

# **A Review of Child Protection and Juvenile Justice Laws in South Sudan**

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Sweden

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- o a world which respects and values each child
- o a world which listens to children and learn
- o a world where all children have hope and opportunity

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## ***Acronyms and Abbreviations***

ACRWC	The African Charter on the Rights and Welfare of Children.
CAT	Convention against Torture
GC	Geneva Convention
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAD	Inter Governmental Authority for Development
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SCS	Save the Children Sweden
UNCRC	United Nations Convention on the Rights of the Child
UDHR	Universal Declaration of Human Rights

## ***The Executive Summary***

This is a desk study examining the laws that address juvenile justice in South Sudan with the aim of examining how they could better incorporate the UN Convention on the Rights of the Child. The study primarily looked into the Penal Code (2003) and the Code of Criminal Procedure (2003) of South Sudan and how they compare to the international standards on juvenile justice as enshrined in the UN Convention on the Rights of the Children and the African Charter on the Rights and Welfare of Children.

This review is just one step in the process towards ensuring children who are victims of crimes and children who are accused of committing crimes are treated fairly and respectfully within the juvenile justice system in South Sudan. There are many ways children should be protected within the juvenile justice system. This study is to look at the legal aspect which lays the foundation for ethical treatment of children. There are other components that must complement these laws to ensure this is properly implemented. Work must be done, for example, to prevent children from coming into conflict with the law in the first place. But another important component is to ensure the laws related to juvenile justice, family, education, health and social welfare reinforce rather than contradict the juvenile justice laws.

During the study, there were a few key recommendations on ways to make the Penal Code and Code of Criminal Responsibility more child rights based. These include but are not limited to:

- There is a need to adopt the universal definition of a child in accordance with the principles of the UNCRC/ACRWC. There is also a need to define a “juvenile”.
- There is a vital need to come up with a birth registration regime for the whole of South Sudan in order to determine ages accurately.
- There is need to amend and enact laws and further come up with policies that state that in all actions concerning children whether undertaken by a public or private social welfare institution, Courts of Law, administrative authorities or legislative bodies, the principle of and the best interest of the child shall be the first and primary consideration.
- Juvenile Courts should be established and if not then child magistrates should be trained accordingly.
- Children’s rights to privacy, legal counsel, timely court appearances, possibility for appeal and innocence until proven guilty should be maintained throughout the children’s involvement in the juvenile justice system.
- Non-custodial options for juvenile offenders should be possible and always considered first. Institutionalization should be the last resort.
- If institutionalized, children should always be separated from adults. The institutions (i.e. prisons or reformatory schools) should lay emphasis on rehabilitation and make it possible for children to go to school and maintain contact with their families.

- Separate systems to address child offenders from children under care of welfare services should be established.
- There is a need for a comprehensive law dealing exclusively with the administration of juvenile justice.
- The Penal Code and the Bill of Rights within the Constitution of southern Sudan should expressly criminalize torture.
- All law enforcement officials, judiciary, reformatory school and prison guards should be trained on children's rights.
- Additions need to be made to the current Penal Code to include the whole range of sexual offences against children including indecent assault, pornography, prostitution and trafficking for the purpose of sexual exploitation
- There is need to train paralegals who will bridge the gap as there are not enough lawyers.
- The minimum age for criminal responsibility should be fixed no lower than 12 years old. There should be a provision for the assessment of the maturity of children between 12 and 15 years of their understanding to judge the nature and consequences of any alleged criminal act.

## **Introduction**

Save the Children Sweden has worked with the southern Sudan people since the late 1980's and is aware of the traditional values and ways of protecting children. Over time we have tried to support and strengthen the traditions that protect children. As in any society, there are also traditions which put children in vulnerable situations. We have discussed these and tried to find alternatives to the traditional practices that keep the best interest of the child in mind. Now, with the comprehensive peace agreement in place as of January 2005, we enter into a new era. With a formal government in place, the structures and laws are also being developed. Save the Children Sweden believes that the future government is in an advantaged position because they can really make a difference with the help of the laws that they are writing. The legal framework of Sudan as well as southern Sudan can build on and confirm the traditional ways of protecting and promoting children's rights. But the government also has the chance to show a vision of where they want to go in the future. While writing the legal framework for their people they can give a vision of where they want to be in the future. And we believe that it is the vision of many Sudanese men, women, boys and girls that the children of tomorrow's Sudan shall be in a situation where their needs and rights are adhered to. This is, of course, a process that Save the Children Sweden would like to support. At the same time, as the organization would like to support the realization of such a vision it is also aware of the great needs in southern Sudan. In order to support the vision and the will to make positive changes for the future development of southern Sudan, SCS has initiated a few studies to stimulate discussions and initiatives related to legal issues in order to improve the fulfillment of rights for the girls and boys in southern Sudan.

This specific study is related to children in conflict with the law. It does not claim to cover all aspects to improve the situation for these children. The document is based on insights gained working with children in conflict with the law in East Africa as well as globally. By relating this to the laws in southern Sudan and to the international legal documents (the UN Convention on the Rights of the Child [UNCRC] and the African Charter on the Rights and Welfare of Children [ACRWC]) it is hoped to stimulate a discussion of how to ensure the rights of girls and boys in conflict with the law in the future legal framework.

## **Objectives of the Situational Analysis**

- The objective of the Situational Analysis was to carry out a review of the 26 existing Laws and Codes of South Sudan with a particular bias towards the Penal Code 2003 and the Code of Criminal Procedure 2003. This was with a view to identifying how much of the laws have incorporated issues of child rights as specified in international instruments and in particular the UNCRC and the ACRWC.
- The Situational Analysis has also sought to identify gaps, if any, and give suggestions and solutions on how to ensure that the laws and policies of South Sudan effectively incorporate child rights and child protection issues.
- It has sought to raise concerns on the shortcomings of the laws of South Sudan particularly the Penal Code 2003 and the Criminal Procedure Code 2003

- After undertaking all the above, the Situational Analysis has made recommendations to the SPLM regarding the laws and policies of South Sudan on issues of child rights and child protection and how best to go about it.

## ***The Role and Commitment of the Sudan People's Liberation Movement***

The commitment of the SPLM to uphold issues of child rights and child protection and further comply with the provisions of the UNCRC can be traced back to 1995 when the SPLM and the SSIM (now SPDF) on the one hand and the Operation Lifeline Sudan (OLS) signed the Ground Rules agreement. Thereafter, the SPLM and the SSIM (now SPDF) in conjunction and with support of civil society organizations based in South Sudan, embarked upon the process of preparing an Alternative Report on the Implementation of the UNCRC which sought to *“describe, document and analyze the situation of children in our areas of administration”*.

Prior to the drafting of the Penal Code 2003 and the Code of Criminal Procedure 2003, the SPLM and SPDF acknowledged that there were internal inconsistencies within the codes which needed to be addressed through a review of its laws and that the review would be done while considering the provisions of the UNCRC.

This commitment was further re-iterated and strengthened in 1999 when the SPLM and SPDF issued a written commitment to uphold and implement the ACRWC.

In this Situational Analysis, we shall be looking at how the SPLM has incorporated issues of child rights as specified in international instruments and in particular the UNCRC and the ACRWC while drafting the Penal Code 2003 and the Code of Criminal Procedure 2003.

## ***The Principles of Protection of Child Rights***

Both the UNCRC and the ACRWC adopted four main principles in protecting the rights of the child. They are;

### **(i) Non Discrimination –**

The Committee on the Rights of the Child has given this principle a dynamic interpretation. Merely legislating against discrimination is not enough; proactive measures are required to combat it. Non-discrimination does not prohibit differentiation between children such as positive action to protect the rights of particularly vulnerable children but this can only be justified if in the best interests of the child. Emphasis is on changing the legal framework, power structures, attitudes amongst those who discriminate, the physical environment and resources so that all children can be served equally.

In the context of juvenile justice, this puts an obligation on states to ensure that justice is administered without discrimination throughout the process. The situation of girls in conflict with the law is worse than that of the boys because society discriminates against females in general. Boys who come into conflict with the law are tolerated to a certain extent, whereas girls doing so are not tolerated at all. Girls suffer more stigmatization when offences are committed by or against them. Therefore, the treatment of girls by the juvenile justice system is discriminatory in many respects. For example, there are no remand homes for girls. In addition, girls are generally not interrogated by female officers.

**(ii) Survival and Development**

This article goes further than simply granting children the right to live. It includes the right to survival and development ‘to the maximum extent possible’ and is thus most closely linked to children’s economic and social rights. The word survival introduces a dynamic aspect to the right to life, including the need for preventive action such as immunisation, breast-feeding, accident prevention and environmental sanitation. The term development is interpreted in a broad sense and adds a qualitative dimension which includes a child’s physical health as well as her mental, spiritual, moral, social and cultural development.

In the context of juvenile justice, this means that children’s right to survival and development should not be violated in the context of detention centers where often they are exposed to various abuses such as physical punishment, forced labor, and sexual abuses. The sanitary and health care facilities are poor and the food inadequate. These conditions have a negative impact on children’s physical and mental development. The situation is worsened by the fact that personnel working in remand homes do not have the minimum training that could help them deal with children.

Furthermore, often psychological and social support that could contribute to the proper rehabilitation and mental health of young offenders does not exist. Proper follow-up and support after release is important to ensure the reintegration of the child into normal and sustainable life and prevent him/her from being victimized. Another area of concern is that a consistent time frame should be set for children’s stay in remand homes. The UNCRC provides that institutionalization should be used as a measure of last resort and for the shortest possible period of time. However, delays in trials and long periods in custody are the current practice.

**(iii) Best interest of the child.**

This principle represents a major building block in the philosophy of the UNCRC that children are both competent with the right to influence their lives and vulnerable and in need of special support and protection.



Many juvenile justice systems do not promote the best interest of the child. The judges, lawyers, police, and social workers lack specific skills for handling children in conflict with the law while respecting their rights. Cases of children in conflict with the law are handled by adult courts that do not take into consideration the child's level of maturity or developmental capacity. Adult courts do not give the children the appropriate opportunities to express their own opinions. In many cases, decisions affecting children are made by judges who have little knowledge of children's rights. Children are rarely given access to legal counsel. The age set for criminal responsibility should also take into account the best interests of the child.

**(iv) Participation**

This places an obligation on governments to ensure that girls' and boys' views are sought and considered in all matters that affect their lives. Decision making bodies must listen to these views and take them into account in accordance with the child's age and maturity. The concept of the developing capacities of the child is one of the key features of this article. This means that age and maturity of the child should be taken into account when determining the scope and self-determination and the freedom of the child. In order to be able to make decisions, children have the right to relevant information provided in a form they can understand.

The rights of children are most respected and the causes for their violations best tackled when they are consulted in matters affecting their rights and interests; juvenile justice systems often fail to do this. Officials carry out interrogations and interviews of children suspected of breaking the law in an atmosphere that does not allow the child to express his/her opinion freely.

## **Findings**

### **Who is a child?**

#### **International Standards**

Article 1 of the UNCRC defines a child as:

*"A child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier."*

The ACRWC on the other hand defines a child as:

*"A child means every human being below the age of 18 years"*

## **The Law of South Sudan**

Nowhere in the Penal Code 2003 or in the Code of Criminal Procedure 2003 has a child been expressly defined.

Section 49 of the Penal Code deals with “*Acts of a child*”. It states as follows;

*“No act is an offence which is done*

- a) by a child of ten years and below;*
- b) by a child above ten years of age but under fourteen who has attained sufficient maturity of understanding to judge the nature and consequences of such act...”*

## **The Gaps**

It is interesting to note that Section 49 of the Penal Code, which deals with “*Acts of a child*”, (and indeed many other sections), has only referred to and used the term child ‘loosely’. It has not sought to define or state a child as a human being below the age of eighteen years. This may lead to abuse of the rights of children.

## **Recommendations**

- There is a need to adopt the universal definition of a child in accordance with the principles of the UNCRC/ACRWC.
- There is a vital need to come up with a birth registration regime for the whole of South Sudan in order to determine ages accurately.

## **The Principle of the Best Interest of the Child**

This principle dictates that in any action involving a child, the best interest of the child shall be of primary and paramount consideration. Such action must be with a view to safeguarding, promoting and conserving the rights and welfare of the child. It must also seek to afford the child proper guidance and correction that is in the interest of the child. Finally, the child must be given an opportunity to express his/her opinion in any proceeding or decision that is bound to affect him/her.

## **International Standards**

Article 3 of the UNCRC provides;

- a) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- b) The State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- c) The State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of*

*safety, health, in the number and suitability of their staff as well as competent supervision.*

The ACRWC has also provided for it in Article 4(1) and it states

1. *In all actions concerning the child undertaken by public any person or authority, the best interests of the child shall be the primary consideration.*
2. *In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.*

### **Laws of South Sudan**

To date, the laws and policies of South Sudan have not embraced this principle in line with the provisions of the two international instruments.

### **Recommendations**

- There is need to amend and enact laws and further come up with policies that state that in all action concerning children whether undertaken by a public or private social welfare institution, Court of law, administrative authority or legislative bodies, then the principle of and the best interest of the child shall be the first and of primary consideration.
- There is need to sensitize the judges, magistrate, police officers, prison warders, social workers and civil society on the principle.

### **Age of Criminal Liability**

This is minimum age below which a person is considered not able to commit any criminal offence or cannot be held criminally liable (responsible) for their acts or omissions that are deemed to break the laws of the land. This age varies from country to country.

### **International Standards**

The UNCRC and the ACRWC have stipulated that each country must set the minimum age for criminal liability. Neither of the two international instruments have set the age of criminal liability. This has been left open to the individual States Parties to decide.

In certain cases when an accused child is brought before a Court of law, the Court has the power to exercise discretion by looking and assessing the child and assessing whether or not that child appreciates the nature and consequences of their actions. It is then that the Court decides whether or not the child should be held criminally liable for his actions. However, it is important that when hearing any matter or making any decision involving a child a Court of Law must always consider the principle of the “*best interest of the child*” as a primary consideration.<sup>1</sup>

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<sup>1</sup> Article 3(1) UNCRC and Article 4(1) ACRWC

The provision on the minimum age with regard to criminal liability is contained in Article 40(3)(a) of the UNCRC and Article 17(4) of the ACRWC. These articles place an obligation on the States Parties to come up with the minimum age below which a child shall be presumed not to have the (mental) capacity to commit a crime.

#### Article 40(3)(a) UNCRC

*“The establishment of a minimum age below which all children shall be presumed not to have the capacity to infringe the penal law.”*

#### Article 17(4) ACRWC

*“There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”*

### **The Law of South Sudan**

The age of criminal liability in the Laws of South Sudan is ten years. However, a child who understands the consequences of his/her actions and is above ten years but under fourteen years, may be held criminally responsible.

This is contained in Section 49 of the Penal Code 2003, which provides as follows:

*No act is an offence, which is done*

- (a) by a child of ten years and below;*
- (b) by a child above ten years of age but under fourteen who has not attained sufficient maturity of understanding to judge the nature and consequences of such act;*
- (c) the provision of this section shall not affect any civil claim by the aggrieved party against the guardian of the child.*

### **The Gaps**

Looking at Section 49 of the Penal Code 2003, a child below the age of ten (10) years cannot in ‘the eyes of the law’ be deemed to have the capability or mind to commit a crime. As such, a child below the age of ten (10) cannot be charged with an offence before any Court of Law.

Section 49(b) of the Penal Code means that any child above ten (10) years but below the age of fourteen (14) years who has not attained the maturity to appreciate the consequence of his action, will not be held liable for his/her actions.

### **Recommendations**

- The minimum age for criminal responsibility should be fixed no lower than 12 years old.
- There should be a provision for the assessment of the maturity of children between 12 and 15 years of their understanding to judge the nature and consequences of any alleged criminal act.

## Administration of Juvenile Justice

It is the Government's duty to arrest and prosecute people who are suspected of having broken the law and if found guilty are punished according to the law. Presumption of innocence is a right that must at all times be guaranteed to all persons suspected of having committed a criminal offence and is contained in Section 3 of the Code of Criminal Procedure 2003, which provides in Section 3 *inter alia*

*"...that every accused person is presumed innocent until his guilt is proved beyond reasonable doubt..."*

## International Standards

Articles 40 of the UNCRC and Article 17 of the ACRWC deal with the issue of administration of juvenile justice. They deal with the treatment of children who have been accused of, or recognized as having committed an offence.

Article 40(1) of the UNCRC and Article 17(1) of the ACRWC place a duty on States Parties to treat any suspected child offender in a manner that promotes his/her dignity while taking into account the child's age and encouraging re-integration back into society.

In achieving this, the UNCRC has sought to place several safeguards and conditions to be adhered to by the States Parties while dealing with such children. They include;

1. The alleged offence must be recognized;
2. Every offence a child is charged with must be 'an offence'<sup>2</sup> within the law at the time it is alleged to have been committed. [Article 40(2)(a) UNCRC]
3. A child shall be presumed innocent until proved guilty [Article 40(2)(b)(i) UNCRC and Article 17(2)(c)(i) ACRWC].
4. The child and his/her parent or guardian must be informed of the charges and legal or appropriate assistance in the preparation and presentation of his or her defense must be given. [Article 40(2)(b)(ii) UNCRC and Article 17(2)(c)(ii) ACRWC]
5. The case must be decided expeditiously taking into account the child's age or situation. [Article 40(2)(b)(iii) UNCRC and Article 17(2)(c)(iv) ACRWC].
6. The child should not be compelled to give testimony or to confess to guilt. [Article 40(2)(b)(iv) UNCRC].
7. The child has a right to have the court's decision reviewed. [Article 40(2)(b)(v) UNCRC].
8. The child has a right to privacy at all stages of the proceedings. [Article 40(2)(b)(vii) UNCRC].

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<sup>2</sup> The offence must be recognized and prohibited by either national or international law

### **Creation of Establishments, Age of Criminal Liability and Diversion**

States Parties must establish laws, procedures, authorities and institutions for child offenders. In so doing, they must establish a minimum age below which all children are deemed not to have the capacity to commit an offence and where possible avoid judicial proceedings [Article 40(3 and 4) UNCRC].

### **Alternative Care vs. Institutionalization**

Article 37 (b) of the UNCRC states that “...*the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*”.

Article 40(4) of the UNCRC and Article 17(3) of the ACRWC state that alternatives to institutionalizations should be given priority and they include care, education and vocational training programmes and other alternatives available depending on their well-being, circumstances and nature of offence.

From the above, it is clear that internationally, the emphasis when dealing with child offenders shall always be on alternative care as opposed to institutionalization.

### **Separation of Child Offenders from Adults**

Child offenders in detention or prison must be separated from adults. (Article 17(2)(b) of the ACRWC).

### **The Law of South Sudan**

Section 3 of the Code of Criminal Procedure 2003 has expressly acknowledged that one is innocent until proven guilty. This is in line with both the UNCRC and the ACRWC.

The Penal Code 2003 has in Section 67 referred to reformatory schools. It provides:

*“When an accused person who has completed his tenth but not completed his eighteenth year of age is convicted by a High Court of any offence or by the Court of a Magistrate of the first or second class any offence not tried summarily; the Court may in passing the sentence prescribed by law, sentence such accused person to be detained in a reformatory school or other establishment appointed for the for the purpose by the Chief Justice for the term which shall not be less than two or more than five years.”*

Section 24 of the Code of Criminal Procedure 2003 encourages the Courts to put persons under eighteen on probation under certain circumstances. Section 65 of the Penal Code 2003 prohibits imprisonment of any person who in the opinion of the court is under 16 years of age.

Section 16 of the Code of Criminal Procedure 2003 empowers the Chief Justice to establish Special Courts e.g. a Court to try juvenile offenders. Section 16(1) provides as follows;

*“The Chief Justice may constitute special courts for the trial of juvenile offenders...”*

## **Recommendations**

- The administration of children in conflict with the law should ensure that each step is in the best interest of the child.
- Children Courts should be established and if not then children magistrates be trained accordingly.
- Children to have access to legal counsel in the preparation and presentation of their defence.
- Ensure children are brought before the courts as soon as possible following their arrest and that their cases are prioritized and determined without delay.
- Children should not be compelled to give testimony or confess guilt.
- An effective appeal system should be in place.
- Children should have access to interpreters when necessary.
- Children's privacy should be respected at all stages of the proceedings.
- There is need to come up with a diversion project whereby community members and trained police are mandated to handle some "not so serious cases" and thereby having the children diverted from the justice system. The diversion programmes shall emphasize on non-custodial measures and shall be established in conformity with human rights and legal safeguards.
- Upon conviction, a variety of options for sentencing children should be available to the court including care, guidance and supervision orders, probation, foster care, education and vocation training programs and other alternatives to institutional care.
- Reformatory schools as referred to in Section 67 of the Penal Code must be set up to avoid child offenders being mixed with adults.
- Deprivation of liberty should be a last resort.
- If deprived of their liberty, children should have the right to maintain contact with their family.
- Reformatory schools or rehabilitation centers should lay emphasis on education, rehabilitation, treatment and re-integration of child offenders as opposed to punishment.
- The personnel working in the reformatory schools must undergo training on child rights to better equip them with the skills needed to help the children.
- The children should be offered psychological and social support while in the institutions. The differences in attitudes for boys and girls among the community also need to be recognized at the time of diversion/reintegration. Because of this, it is many times more difficult for girls to be reintegrated. One way of ensuring the correct response is to talk to the children themselves.
- There is a need to separate child offenders from children under care of welfare services.
- There is a need for a comprehensive law dealing exclusively with the administration of juvenile justice.

## **Protection from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Deprivation of Liberty**

Respect for basic human rights and protection from torture or other cruel, inhuman treatment is in line with the provisions of the UNCRC and ACRWC.

### **International Standards**

The provisions regarding protection from torture or other cruel, inhuman or degrading treatment or punishment and deprivation of liberty is contained in Article 37 of the UNCRC. It states:

- a) *“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment...shall be imposed...”*
- b) *“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law...”*
- c) *“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of a person his or her age. In addition, every child deprived of liberty shall be separated from adults...”*
- d) *“Every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance...and to a prompt decision on any such action.”*

The above Article sets out what punishments may be meted out to child offenders. What it means is that no child can be tortured, sentenced to death or to life imprisonment without a possibility of release under any circumstances.

The ACRWC has not delved into the issue of torture, inhuman or degrading treatment or punishment. The same is contained in Article 17(2)(a)

*States Parties to the present Charter shall in particular:*

- (a) *ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;*

Note that in the ACRWC, this provision is contained within Article 17, which deals with Administration of Juvenile Justice. Further, the ACRWC also prohibits the sentencing of children to death. This is contained in Article 5(3), which provides that

*“Death sentence shall not be pronounced for crimes committed by children”*



## **The Law of South Sudan**

### Powers of the Court Regarding Punishment

Chapter 4 of the Penal Code 2003 deals with “*Punishment and Compensation*”. Section 64 sets out the various forms of punishment available to a Court when sentencing a person who has been found guilty and they include death, forfeiture of property, imprisonment, detention in a reformatory, fines and whipping.

Section 65 of the Penal Code 2003 points out that any person under the age of 16 shall not be imprisoned. It also prohibits the sentencing to death of any person under the age of eighteen (18) years at the time of committing the offence. It is positive that the section prohibits the sentencing to death of a person under the age of eighteen (18) years. However, there is the challenge of confirming the age of the convict due to lack of birth registration.

Section 67 of the Penal Code 2003, which deals with “*Special sentences for Juvenile Offenders*” on the other hand provides as follows;

*“When an accused person who has completed his tenth but not completed his eighteenth year of age is convicted...the Court may in passing the sentence prescribed by law, sentence such accused person to be detained in a reformatory school or other establishment appointed for the purpose by the Chief Justice for a term which shall not be less than two or more than five years”*

Section 76 allows a Court to sentence a person to “...whipping not exceeding ten strokes...”

### **Gaps and Concerns**

1. Looking at the forms of punishments available under Section 64 of the Penal Code 2003, they apply to all categories of offenders. It has not taken into consideration the punishments that can be meted out to children.
2. It is very easy for a child to be erroneously sentenced to death as there is no clear registration regime.
3. Note that the Penal Code 2003 deals with offences committed by all offenders yet it does not expressly provide for children. It is clear that the drafters of the Penal Code 2003 dealt with issues of children in a piecemeal manner.
4. Physical punishment should be removed from the list of the possible punishments in the Penal Code 2003 that can be meted out to any persons found guilty of committing an offence, let alone children.
4. The Penal Code 2003 has not sought to define ‘who’ a juvenile is. With regard to Section 65(a) of the Penal Code 2003, what happens to those children between 16 and 18 years? Does it mean that they may be imprisoned?
5. Section 67 of the Penal Code 2003 has confused the position even further as it refers to juvenile offenders. It places the age of such children between ten (10) years and eighteen (18) years. This is in contradiction with Section 65 which covers children up the age of 16 years of age.

## Recommendations

- The Penal Code and the Bill of Rights within the Constitution of southern Sudan should expressly criminalize torture.
- Law enforcement officials need to be sensitized and trained concerning the provisions in the CRC and ACRWC regarding the prohibition of torture and inhumane treatment and secondly, there is a need to have investigation and sanctions whereby law enforcement officials who violate these rights are punished.
- The Penal Code should clearly define who a juvenile is. What is the age when one is considered a juvenile for purpose of punishment?

## Sexual Abuse

### International Standards

The UNCRC states the following:

*“...protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, ...”* Art.19(1)

*“...provide necessary support for the child and for those who have the care of the child..”*Art.19(2)

This article places a duty on the Government to take measures to protect children from abuse and provide support to victims of abuse. This Government must also take measures to prevent sexual abuse and exploitation as is written in Article 34 of the UNCRC:

*“...protect the child from all forms of sexual exploitation and sexual abuse...”* These activities include prostitution and pornography.

In Article 35, the government must prevent:

*“...prevent the abduction of, the sale of or traffic in children for any purposes or in any form.”*

At the same time the ACRWC also has strict recommendations on sexual abuse. Article 16 states:

*“...protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse...”*(Article 16 [1])

*“...provide necessary support for the child and for those who have the care of the child...”* (Article 16 [2])

*“...protect the child from all forms of sexual exploitation and sexual abuse...”* (Article 27)

*“...prevent:*

*(a) the abduction, the sale of, or traffic in children for any purpose or in any form* (Article 29)

Therefore, governments must take measures to protect children from abuse and provide support to victims of abuse. They must also take measures to prevent sexual abuse and exploitation and trafficking, specifically.

## The Law of South Sudan

The law regarding sexual abuse is titled “*Rape and other sexual offences*” and it starts from Section 316 to Section 319 of the Penal Code 2003.

Section 316 of the Penal Code has sought to define rape and it states the following;

*“A man is said to commit rape, who save in the case expected in this section and section 316(A) has sexual relations with a woman against her will or without her consent; provided that a consent given by a woman below the age of eighteen years shall not be a consent within the meaning of this section.”*

The import of the above is two fold; (1) it is an offence to have sexual intercourse with a woman (above eighteen years) without her consent; (2) but should she be below the age of eighteen (18) years, then the question as to whether or not she consented to the sexual intercourse is immaterial as a person below eighteen is not deemed to be able to understand and/or appreciate the implications of his/her actions and therefore for that reason not able to consent (to sexual intercourse).

Therefore, the age of consent for sexual intercourse in South Sudan is eighteen (18) years. This thus protects children. This is re-iterated in the Alternative Report, which states;

*“Traditionally, sexual consent is closely linked to the age of marriage and the passage of a girl into adulthood.”<sup>3</sup>*

It is worth noting that there is a proviso to Section 316, which provides that a man cannot rape his wife. It states;

*“Sexual intercourse by a man with his own wife is not rape within the meaning of this Section”*

Section 316(A) whose margin notes reads, “*Sexual intercourse with girls*”, on the other hand goes ahead to provide as follows

*“Whoever has sexual intercourse with a girl, not being his wife, who is 18 years of age or above with her consent, commits an offence and shall on conviction, be punished with imprisonment for a term not exceeding two years or with fine or both.”*

What this seeks to do is prohibit sex with a woman not being his wife. Thus, sex is only allowed in a marriage setting. But please note that it talks of sexual intercourse with “a girl”. Ideally, any person above the age of eighteen should be referred to as a woman (and not a girl). The language should be clear where any person below eighteen is referred to as a girl while a person above eighteen, a woman. Finally on this section, it only seeks to punish the man but not the woman.

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<sup>3</sup> *Alternative Report on the Implementation of the United Nations Convention on the Rights of the Child-by SPLM and SPDF-Page 14*

The general punishment for rape is contained in Section 317 of the Penal Code 2003, which puts it at fourteen years and carries the possibility of a fine.

Section 318 of the Penal Code 2003 deals with “*Unnatural Offences*”. Where the act is committed by consenting adults then the punishment shall not exceed ten (10) years with the possibility of a fine but fourteen years if there was no consent. Consent by a person below the age of eighteen is not deemed as consent within the section. This therefore seeks to protect children.

### **The Gaps**

1. A man cannot under the present law be prosecuted for raping his wife.
2. Any woman above eighteen should be referred to as a woman rather than as a girl for the sake of clarity.
3. The Laws of South Sudan have not exhausted all aspects of criminal sexual abuse for the protection of children including pornography, child trafficking and indecent assault, and prostitution, among others.

### **Recommendations**

- There is a need to sensitize law enforcement officials and the judiciary of South Sudan on issues of child sexual abuse.
- Effective procedures should be established including special monitoring units to provide necessary support for victims of sexual abuse and further come up with proper and effective systems for prevention, identification, reporting, referral, investigation, treatment, and follow-up of instances of child sexual abuse in line with the UNCRC and the ACRWC.
- Additions need to be made to the current Penal Code to include the whole range of sexual offences against children including indecent assault, pornography, prostitution and trafficking for the purpose of sexual exploitation.

### **Protection from Harmful Cultural Practices**

One of the major differences between the UNCRC and the ACRWC can be found on the issue of the cultural practices. It is worth noting that the ACRWC being specific to Africa, it captures the peculiar issues that are unique to the African continent. The UNCRC has not delved into the issue at all.

A cultural practice is considered harmful if it affects the welfare, dignity, growth and physical or psychological development of a person or if it is prejudicial to the health or life of that person or is discriminatory.

It is with this background in mind that we need to look at some of the practices that still persist in Africa. They include female genital mutilation, early marriage, and forced marriage.

## **International Standards**

Article 21 of the ACRWC seeks to protect children from harmful social and cultural practices particularly if they are prejudicial to the health or life of a child. It provides that

*1. States Parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:*

- a) those customs and practices prejudicial to the health or life of the child; and*
- b) those customs and practices discriminatory to the child on the ground of sex or other status.*

*2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age to be 18 years and make registration of all marriages in an official registry compulsory*

## **Laws of South Sudan**

### Child (Early) Marriage, Forced Marriage, Child Betrothal, Age of Maturity

Child (Early) Marriage is where a child is married off before they reach the age of consent, which is eighteen (18) years. Forced marriage is where a child is forced to marry a spouse who is not of her choice. While child betrothal on the other hand occurs when the family of the groom “books” a girl for marriage when the bride to be is still very young and dowry is even paid way in advance.

Even before the drafting of the Penal Code 2003, the SPLM and the SPDF did acknowledge in the Alternative Report on the Implementation of the United Nations Convention on the Rights of the Child, which was prepared in November 2000, that the issue of girls being married off at an early age was indeed a major problem in South Sudan. This is because the people of South Sudan used different methods to determine adulthood and thus the age when one was considered ready for marriage. They include initiation and the advent of menstruation, among others.

Where Initiation rites are employed, one is considered an adult once he/she undergoes the passage to adulthood. The methods employed tend to vary from tribe to tribe and is subjective and arbitrary.

For the girls, there are tribes, which consider a person an adult and thus ready for marriage upon her getting her first menstrual periods. This has presented a major challenge as some girls get their menstruation as early as ten (10) years. That means that these girls end up getting married at a very young age. The situation is made worse due to poverty as the bride’s family ‘marry off’ their daughters early because customarily, they receive bride price from the family of the groom.

### Female Genital Mutilation

There is very little in the Penal Code 2003 regarding anything that amounts to Harmful Cultural Practices. What is there is in the form of female circumcision, which the law has expressly criminalized.

Section 284(A) provides as follows

*Whoever makes or causes female circumcision to be done commits an offence and shall on conviction, be punished with imprisonment for a term not exceeding ten years or with fine or with both.*

### **The Gaps**

Despite child and forced marriage and child betrothal being a major problem, which was acknowledged by the SPLM and SPDF in the Alternative Report, the Penal Code 2003, which was drafted subsequent thereto, failed to address the issue.

### **Recommendations**

- As was rightfully recommended in the Alternative Report, there is need to review the Penal Code (in this case the Penal Code 2003), as well as existing customary law and recommend modifications required to bring it to compliance with the international instruments.
- Laws should be drafted to criminalize all forms of harmful cultural practices including child (early) marriage, forced marriage, child betrothal, female circumcision (female genital mutilation) together with other cultural rites, customs and traditional practices that negatively affect the child the life and development of a child.
- There is a vital need to come up with a birth registration regime for the whole of South Sudan to protect children against early or forced marriage and betrothal.

### **Concluding Recommendations**

- There is need to undertake a comprehensive and thorough child rights audit of all the policies and the laws of South Sudan including the Constitution and recommend changes and amendments to the relevant offices and officers of the SPLM.
- There is need to examine the weakness in administration of juvenile justice in South Sudan by examining the implementation of the UNCRC and the ACRWC vis-à-vis the Penal Code, 2003 and the Criminal Procedure Code, 2003.
- The Code of Criminal Procedure 2003 is not well equipped to deal with matters relating to children as children have very special needs. Such a scenario if left to persist may in itself lead to serious violations of the rights of children.
- There is a need for an Act specifically dealing with the issues of the administration of juvenile justice.
- Diversion should be used and encouraged to avoid having children who are in need of care and protection and petty criminals being placed together with hard-core criminals.
- There is need to sensitize the Government officials, the community and particularly the children to enable all of them better understand child rights.

- Since Sudan is a very big country, there is need to train paralegals who will bridge the gap as there are not enough lawyers.
- There is need for the creation of a central bureau of statistics that will deal with among other issues the registration of births (and deaths) so as to have the ages of persons documented.
- There is need to ensure that there is a centralized training and minimum standards requirements for the training of police officers, magistrates and judges. Such trainings should espouse child rights with a bias on how to deal with children in need of care and protection and children in conflict with the law.
- The minimum age for criminal responsibility should be fixed no lower than 12 years old.
- There should be a provision for the assessment of the maturity of children between 12 and 15 years of their understanding to judge the nature and consequences of any alleged criminal act.
- Aspects of juvenile justice should also be included in the overall covering Children's Act that is being developed right now.