conviction was 16 years at the International Criminal Tribunal for the former Yugoslavia and the majority of convicted were sentenced to life imprisonment at the International Criminal Tribunal for Rwanda.<sup>18</sup>

Meanwhile, the death penalty should not be available as a punishment in any national alternative (which it currently is in Uganda for serious crimes, such as murder or rape) to ICC prosecutions. International and international-national tribunals do not permit the death penalty as an option for punishment of war criminals. Human Rights Watch opposes the death penalty in all circumstances as it is an inherently cruel and inhuman punishment.

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<sup>17</sup> Rome Statute, art. 77(1).

<sup>18</sup> See Mark A. Drumbl and Kenneth S. Gallant, "Sentencing Policies and Practices in the International Criminal Tribunals," *Federal Sentencing Reporter*, Vol. 15, No. 2, December 2002, p. 142.

Finally, fines following conviction, unless imposed in addition to imprisonment, would also be inappropriate as penalties for serious crimes under international law. The ICC includes fines as a penalty, but only in addition to imprisonment.<sup>19</sup> Requiring compensation to be paid by a clan (as takes place under some Acholi traditional justice measures) without imprisonment would therefore be similarly unacceptable as the only form of punishment for such crimes. It would also be an unlawful form of collective punishment.

#### **IV. Determining the sufficiency of a national alternative to ICC prosecutions**

Under article 19 of the Rome Statute, it is the ICC judges who decide whether a trial in a domestic jurisdiction is an acceptable alternative to its cases. Uganda, like all other states, cannot take the decision unilaterally. Furthermore article 19 suggests that a case tried domestically against a person on whom an ICC warrant has been issued, but which does not meet the Rome Statute's criteria for national alternatives, could be brought back to the ICC for trial. Otherwise, it would be easy for states to circumvent the spirit and purpose of the Rome Statute's requirements. Specifically, article 19 of the Rome Statute states: "If the Court has decided that a case is inadmissible (...), the Prosecutor may submit a request for a review of the decisions when he or she is fully satisfied that new facts have arisen which negate the basis of which the case had previously been found inadmissible." Accordingly, any national alternative to trial by the ICC would need not only to meet the requirements of genuine willingness and ability to try the case, but live up to these requirements in practice.

#### **V. A note on possible Security Council deferral of an ICC investigation or prosecution**

There are media reports that have suggested that the LRA has called for a deferral by the Security Council of the ICC's action against LRA leaders, which is provided under article 16 of the Rome Statute.<sup>20</sup>

Article 16 provides a temporary suspension of investigation or prosecution for a 12-month period, and is not to allow alleged perpetrators to escape justice for crimes with which they have been charged. Human Rights Watch is concerned that in the absence of fair and credible prosecution at the national level, a Security Council deferral would be utilized to shield LRA leadership from facing trial, perhaps indefinitely if renewed.

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<sup>19</sup> Rome Statute, art. 77(2).

<sup>20</sup> See, for example, "Ugandan rebels urge suspension of arrest warrants," Reuters, April 19, 2007.

In addition, Security Council deferral could open the door to dangerous interference by the Security Council in the work of the ICC. As an independent court, the ICC should not have its judicial operations subjected to political interference.

Human Rights Watch believes an article 16 deferral of the ICC's investigation or prosecution of LRA suspects would be inappropriate.



# **The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes**

## **Human Rights Watch’s Second Memorandum on Justice Issues and the Juba Talks**

July 2007

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## I. Introduction

On June 29 the government of Uganda and the Lord's Resistance Army (LRA) signed an agreement on accountability and reconciliation as part of the peace talks that have been taking place in Juba, southern Sudan, since July 2006. The talks are now on a recess for consultations and development of implementing protocols to the agreement.

Human Rights Watch believes that the peace talks create important prospects for ending the devastating 21-year conflict in northern Uganda. Human Rights Watch also believes that any outcome must include both a peace agreement and fair and credible prosecutions of those responsible for the most serious crimes committed, together with broader accountability measures. Throughout the conflict, the LRA and, to a lesser extent, the government forces have committed numerous crimes in violation of international law and other human rights abuses. We firmly believe that prosecutions for the most serious of these are essential to accountability and to establishing a durable peace in northern Uganda.<sup>1</sup>

Arrest warrants issued by the International Criminal Court (ICC) in 2005 for LRA leaders provide a crucial opportunity to ensure justice is done for at least some serious crimes. The warrants allege that LRA leaders bear individual criminal responsibility for crimes against humanity including murder, enslavement, sexual enslavement, and rape; and for war crimes including murder, intentionally directing an attack against a civilian population, pillaging, rape, and forced enlisting of children.<sup>2</sup>

The June 29 agreement on accountability and reconciliation looks instead to national trials in Uganda. The ICC allows and actually favors national trials where possible. Nevertheless, as detailed in a May 2007 Human Rights Watch memorandum, any national alternative to trial by the ICC should, consistent with the ICC's Rome Statute and other international standards, satisfy substantial benchmarks. These are credible, impartial, and independent investigation and prosecution; rigorous adherence in principle and in practice to international fair trial standards; and penalties that are appropriate and that reflect the gravity of the crimes.<sup>3</sup>

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<sup>1</sup> For a more detailed discussion of this point, see Human Rights Watch, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders (Benchmarks Memorandum)*, May 30, 2007, <http://hrw.org/backgrounder/ij/icc0507/>, Section II.

<sup>2</sup> See "Warrant of Arrest unsealed against five LRA Commanders," ICC press release, October 14, 2005, <http://www.icc-cpi.int/press/pressreleases/114.html> (accessed July 7, 2007).

<sup>3</sup> Human Rights Watch, *Benchmarks Memorandum*.

The June 29 agreement’s recognition of the importance of trials for the most serious crimes, including for any individual regardless of affiliation, is positive.<sup>4</sup> The agreement also includes broader accountability measures, including truth-telling and traditional justice.<sup>5</sup> Nevertheless, the agreement leaves open the potential for fundamentally inadequate penalties in the event of convictions for the most serious crimes. Paragraph 6.3 of the agreement states that “a regime of alternative penalties and sanctions” shall be introduced and “replace existing penalties” with respect to serious crimes committed by “non-state actors.” It is unclear from the agreement and from public statements what “alternative penalties” may apply and to what extent they will depart from ordinary criminal penalties under Ugandan law. The agreement, furthermore, indicates under paragraph 6.4 that penalties should address various objectives—including to reflect the gravity of the crime and to promote reconciliation and rehabilitation—but without addressing what types of penalties will advance such objectives.

The agreement also does not address full incorporation of international crimes and theories of criminal responsibility into domestic law. These are necessary for charges to reflect the gravity of the most serious crimes and culpability where a defendant is not accused of directly committing crimes, which is often the case when leaders are tried.

This memorandum builds upon our May 2007 memorandum by providing a more detailed discussion of appropriate penalties for any national trials of ICC cases. These are the same penalties that should apply to any other national trials for serious crimes. In sum, the Rome Statute and international standards, along with international and domestic practice, indicate that a term of imprisonment that matches the seriousness of the offense, while taking into account any mitigating factors, should be the penalty in the event of conviction. Although permitted under Ugandan law, the death penalty should not be allowed as it is an inherently cruel and inhuman form of punishment.

Our analysis of penalties here should not obscure the fundamental right under international law of an accused to be presumed innocent. Any trials for which appropriate penalties are available must rigorously observe international fair trial standards.<sup>6</sup>

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<sup>4</sup> Under paragraphs 6.1 and 6.2, the June 29 agreement states, “Formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict,” and that “[f]ormal courts and tribunals” will “adjudicate allegations of gross human rights violations.” Under paragraphs 4.1 and 4.2, the agreement further provides that “[f]ormal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes,” and prosecutions “shall be based upon systematic, independent and impartial investigations.”

<sup>5</sup> See, for example, paras. 3.1 and 7.3.

<sup>6</sup> For a more detailed discussion of these standards, see Human Rights Watch, *Benchmarks Memorandum*, Section III(B).

Key governments, United Nations (UN) representatives, and the mediation team have a crucial role to play in ensuring that both peace and justice are achieved in northern Uganda. We urge that all appropriate influence be brought to bear on the parties to pursue this outcome, including by insisting that proposed national trials include provision of adequate penalties in the event of convictions.

## **II. ICC judges determine the sufficiency of national alternatives to its cases, and adequate penalties go to the ICC’s requirements for such alternatives**

At the outset, it should be noted that the ICC judges alone decide whether a national trial is an acceptable alternative to ICC prosecution under Article 19 of the Rome Statute. The statute further suggests that if a national trial against a person for whom an ICC warrant has been previously issued does not meet the Rome Statute’s criteria, the case can be brought back to the ICC for trial.<sup>7</sup> Any national alternative to ICC cases must be adequate not only in principle but also in practice.

Under Article 17, the Rome Statute details its requirements for any national alternative to its cases, which relate to a state’s ability and willingness to investigate and prosecute. While Article 17 does not explicitly discuss penalties, inadequate penalties would in our view reflect a state’s unwillingness, which includes that the “proceedings ... are being conducted in a manner which ... is inconsistent with an intent to bring the person concerned to justice.”<sup>8</sup> The Rome Statute’s object and purposes, which include “affirming that the most serious crimes ... must not go unpunished,” reinforce this assessment.<sup>9</sup> Thus, inadequate penalties would be incompatible with the Rome Statute’s requirements for national trials of its cases.

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<sup>7</sup> Specifically, article 19(10) of the Rome Statute provides, “If the Court has decided that a case is inadmissible ..., the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible ....” Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002.

<sup>8</sup> Ibid., art. 17(2)(c).

<sup>9</sup> Ibid., preamble.

### **III. International standards and practice indicate that a term of imprisonment reflecting the gravity of the crimes is the appropriate penalty for the most serious crimes**

International law specifies that states should not only prosecute but also punish perpetrators of serious human rights violations. For example, the Convention against Torture indicates that crimes under the convention should be “punishable by appropriate penalties which take into account their grave nature.”<sup>10</sup> The UN principles on combating impunity provide that states should ensure that “those responsible for serious crimes under international law are prosecuted, tried and *duly punished*.”<sup>11</sup> The UN principles and guidelines on the right to a remedy and reparation similarly indicate that states have “the duty to submit to prosecution the person allegedly responsible for the violations [constituting crimes under international law] and, if found guilty, the *duty to punish* her or him.”<sup>12</sup>

Consistent with these standards, existing international and hybrid international-national criminal tribunals impose imprisonment as the principal punishment for crimes under their jurisdiction, including genocide, crimes against humanity, and war crimes.<sup>13</sup> Indeed, while there was debate and disagreement at the diplomatic conference establishing the ICC over certain aspects relating to penalties, such as the death penalty, all the delegations agreed that imprisonment should be the primary penalty.<sup>14</sup>

The statutes of the ICC and other international and hybrid tribunals, furthermore, prescribe that penalties should be commensurate with the gravity of the offense. The Rome Statute states, “In determining the sentence, the Court shall ... take into account such factors as the

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<sup>10</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/RES/39/46, entered into force June 26, 1987, art. 4(2).

<sup>11</sup> Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, February 8, 2005, E/CN.4/2005/102/Add.1, principle 19 (emphasis added).

<sup>12</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted December 16, 2005, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, part III, para. 4 (emphasis added).

<sup>13</sup> Rome Statute, art. 77; Statute 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 (ICTY Statute), adopted May 25, 1993, U.N. Doc. S/25704, art. 24; Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), adopted November 8, 1994, U.N. Doc. S/RES/955, art. 23; Statute of the Special Court for Sierra Leone (SCSL Statute), adopted August 14, 2000, <http://www.sc-sl.org/scsl-statute.html> (accessed June 15, 2007), art. 19.

<sup>14</sup> Rolf Einar Fife, “Commentary on Article 77, Applicable Penalties,” in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 990.

gravity of the crime and the individual circumstances of the convicted persons.”<sup>15</sup> At the diplomatic conference establishing the ICC, a number of delegations stressed the importance of having severe penalties proportionate to the gravity of the crimes.<sup>16</sup> The ICC’s penalties include imprisonment for “a specified number of years,” up to 30 years, or life imprisonment when “justified by the extreme gravity of the crime and the individual circumstances of the convicted.”<sup>17</sup>

Case law from the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) also supports the notion that the penalty should reflect the gravity of the crimes.<sup>18</sup> For example, the ICTY appeals chamber has stated that “the gravity of the offence may be regarded as the ‘litmus test’ in the imposition of an appropriate sentence.”<sup>19</sup> An ICTR trial chamber similarly has indicated that “the penalty must first and foremost be commensurate to the gravity of the offence,” and that “the more heinous the crime, the higher the sentences that should be imposed.”<sup>20</sup> An ICTY trial chamber has, furthermore, said that matching the penalty to the gravity of the criminal conduct should be “the overriding obligation in determining sentence.”<sup>21</sup>

In addition, the Yugoslav and Rwandan tribunals have found that an offender who plans or acts in a leadership role is viewed as committing a graver offense than a subordinate.<sup>22</sup> For example, two ICTY trial chambers have indicated that “the commission of offences by a person in ... a prominent position aggravates the sentence substantially,”<sup>23</sup> and that the

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<sup>15</sup> Rome Statute, art. 78(1). See also ICTY Statute, art. 24(2); ICTR Statute, art. 23(2); SCSL Statute, art. 19(2) (“In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”)

<sup>16</sup> Fife, in Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, p. 990.

<sup>17</sup> Rome Statute, art. 77(1). The ICTR and the ICTY provide a “term up to and including the remainder of the convicted person’s life.” See rule 101 of their respective Rules of Procedure and Evidence, for the ICTY adopted February 11, 1994, [http://www.un.org/icty/legaldoc-e/basic/rpe/IT32\\_rev36.htm](http://www.un.org/icty/legaldoc-e/basic/rpe/IT32_rev36.htm); for the ICTR adopted June 29, 1995, <http://www.un.org/icty/rules.html> (accessed June 21, 2007). The Special Court for Sierra Leone (SCSL) provides for “imprisonment for a specific number of years.” See Rules of Procedure and Evidence for the SCSL, adopted January 16, 2002, <http://www.sc-sl.org/scsl-procedure.html> (accessed July 17, 2007), rule 101.

<sup>18</sup> For a listing of a number of ICTY cases that address the importance of gravity of the crime in sentencing, see Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia (Topical Digest of the Case Law of the ICTY)* (New York: Human Rights Watch, 2006), pp. 544-45.

<sup>19</sup> *Prosecutor v. Dragan Nikolic*, ICTY, Case No. IT-94-2, Judgment on Sentencing Appeal (Appeals Chamber), February 4, 2005, para. 18.

<sup>20</sup> *Prosecutor v. Kamuhanda*, ICTR, Case No. ICTR-95-54, Judgment (Trial Chamber), January 22, 2004, paras. 760, 765.

<sup>21</sup> *Prosecutor v. Predrag Banovic*, ICTY, Case No. IT-02-65, Sentencing Judgment (Trial Chamber), October 28, 2003, para. 36.

<sup>22</sup> For a listing of a number of ICTY cases that address this point, see Human Rights Watch, *Topical Digest of the Case Law of the ICTY*, pp. 584-586.

<sup>23</sup> *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24, Judgment (Trial Chamber), July 31, 2003, para 913.

“abuse of positions of authority or trust will be regarded as aggravating.”<sup>24</sup> An ICTR trial chamber similarly has cited the commission of crimes by a “person in a high position” as an aggravating factor.<sup>25</sup>

At the same time, sentences are, of course, appropriately tailored to individual circumstances and have been reduced in international practice on the basis of mitigating factors.<sup>26</sup> Nevertheless, even when mitigating factors are present, the Yugoslav and Rwandan tribunals have still imposed sentences involving lengthy terms of imprisonment.<sup>27</sup> Indeed, while not addressing particular crimes or counts, a 2002 study of sentencing practice at the Yugoslav and Rwandan tribunals found that the mean sentence was 16 years at the ICTY and that the majority of individuals convicted by the ICTR were sentenced to life imprisonment.<sup>28</sup> An ICTR trial chamber discussion of sentencing practices states, “Principal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have been punished with sentences ranging from fifteen years’ imprisonment to life imprisonment ... [R]ape as a crime against humanity has resulted in specific sentences between twelve years and fifteen years. Torture as a crime against humanity has resulted in

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<sup>24</sup> *Prosecutor v. Mucic et al.* (the *Celebici* case or *Prosecutor v. Delalic et al.*), ICTY, Case No. IT-96-21, Judgment (Trial Chamber), November 16, 1998, para. 1220. See William Schabas, “Penalties,” in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary, Vol. II* (Oxford: Oxford University Press, 2002), p. 1522.

<sup>25</sup> *Prosecutor v. Rutaganda*, ICTR, Case No. ICTR-96-3, Judgment (Trial Chamber), December 6, 1999, paras. 469-470.

<sup>26</sup> Mitigating factors may include such factors as the accused’s cooperation with the prosecutor; voluntary surrender; entering a guilty plea; duress; age; and remorse. See ICTY Rules of Procedure and Evidence, rule 101; ICTR Rules of Procedure and Evidence, rule 101; SCSL Rules of Procedure and Evidence, rule 101. See also Human Rights Watch, *Topical Digest of the Case Law of the ICTY*, p. 610.

<sup>27</sup> See, for example, *Prosecutor v. Momir Nikolic*, ICTY, Case No. IT-02-60, Sentencing Judgment (Trial Chamber), December 2, 2003, paras. 140-183; Judgment on Sentencing Appeal (Appeals Chamber), March 8, 2006, Disposition (sentence of 27 years for crimes against humanity while early guilty plea played “important role” in mitigating sentence; reduced to 20 years on appeal); *Prosecutor v. Dragan Nikolic*, ICTY, Case No. IT-94-2, Sentencing Judgment (Trial Chamber), December 18, 2003, para. 274, Disposition; Judgment on Sentencing Appeal (Appeals Chamber), February 4, 2005, Disposition (stating mitigating factors warranted a “substantial reduction” of sentence, but nevertheless imposing 23 years’ imprisonment for crimes against humanity; reduced to 20 years on appeal); *Prosecutor v. Obrenovic*, ICTY, Case No. IT-02-60, Sentencing Judgment (Trial Chamber), December 10, 2003, paras. 149-156 (sentence of 17 years for crimes against humanity despite “numerous mitigating circumstances”); *Prosecutor v. Akayesu*, ICTR, Case No. 96-4, Judgment (Trial Chamber), September 2, 1998, paras. 184-187; Sentence (Trial Chamber), October 2, 1998 (sentence of life imprisonment despite several mitigating factors). We came across some cases involving lesser sentences and mitigating factors, but they also involved substantial imprisonment. See, for example, *Prosecutor v. Plavsic*, ICTY, Case No. IT-00-39, Judgment (Trial Chamber), February 27, 2003 (defendant who played leadership role in crimes against humanity sentenced to 11 years after entering guilty plea and showing remorse; accused’s advanced age also considered); *Prosecutor v. Erdemovic*, ICTY, Case No. IT-96-22, Sentencing Judgment (Trial Chamber), March 5, 1998 (sentence of five years for war crimes after entering guilty plea, cooperating with prosecutor, and showing crimes committed under duress; court also considered accused’s young age).

<sup>28</sup> See Mark A. Drumbl and Kenneth S. Gallant, “Sentencing Policies and Practices in the International Criminal Tribunals,” *Federal Sentencing Reporter*, vol. 15, no. 2 (2002), p. 142.

specific sentences between five and twelve years. Murder as a crime against humanity has been punished by specific fixed term sentences ranging from twelve years to twenty years.”<sup>29</sup>

We believe that inadequate penalties for the most serious crimes, in addition to being inconsistent with international standards, would be detrimental to efforts to achieve long-term stability and a durable peace in northern Uganda by undermining any deterrent effect of prosecutions. A “slap-on-the-wrist sentence” would be tantamount to impunity in sending the message to would-be perpetrators that such crimes will be tolerated. Indeed, it would taint what might otherwise be fair and credible trials. Notably, the Yugoslav and Rwandan tribunals have expressly referred to deterrence as one of the most important factors in sentencing.<sup>30</sup>

#### **IV. Ugandan law and judicial practice, along with the practice of other national jurisdictions, reinforce that terms of imprisonment consistent with the gravity of the crimes is the appropriate penalty**

The Ugandan Penal Code Act includes lengthy imprisonment for various serious domestic offenses.<sup>31</sup> A selection of relevant criminal appeals judgments from Uganda<sup>32</sup> available to Human Rights Watch, furthermore, support that penalties should reflect the gravity of the crime, along with indicating sentences imposed for rape and defilement.<sup>33</sup>

For example, the Uganda court of appeal indicated that the trial court considered the “right principles of sentencing,” including the seriousness of the offense, in affirming a sentence of eight years for defilement.<sup>34</sup> In another case, the court held that the seriousness of the offense, along with the circumstances of the crime, justified a sentence of life imprisonment for defilement of a two-year-old.<sup>35</sup> In a similar case, the court upheld a trial decision which

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<sup>29</sup> *Prosecutor v. Semanza*, ICTR, Case No. ICTR-97-20, Judgment (Trial Chamber), May 15, 2003, paras. 563-564.

<sup>30</sup> See, for example, *Prosecutor v. Dusko Tadic*, ICTY, Case No. IT-94-1, Sentencing Judgment (Trial Chamber), November, 11, 1999, paras. 7-9; *Prosecutor v. Kambanda*, ICTR, Case No. 97-23, Judgment (Trial Chamber), para. 28.

<sup>31</sup> See, for example, Ugandan Penal Code Act, [http://www.ugandaonlinelawlibrary.com/lawlib/chapter\\_1\\_364\\_revised\\_edition.asp](http://www.ugandaonlinelawlibrary.com/lawlib/chapter_1_364_revised_edition.asp) (accessed July 6, 2007), sects. 190 and 242. The year of enactment was not available on the date of access.

<sup>32</sup> A selection of recent Ugandan criminal case law can be found at <http://www.ugandaonlinelawlibrary.com/> (accessed June 20, 2007).

<sup>33</sup> While available decisions cover various offenses, decisions where gravity and sentencing are at issue often involve rape and defilement. The Ugandan Penal Code Act defines defilement as “unlawful ... sexual intercourse with a girl under the age of eighteen years” and makes the offense punishable by death (para. 129(1)).

<sup>34</sup> *Richard Abot v. Uganda* (Criminal Appeal No.90 of 2004).

<sup>35</sup> *Guloba Muzamiru v. Uganda* (Criminal Appeal No.289 of 2003).

held that the “accused has committed a serious offence” and “deserves a stiff sentence.”<sup>36</sup> The court likewise held that a sentence of 12 years’ imprisonment was not “harsh, excessive nor illegal” and fit the circumstances of the offense for defilement of a young schoolgirl.<sup>37</sup> Notably, in none of the case law available to Human Rights Watch were traditional justice practices considered or applied as an alternative to imprisonment.

As noted above, the Ugandan Penal Code Act also allows for the death penalty for certain serious offenses. The death penalty should not, however, be permitted. International and hybrid criminal tribunals do not permit the death penalty, and Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and inhuman punishment.

A report in 2003 on sentencing practice in various legal systems throughout the world, commissioned by the ICTY,<sup>38</sup> further suggests that Ugandan law is consistent with other domestic law and practice. According to an ICTY trial chamber, the report found that “in almost all countries studied, murder attracts rather severe penalties,” and “in most countries a single act of murder attracts life imprisonment or the death penalty, as either an optional or mandatory sanction.”<sup>39</sup>

## V. Conclusion

Terms of imprisonment that are commensurate with the gravity of the crimes should be the appropriate penalty for convictions for the most serious crimes. A national trial which allowed a “slap-on-the-wrist sentence” in the event of conviction would run counter to international standards and practice as well as domestic law and practice, along with undercutting the deterrent effect of prosecutions. It would, furthermore, be inconsistent with the requirement of “intent to bring a person to justice” for national trials of ICC cases.

Consistent with this, inclusion of appropriate penalties for the most serious crimes is essential. Ultimately, the suitability of national trial of ICC cases is a matter for the ICC judges to determine.

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<sup>36</sup> *Nyasio Bumali v. Uganda* (Criminal Appeal No.197 of 2003).

<sup>37</sup> *Mutundi Richard v. Uganda* (Criminal Appeal No.17 of 2004).

<sup>38</sup> This report was commissioned for and is referred to in *Prosecutor v. Dragan Nikolic*, Sentencing Judgment (Trial Chamber), para. 38.

<sup>39</sup> *Ibid.*, paras. 166, 172.



# **Particular Challenges for Uganda in Conducting National Trials for Serious Crimes**

## **Human Rights Watch’s Third Memorandum on Justice Issues and the Juba Talks**

September 2007

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## I. Introduction

Peace talks between the government of Uganda and the Lord's Resistance Army (LRA) to resolve the 20-year conflict in northern Uganda have been ongoing in Juba, southern Sudan, for over a year. On June 29, 2007, the parties signed an agreement on accountability and reconciliation that articulates principles to address past crimes and notably envisions national trials for abuses that constitute international crimes. Since August the Ugandan government has been consulting with civil society and affected communities on the June 29 agreement.

Human Rights Watch believes that prosecutions for the most serious crimes committed by both sides during the conflict, together with broader accountability measures, are crucial to ensure justice and a durable peace for northern Uganda. In this regard, Human Rights Watch strongly supports the arrest warrants issued in 2005 by the International Criminal Court (ICC) for four LRA leaders on charges of war crimes and crimes against humanity. These cases are a major opportunity to see that justice is done for some of the atrocities committed.

We understand that members of the Ugandan legal community are in the process of considering what steps would be needed for Uganda to conduct national trials for serious crimes under international law, including ICC cases against LRA leaders. We also understand that consultations will be held with the Ugandan justice sector in Kampala on September 26 and 27 to develop proposals to implement the June 29 agreement, including with respect to national trials.

The ICC's Rome Statute recognizes the important role of national trials for serious crimes — as proposed in the June 29 agreement — where possible. Nevertheless, as detailed in two Human Rights Watch memoranda issued earlier this year,<sup>1</sup> any national alternative to ICC trials and any other domestic trial for serious crimes should satisfy substantial benchmarks. Consistent with the Rome Statute, other international standards, and international and domestic practice, the benchmarks comprise:

- credible, impartial, and independent investigation and prosecution;
- rigorous adherence in principle and in practice to international fair trial standards; and

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<sup>1</sup> Human Rights Watch, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders (Benchmarks Memorandum)*, May 2007, <http://hrw.org/backgrounder/ij/icco507/icco507web.pdf>; *The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes (Penalties Memorandum)*, July 2007, <http://hrw.org/backgrounder/ij/uganda0707/>.

- penalties that are appropriate and reflect the gravity of the crime, that is, a term of imprisonment that reflects the seriousness of the offense.<sup>2</sup>

In August 2007 Human Rights Watch held a number of discussions in Kampala on Ugandan law and practice that are relevant to these benchmarks. This memorandum draws on those discussions to detail several issues that we believe pose particular challenges to conducting domestic serious crimes trials in Uganda. They are the adequacy of substantive crimes under Ugandan law; risk of torture of suspects in custody and the death penalty; the scope and adequacy of disclosure of prosecutorial material to the defense; potential interference by the executive with the judiciary and protecting the latter's independence and impartiality; and investigative and prosecutorial capacity. The memorandum also discusses witness protection and support, victims' participation and reparations, security, and outreach and communications. The experience of international and hybrid national-international criminal tribunals has shown the significance of these to ensuring fair and effective trials for serious crimes.

It will be essential that any proposals for national trials to implement the June 29 agreement adequately address the above benchmarks and additional areas detailed in this memorandum.<sup>3</sup> The international community, including key donors, United Nations representatives, and the mediation team, should insist on nothing less. In addition to ensuring that justice is done, fair and effective investigations and prosecutions are an important way to promote respect for rule of law and can be part of establishing an indisputable historical record of past crimes committed in northern Uganda.

With regard to the ICC warrants, it is the ICC judges alone who ultimately will determine whether a national trial is a sufficient alternative to its cases.<sup>4</sup> Moreover, if a national trial subsequently proves inadequate, the ICC statute suggests that the case can be brought back to the ICC for trial.<sup>5</sup>

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<sup>2</sup> Notably, while traditional justice measures may have an important role to play in a comprehensive approach to accountability and community healing, they do not meet these benchmarks. The Acholi practice of *mato oput*, for example, focuses on confession of crimes and symbolic rituals for reconciliation. It does not consist of impartial and independent investigation leading to identification of those responsible and a determination of liability before an independent tribunal during which an accused benefits from fair trial guarantees and, if convicted, receives appropriate punishment. See *Benchmarks Memorandum*, Section III(A).

<sup>3</sup> It should be noted that to varying degrees, members of the Ugandan legal community are already looking at some of these.

<sup>4</sup> See Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf), art. 19.

<sup>5</sup> *Ibid.*, art. 19(10).

## II. A note on trials for crimes by government forces

Human Rights Watch and other organizations have documented serious crimes committed during the conflict in northern Uganda by both the LRA and, to a lesser extent, government forces, the Ugandan Peoples' Defence Forces (UPDF).<sup>6</sup> Human Rights Watch is strongly committed to prosecutions of the most serious of these perpetrated by both sides.

The June 29 agreement suggests that state and non-state actors accused of serious crimes may, however, be subject to different justice processes: state actors will be subject to "existing criminal justice processes," while non-state actors may be subjected to "special justice processes" under the agreement.<sup>7</sup> It is unclear what is referred to by "special justice processes," although they could be a special chamber or division to hold national trials, and/or broader accountability measures.

Regarding application of existing criminal justice procedures to state actors, Human Rights Watch is concerned that hitherto the state response to allegations of human rights violations by UPDF soldiers has been inadequate. Human Rights Watch research in 2007 on law enforcement operations in the Karamoja region of Uganda showed a failure to bring soldiers to account in a systematic and transparent manner and to provide compensation to victims.<sup>8</sup> Research in 2005 on accountability efforts to address allegations of human rights violations by the UPDF in the areas affected by the LRA conflict pointed to a range of inadequacies.<sup>9</sup> These included lack of investigation and prosecution, or in some cases lack of any follow up to alleged abuses. Fear of and intimidation by UPDF personnel also hindered people in

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<sup>6</sup> On the part of the LRA, these have included willful killings, beatings, large-scale abductions, forced recruitment of adults and children, sexual violence against girls whom it assigns as "wives" or sex slaves to commanders, and large-scale looting and destruction of civilian property. On the part of the government, these have included extrajudicial executions, rape, torture and cruel, inhuman and degrading treatment, arbitrary detention, and forced displacement. See Human Rights Watch, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York: Human Rights Watch, September 1997), <http://www.hrw.org/reports/pdfs/c/crd/uganda979.pdf>; *State of Pain: Torture in Uganda*, vol. 16, no. 4(A), March 2004, <http://hrw.org/reports/2004/uganda0404/uganda0304.pdf>; *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/reports/2003/uganda0703/>; *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://hrw.org/reports/2005/uganda0905/uganda0905.pdf>. See also Amnesty International, "Uganda: 'Breaking God's commands': The destruction of childhood by the Lord's Resistance Army," AI Index: AFR 59/001/1997, September 18, 1997, <http://web.amnesty.org/library/Index/ENGAFR590011997?open&of=ENG-UGA>; and "Uganda: Breaking the Circle: Protecting human rights in the northern war zone," AI Index: AFR 59/001/1999, March 17, 1999, <http://web.amnesty.org/library/Index/ENGAFR590011999?open&of=ENG-UGA> (both accessed September 12, 2007).

<sup>7</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007 (June 29 Agreement), para. 4.1.

<sup>8</sup> Human Rights Watch, *Uganda – "Get the Gun!" Human Rights Violations by Uganda's National Army in Law Enforcement Operations in Karamoja Region*, vol. 19, no. 13(A), September 2007, <http://hrw.org/reports/2007/uganda0907/uganda0907webwcover.pdf>.

<sup>9</sup> Human Rights Watch, *Uprooted and Forgotten*, pp. 41-48.

coming forward with complaints, while the fact that courts martial tend to sit within barracks undermined their accessibility to the public.<sup>10</sup> Other problems with the courts martial system include that soldiers found guilty before them have been executed.<sup>11</sup>

The same standards should apply to prosecutions for serious crimes regardless of whether the alleged perpetrator is associated with the UPDF or the LRA. Any existing processes that may be employed should thus be reviewed for their compatibility with the benchmarks for national trials listed above and the standards detailed in this memorandum and should be reformed as necessary.

### **III. Adequacy of substantive crimes under Uganda law**

War crimes and crimes against humanity are among the most serious crimes under international law, and charges for such crimes should reflect their full scope.<sup>12</sup> However, war crimes and crimes against humanity are not codified as such in Ugandan domestic law.<sup>13</sup>

Some members of the Ugandan legal community have suggested that such crimes cannot now be enacted to apply to the period of the conflict, as doing so would violate the principle of non-retroactivity.<sup>14</sup> They indicated that it may be necessary instead to draw from existing law to approximate as closely as possible war crimes and crimes against humanity (such as, for example, multiple murders).<sup>15</sup> However, it is questionable whether utilizing existing Ugandan law would capture the nature of crimes committed. For example, crimes against humanity go beyond multiple criminal acts such as murder, torture, and enslavement. Crimes against humanity are committed when such offenses are “part of a widespread or

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<sup>10</sup> Ibid.

<sup>11</sup> See, for example, Samuel Okiror Egadu, “Uganda Rejects Blame for Atrocities in LRA War,” *Institute for War & Peace Reporting*, September 3, 2007, [http://iwpr.net/index.php?apc\\_state=hen&s=o&o=l=EN&p=acr&s=f&o=338293](http://iwpr.net/index.php?apc_state=hen&s=o&o=l=EN&p=acr&s=f&o=338293) (accessed September 12, 2007); Evelyn Kiapi Matsamura, “Uganda’s laws favour death sentences,” *Mail and Guardian Online*, November 16, 2006, [http://www.mg.co.za/articlePage.aspx?articleid=290079&area=/insight/insight\\_\\_africa/](http://www.mg.co.za/articlePage.aspx?articleid=290079&area=/insight/insight__africa/) (accessed September 12, 2007). As discussed later in this memorandum, the death penalty should not be permitted.

<sup>12</sup> See Human Rights Watch, *Benchmarks Memorandum*, Section III(A).

<sup>13</sup> Appropriate bases of criminal responsibility, such as command responsibility, should also be available to allow culpability where defendants are not accused of physically committing the crime. It could not be confirmed whether such theories currently exist in Ugandan law. Human Rights Watch interviews with members of the Ugandan legal community, August 2007.

<sup>14</sup> The principle against non-retroactivity refers to not criminalizing conduct after it has been committed. Uganda’s constitution includes the following in regard to non-retroactivity: “No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.... No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.” Constitution of the Republic of Uganda, 1995, [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf) (accessed September 18, 2007), art. 28(7-8). Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007.

<sup>15</sup> Human Rights Watch interviews with members of the legal community, Kampala, August 2007.

systematic attack directed against any civilian population.”<sup>16</sup> Domestic law may lack even an approximation of some international crimes. Utilizing existing law, furthermore, may not satisfy the ICC’s requirements for national trials.<sup>17</sup>

Prosecuting war crimes and crimes against humanity for conduct prior to their codification as crimes should not, however, violate the principle of non-retroactivity. This is because these crimes were already established as crimes under international law regardless of the moment when it became possible to prosecute them under the jurisdiction of domestic courts as a result, for example, of their domestic codification. As Article 15 of the International Covenant of Civil and Political Rights (ICCPR), to which Uganda is a state party, states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.... [However, n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, *at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*<sup>18</sup>

The European Convention on Human Rights has the exact same provision, and the European Court of Human Rights has repeatedly held that it does not prevent the prosecution of serious crimes under international law even if at the time they were committed they were not codified under domestic law.<sup>19</sup>

Consistent with this approach, international and hybrid criminal tribunals have allowed prosecution of war crimes and crimes against humanity for conduct prior to the creation of the applicable statutes, and several domestic jurisdictions have done the same.<sup>20</sup>

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<sup>16</sup> See Rome Statute, art. 7.

<sup>17</sup> See *Benchmarks Memorandum*, Section III(A). For example, ICC judges have found that a state was not acting on an ICC case where the state had issued arrest warrants that did not refer to the same crimes included in an ICC prosecutor’s application for an ICC arrest warrant of the same individual.

<sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res.2200A (XXI), 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, arts. 15(1) and 15(2)(emphasis added). Uganda became a party to the ICCPR in 1995.

<sup>19</sup> See, for example, European Court of Human Rights, *Papon v. France*, (Application No. 54210/00), ECHR 2001-XII, and *Touvier v. France*, Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 161; *Kolk and Kislyiy*, No. 23052/04 and 24018/04, Decision of January 17, 2006, all available at <http://www.echr.coe.int/echr> (accessed September 21, 2007).

<sup>20</sup> See, for example, *Prosecutor v. Norman*, Special Court for Sierra Leone (SCSL), Case No. SCSL-2004-14-AR72, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber), May 31, 2004, <http://www.scs-sl.org/CDF-decisions.html> (accessed September 21, 2007); and *Prosecutor v. Hadzihasanovic* (Trial Chamber), Decision on Joint Challenge to Jurisdiction, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-01-47-PT, November 12, 2002, reversed in part by Interlocutory Appeal (Appeals Chamber), November 27, 2002 (for a summary of these decisions, see Tenth Annual Report of the ICTY, August 13, 2004, <http://www.un.org/icty/rappannu-e/2003/index.htm>, para.

On the basis of treaty law, such as the Geneva Conventions, and customary international law, war crimes and crimes against humanity were prohibited and punishable conduct at the time the conflict in northern Uganda began in 1986.<sup>21</sup> Human Rights Watch believes that domestic incorporation of war crimes and crimes against humanity to cover crimes during the conflict would be necessary and not at variance with the principle of non-retroactivity.

#### **IV. Risk of torture of suspects in custody, and the death penalty**

A fundamental right under international law is that suspects are protected from torture and cruel, inhuman or degrading treatment.<sup>22</sup> Consistent with this, Uganda's constitution prohibits torture.<sup>23</sup> Nevertheless, Human Rights Watch and other organizations have documented torture of suspects in detention in Uganda.<sup>24</sup> In 2006 the Ugandan government also indicated that "evidence obtained through information obtained by torture is admissible [under Ugandan law], and the police have been known to exploit this loophole."<sup>25</sup>

The likely high-profile nature and international scrutiny of any domestic serious crimes trials could be a disincentive to torture of suspects in detention. At the same time, such trials are

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81, and ICTY, Judicial Supplement, October, November, December 2002, Number 38, <http://www.un.org/icty/Supplement/supp38-e/hadzihanovic.htm> (both accessed September 21, 2007)). See also Supreme Court of Canada, *Regina v. Finta*, March 24, 1994 (for a discussion of this case see International Decisions, *American Journal of International Law*, July 1996, [http://links.jstor.org/sici?sici=0002-9300\(199607\)90%3A3%3C460%3ARVF%3E2.o.CO%3B2J](http://links.jstor.org/sici?sici=0002-9300(199607)90%3A3%3C460%3ARVF%3E2.o.CO%3B2J) (accessed September 18, 2007)). See further the cases cited above ruled on by the European Court of Human Rights.

<sup>21</sup> Uganda ratified the Geneva Conventions in 1964 and their Additional Protocols in 1991.

<sup>22</sup> ICCPR, art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. For a discussion of the range of fair trial rights under international law applicable to trials for serious crimes, see *Benchmarks Memorandum*, Section III(B).

<sup>23</sup> Constitution of the Republic of Uganda, art. 24.

<sup>24</sup> While most incidents relate to torture by security forces in unauthorized places of detention, torture by the police and in prisons and police cells is also discussed. See, for example, UN Committee against Torture, "Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Uganda," CAT/C/CR/34/UGA, June 21, 2005, paras. 6 and 7; and Human Rights Watch and Foundation for Human Rights Initiative, *Concerns regarding Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Uganda*, May 2005, <http://hrw.org/backgrounder/africa/uganda0505/uganda0505.pdf>. See also Government of Uganda, Initial Report to Human Rights Committee, CCPR/C/UGA/2003/1, February 25, 2003, paras. 147-148, 167; discussion of torture documented in a new report by the Uganda Human Rights Commission in Joyce Namutebi, "Child Neglect Tops Rights Abuses," *New Vision* (Kampala), September 19, 2007 and Mercy Nalugo and Solomon Muyita, "Rights Body Wants MPs to Criminalise Torture," *The Monitor* (Kampala), September 20, 2007.

<sup>25</sup> This is as opposed to evidence obtained directly through torture and is rather evidence obtained as a result of information that was obtained during torture. Republic of Uganda, Report to the Commission on Human and Peoples' Rights Presented at the 39<sup>th</sup> Ordinary Session of the Commission on Human and Peoples' Rights, Banjul, The Gambia, May 2006, [http://www.chr.up.ac.za/hr\\_docs/documents/2nd%20periodic%20report%20\(2006\).pdf](http://www.chr.up.ac.za/hr_docs/documents/2nd%20periodic%20report%20(2006).pdf) (accessed September 18, 2007), para. 36.1; Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007.

sensitive and likely to evoke strong emotions, underscoring the need for robust measures to prevent abusive practices in their investigation and prosecution.

The death penalty should also not be permitted. The Ugandan Penal Code Act allows for the death penalty for certain offenses. International and hybrid criminal tribunals do not permit the death penalty. Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and inhuman punishment.

## **V. Scope and adequacy of disclosure of prosecutorial material to the defense**

The right to adequate time and facilities for the defense to prepare its case is a core fair trial right under international law.<sup>26</sup> A key aspect of such preparation is the opportunity for the defense to review in advance of trial material that forms the prosecution's case, such as names of witnesses it intends to call.<sup>27</sup> This process is generally referred to as "disclosure" and is particularly important to effective cross-examination as it allows counsel time to identify and research areas for questioning. Cross-examination is a vital way in which the defense can impact the outcome of a case by revealing inconsistencies in testimony or otherwise discrediting a witness.

To the extent a practice of disclosure by the prosecution to the defense in advance of trial exists in Uganda, it is minimal. Human Rights Watch researchers were told that the defense generally has access only to a case synopsis as opposed to names of witnesses, witness statements, or other relevant evidence.<sup>28</sup> We were also told of situations in high-profile cases in which lawyers did not receive any information concerning prosecution witnesses in advance of trial; lawyers faced having to conduct cross-examination after learning a witness's identity only the previous day.<sup>29</sup>

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<sup>26</sup> See ICCPR, art. 14(3)(b).

<sup>27</sup> At the same time, protection of the safety and security of any at-risk witnesses is key and is discussed later in this memorandum.

<sup>28</sup> While some lawyers we spoke with suggested more information could perhaps be obtained, the majority indicated that a case synopsis was all that is available, and a review of relevant acts and rules supported this conclusion. One lawyer further indicated that the current practice reflects a curtailment of prior fuller disclosure that was deemed too burdensome on the prosecution. Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007. See also US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2006: Uganda," March 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78763.htm> (accessed September 12, 2007), section 1e; Hillary Kiirya, Milton Olupot, and Hillary Nsambu, "Besigye Petitions for Ruling that Prosecution Violating Rights," *New Vision*, May 16, 2006; Bill Matovu, "Let Besigye Trial Continue," *New Vision*, June 5, 2006.

<sup>29</sup> Human Rights Watch interview with member of Ugandan legal community, Kampala, August 2007. See also Solomon Muyita et. al., "60 Witnesses Listed Against Besigye," *The Monitor*, April 5, 2006 ("[t]he judge ruled that it's not mandatory for the prosecution to give its evidence to the defence before the hearing. 'Since the evidence of the prosecution will be called and

In order to be meaningful, disclosure would need to be made substantially more comprehensive.<sup>30</sup> Consistent with the practice of international and hybrid tribunals, disclosure should include the names of prosecution witnesses; copies of prior statements by such witnesses; and any exculpatory evidence.<sup>31</sup> Disclosure should also take place well in advance of trial. Disclosure is required no less than 60 days prior to trial at some tribunals and otherwise within a time limit set by the relevant chamber.<sup>32</sup>

## **VI. Potential interference by the executive with the judiciary and protecting their independence and impartiality**

An impartial and independent bench is another core fair trial right under international law.<sup>33</sup> Impartiality and independence are also indicative of a state's willingness to prosecute national cases as defined under the Rome Statute's requirements for national trials.<sup>34</sup>

The high quality of Ugandan judges and their good record in handling sensitive cases is widely acknowledged, as noted in our May 2007 "Benchmarks Memorandum" and reinforced during our interviews in Kampala in August 2007. Nevertheless, attempted intimidation by the executive, including in high-profile trials, has been a problem.<sup>35</sup> A recent analysis by the International Bar Association found that the government has inappropriately

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availed for cross-examination, the accused's interest to get a fair trial will not be prejudiced as a result of the prosecution's non-disclosure of its evidence at a preliminary hearing,' Justice Kagaba ruled."); "Uganda: State to produce 60 witnesses in Besigye treason trial," *BBC Monitoring Africa*, April 5, 2006.

<sup>30</sup> Notably, we understand a challenge to disclosure practice is currently before the Ugandan Constitutional Court. Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007.

<sup>31</sup> Exculpatory evidence includes evidence that may tend to show the innocence of the accused, mitigate the accused's guilt, or otherwise undermine the credibility of the prosecution's evidence. See ICC Rules of Procedure and Evidence (ICC Rules), ICC-ASP/1/3, [http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_procedure_and_Evidence_English.pdf) (accessed September 12, 2007), rules 76 and 77; Rome Statute, art. 67(2); Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY Rules), IT/32/Rev.40, July 13, 2007, <http://www.un.org/icty/legaldoc-e/index-t.htm> (accessed September 12, 2007), rules 66, 67, and 68; Rules of Evidence and Procedure of the International Criminal Tribunal for Rwanda (ICTR Rules), November 10, 2006, <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf> (accessed September 12, 2007), rules 66, 67, and 68; Rules of Procedure and Evidence, Special Court for Sierra Leone (SCSL Rules), <http://www.scs-l.org/rulesofprocedureandevidence.pdf> (accessed September 12, 2007), rules 66, 67, and 68.

<sup>32</sup> *Ibid.*

<sup>33</sup> ICCPR, art. 14(1). These requirements are also highlighted in paragraph 3.3 of the June 29 agreement.

<sup>34</sup> Rome Statute, art. 17(2)(c).

<sup>35</sup> Human Rights Watch and others have documented attempts by the authorities to intimidate the judiciary, most recently the storming of the High Court building in Kampala by security forces in March 2007. See Human Rights Watch, *In Hope and Fear: Uganda's Presidential and Parliamentary Polls*, February 2006, <http://hrw.org/backgrounder/africa/ugandao206/ugandao206.pdf>; "Uganda: Government Gunmen Storm High Court Again," Human Rights Watch news release, March 5, 2007, <http://hrw.org/english/docs/2007/03/05/uganda15449.htm>; "Uganda: Political Repression Accelerates," Human Rights Watch news release, November 23, 2005, <http://hrw.org/english/docs/2005/11/24/uganda12089.htm>. See also "Besigye Judge Quits," *The Monitor*, February 4, 2006.

criticized court decisions, intimidated individual members of the judiciary, and defied court orders.<sup>36</sup>

The executive must cease efforts to interfere with the Ugandan judiciary, as any trial for serious crimes in which interference occurred would be fundamentally flawed. International and hybrid tribunals have taken various steps to promote their impartiality and independence and the appearance thereof, which should be considered for any Ugandan national serious crimes trials.<sup>37</sup> For example, the use of panels of judges to try cases is standard practice in such tribunals. This helps to avoid concerns that could be raised with respect to an individual judge and to make it more difficult for any external actor to influence the bench. Some courts have also appointed benches with a mixture of international and domestic judges and with a majority of international judges on each panel. Positive examples of such mixed chambers that could be drawn from include the Special Court for Sierra Leone and Bosnia's War Crimes Chamber.<sup>38</sup>

## VII. Investigative and prosecutorial capacity

International standards require prompt, thorough, independent, and impartial investigation and prosecution, and the Rome Statute requires that states be not only *willing*, but *able* to investigate and prosecute cases.<sup>39</sup> At the same time, investigation and prosecution of serious crimes can be extremely complex. For example, demonstrating the systematic and widespread nature of crimes and the responsibility of perpetrators—who may have been leaders far removed from crimes scenes—can pose tough challenges.

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<sup>36</sup> International Bar Association, "Judicial independence undermined: A report on Uganda," September 18, 2007, [http://www.ibanet.org/images/downloads/09\\_2007\\_Sep18\\_Judicial\\_independence\\_undermined\\_-\\_a\\_report\\_on\\_Uganda\\_Final.pdf](http://www.ibanet.org/images/downloads/09_2007_Sep18_Judicial_independence_undermined_-_a_report_on_Uganda_Final.pdf) (accessed September 18, 2007), pp. 39-42.

<sup>37</sup> Some members of the legal community suggested that sectoral fissures in Uganda may also pose challenges to ensuring that judges are seen as impartial. Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007. In addition, a recent survey of victims' perceptions of accountability in northern Uganda found that respondents had concerns about the impartiality of domestic justice institutions. Office of the United Nations High Commissioner for Human Rights, "Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda," 2007, [http://www.ohchr.org/english/docs/northern\\_Uganda\\_august2007.pdf](http://www.ohchr.org/english/docs/northern_Uganda_august2007.pdf) (accessed September 18, 2007), p. 50.

<sup>38</sup> See Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support*, vol. 16, no. 8(A), September 2004, <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>, pp. 1-3, 11-12; *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://hrw.org/reports/2006/ijo206/ijo206web.pdf>, pp. 1-7.

<sup>39</sup> See Report of the independent expert to update the set of principles to combat impunity, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles), E/CN.4/2005/102/Add.1, February 8, 2005, <http://daccessdds.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> (accessed September 18, 2007), principle 19; Rome Statute, art. 17(1)(a).

The investigative and prosecutorial capacity of Uganda’s justice sector has been described as weak.<sup>40</sup> The government’s practice of hiring private lawyers to prosecute more sensitive and high-profile cases was cited to us (and in the Ugandan media) as evidence of this fact.<sup>41</sup> Inadequate resources and low remuneration are considered contributing factors to lack of capacity.<sup>42</sup> It would need to be strengthened to enable effective investigation and prosecution of serious crimes.

## VIII. Witness protection and support

Given the sensitive nature of trials for war crimes or crimes against humanity, witnesses in such trials — who may also be direct victims — face serious risks. They may confront direct threats to the safety of their families and themselves before or after testifying in court. They may also be in need of ongoing psychosocial support in the aftermath of testifying about deeply traumatic events. In circumstances where a conflict is ongoing or has only recently ended, the risks to all witnesses are particularly acute.

Uganda has domestic laws that impose sanctions for interfering with witnesses<sup>43</sup> and has some informal protection practices, such as keeping witnesses in guarded locations during high-profile cases.<sup>44</sup> However, Uganda has no comprehensive witness protection program. Moreover, we were told that witnesses in high-profile cases have raised concerns over intimidation and that there have been instances of witnesses disappearing.<sup>45</sup>

The June 29 agreement rightly notes, “Measures shall be taken to ensure the safety and privacy of witnesses. Witness shall be protected from intimidation or persecution. Child witnesses and victims of sexual crimes shall be given particular protection.”<sup>46</sup> Consistent with the practice of international and hybrid tribunals, all witnesses, both victim and non-victim, would need to receive pre-trial and post-trial risk assessments; in-court protective measures based on the risk assessment; safe transportation and accommodation during court attendance; post-trial follow up and threat monitoring; and access to counseling. There

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<sup>40</sup> Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007.

<sup>41</sup> Ibid. See also Anne Mugisa, Hillary Nsambu, and Hillary Kiirya, “State Hires Top Lawyers Over Besigye,” *New Vision*, May 9, 2006; Solomon Muyita, “Government Moves to Change Besigye Prosecution,” *The Monitor*, May 1, 2006; Solomon Muyita, Lydia Mukisa, and Siraje K. Lubwama, “Besigye Treason Case Resumes Today,” *The Monitor*, June 4, 2007.

<sup>42</sup> Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007.

<sup>43</sup> See Penal Code Act of Uganda, section 103, [http://www.ugandaonlinelawlibrary.com/files/free/The\\_Penal\\_Code\\_Act.pdf](http://www.ugandaonlinelawlibrary.com/files/free/The_Penal_Code_Act.pdf) (accessed September 10, 2007).

<sup>44</sup> Human Rights Watch interviews with members of the legal community, Kampala, August 2007. See also “State Concludes Besigye Case,” *New Vision*, January 29, 2006.

<sup>45</sup> Ibid. See also “Disappearance halts Uganda trial,” *BBC News Online*, April 19, 2006, <http://news.bbc.co.uk/2/hi/africa/4923158.stm> (accessed September 12, 2007).

<sup>46</sup> June 29 Agreement, para. 3.4.

should also be relocation arrangements, possibly including international relocation, for the most at-risk witnesses.<sup>47</sup>

Another issue relates to who is assigned to provide protection to witnesses. It was suggested people in the north lack faith in the Ugandan government's ability to protect them due to their experiences during the conflict.<sup>48</sup> Witness protection should account for these conditions in order to create an environment where witnesses do not fear coming forward, perhaps through having protection staff that are not associated with the military or the police.

## **IX. Victims' participation and reparations**

The June 29 agreement indicates that “[t]he Government shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings” and that reparations may be ordered, which may include rehabilitation, restitution, and compensation.<sup>49</sup> These provisions are positive and could help to bridge the gaps that may exist between victims and the criminal justice processes. In applying them, lessons may be drawn from the ICC, which gives a central role to victims unprecedented at an international justice institution: the Rome Statute and ICC rules of procedure and evidence provide victims with rights to participate in proceedings, separate from serving as a witness,<sup>50</sup> and with opportunities to receive reparations.<sup>51</sup>

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<sup>47</sup> See SCSL Statute, art. 16; SCSL Rules, rules 34, 69, and 75; SCSL, “Fourth Annual Report of the President of the Special Court for Sierra Leone for the Period January 2006 – May 2007,” <http://www.sc-sl.org/specialcourannualreport2006-2007.pdf> (accessed September 18, 2007), p. 52; ICTR Statute, S.C. Res. 955, U.N. Doc. S/RES/955 (1994), as amended, <http://69.94.11.53/ENGLISH/basicdocs/statute.html>, arts. 19(1) and 21; ICTR Rules, rules 34, 69, and 75; ICTR, “Witnesses and Victims Support Section,” Fact Sheet No. 9, <http://69.94.11.53/ENGLISH/factsheets/9.htm> (accessed September 17, 2007); ICTY Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, <http://www.un.org/icty/legaldoc-e/index.htm>, arts. 20(1) and 22; ICTY Rules, rules 34, 69, and 75; UN General Assembly and UN Security Council, Report of the ICTY, A/60/267-A/2005/532, August 17, 2005, <http://www.un.org/icty/rappannu-e/2005/index.htm> (accessed September 18, 2007), paras. 225-229; Rome Statute, art. 43(6); ICC Rules, rules 17, 18, 87, and 88; ICC, “Victims and witnesses protection,” <http://www.icc-cpi.int/victimissues/witnessprotection.html> (accessed September 17, 2007).

<sup>48</sup> Human Rights Watch interviews with members of the legal community, Kampala, August 2007.

<sup>49</sup> June 29 Agreement, paras. 8.2 and 9.1.

<sup>50</sup> Rome Statute, art. 68; ICC Rules, rule 89. Early decisions of the ICC have also provided guidance on victim participation. At the investigation stage, it has been held that victims may, inter alia, present their views and concerns and file documents. At the confirmation stage, victims may be able to, inter alia, present observations at the opening and closing of a hearing. See Human Rights Watch, *Summary of the Case Law of the International Criminal Court*, March 2007, pp. 3-7; ICC, “Participation of victims in proceedings,” <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (accessed September 17, 2007).

<sup>51</sup> Rome Statute, art. 75; ICC Rules, rules 94-99. ICC, “Reparations for victims,” <http://www.icc-cpi.int/victimissues/victimsreparation.html> (accessed September 17, 2007).

## X. Security

The highly charged nature of trials for serious crimes underscores the importance of adequate security. This includes security at the facilities where proceedings are being conducted; for staff working on the proceedings; for accused and defense counsel; and for witnesses (as discussed above). The devastating consequences of failure to adequately address security can be seen from the example of the Iraqi High Tribunal (IHT): several defense attorneys representing accused at the IHT were assassinated, making it difficult to ensure an adequate defense.<sup>52</sup>

Due to their sensitivity, trials against either members of the LRA or UPDF can be expected to create major security challenges. Effective trials would need appropriate procedures to ensure security based on a thorough assessment of security risks.

## XI. Outreach and communications

The experience of international and hybrid criminal tribunals strongly demonstrates the need for communities most affected by the crimes to have adequate information about prosecutions.<sup>53</sup> It is in this way that prosecutions—which will undoubtedly target a relatively small number of alleged perpetrators—can have maximum resonance and relevance. Indeed, the lack of comprehensive outreach and communications by the ICC in Uganda has contributed to ongoing misunderstanding of and frustration with the court’s work, although the court has enhanced its programming in these areas over time.<sup>54</sup>

We understand that spokespersons currently provide information concerning developments in domestic criminal proceedings to the media. A robust and targeted information dissemination campaign would need to reach out further to civil society and affected communities in the north. In this regard, the Special Court for Sierra Leone’s outreach and communications programs provide a useful model.<sup>55</sup> Their efforts include dissemination of video and audio summaries of proceedings in addition to town hall meetings across Sierra Leone about the court.

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<sup>52</sup> See Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, vol. 18, no. 9(E), November 2006, <http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf>, pp. 20-21.

<sup>53</sup> For more detailed discussion on this, see Human Rights Watch, *Human Rights Watch Memorandum for the Fifth Session of the Assembly of States Parties to the ICC*, November 2006, <http://www.hrw.org/backgrounder/ij/asp1106/asp1106web.pdf>, pp. 10-14.

<sup>54</sup> Human Rights Watch interviews with Ugandan civil society, Kampala and northern Uganda, March 2007.

<sup>55</sup> Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), November 2005, <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105wcover.pdf>, pp. 27-33.

## **XII. Funding**

Of course resources would be required to fully address many of the above issues. We note that the judicial system in Uganda already suffers from a significant backlog of cases due to inadequate resources. Additional funding would be needed both for national trials of serious crimes to be conducted effectively and to avoid such trials negatively impacting the overall functioning of Uganda's justice sector.



# **Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation**

## **Human Rights Watch’s Fourth Memorandum on Justice Issues and the Juba Talks**

February 2008

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## I. Introduction

As part of the peace talks on the conflict in northern Uganda, the government of Uganda and the Lord's Resistance Army (LRA) on February 19, 2008, signed an important annex to their June 29, 2007, agreement on principles for accountability and reconciliation. The annex provides measures to implement the June 29 agreement, which include trials for the most serious crimes and a truth commission, reparations, and traditional justice practices.

This memorandum provides an analysis of the annex, specifically: its significant provisions on trials and other justice measures; the need for additional provisions regarding penalties and fair trial standards; challenges to conducting trials that likely will need to be addressed through strengthening domestic law and practice; and the need for prosecution of the most serious crimes committed by both the LRA and the Uganda Peoples' Defence Forces.<sup>1</sup>

The challenges of putting the annex into practice—including existing inadequacies in the Ugandan justice system and the at-times questionable commitment shown by both parties to serious accountability efforts—mean that its true test ultimately is not in the language of the text, but in its rigorous implementation. Fair, credible prosecutions of the most serious crimes by individuals from both parties with proper penalties for those convictions are needed. Ultimately, as discussed further below, it will be the International Criminal Court (ICC) judges who will decide whether national trials are an appropriate alternative to ICC prosecution of those LRA leaders under ICC arrest warrant.

We look to the parties, the mediators, international observers, major donors, United Nations Special Envoy Joaquim Chissano, and other relevant United Nations actors to ensure that fair and credible trials take place so that justice and sustainable peace can be achieved. This includes the commitment of resources necessary for the annex's implementation. In extraordinary national consultations that preceded and informed the signing of this annex, the people of northern Uganda voiced the multifaceted needs of justice, accountability, and reconciliation reflected in the annex's text. Anything less than its full-fledged implementation now would be a mockery of those who for too long have borne the brunt of northern Uganda's armed conflict.

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<sup>1</sup> The analysis draws from and builds upon three memoranda Human Rights Watch previously issued on justice issues in the Juba talks and which are referred to throughout this memorandum.

## **II. Significant provisions on trials and other accountability measures**

### **A. Trials for the most serious crimes**

The parties agree in the annex to investigation and prosecution of those who planned or carried out war crimes and “widespread, systematic, or serious attacks” on civilians during the conflict before a special division of the Ugandan High Court.<sup>2</sup> Particular emphasis is placed on the investigation of patterns in the conflict and crimes against women and children.<sup>3</sup> This is very positive. Throughout the conflict, the LRA and, to a lesser extent, government forces have committed numerous crimes in violation of international law and other human rights abuses. Investigation and prosecution of the most serious of these is in our view critical not only to accountability, but to establishing a durable peace.

Equally significant, meeting the task of fair and credible domestic prosecutions of war crimes and crimes against humanity will require strengthening the Ugandan justice system. The significance of the annex, therefore, may not be limited to accountability for serious crimes committed in northern Uganda, but could improve access to justice and the judicial process in ordinary criminal cases nationwide.

Some of the challenges implicit in this task are discussed in more detail below.<sup>4</sup> One immediate undertaking, however, will be to ensure that the full breadth of crimes against humanity and proper bases of individual criminal responsibility for war crimes and crimes against humanity, including command responsibility, are provided for within the mandate of the special division of the High Court. Command responsibility is especially important in charging those at the most senior levels of leadership.

Although the annex’s reference to “widespread, systematic, or serious attacks on the civilian population” clearly relates to crimes against humanity,<sup>5</sup> it is not clear whether the special division’s mandate as drafted includes the full range of crimes which constitute crimes against humanity. Available theories of criminal responsibility also are not detailed in the annex. Neither war crimes nor crimes against humanity are crimes under existing Ugandan

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<sup>2</sup> Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement (Annex to June 29 Agreement), Juba, Sudan, June 29, 2007, February 19, 2008, paras. 7, 10-14. Although paragraph 14 of the annex refers to grave breaches of the Geneva Conventions, these are otherwise known as war crimes.

<sup>3</sup> Annex to June 29 Agreement, para. 13(b)-(c).

<sup>4</sup> See below Parts III and IV.

<sup>5</sup> Annex to June 29 Agreement, para. 14.

domestic law; nor has it been possible to confirm theories of liability available under Ugandan law.<sup>6</sup>

The annex anticipates that the government of Uganda will prepare legislation necessary for implementation.<sup>7</sup> An important first step, therefore, will be to ensure that necessary legal reforms are carried out to permit domestic prosecutions consistent with the letter and spirit of the annex. Without this, the special division of the High Court may be unable to address the gravity and scope of the horrific crimes against civilians that have marked the armed conflict.<sup>8</sup>

Similarly, although the June 29 agreement refers to the need to introduce conforming amendments to Uganda's existing Amnesty Act,<sup>9</sup> the annex does not explicitly discuss either the Amnesty Act or what amendments will be required. In our view, it will be essential that the Amnesty Act is appropriately amended to ensure that those accused of war crimes and crimes against humanity are eligible to stand trial before the special division. The annex does have several other important provisions aimed at implementing plans for investigations and prosecutions. In addition to a special division in the High Court to try alleged perpetrators, the annex provides for:

- A multidisciplinary unit to carry out investigations and prosecutions headed by Uganda's director of public prosecutions;
- A registry with authority to facilitate protection of witnesses and victims, with special attention to women and children;
- The right against self-incrimination by witnesses; and
- Staff with necessary expertise, among which there is gender balance.<sup>10</sup>

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<sup>6</sup> See Human Rights Watch, *Human Rights Watch's Third Memorandum on Justice Issues and the Juba Talks: Particular Challenges for Uganda in Conducting National Trials for Serious Crimes (Particular Challenges Memorandum)*, September 2007, <http://hrw.org/eca/ugandamemo0907/>, "Adequacy of substantive crimes in Uganda law."

<sup>7</sup> Annex to June 29 Agreement, para. 2.

<sup>8</sup> This also may be relevant to any admissibility challenge made before the ICC with regard to its pending cases against LRA leaders. ICC judges have previously found that a state was not acting in an ICC case where the state had issued arrest warrants that did not refer to alleged criminal responsibility for conduct included in an ICC prosecutor's application for an ICC arrest warrant of the same individual. See Human Rights Watch, *A Summary of the Case Law of the International Criminal Court*, March 2007, <http://www.hrw.org/backgrounder/ij/icco307/index.htm>. For more on the role of the ICC in determining whether national trials are adequate alternatives to ICC prosecution, see below Part VI.

<sup>9</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007 (June 29 Agreement), para. 14.4.

<sup>10</sup> Annex to June 29 Agreement, paras. 11, 8, 15, and 25, respectively.

The importance to fair and credible prosecutions of realizing these provisions cannot be understated, but—as discussed further below—neither can the magnitude of putting them into practice, particularly given the paucity of resources currently allocated to the Ugandan justice system. In light of implementation challenges and the possible interest of the parties to the conflict in influencing the outcome of proceedings,<sup>11</sup> the annex’s provision for monitoring of its implementation through reports requested by the peace talks’ mediators is particularly farsighted. Oversight of prosecutions and investigations will be key to ensuring their credibility and independence, and the establishment of other monitoring mechanisms should be considered as part of the annex’s implementation.

## **B. Truth commission, reparations to victims, and traditional justice**

The annex also sets out an ambitious agenda of other important mechanisms, which, if implemented in full, would together make a significant contribution toward meeting needs of accountability and reconciliation not addressed by prosecutions standing alone.

The annex provides, first, for the establishment of a commission to hold hearings and to analyze and preserve the history of the conflict.<sup>12</sup> This commission also will have the authority to make recommendations on the significant issue of reparations to victims.<sup>13</sup> Other noteworthy provisions regarding the commission relate to protecting witnesses; conducting formal investigations; and having staff of high moral character, with necessary expertise and reflecting “gender balance and the national character.”<sup>14</sup>

Second, with regard to reparations, the annex provides that the government will establish mechanisms to make reparations to victims of the conflict and will analyze the appropriate financial arrangements for doing so.<sup>15</sup>

Finally, the annex provides that traditional justice practices will be a central part of accountability. Consultations will be conducted by the government to determine the most appropriate role for traditional justice practices, as well as the impact of any such practices on women and children. At the same time, no one will be required to participate in traditional justice practices.<sup>16</sup>

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<sup>11</sup> Annex to June 29 Agreement, para. 26.

<sup>12</sup> Annex to June 29 Agreement, para. 4(a), (d).

<sup>13</sup> Annex to June 29 Agreement, para. 4(j).

<sup>14</sup> Annex to June 29 Agreement, paras. 4-6.

<sup>15</sup> Annex to June 29 Agreement, paras. 16-17.

<sup>16</sup> Annex to June 29 Agreement, paras. 19-22.

Just as with domestic prosecutions of serious crimes, the vast potential held out by this robust regime of accountability mechanisms is matched by the challenges of implementation. Truth commissions in other contexts have often met with a lack of political support and resources necessary to carry out their mandates. As importantly anticipated in the annex,<sup>17</sup> careful attention also will need to be paid to the relationship between a truth commission for Uganda and the special division of the High Court or other formal proceedings prosecuting serious crimes committed in northern Uganda given, among other concerns, potential overlap in investigations and witnesses. While it is an endeavor well worth the effort, implementation of additional accountability measures will be no easy task and will also require the attention and support of international partners.

### **III. Key additional provisions needed for domestic trials of serious crimes: appropriate penalties and adherence to international fair trial standards**

The Rome Statute of the ICC and other international standards indicate that national trials of serious crimes should meet important benchmarks. These are credible, independent, and impartial prosecution; adherence to international fair trial standards; and penalties that are appropriate given the gravity of the crime, namely terms of imprisonment.<sup>18</sup>

Although the annex has substantial provisions on trials, provisions to ensure adherence to international fair trial standards and adequate penalties are lacking. The annex provides that where it is silent or in conflict with the June 29 agreement, the June 29 agreement governs.<sup>19</sup> However, as detailed below, adequate provisions on penalties and international fair trial standards in the June 29 agreement are also absent.

#### **A. International fair trial standards**

The annex includes almost no reference to international fair trial standards.<sup>20</sup> At the same time, the June 29 agreement positively provides for “the right of the individual to a fair hearing and due process, as guaranteed by the Constitution” and “a fair, speedy and public

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<sup>17</sup> Annex to June 29 Agreement, para. 5.

<sup>18</sup> These standards are analyzed in Human Rights Watch, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases for LRA Leaders (Benchmarks Memorandum)*, May 2007, <http://hrw.org/backgrounder/ij/icc0507/>.

<sup>19</sup> Annex to June 29 Agreement, para. 1.

<sup>20</sup> The only reference we found in the annex related to the right to avoid self-incrimination by witnesses. See Annex to June 29 Agreement, para. 15.

hearing before an independent and impartial court or tribunal established by law.”<sup>21</sup>  
Uganda’s constitution details a range of international fair trial standards.<sup>22</sup>

Nevertheless, Human Rights Watch research in August 2007 indicates that international fair trial standards and practice are inconsistently adhered to in Uganda. As detailed in greater depth in a September 2007 Human Rights Watch memorandum,<sup>23</sup> the following concerns exist:

- **Suspects have been tortured in detention:**<sup>24</sup> Under article 7 of the International Covenant on Civil and Political Rights (ICCPR), and other human rights treaties to which Uganda is a party, protection against torture and other cruel, inhuman or degrading treatment is a fundamental right.<sup>25</sup>
- **Imposition of the death penalty is permissible under Ugandan law:**<sup>26</sup> Human Rights Watch opposes the death penalty in all circumstances given its inherent cruelty and irreversibility. International human rights law favors the abolition of capital punishment<sup>27</sup> and the imposition of the death penalty is not permitted in current international and hybrid national-international criminal tribunals.
- **The executive has attempted to interfere with the judiciary:**<sup>28</sup> Under article 14(1) of the ICCPR, an impartial and independent bench is a fundamental right.
- **There is no meaningful process of disclosure of prosecutorial material to the defense:**<sup>29</sup> Under article 14(3) of the ICCPR, the right to adequate time and facilities to prepare a defense is a fundamental right. A key aspect of such preparation is for the defense to

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<sup>21</sup> June 29 Agreement, para 3.3.

<sup>22</sup> In fact, the Constitution has a number of provisions which appear to be taken directly from the International Covenant on Civil and Political Rights. See, for example, The Constitution of the Republic of Uganda, 1995, arts. 24 and 28, <http://www.trybunal.gov.pl/constit/constitu/constit/uganda/uganda-e.htm> (accessed February 15, 2008).

<sup>23</sup> Human Rights Watch, *Particular Challenges Memorandum*.

<sup>24</sup> See Human Rights Watch, *State of Pain: Torture in Uganda (State of Pain)*, vol. 16, no. 4(A), March 2004, <http://hrw.org/reports/2004/uganda0404>; Human Rights Watch, *Particular Challenges Memorandum*, “Risk of torture of suspects in custody, and the death penalty.” In *State of Pain*, Human Rights Watch documented torture and detention conditions conducive to torture present in Uganda. These conditions included violations such as holding suspects for weeks or months longer than the legally permitted 48 hours without charge; lack of right to be represented by counsel from the time of detention; use of ungazetted and illegal places of detention, such as “safe houses”; police fear of or reluctance to confront military, security, and intelligence agencies detaining suspects contrary to law; and a lack of, or reluctance to use, judicial authority to confront the military, security, and intelligence agencies’ illegal procedures and acts.

<sup>25</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 7. Uganda acceded to the ICCPR in 1995.

<sup>26</sup> Human Rights Watch, *Particular Challenges Memorandum*, “Risk of torture of suspects in custody, and the death penalty.”

<sup>27</sup> ICCPR, art. 6.

<sup>28</sup> See Human Rights Watch, *Particular Challenges Memorandum*, “Potential interference by the executive with the judiciary and protecting their independence and impartiality.”

<sup>29</sup> *Ibid.*, “Scope and adequacy of disclosure of prosecutorial material to the defense.”

have the opportunity to review material that forms the prosecution’s case in advance of trial, including the names of witnesses the prosecution intends to call.

It is essential that fair trial standards be respected not only in theory, but in practice. Specific measures to guard against the concerns above are needed, particularly where, as is the case here, leading figures from both sides of a conflict are to be brought to trial.

## **B. Penalties that reflect the gravity of the crime**

The annex makes no reference to penalties in the event of conviction. While the June 29 agreement has provisions on penalties, the provisions are vague and open to varying interpretations.<sup>30</sup> The provisions leave open the possibility for a “slap-on-the-wrist” penalty in the event of conviction for war crimes and crimes against humanity.

We understand that the question of penalties in the event of convictions in domestic trials of serious crimes has become a major point of debate around the peace talks. Some have argued that “light” terms of imprisonment or penalties other than imprisonment will make trials more palatable to LRA leaders. As detailed in a July 2007 Human Rights Watch memorandum, such penalties for war crimes and crimes against humanity would be wholly inconsistent with international standards and practice as well as with domestic law and practice in Uganda and elsewhere.<sup>31</sup> Insufficient penalties would also be detrimental to long-term stability and a durable peace in northern Uganda. Penalties that do not reflect the gravity of the crime would undermine any deterrent effect of prosecutions and the notion that serious crimes will not be tolerated. Such penalties would taint otherwise fair and credible trials.

Measures should be taken to ensure that terms of imprisonment commensurate with the gravity of the crime are the primary penalties in the event of convictions for serious crimes. At the same time, as detailed above, the death penalty should not be permitted as a punishment.

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<sup>30</sup> The June 29 agreement states that “a regime of alternative penalties and sanctions” shall be introduced and “replace existing penalties” with respect to serious crimes committed by “non-state actors.” June 29 Agreement, para. 6.3. The agreement does not indicate what “alternative penalties” may include nor to what extent “alternative penalties” will depart from ordinary criminal penalties under Ugandan law. The agreement further indicates that penalties should address various objectives—including to reflect the gravity of the crime and to promote reconciliation and rehabilitation—but does not indicate what types of penalties will advance such objectives. June 29 Agreement, para. 6.4.

<sup>31</sup> Human Rights Watch, *The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes (Penalties Memorandum)*, July 2007, <http://hrw.org/backgrounder/ij/uganda0707/>, “Introduction.”

## IV. Other challenges regarding domestic trials for serious crimes

Effectively prosecuting serious crimes involves a range of additional challenges that Ugandan law and practice likely will need strengthening to overcome. As analyzed in greater depth in a September 2007 Human Rights Watch memorandum,<sup>32</sup> the challenges are in summary as follows:

- **Effective witness protection and support:** The annex and June 29 agreement rightly emphasize the need for witness protection in trials of serious crimes.<sup>33</sup> Ugandan law also imposes sanctions for interfering with witnesses and has some informal protection practices. However, no meaningful witness protection program exists in Uganda, and concerns over witness security have been documented previously.<sup>34</sup>
- **Adequate investigative and prosecutorial capacity:** The annex provides for a special unit on investigations and prosecutions of serious crimes.<sup>35</sup> At the same time, investigative and prosecutorial capacity in the domestic justice system has been characterized as weak by members of Uganda’s legal community.<sup>36</sup>
- **Security:** The annex does not have provisions on security in relation to trials. Trials for serious crimes often evoke strong emotions and generate special security needs.
- **Funding:** Resources will be required to fully address many of the above issues. We note that the justice system in Uganda already suffers from a significant backlog of cases and poor conditions of detention and imprisonment due to inadequate resources. The much-needed rehabilitation of the justice system in northern Uganda—including police, courts, and prisons—features prominently in a recently launched program of development and recovery, and in other aspects of the Juba talks.<sup>37</sup> Additional funding would be needed both for national trials of serious crimes to be conducted effectively and to avoid such trials negatively impacting the overall functioning of Uganda’s justice system.<sup>38</sup>

There are two other areas that may need to be addressed in relation to domestic trials on war crimes and crimes against humanity: facilitating involvement by victims in the proceedings

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<sup>32</sup> Human Rights Watch, *Particular Challenges Memorandum*.

<sup>33</sup> Annex to June 29 Agreement, para. 8; June 29 Agreement, para. 3.4.

<sup>34</sup> See Human Rights Watch, *Particular Challenges Memorandum*, “Witness protection and support.”

<sup>35</sup> Annex to June 29 Agreement, para. 10.

<sup>36</sup> Human Rights Watch interviews with members of the Ugandan legal community, Kampala, August 2007. See also Human Rights Watch, *Particular Challenges Memorandum*, “Investigative and prosecutorial capacity.”

<sup>37</sup> Republic of Uganda, Peace, Recovery, and Development Plan for Northern Uganda, 2007-2010, September 2007, pp. 42-50; Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Juba, Sudan, May 2, 2007, para. 7.1 (“The Parties agree that the Government shall restore and strengthen the institutions of the rule of law in the conflict affected areas of Uganda where such institutions have been disrupted.”).

<sup>38</sup> Human Rights Watch, *Particular Challenges Memorandum*, “Funding.”

and conducting outreach to communities that have been most affected by the crimes. Such measures are not regular features of common law systems. The June 29 agreement, however, positively refers to effective and meaningful participation by victims in proceedings.<sup>39</sup> Moreover, the experience of international and hybrid national-international war crimes tribunals has shown the value of victims' involvement and outreach. These measures can help ensure that the people that the crimes have affected—who may be unfamiliar with and otherwise removed from judicial processes—are able to understand and appreciate the proceedings. At the same time, such measures must not infringe upon the due process rights of the accused.

## **V. Application of the annex to alleged perpetrators on both sides**

Human Rights Watch and other organizations have documented serious crimes committed during the conflict in northern Uganda by the LRA and, to a lesser extent, the Uganda Peoples' Defence Forces (UPDF).<sup>40</sup> It is crucial that the most serious crimes committed by both sides during the conflict be prosecuted.

The annex rightly does not limit the jurisdiction of the special division to crimes by perpetrators with particular affiliations. The special division in our view would be the most appropriate domestic venue for trials of crimes by members of both parties. As detailed in our September 2007 memorandum, state response to allegations of human rights abuses by government forces has been inadequate.<sup>41</sup> Moreover, the same standards on ensuring justice is done apply regardless of whether the alleged perpetrators are associated with the LRA or the UPDF.<sup>42</sup>

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<sup>39</sup> June 29 Agreement, paras. 8.2, 9.1.

<sup>40</sup> See, for example, Human Rights Watch, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda*, (New York: Human Rights Watch, September 1997), <http://www.hrw.org/reports/pdfs/c/crd/uganda979.pdf>; Human Rights Watch, *The State of Pain*; Human Rights Watch, *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/reports/2003/uganda0703/>; Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://hrw.org/reports/2005/uganda0905>.

<sup>41</sup> Human Rights Watch, *Particular Challenges Memorandum*, "A note on trials for crimes by government forces."

<sup>42</sup> *Ibid.*

## VI. The ICC decides if national trials are adequate alternatives to ICC prosecution

Interest in domestic trials for crimes committed in northern Uganda gained momentum during the peace talks in response to resistance by LRA leaders to trial at the ICC, which issued arrest warrants for LRA leaders for crimes against humanity and war crimes in 2005.<sup>43</sup>

Like the June 29 agreement, the annex “recall[s] ... the requirements of the Rome Statute of the [ICC] and in particular the principle of complementarity.”<sup>44</sup> The June 29 agreement also provides that the Ugandan government agrees to “[a]ddress conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M.”<sup>45</sup>

The ICC statute favors national trials where possible, but under the court’s statute and other international standards such trials should meet important benchmarks.<sup>46</sup> Following ratification of the Rome Statute in 2002, Uganda became a state party to the statute and is obligated to abide by the statute’s provisions.

As indicated above, under the Rome Statute, the ICC decides whether a national trial is an acceptable alternative to ICC prosecution.<sup>47</sup> This determination would be made in response to what is known as an admissibility challenge.<sup>48</sup> Such a challenge could be made by the Ugandan government or an accused on the basis that there is a national trial of one of the ICC’s cases.<sup>49</sup> If the ICC judges find that a case is no longer admissible, but a national trial does not ultimately meet necessary requirements, the ICC’s statute suggests that the case could be returned to the ICC.<sup>50</sup>

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<sup>43</sup> See “Warrant of Arrest unsealed against five LRA Commanders,” ICC press release, October 14, 2005, <http://www.icccpi.int/press/pressreleases/114.html> (accessed February 15, 2008).

<sup>44</sup> June 29 Agreement, preamble; Annex to June 29 Agreement, preamble.

<sup>45</sup> June 29 Agreement, para. 14.6.

<sup>46</sup> See Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf), art. 17; Human Rights Watch, *Benchmarks Memorandum*; Human Rights Watch, *Penalties Memorandum*, “ICC judges determine the sufficiency of national alternatives to its cases, and adequate penalties go to the ICC’s requirements for such alternatives.”

<sup>47</sup> Rome Statute, art. 19.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> This would happen on the basis of a submission by the ICC’s prosecutor. Rome Statute, art. 19(10). Such a scenario has yet to come before or to be ruled on by the ICC judges, however.

While LRA leaders have sought to portray the ICC as an obstacle to achieving peace, the ICC is widely credited with helping to move the parties to the negotiating table and with contributing to a focus on accountability at the peace talks.

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