HUMAN RIGHTS WATCH

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

A Human Rights Watch Memorandum

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.[1]

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

[1] 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 (accessed May 7, 2007).

before any national alternative to trial by the ICC of the cases of the four LRA leaders would 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.[2]

[2] 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/ugandao404/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/ugandao703/; 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/ugandao905; 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).

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 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.[3] 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."[4]

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[3] 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.

[4] 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."[5]

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.[6] 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

[5] Ibid., Summary.

[6] 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.[7] 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."[8]

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.[9] In terms of substance, Rome Statute crimes and theories of individual criminal responsibility should be applied, which requires their substantive incorporation into Uganda law.[10] Incorporation of Rome Statute crimes and forms of responsibility has been an important byproduct of the establishment of the ICC in many states.

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[7] This is one aspect of what is known as the complementarity principle.

[8] Updated Principles, principle 19.

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

[10] In Uganda, draft legislation to implement the Rome Statute exists domestically, although it has not yet been enacted into law.

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 prosecution of ICC cases would need to include charges that reflect these crimes.[11] 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.[12] 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

[11] 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/icc0307/index.htm, p. 2.

[12] 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).

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.

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.[13]

Uganda is a party to the ICCPR and the above rights are included in its constitution.[14] Moreover, Uganda's judiciary has been praised for its good record of independence in handling controversial trials.[15] 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.[16]

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[13] ICCPR, arts. 7 and 14.

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

[15] 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).

[16] 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.

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 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.[17] 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.[18]

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

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[17] Rome Statute, art. 77(1).

[18] See Mark A. Drumbl and Kenneth S. Gallant, "Sentencing Policies and Practices in the International Criminal Tribunals," *Federal Sentencing Report*er, Vol. 15, No. 2, December 2002, p. 142.

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.

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.[19] 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.[20]

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[19] Rome Statute, art. 77(2).

[20] See, for example, "Ugandan rebels urge suspension of arrest warrants," Reuters, April 19, 2007.

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.

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.