



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.¹

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

¹ 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.

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.

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.² Particular emphasis is placed on the investigation of patterns in the conflict and crimes against women and children.³ 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.⁴ 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

² 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.

³ Annex to June 29 Agreement, para. 13(b)-(c).

⁴ See below Parts III and IV.

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,⁵ 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 domestic law; nor has it been possible to confirm theories of liability available under Ugandan law.⁶

The annex anticipates that the government of Uganda will prepare legislation necessary for implementation.⁷ 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.⁸

Similarly, although the June 29 agreement refers to the need to introduce conforming amendments to Uganda's existing Amnesty Act,⁹ 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.

⁵ Annex to June 29 Agreement, para. 14.

⁶ 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, "Adequacy of substantive crimes in Uganda law," <http://hrw.org/eca/ugandamemo0907/>.

⁷ Annex to June 29 Agreement, para. 2.

⁸ 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/icc0307/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.

⁹ 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.

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.¹⁰

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,¹¹ 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.

¹⁰ Annex to June 29 Agreement, paras. 11, 8, 15, and 25, respectively.

¹¹ Annex to June 29 Agreement, para. 26.

The annex provides, first, for the establishment of a commission to hold hearings and to analyze and preserve the history of the conflict.¹² This commission also will have the authority to make recommendations on the significant issue of reparations to victims.¹³ 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.”¹⁴

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.¹⁵

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.¹⁶

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,¹⁷ 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

¹² Annex to June 29 Agreement, para. 4(a), (d).

¹³ Annex to June 29 Agreement, para. 4(j).

¹⁴ Annex to June 29 Agreement, paras. 4-6.

¹⁵ Annex to June 29 Agreement, paras. 16-17.

¹⁶ Annex to June 29 Agreement, paras. 19-22.

¹⁷ Annex to June 29 Agreement, para. 5.

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.¹⁸

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.¹⁹ 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.²⁰ 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 hearing before an independent and impartial court or tribunal

¹⁸ 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/>.

¹⁹ Annex to June 29 Agreement, para. 1.

²⁰ 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.

established by law.”²¹ Uganda’s constitution details a range of international fair trial standards.²²

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,²³ the following concerns exist:

- **Suspects have been tortured in detention:**²⁴ 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.²⁵
- **Imposition of the death penalty is permissible under Ugandan law:**²⁶ 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 punishment²⁷ and the imposition of the death penalty is not permitted in current international and hybrid national-international criminal tribunals.

²¹ June 29 Agreement, para 3.3.

²² 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).

²³ Human Rights Watch, *Particular Challenges Memorandum*.

²⁴ 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.

²⁵ 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.

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

²⁷ ICCPR, art. 6.

- **The executive has attempted to interfere with the judiciary:**²⁸ 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:**²⁹ 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 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.³⁰ 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

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

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

³⁰ 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.

against humanity would be wholly inconsistent with international standards and practice as well as with domestic law and practice in Uganda and elsewhere.³¹ 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.

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,³² 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.³³ 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.³⁴
- **Adequate investigative and prosecutorial capacity:** The annex provides for a special unit on investigations and prosecutions of serious crimes.³⁵ At the same time, investigative and prosecutorial capacity in the domestic justice

³¹ 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/backgrounders/ij/uganda0707/>, "Introduction."

³² Human Rights Watch, *Particular Challenges Memorandum*.

³³ Annex to June 29 Agreement, para. 8; June 29 Agreement, para. 3.4.

³⁴ See Human Rights Watch, *Particular Challenges Memorandum*, "Witness protection and support."

³⁵ Annex to June 29 Agreement, para. 10.

system has been characterized as weak by members of Uganda’s legal community.³⁶

- **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.³⁷ 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.³⁸

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 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.³⁹ 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

³⁶ 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.”

³⁷ 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.”).

³⁸ Human Rights Watch, *Particular Challenges Memorandum*, “Funding.”

³⁹ June 29 Agreement, paras. 8.2, 9.1.

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).⁴⁰ 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.⁴¹ Moreover, the same standards on ensuring justice is done apply regardless of whether the alleged perpetrators are associated with the LRA or the UPDF.⁴²

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 2005.⁴³

⁴⁰ 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>.

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

⁴² *Ibid.*

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

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.”⁴⁴ 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.”⁴⁵

The ICC statute favors national trials where possible, but under the court’s statute and other international standards such trials should meet important benchmarks.⁴⁶ 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.⁴⁷ This determination would be made in response to what is known as an admissibility challenge.⁴⁸ 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.⁴⁹ 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.⁵⁰

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.

⁴⁴ June 29 Agreement, preamble; Annex to June 29 Agreement, preamble.

⁴⁵ June 29 Agreement, para. 14.6.

⁴⁶ 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, 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.”

⁴⁷ Rome Statute, art. 19.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ 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.