A CRITIQUE ON THE JUVENILE JUSTICE SYSTEM:

CASE STUDY OF SOUTHERN SUDAN

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DECEMBER 2010

DECLARATION

This declaration is to the effect that the contents of this research are my own original work save the references which are duly acknowledged and has not been presented and will not be submitted to any other University for the award of the same degree.

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APPROVAL

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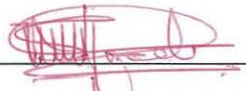
Signature: 

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DEDICATIONS:

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LIST OF ABBREVIATION

GOSS:	Government of Southern Sudan
GoS:	Government of Sudan
ICC:	Independent Child Commission
CA:	Child Act
CPA:	Comprehensive Peace Agreement
CEG:	Centre Equatoria Government
JJC:	Juvenile Justice Committee
ICSS:	Interim Constitution of Southern Sudan
SPLM:	Sudan People Liberation Movement
SPLA:	Sudan People Liberation Army
SSPS:	Southern Sudan Police Service
SHRC:	Southern Sudan Human Rights Commission
SSPS:	Southern Sudan Police Services
JSC:	Judicial Service Council
JOSS:	Judiciary of Southern Sudan
MoLACD:	Ministry of Legal Affairs and Constitutional Development
MGCSWRA:	Ministry of Gender, Child and Social Welfare
SSLA:	Southern Sudan Legislative Assembly

LIST OF INTERNATIONAL AND REGIONAL ACRONYMS AND INSTRUMENTS:

(UN)	United Nations 1945
(UNMIS)	United Nations Mission in Sudan
(UNICEF)	United Nations Children Fund
(UNDP)	United Nations Development Programmes
(SCF- Sweden):	Save the Children Fund- Sweden
(WC):	War Child
(UDHR)	Universal Declaration of Human Rights 1948
(UNCRC)	United Nations Convention on the Rights of the Child 1989
(ICCPR)	International Covenant of Civil and Political Rights 1966
(ICESCR)	International Covenant on Economic, Social and Cultural Rights 1966
(ACRWC)	African Charter on the Rights and Welfare of the Child, 1990
(ACHPR)	African Charter on Human and Peoples' Rights, 1986
(ECHR)	European Commission on Human Rights, 1995
(ECHR):	European Convention on Human Rights 1950
(ACHR):	American Convention on Human Rights, 1969

Riyadh Convention on Judicial Cooperation between States of Arab League, 1983

United Nations Rules on Juveniles Deprived of their Liberty, 1990

UN Standard Minimum Rules for the Administration of Juvenile Justice, Beijing Rules 1985

Optional Protocol to the Convention on the Rights of the Child in the involvement of Children in Armed Conflict, 2000

LAW REPORTS

SLR:	Sudan Law Reports
SLJR:	Sudan Law Journal Report
E.A:	East Africa
ULR:	Uganda Law Report
K.B:	King Bench
Q.B:	Queen Bench
Q.B.D:	Queen Bench Division
Ch. D:	Chancery Division
KLR:	Kenyan Law Report

LIST OF NATIONAL STATUTES

The Interim Constitution of Southern Sudan, 2005

The Evidence Act 2006

The Child Act 2008

The Penal Code Act 2008

The Criminal Procedure Act, 2008

The Ministry of Legal Affairs & Constitutional Development Organization Act 2008

The Judiciary Act 2008

The SPLA Act 2009

The Police Act 2009

Prisons Services Bill 2009 (draft- not yet passed)

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The Sudan Government v. Mohamed Ahmed Abu Kakr (1967) SLJR 103

Turon V. R [1967] EA 789

R v. Chelsea justice ex parte DPP (1963) 3 ALLER 657

R. v. Rider (1954) 1 ALLER 5)

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1230

R v. Windle (1952) 2 QB 826

Re Gault 387 U.S. 1 (1962)

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DPP vs. Majewski (1977) AC 443

T. J. Stephen V. Parle Bottling Co. (P) Ltd, (1988)

The people Vs Asanga Asongwe CFIBA/1128C/01-02

ABSTRACT

Although extensive international and regional theoretical literature has developed over the years which have shaped commendable treatments of juveniles in most states, the situation of juvenile justice system in Southern Sudan has not only been battling the violations of human rights as a result of the prolonged civil war but also had to face the inadequacies of legal framework that was brutally uprooted. The 2005 Comprehensive Peace Agreement signed in Kenya has ushered in a glimpse of relief to reconstruct and fill the legislative vacuum in general and juvenile related legislations in particular. Thus, the 2005 Interim Constitution of Southern Sudan has the child related provisions while the first ever Child Act, 2008 is premised exclusively on juvenile justice system. What has remained to be observed is the implementation of these legislations as they require concerted efforts for the re-orientation of the public attitudes in Southern Sudan towards realization, promotion and protection of the human and legal rights of the juveniles.
This research will be useful in its attempt to analyze the relevant legislations and the practices of the institutions charged with the administration of juvenile justice system thereby giving insights as to what needs to be done to improve the juvenile justice system in Southern Sudan. The analysis in this research embraces different fields that have crucial bearings in the juvenile justice system including customary practices, the recent National Child Legislations and the International and Regional Instruments that Southern Sudan is a party to by virtue of ratification by the Republic of the Sudan.

This research begins with Chapter One which deals with an overall introduction to the juvenile justice system. It also explores definitions of relevant terms, principles and concepts in juvenile justice system. It further explains why this research will be useful not only to the stakeholders in the administration of juvenile justice system but also to the general society which is being affected not only by the juvenile delinquency but also by the treatment of juvenile offenders. The part of chapter one evaluates the position of the Traditions and Customary practices in comparison to the modern statutory Juvenile Justice System which is based on International and Regional values and principles. Chapter Two appraises the Legislations and the Practices in light of the International and

Regional Instruments on the rights and treatment of juvenile offenders; Chapter Three discusses different stakeholders and their roles, procedures and powers in the administration of Juvenile Justice System in Southern Sudan. These stakeholders include the police, the courts, the prisons services, social workers as well as the parents and the wider society. Chapter Four analyses the Challenges facing the stakeholders and their weaknesses in the administration of the Juvenile Justice System. Under Chapter Five, a general Conclusion is made in light of what has or has not been done considering the fact that Southern Sudan after the long protracted civil war has now embarked on acquiring the resources that it would need for the reconstructions and development of its institutional and infrastructural facilities that are necessary for justice system in general and juvenile justice in particular. It ends with the recommendations that are believed to be appropriate for the desired standard juvenile justice system.

CHAPTER 1: Concept of Juvenile Justice System

1.0 Introduction

The global quest for harmonious legal systems that embrace inherent values of human dignity as envisaged in the preamble to the Universal Declaration of Human Rights is not possible without established rules and principles that should safeguard and promote the realization of human security, peace and development[1]. This means that any justice system aims at ensuring that laws are made for the good of human person, hence the realm of justice system must be adorned with necessary legislations which cater for different aspects of social strata. It is this reason that Principle **1** of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) provides for the fair and humane treatment of juveniles in conflict with the law which in essence means that, the aims of juvenile justice should be the protection, the promotion of the well-being of the juvenile and a proportionate reaction by the authorities to the nature of the offender as well as to the offence[2]. The juvenile justice system should form an autonomous part of the general justice system in order to address the special rights and procedural treatments of children who come into conflict with the law.

In order to achieve justice for young offenders, the juvenile justice system should not only be autonomous but should also be sufficient and effectively child-centered in accordance with principle **1.4** of the Beijing Rules. This Rule is to the effect that: *"juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society"*[3].

This means that every national justice system is obligated to have an adequate and appropriate juvenile justice system in which children are treated with humanity. If this is lacking, the nation will be no better than what the Secretary of Home Affairs of Great Britain said in 1997 that the youth justice system in England and Wales is in disarray that

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[1] Universal Declaration of Human Rights, 1948
[2] UN Standard Minimum Rules for the Administration of Juvenile Justice, Beijing Rules 1985
[3] Ibid

it can be scarcely called a system at all because it lacks coherent objective. That it satisfies neither those whose principal concern is crime control nor those whose principal priority is the welfare of the young offender[4].

According to the commentary on the UN Beijing Rules, "*juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society*"[5].

Southern Sudan had never had its own national legislations since the inception of the Sudan as an independent country on the 1st January 1965. This is attributed to the fact that it had been part of the whole Sudan which has been ruled by a mixture of secular and theocratic legislations. Such lack of a unified justice system has impacted negatively on the general populace in general and on the juveniles in particular.

On the signing of the Sudanese Comprehensive Peace Agreement in the Kenyan Town of Naivasha on the 9th of January, 2005, Southern Sudan was granted an autonomous Government with the powers to legislate necessary laws that would address the needs of its inhabitants. With the powers to legislate necessary laws, the Government of Southern Sudan in an endeavour to establish its own justice system as a nation, had exerted some commendable efforts to set up juvenile justice system along side the general justice system. This is evidenced in its legislations that specifically provide for the establishment of the institutions, departments and appointment of officials that are charged with the administration of the juvenile justice system.

Some of the institutions and departments dealing with the administration of juvenile justice system in Southern Sudan include:

- The Ministry of Gender, Child, Social Welfare and Religious Affairs which has separate directorate for the welfare of children;
- The Judiciary of Southern Sudan (JOSS) which is tasked to create the family courts for adjudication of cases involving children;

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[4] Quoted from Lode Walgrave, Restorative Justice for Juveniles, Potentialities, Risks and Problems (1998 Leuven University Press)

[5] Geraldine Van Bueren & Anne-Marie Tootell, 1993

- The Ministry of Legal Affairs and Constitutional Development whose Directorate of Public Prosecutions had a Department of Women and Juvenile Justice which initiated the legislation and eventual passing into law of the Child Act 2008;
- The envisaged establishment of an independent Child Commission under section 193 (1) of the Child Act[6] is another institution to take lead in the juvenile justice system;
- The Southern Sudan Police Services whose department conducts the arrests and investigations of juvenile offenders; and
- The Southern Sudan Prison Service whose administration runs the juveniles' detention and reformatory facilities.

The question now is whether the juvenile justice system which is deemed to have been set up in Southern Sudan is adequate to match the international standards expected of a nation having a juvenile justice system or is lagging behind the expectations.

1.1 Who is a Juvenile

There are many varying definitions as to who exactly is a juvenile; or in other words, it is not yet universally settled at what stage a person is considered to be a juvenile. However, since the available definitions of juvenile are not different from the definitions of a child as a person who has not reached the age of 18 years, it is prudent to infer that a juvenile fall within the definition of a child.

The word 'juvenile' refers to a young person who has not reached the age of 18 years at which one should be treated as an adult by the criminal justice system[7]. Also according to the Southern Sudan Judicial Circular Number 4 of 2007, a juvenile under the criminal Justice System of the Southern Sudan, is a person who has not yet reached eighteen years of age at which he/she should be treated as an adult. While the courts or judges are entitled to impose sentences authorized by law on adult offenders, juvenile offenders are entitled to receive special treatment under section 24 of the Criminal Procedure Act, 2003 (now section 284 of the Criminal Procedure Act, 2008)[8].

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[6] Laws of Southern,2008
[7] Black law Dictionary
[8] Judicial Circular Number 4 of 2007

This is in consonant with the general legal parlance that considers juveniles as young persons who are not yet adults. Usually, juvenile offenders are tried in a separate court know as juvenile courts which are courts that deal with young people who are not yet adults[9].

Therefore, for the purpose of this dissertation, reliance shall be had to the regional and international instruments that define who a child is. Thus Article 2 of the African Charter on the Rights and Welfare of the Child, 1990 defines a child as every human being below the age of 18 years. This definition is the same under Article 1 of the 1989 United Nations Convention on the Right of the Child (UNCRC).

What should be noted in article 1 of the UNCRC is that the definition of a child is not conclusive but depending on the law applicable in the country or state in which the child hails.

Thus the question as to who is a child depends entirely on the definition provided in a particular national law. Because of the variability in the definition of a child, this dissertation will adopt the provision of Article 1 of the UNCRC 1989.

1.2 Age of Criminal Responsibility

The age of criminal responsibility is not universally agreed and therefore, it is at the state's discretion to fix the age of criminal responsibility. It follows also that the age of criminal responsibility should not be unreasonable or in other words, the age of criminal responsibility should not be too low. According to **Principal 4.1** of the Beijing Rules it is provided that: *"In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity"*[10]. This international position is contradicted by Muga's definition of juvenile as seen above which sets the starting age of criminal responsibility at seven. The researcher's view is that Muga's definition of the juvenile is too low and therefore, for the purposes of this dissertation, Southern Sudan's position under section 138 (1) of the Child Act, 2008 which set the age of criminal responsibility at twelve years is considered as of much more

[9] Advanced Oxford Learner's Dictionary, 11th Edition

[10] UN Standard Minimum Rules for the Administration of Juvenile Justice, Beijing Rules 1985

of an international standard and therefore will be adopted. The age of criminal responsibility was considered by the European Court of Human Rights in the case of **T v. UK**[11], where the court considered whether the attribution of criminal responsibility to the applicant in respect of acts committed at the age of ten could in itself amount to inhuman or degrading treatment, contrary to European Convention on Human Rights Art. 3. In its judgment, the court did not find that there was any clear common standard among the member states of the council of Europe as to the minimum age of criminal responsibility.
Therefore, Southern Sudan being an accession state to the UNCRC by virtue of the Sudan having ratified it echoes the same definition of the child under Article 21 (4) of the Interim Constitution of Southern Sudan (ICSS) and section 5 of the Child Act 2008, as every human being under the age of eighteen years. The minimum age of criminal responsibility in Southern Sudan is set under section 138 (1) of the Child Act 2008. It is to the effect that no child under the age of twelve years shall be prosecuted for a criminal offence as it shall be conclusively presumed that he or she is incapable of committing an offence.
In Kabatere Steve v Uganda[12], it was held that age was to be considered at the time of sentencing and not at the time of committing of offence

1.3 Juvenile Delinquency

Juvenile delinquency is defined as an antisocial behaviour by a minor; especially behaviour that would be criminally punishable if the actor or actors were an adult; but instead is usually punished by special law pertaining to a minor[13].
In the words of Erasto Muga, the phrase 'Juvenile Delinquency' refers to criminal acts or omissions performed by juveniles. It is the broad-based term given to juveniles who commit crimes[14]. Thus a juvenile delinquent means a young person who has the tendency or who commits criminal acts or omissions. As to who exactly is a juvenile delinquent, a juvenile delinquent is a young person who is not yet an adult and who is guilty of

[11] (200030 EHRR 121
[12] CA 23/2001
[13] Black Law Dictionary
[14] Erasto Muga ,Crime and Delinquency in Kenya, 1975

committing a crime[15]. Erasto Muga in his book refers to a juvenile delinquent thus *"a juvenile delinquent is a child between the statutory juvenile court age of seven and sixteen years who commits an act which, when committed by person beyond this statutory juvenile court age would be punishable as a crime or as an act injurious to other individuals or public, that is the state or government[16]"*.

In Southern Sudan, juvenile delinquent is not defined but an analogy may be drawn from section 138 of the Child Act, 2008 which provides for minimum age of criminal responsibility to mean a child who commits or attempts to commit any crime and who is not between the ages of twelve and fourteen years.

1.4 Juvenile Justice System

The juvenile justice system means the ways in which juvenile offenders are brought to justice; it includes the procedure of instituting criminal prosecution of juvenile offenders, the methods of arrest as well as treatment while in detention and subsequently, the nature of orders and punishment which can be made and imposed by courts against juveniles who come into conflict with the law. In the international arena, the juvenile justice system should be that system which upholds the rights, safety and promote the physical and mental well-being of juveniles and take into account the desirability of rehabilitating the young person[17].

Unlike the general criminal justice system which consists of the three main agencies of the police, the courts and correctional services, the juvenile justice system is a unique system that involves social workers who are experienced personnel for the well-being of juveniles while preserving the interests of the community.

It is on this basis that most legal systems prescribe specific procedures for dealing with juvenile offenders as well as establishing mechanism for treatment at the beginning of the institution of juvenile prosecution, during pre-trial detention period and eventually after any decision had been passed by the juvenile court against the offending juvenile. Southern Sudan's juvenile justice system as explained in this dissertation has of recent

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[15] Advance Oxford Learner's Dictionary, 11th Edition
[16] Ibid
[17] Art. 14 (4) of the ICCPR, and UN Rules for the Protection of Juveniles Deprived of their Liberty

enacted the Child Act, 2008 which lays down specific guiding principles and procedures for the treatment of juvenile offenders under Chapter II[18].

1.5 Importance of Juvenile Justice System

The importance of a juvenile justice system is that it provides avenues and ways in which many societies tackle the problem of juvenile delinquency[19]. These avenues and ways afford the creation of necessary legal and social restorative programs that help prevent children from committing crimes or becoming delinquents. According to the provisions of section 135 of the Child Act[20], the main objectives of juvenile justice system are (a) reformation, social rehabilitation and reintegration of the child, while emphasizing individual accountability for crimes committed; and (b) the restoration of harmonious relationships between the child offender and the victim through reconciliation, restitution and compensation.

In the words of **Mark Fenwick and Keith Hayward**, "*a good juvenile justice system must always encourage social reformatory programs which focus mainly on restorative as well as rehabilitative mechanisms which afford the juveniles affected by the criminal law opportunities to once again lead a normal life. Both legal treatment and social rehabilitation of the juveniles should aim at discouraging and eradicating causes of juvenile delinquency*[21]".

The researcher's observation is that the level of juvenile delinquency vis-à-vis the established juvenile justice systems in developing countries such as Southern Sudan is wanting in the sense that young people are not only lured into delinquency by the changing social strata but by the deliberate involvement into horrible activities that expose them to heinous crimes. A good example is the recruitment of young persons into armed forces, a hard job which does not only constitute child labour but also a good step-ladder of becoming a delinquent gangster.

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[18] Laws of Southern Sudan, 2008
[19] David McClean and Kisch Beevers, The Conflict of Laws, 6th Edition, 2005
[20] Laws of Southern Sudan, 2008
[21] Quoted from Youth Justice: Theory and Practice edited by Jane Pickford

It should be noted that recruitment of young persons into a non-conventional armed forces which had been the practice of the Government of Sudan and its alliance Militias are acts which defy the quest for rehabilitative juvenile justice system.

This practice inevitably exposes the young recruits into what **Mark Fenwick and Keith Hayward** called "*an addictive harmful activities that makes young persons hardened criminals who fantasy at criminal acts or omissions*[22]".

In a situation like the one just exemplified, it is clear that "*young persons who are trained in the arts of militarism could consider themselves of being able do hard thing like robberies because they have the requisite physical abilities that can withstand an adult and therefore may enjoy the fantasies of horrible crimes*[23]".

The question now is that how does the juvenile justice system deal with those juveniles who have been lured and involved deliberately into activities that make it easy for them to commit offences.

The answer may rest with authorities to devise legal mechanisms for the prevention of delinquent activities that lure young persons into crimes. Such preventive measures suffice in the provision of section 32 of the Child Act[24], which provides for penalties for recruitment of a child into the Armed Force. It is categorically stated that any person involved in the recruitment of a child into the armed force or use of a child in any activity set forth above, commits an offence and shall upon conviction, be sentenced to imprisonment for a term not exceeding ten years or with a fine or with both.

The current Sudan People Liberation Army (SPLA) Act, 2009 under section 22 (a) provides for the criteria of eligibility for enrolment in the army. It is to the effect that a person shall be eligible for enrolment into the SPLA forces if he or she has attained eighteen years of age. Thus the SPLA Act, 2009 prevents an armed juvenile criminality.

The importance of juvenile justice system according to the provisions of Article 27 of the Beijing Rules, is that children accused of having infringed the penal law are entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection.

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[22] Ibid
[23] Ibid
[24] Laws of Southern Sudan, 2008

As such, the importance of juvenile justice system is that it focuses on both sides i.e. the rehabilitation of the juvenile offender while finding adequate remedial measures for the compensation of the victim of the juvenile offence.

1.6 Why Do Children Commit Offences?

The reasons why children commit offences may not be uniformly explained but in general, the tendency to commit offences varies from place to place; from time to time and from culture to culture. Criminologists say that crimes may be committed because of *"poverty as a result of low family income, large family size, or due to environmental influences on the children for example peer pressure, poor child rearing and experience of criminal parent"*[25]. The political organization of the country may also expose child to the commission of offences.

In the words of **Mark Fenwick and Keith Hayward**[26]**,** "The establishment of the juvenile court in 1908 indicated a certain understanding that the reasons why children and young people commit crime and the needs of children who come before the courts may not be the same as adults. Why? Because of the vulnerability to temptation to commit crime and inadequate capacity to form necessary intention are lacking in a young person[27]." Thus, "*a well established juvenile justice system helps in preventing juvenile delinquency through appropriate legal intervention, social and restorative juvenile rehabilitation which is better than applying pure retributive and punitive mechanism of criminal justice system. The central idea of rehabilitation is to reform the offender, who can then be socially reestablished in the situation he was in prior to the offence. It involves changing an offender's behaviour to prevent recidivism*"[28]. Mwai Kibaki, the then Vice President of the Republic of Kenya (now the President) once said "no child is born delinquent but the substances have made him delinquent".

In Southern Sudan, many factors lead juveniles to delinquent lives according to a social worker interviewed by the researcher during the field work for this research in Juba main prison, *"most of the juveniles who commit heinous crimes such as murder come from the*

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[25] John E. Conklin, Criminology, 6th Edition, 1998
[26] Quoted from Youth Justice: Theory and Practice edited by Jane Pickford
[27] Ibid
[28] Ibid

cattle keeping communities who possess guns initially meant to guard their cattle. She attributed such behaviours not to the natural tendency but to the deliberate exposure of the young by the parents or guardian. The other reason why children commit crimes in the words of this social worker is that some of juveniles are used by the adults to commit crimes such as in the sale of drugs like hashish or cannabis. Minor crimes such as the crime of theft are mostly committed by orphans and children of poor families because they lack parental care and therefore the harshness of poor families' conditions force them to commit crimes"[29].

In another interview on juvenile justice system in Southern Sudan with Judge Awan of Aweil South County of Northern Bhar el Ghazal State, the reason why children commit crimes was revealed to the effect that *"some children are used for the commission of crime by the adult and he gave an example in a case where an adult sent a child to steal a cow which the adult wanted to benefit from the proceeds of theft. This adult was held responsible for compensation because he enjoys the proceeds of the crime. He said that where a juvenile is proved to have committed the crime, the parents are compelled to pay compensation to the victim of juvenile crime"*[30].

2. Statement of the Problem

When the British colonial government came to rule what is now called the Republic of the Sudan in 1898, the North and South had separate colonial administrative centres, however, when the agitations for independence were begun against the British Colonial Government in Sudan, the North and the South were merged together without consent of Southern inhabitants. This was done *"despite the fact that even before independence, there was war between the North and the South that started in 1955 before independence in 1956.*[31] *Therefore, the union between the North and the South to form one Sudan was de jure in nature rather than de facto"*[32].

This had not only kept the country in constant geopolitical and religious ideological heterogeneity, but had also deprived the country with a unified legal harmony.

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[29] Betty Paul, a social worker in Juba main prison
[30] Judge Awan, currently county judge of Aweil South County court
[31] Douglas Johnson, The Root Causes of Civil War in Sudan
[32] Ibid

Arop Madut Arop in his book, **'Sudan Painful Road to Peace'** says *"throughout its colonial and post colonial period, Sudan had never been brought up to feel as one nation. The reason was simple: its two distinct parts were kept rigidly apart as two separate entities with two different official languages, Arabic in the North and English in South. Because of this unfortunate axiomatic relationship, the writing of permanent constitution was not made possible"*[33].

The war that started in 1955 before Independence in 1956 was to be resolved 17 years later in the Ethiopian Capital Addis Ababa in 1972. With the 1972 Addis Ababa Peace Agreement in place, momentum was gained and the 11 years of peace enabled the country establish a national justice system although the dual legal systems allowed theocratic Islamic legislations in the North and secular legislations in the South[34]. During the period of 1972- 1983, the justice system in general and juvenile justice in particular was both secular and traditional or customary in nature in Southern Sudan; but due to the irreconcilable differences between the North and South, the country was again plunged into a devastating civil war in 1983[35].

Southern Sudan had to suffer from the menace of the civil war from 1983 to 2005. The researcher observe that the menace of civil war led to the brutal abrogation of the entire justice system that left the inhabitants in general and young persons of Southern Sudan to live in a lawless state where rule of anarchy had to rein unabated.

In 2005, a Peace Agreement was concluded between the North and South in Kenya that granted Southern Sudan an autonomous self-government which had to start from the scratch to establish its general justice system of which the juvenile justice system forms a part. Hence, the adequacy of such a juvenile justice system has not yet been tested by any research. The researcher has not come across any writer who has carried out a research of this kind in Southern Sudan.

Many indications suggest that the level of juvenile delinquency in Southern Sudan could be high. It would therefore be beneficial if a work of this nature is conducted to find out how effective the newly established juvenile justice system operates in an emerging new

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[33] Sudan Painful Road to Peace, 2006
[34] Ibid
[35] Ibid

nation like Southern Sudan and how sufficient and effective it is for the administration and control of juvenile delinquency.

3. Objectives/Rationale for the Research

The aims of this research are to critically examine and analyze the existing juvenile justice system in southern Sudan in order to find out:-

a. How adequate or inadequate the juvenile justice system in Southern Sudan is;
b. Whether the practices comply with the legal provisions;
c. Whether there exist any lacunae/gaps to be filled.
d. The sufficiency and effectiveness of the institutions/stakeholders responsible for juvenile justice system;
e. The challenges facing the stakeholders in the administration of juvenile justice system; and
f. Suggest recommendations for improving the existing juvenile justice system.

4. Significance of the study.

Southern Sudan is a new nation emerging with a new legal system which has not yet stood the test of time. It is possible to infer from the above that the Government of Southern Sudan is still striving to meet the required international standards of justice system in general and juvenile justice system in particular as a nation.

As such, a research of this kind will contribute significantly in understanding the nature of the juvenile justice system that Southern Sudan has established by analyzing it in light of the international and regional instruments that set standards of handling juvenile offenders.

This research will also examine the compatibility of the legislations for juvenile justice that exists in Southern Sudan with international and regional juvenile legal regimes.

The extent of which the international and regional juvenile legal instruments have been incorporated in the domestic legislations in Southern Sudan will also be examined with a view to the required standards if it is filled.

It is believed that the findings of this research will serve as a litmus exposition upon which necessary suggestions and recommendations will be usefully made for further legal improvements of all those mechanisms that constitute a juvenile justice system in Southern Sudan.

5. Scope and Limitations of the Research

This research covers the juvenile justice system in Southern Sudan since the promulgation of the Interim Constitution of Southern Sudan 2005. It is limited to the institutions falling under the Central Government in Juba. Some of the various national customary laws will also be examined in order to find out how best juvenile crimes are being addressed traditionally and customarily. The compatibility of the customary laws with the legislated national and international legal instruments which concern the treatment of juvenile offenders will also be examined.

6. Research Methodology

The research methods used to produce this dissertation included library researches conducted in various libraries in Juba. Among them were the Library in the Ministry of Legal Affairs and Constitutional Development in Juba, the Southern Sudan Legislative Assembly (SSLA) and Southern Sudan Human Rights Commission's library. Face to face field interviews were also conducted with the juvenile offenders both in the Juba main prisons and in the three police stations of Juba North, West and Malakia as well as with the victims, parents/guardian, social workers and the main institutions charged with the juvenile justice system in Southern Sudan. These institutions include the Public Prosecutions Directorate in the Ministry of Legal Affairs and Constitutional Development. Some of the judges of the county the Courts who handle juvenile cases were also interviewed. Several heads of the Police Departments, investigators, as well as women police officers in charge of the departments of women and child centres and police personnel that guard the juvenile detention cells were interviewed. Interviews were

alos conducted with some of the senior prison officers as well as with the Prison Warders responsible for the pre-trial detainees and convicted juvenile offenders and the social workers in the prisons services. Some of the information were also collected from the available Government institutional research centres as well as research centres under NGOs operating in Southern Sudan such as **UNICEF, SCF-Sweden, War Child and UNMIS' Child Protection Department** that were visited during the field work for this research. Relevant books and academic articles via internet had also been resourceful references of this research.

7. Hypothesis

This research is a critique on the juvenile justice system in Southern Sudan and therefore, it would be based on many assumptions. For the purpose of this dissertation, the working hypotheses are:

- Southern Sudan has just established its juvenile justice system after a long absence of the rule of law, thus the new juvenile justice system may be so harsh in controlling juvenile delinquency;
- The new juvenile justice system may be too inadequate to control a long time deep rooted high level of juvenile delinquency.
- The concept of juvenile justice is a new concept in Southern Sudan justice system and therefore, its application may pose challenges to the stakeholders as the entrenched customs and traditions may not be easily surmount or the valuable customs may by faced out unreasonably by the new juvenile justice system

8. Literature Review

The Republic of the Sudan to which Southern Sudan is still legally attached in matters of sovereignty, ratified the Convention on the Rights of the Child in late 1990. Despite this, insufficient literature is available on the juvenile justice system. This is partly because of instability that had engulfed Southern Sudan during the civil war or partly due to the unwilling attitude of the Khartoum repressive regimes that kept Southern Sudan underdeveloped in all aspects including lack of funds for legal research development.

This explains why much of the work relied on in this dissertation for the purposes of comparative analysis is foreign and may not adequately reflect the realities of the Southern Sudan juvenile justice system. It is noted by the researcher that most of the researches done on this subject fail to address juvenile legal matters in Southern Sudan. Further, it is noted that the available literatures is the result of the work of NGOs largely based on humanitarian aspects rather than on a comprehensive legal analysis of the existing juvenile legislations.

Another reason is that, most of the available literatures dates to the time before the promulgation of the Child Act, 2008 which is the primary legislation concerned, concerned with juvenile justice system, making it more of an international analysis than of a Southern Sudanese standard.

It is also important to note that the previous predominant legislations in the Sudan such as the 2004 Child Act were written in Arabic, and therefore any work done before 2008 was based on a translated version of the laws and the facts.

This dissertation avers that although the necessary legal frameworks for a juvenile justice system has been promulgated and enacted, there still exist impeding hurdles to the implementation of the same. There is a need to revisit all those customs and traditions whose force of law embattles not only the juvenile justice system but also the prevalence of the rule of law as a whole. This dissertation acknowledges the recognition accorded to customs and traditional authorities by the Interim Constitution of Southern Sudan. This has had the effect of strengthening resistant attitudes of the stakeholders who still cling to old practices when there was no law and making compliance with the new law an uphill task.

Several principles on juvenile justice have been developed both by individual writers as well as international bodies in form of Conventions, Protocols and Declarations; however these instruments could only be persuasive in Southern Sudan because it is acknowledged that *"a home grown legal system is preferable since it would embody the belief and spirits of the people"*.

Sewanyana L. a Ugandan writer states that "*a comprehensive juvenile justice system should foster the well-being of the child offender and ensure that a proportionate reaction by the authorities to the nature and character of the offender as well as to the offence should be encouraged. This can only be guaranteed by ensuring that juvenile justice standards are established and upheld*[36]". Sewanyana's work would be relevant to Southern Sudan since it is believed to have established its juvenile justice system that can only be applauded if the practices show that standard principles for protection of the juveniles' rights are upheld. The situation of juvenile justice system in Southern Sudan is no different from the IRIN report on Liberia which revealed that "*four years after the end of Liberian's brutal 14-year war, the juvenile justice system is barely functional. Its problems mirror the breakdown of the judicial system as a whole "a source of deep concern". The report went on to say that rebuilding the juvenile justice system will be a daunting challenge*" [37]. The IRIN report on Liberia is relevant to the juvenile justice system in Southern Sudan which is barely functional despite the fact that standard Child Act, 2008 has been enacted, however, the practices still defies description due to lack of trained personnel in the administration of juvenile justice system.

The Declaration of the Rights of the Child, commonly known as the 'Geneva Declaration', provides that "*men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed that the delinquent child must be reclaimed, regained and reestablished and to be given the means requisite for their normal development, both materially and spiritually*" [38].

The work which is also relevant for this research is a report of JJPL on Louisiana which stated that *"locking children away in juvenile prisons steals a piece of humanity from all of us. That when we condone putting young people behind bars, violent institutions far*

[36] Juvenile Justice System in Uganda, January- July 2009
[37] MONROVIA, 10 September 2007 (IRIN)
[38] John Kamya , A Compilation of International and Regional and Uganda's Legal and Human Rights Instruments

from their homes and communities, we are complicit in the destruction of their childhood"[39].

This report is relevant since most of the juvenile offenders languish in prison in Southern Sudan as illustrated by Alphaxard K. Chabari that "*it is the common practice of putting children in custody on behalf of their relatives"*[40] despite the fact that criminal act is a personal responsibility. Therefore, putting children in custody on behalf of their relatives is not only a violation of the provisions of the Child Act, but also defiance to the principles of criminal law in general.

Since this present research is a critique on juvenile justice system in Southern Sudan, it considers such acts as violation of section 136 (3) of the Child Act, 2008 which provides that no child accused of infringing the law shall be removed from parental supervision, either partly or entirely, unless the circumstances of a case make it absolutely necessary. The foregoing work has a crucial bearing in the plight of juveniles under the fragmented legal system in Southern Sudan. It is indeed an abhorrent, degrading or inhuman treatment for the young person to be incarcerated in a flimsy detention without his/her parents being informed[41].

The United Nations Mission in Sudan (UNMIS) has also produced a report on the Juvenile Justice System in Southern Sudan and in its Biannual Report[42], two common themes run through the various categories of child rights violations. First, the police and other authorities appear to use arrest and detention as a first response to reports of child offenders. This leads both to overly harsh treatment of children. Moreover, arrest and detention should be the last resort where children are concerned, not a reflexive first response as provided under section 150 (1) of the Child Act which provides that detention of a child in police custody, whether in a police cell, police vehicle, lock-up or any other place shall be used as a measure of last resort and for a period not exceeding twenty four hours.

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[39] JJPL, 1998 Report

[40] Alphaxard K. Chabari, Adapting Restorative Justice Principles to Reform Customary Courts in Dealing with Gender-Based Violence in Southern Sudan, November 2008

[41] Ibid

[42] UNMIS Report: Biannual Report on Juvenile Justice in Southern Sudan, November 2007

Second, child protective laws that do exist are not always properly applied in Southern Sudan... corporal punishment, for instance, was illegally imposed in a number of cases[43] in violation of Article 21 (1) (f) of ICSS that clearly prohibits corporal punishment against children. This report is relevant since it shows how the practices in Juvenile justice system contradict the legislations in Southern Sudan.

Hirschi and Travis in their work **'Causes and Delinquency'**[44] suggested that deserved punishments for juveniles should be scaled well below those applicable to adults for three reasons: (1) juveniles' lesser culpability, (2) punishments' greater bite when applied to adolescents, and (3) a principle of greater tolerance in the application of penal censure to juveniles. The juvenile justice system has evolved over the years based on the premise that juveniles are different from adults and juveniles who commit criminal acts generally should be treated differently from adults. Separate courts, detention facilities, rules, procedures, and laws were created for juveniles with intent to protect their welfare and rehabilitate them, while protecting public safety[45]. This is relevant because if these suggestions are observed in Southern Sudan, the plights of juveniles under the hands of stakeholders are likely to improve.

Hirschi and Travis believe in the adage that *"prevention works better and is cheaper than treatment"*. Since there are factors which allure young persons into delinquency in Southern Sudan, it will be beneficial if the authorities devise ways and means that prevent inadvertent criminality of juveniles. That delinquency is seen as a function of the surroundings or environment that a juvenile lives in. The saying that, "society made me do it" could help to better understand this perspective[46]. Hirschi and Travis' work underscores the fact that the juvenile justice system is a complex web of people and agencies and to understand the system requires baseline knowledge of the statistical trends during the past decade that have shaped the system's ability to function and the roles played by the various components of the system[47].

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[43] Ibid
[44] Hirschi, Travis, Causes and Delinquency, University of California, 1969
[45] Ibid
[46] Ibid
[47] Ibid

Since there is lack of case law reporting in Southern Sudan, it is difficult to find judicial authority. For this reason, a foreign case such as **The King vs. William Groombride**[48] is a persuasive illustration. In that case, the prisoner was indicted of rape upon an infant under the age of ten. The defendant was under 14 years and was therefore not criminally responsible for rape. Court held that an infant under the age of 14 is unable to commit rape. Therefore, it could be borne in mind that adultery could not be committed by children of tender years for their incapacities to have carnal knowledge. It could also be an insolent contravention of Article 16 of the Interim Constitution of Southern Sudan (ICSS) which prohibits the detention or arrest of any person "except for specified reasons and in accordance with procedures described by law".

The Report of Save the Children-Sweden finds that children in conflict with the law in Southern Sudan have no legal aid or official sources of psychological support. Their main source of support is the family" [49]. That in most states, there are no special pre-trial remand homes. For instance, in all states, the police put children (and adults) in prison as they wait to be produced in court"[50]. Some of the children are confined for many days and even months without any contact with outside world and without their relatives knowing. The report gives example that some of the children in Rumbek prison claimed that they had been arrested while going to school[51].

The report went on to say that many criminal suspects in Southern Sudan spend long periods in pre-trial detention- sometimes up to a week or more- and juvenile detentions are not exceptions. A lack of resources, infrastructure, investigative efficiency, and trained legal professionals all contribute to this problem.

The researcher of this work had the opportunity to visit both police custodies and prisons in Juba and found out at first hand juveniles who spent more than a year without trial as the investigation could not have been finished earlier for the juveniles to be produced in court. Other juveniles were in prison without their parents being aware of their incarcerations. This is a staunch contravention of section 187 (1) (k) of the Child Act

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[48] (1983) 173 ALLER 256

[49] Alphaxard K. Chabari, Adapting Restorative Justice Principles to Reform Customary Courts in Dealing with Gender-Based Violence in Southern Sudan, November 2008

[50] Ibid

[51] Ibid

which provides that every child in detention has the right to be detained as close as possible to family and to have regular contact with family and guardians.

Several impediments that have bogged down the implementation of juvenile justice system in Southern Sudan are being observed as ranging from institutional incapacities to poor facilities. According to the United Nations Mission in Sudan (UNMIS), the final deficit in Southern Sudan's juvenile justice system that deserves mention is the lack of trained personnel to attend tc children's real psychological and emotional needs. Many of the difficulties noted could have been remedied by a skilled social worker. Social workers should be well placed to sensitively guide children through an unfamiliar, and often frightening legal environment. In addition, social workers can evaluate a child's family situation and the unique pressures that he or she may face[52]. The report found that most of the crimes of which children are arrested and detained in Southern Sudan include adultery and that children are generally arrested for adultery when they are suspected of engaging in pre-marital sexual relations.

The commentary on the UN Standard Minimum Rules for the Administration of juvenile Justice[53] is such a useful proclamation on which standard juvenile justice system must be molded for it provides "*broad perspectives which refer to comprehensive social policy in general and aim at promoting juvenile welfare to the greatest possible extent, which will minimize the necessity of intervention by the juvenile justice system, and in turn, will reduce the harm that may be caused by any intervention. Such care measures for the young, before the onset of delinquency, are basic policy requisites designed to obviate the need for the application of the rules*".

Southern Sudan could be a better place for juvenile offenders if due process is accorded to the spirit of the legislated laws.

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[52] Ibid

[53] Beijing Rules 1985

CHAPTER 2: International, Regional Instruments and Traditions on Juvenile Justice System

This chapter discusses two sections of which the first section explores the international and regional instruments that recognize specific norms and principles to be observed in the administration of juvenile justice system by the state parties to them. International and regional instruments are expected to be incorporated into the states' legal machinery. They may be in form of soft law premised principally on the international customary practices, or they may have a binding force of law which does not require deviance by the states. When a state ratifies them, the state has promised to be bound by them. The second section of this chapter discusses the traditions and customary notion of juvenile justice.

A. The International and Regional Legal Instruments on juveniles Justice System

This section explores the international and regional position on juvenile justice system. It is discussed in such a way as to draw an insight from the concepts and principles which are recognized and emphasized in these international and regional instruments. These instruments are very important in the sense that if they are accepted and implemented, they would be beneficial not only to the individual juvenile offenders but also to the victims and the wider community. The role of Non Governmental Organizations is also discussed in order to understand that juvenile justice system does not necessarily require national efforts but also involves international and regional authorities.

1. The International Instruments on Juvenile Justice

In the international arena, the issue of juvenile justice system is well addressed in a number of instruments; Rule 1.6 of the Beijing Rules is to the effect that juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

Rule 11 of the same Rules provides for Diversion and it is to the effect that consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting

to formal trial by the competent authority. That the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules. Rule 12 of Beijing Rules goes further for specialization within the police and as such, it is provided that "in order to best fulfill their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engage in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose. As to detention before trial, rule 13 of the Beijing Rules is to the effect that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. That the danger to juveniles of 'criminal condemnation' while in detention pending trial must not be underestimated. That it is therefore important to stress the need for alternative measures.

In addition to the force of the UN safeguards, states that are party to the international Covenant on Civil and Political Rights (ICCPR) (article 5) and American Covenant on Human Rights (article 4 (5)) are prohibited from imposing capital punishment for offences committed by persons below 18 years of age, unless of course they add a reservation to this effect- as the United States of America have done[54].
Southern Sudan is a party to these instruments by virtue of the ratification by the Republic of Sudan to which it is still attached legally. As such, section 9 of the Penal Code provides that capital shall not be passed on the person who in opinion of the court is under sixteen years of age.

2. Regional Instruments on Juvenile Justice System

From the Regional context, the African Charter on the Rights and Welfare of the Child under Article 17 (1) [55] provides for the Administration of Juvenile Justice and it is to the effect that every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and

[54] Roger Hood, The Death Penalty. A World Wide Perspective, 3rd Edition, 2002
[55] OAU Doc. CAB/LEG/24.9/49 (1990) Entered into force Nov. 29, 1999

worth and which reinforces the child's respect for human rights and fundamental freedoms of others. State parties to the Charter shall particularly: (a) ensure that no child who is detained or imprisoned or otherwise deprived of his liberty is subjected to torture, inhuman or degrading treatment or punishment (b) ensure that children are separated from adults in their place of detention or imprisonment (c) ensure that every child accused of infringing the penal law: (i) shall be presumed innocent until duly recognized guilty (ii) shall be informed promptly in a language that he or she understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used; (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence; (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal; (d) prohibit the press and the public from attending the trial

Article 17 (3) of the ACRWC further emphasizes that the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. This position is the same in Southern Sudan since it is a party to these states. Section 138 of the Child Act provides that a child between twelve and fourteen years of age is conclusively presumed to lack capacity to commit criminal act.

Notwithstanding the legislation generally, the massive displacement that forced the population both across borders and internally had exposed internally displaced juveniles in Southern Sudan to the wrath of lawlessness due to the absence of legal protection. The international community has been unaware of this or there has been no accessibility to the displaced camps. In the words of Roberta Cohen & Francis Mading Deng, *"whereas refugees crossing national borders benefit from an established system of international protection and assistance, those who are displaced internally suffer from an absence of legal or institutional bases for their protection and assistance from the international community"*[56].

[56] Roberta Cohen & Francis Mading Deng, The Forsaken people, 1998

3. Some of the Principles Applicable to Juvenile Justice System

As the institutions charged with criminal justice system are required to follow certain principles and practices, the same principles and practices are also applicable to juveniles who come into conflict with the law.

In juvenile cases, the principle of fair trail must be ensured and upheld. The right to a fair administration of justice holds such a prominent place in societies based on the rule of law that international human rights has established very detailed obligations of states to ensure by means of positive action that their domestic courts' proceedings correspond to minimum international standards[57]. A Human Rights Watch Report on Southern Sudan found that *"There is No child protection; and that, the abusive practices in the administration of justice and weaknesses in Southern Sudan's justice sectors have given rise to various human rights violations in the administration of justice.*[58]*"*

The state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability.

In **Hussanara khatoon (iv) v. State of Bihar**[59], speedy trial was held to be an essential ingredient of reasonable, fair and just procedure granted by the constitution and the state is to devise such a procedure as would ensure speedy trial to the accused.

Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and to the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated[60].

The legislations in Southern Sudan recognizes this principle and as such, article 23 (2) of the Interim Constitution of Southern Sudan provides that *"any person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her".*

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[57] Janusz Symonides, Human Rights Concepts and Standards, Reprinted 2005
[58] Human Rights Watch, Insecurity and Human Rights in Southern Sudan, 2009 P. 33
[59] (1980)1 SCC 98
[60] Zahira Habibulah Sheikh (5) v. State of Gujarat, (2006) 3 ACC 374 at P. 395

Fair trial in the proceedings against juvenile offenders according to section 144 (1) of the Child Act, is to the effect that where the arrest of the child above the age of twelve years has taken place, the policeman or policewoman must inter alia inform the child in a language that the child understands of the allegation against him or her, the right to remain silent and the right to have the of the Child's parents or guardian or any appropriate adult contacted. These are elements of fair trial.

4. The Role of Charitable Non Governmental Organizations

The preamble of the UN Convention on the Rights of Child recognizes that mankind owes to the child the best it has to give, and call upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national government to recognize the rights of the child and their observance by legislative and other measures progressively taken in accordance with the principles set forth in this Convention. It is this explicit call upon mankind by the UN that Charitable Non-Governmental Organizations take it upon them to play an important role in the Juvenile Justice System. The reason for allowing Charitable NGOs to participate in the administration of Juvenile Justice System in Southern Sudan is geared at the compliance with the provision of article 37 (b) of the UN Convention on the Rights of the Child, which emphasizes that imprisonment of children should be used as a last resort. Article 173 of the ICSS provides that the object of the local government shall be to encourage the involvement of communities and community-based organizations in matters of local government, and promote dialogue among them on matters of local interest.

Southern Sudan recognizes the role played by the NGOs in the administration of juvenile justice system but they are required to meet certain criteria to render their assistance to juveniles. It is a legal requirement that for an NGO to render charitable services to the needy children, it must be registered for such purpose. It is this requirement that section 133 (1) of the Child Act[61], provides that application for registration of all non-governmental organizations which want to operate children's home shall be submitted to the Chief Registrar of Companies, Business Names, Non-governmental Organizations and Associations at the Ministry of Legal Affairs and Constitutional Development.

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[61] Ibid

The placement of a child in the child care centre in Southern Sudan according to the Child Act is that, *"institutional care for a child shall be a measure of last resort, to be used only when a child has no one to take care of him or her and for the shortest possible period*[62]*"*.

The role of NGOs in juvenile justice is self-evident because in most of the institutions visited during the field work for this research, most of the educational support both materially and morally were said to be from the NGOs. For example, in Juba main prison, the researcher was told that the scholastic materials to the detained juveniles are being provided by NGOs mainly by the War Child and the Right to Play Organizations respectively for juvenile prisoners. What should be noted from the role of NGOs that provides educational materials to the juvenile detainees is in compliance with the legal right of juveniles to education and this is of legal significance to juvenile justice.

B. The Traditional Treatment of Juvenile Offenders

This section discusses the ways in which juvenile criminal acts or omissions are traditionally handled in a customary setting in Southern Sudan. It analyzes whether the customary practices could still be maintained and whether these traditional practices are sufficient, relevant and effective in the administration of justice in general and juvenile justice in particular compare to modern juvenile justice system enshrined in the international and regional instruments which are also echoed by the Interim Constitution of Southern Sudan 2005, the Child Act, 2008.

1. The Traditions and Customs vis-à-vis Juvenile Justice System

Nearly all communities in Southern Sudan adhere to their customary practices thereby making customary laws indispensable in the administration of justice in general and juvenile justice in particular. Customary Law is defined as *"a law consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic; a part of a social and economic system that they are treated as if they were laws. In contrast with the statutory laws, customary law may be*

[62] section 131 (1) of the Child Act, 2008 (Laws of Southern Sudan)

said to exemplify implicit law, its use therefore describe customary law in terms that will reveal to the maximum this quality of implicitness. A custom is not declared or enacted, but grows or develops through time. The date when it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author, there is no person or defined human agency we can praise or blame for its being good or bad. There is no authoritative verbal declaration of terms of the custom; it expresses itself not in a succession of words, but in a course of conduct"[63].

The researcher believes that in many African societies custom out weighs the law and as such, the communities in Southern Sudan are no exception in an adherence to their customs. Thus the statutes in Southern Sudan provide for the application of customary laws when necessity requires and accordingly, section 6 (2) of the Penal Code Act, provides that in conviction for offences committed within Southern Sudan, Courts may consider the existing customary laws and practices prevailing in the specific areas[64].

The baffling scenario is that the customary institutions in Southern Sudan lack enforcement mechanism and therefore, it is said that *"the execution or enforcement of the provisions of criminal law requires the existence of certain institutions i.e. there must be judges to try persons against criminal charges brought, a police to prevent the commission of crime, apprehend the criminals and present them to courts for trial; and prison warders to take the custody of the convicts or detainees who are waiting for trial who must be confined. There must also be prisons or cells where these convicted prisoners or waiting for trials must be confined. Without these institutions and facilities, it is unlikely that the criminal law can achieve its full objective"*[65]. These law enforcement agencies or institutions are non-existence in the traditional setting in Southern Sudan, lest the statutory institutions are to assist the customary authorities in the enforcement of customary laws. In order to evaluate the efficacy of the traditions and customs vis-à-vis statutory laws the followings discussions explore some of the

[63] Lon L. Fuller, Anatomy of the Law, 1968
[64] Laws of Southern Sudan, 2008
[65] John Wol Makec, The Customary Law of the Dinka, 1986

customary laws and how they deal with the juvenile cases compare to modern statutory system.

2. Juvenile Crimes and the Application of Customary Law

Customary laws and the institutions of traditional authorities are recognized in Southern Sudan and as such, the ICSS provides that judicial power is derived from the people and shall be exercised by courts in accordance with the customs, values, norms and aspirations of the people[66]. The laws such as, the Interim Constitution of Southern Sudan and Penal Code Act provide for the crimes of customary nature to be referred to the traditional courts but these laws fail to specify which crimes are of customary nature. It is this reason that section 6 (2) of the Penal Code Act provides that, in the application of this Act, Courts may consider the existing customary laws and practices prevailing in the specific areas. Therefore, whenever an offence of customary nature is committed, the courts are bound to apply the customs prevailing in the area; or refer the case to the customary court[67]. Such practices are also applicable in juvenile cases. This is on the belief that *"there is inherent human desire to apply a legal system whose values of principle derive their origin from the local traditions of the people. That precisely, people generally attached more allegiance of respect to their customary home grown legal principles in contrast to the laws which derive their authority from alien origins". It is people's allegiance which provides legal validity or authority to their home made laws"*[68].

While commenting on the Dinka customs, Stubbs once said that *"the Dinka have no criminal law as understood by European; but the most important thing in their customs is that they aim at adjusting the balance of values upset by any act. The reasons for damage or the manner in which it was inflicted were immaterial"*[69].

Thus, the application of customary laws in the juvenile crimes among communities in Southern Sudan is by paying compensation to the relatives of the victim. Among the

[66] Article 126 (1) of the ICSS 2005
[67] Section 11 of the Local Government Act, 2009
[68] John Wol Makec, Judge of the Supreme Court and Town Rural Courts in Southern Sudan Dinka Customary Law
[69] Stubbs, Customary Law of the Aweil Dinka, (Sudan Law Journal Report 45753 (1962)

Dinka tribe in Southern Sudan, *"whenever ... a minor or a child causes death of another person, the relatives of the minor or a child shall pay 30 cows to the deceased family. No further punishment than vicarious liability on the parents"*[70]. This is also similar in minor offences such as theft and sexual offences where the parents or relatives are forced to pay the value of the stolen property to the owner of the property or pay one cow for the loss of virginity of the girl to the parents of the girl respectively. Among the Dinka, the boys are punished by fine and payment of a cow to the parents or relative of the girl and the reverse is not applied to the girl who is involved in pre-marital sexual intercourse. The only punishment for a girl is that she may be forced to marry someone even though she is not consenting to marry such a man.

In other communities such as Kakwa, Pajulu Kaliko and Luguara of Equatoria Region, it is a practice that where minors are involved in pre-marital sexual inter course, the minors shall be chastised and warned not to repeat that act[71].

Rape was more recognized when it involved a young unmarried girl or virgin. The standard punishment was for the offender to pay damages to the parents. Such damages would be at least equal to the bride price that parents would have received from a more patient suitor. Sometimes the offender would be forced to marry the girl/victim[72].

The Bari juvenile justice system was also narrated by a Bari elder interviewed during the field research[73]. According to the Bari customary law, in case of the homicide, vicarious liability is imposed on the parents/guardian of the juvenile offender. This is usually in form cattle and in case of lack of cows; the sister of the offender is surrendered to the relatives of the deceased. The blood compensation would normally be the full dowry but in exceptional cases would be less than full dowry. The seriousness or the degree of culpability is taken into account in assessing the compensation or damage. There was no imprisonment but the juvenile offender would be evacuated to another area to allow the tension to subside. This means that the offender would not be made accountable for the

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[70] Section 26 of Re-statement of Dinka Padang (Baliet) Customary Law, 1998

[71] Section 11 (1) of the Code of Customary Laws of the Kakwa, Kuku, Pajulu, Kaliko and Luguara Ethnic Groups of Yei/Kajo-keji of equatorial Region (1994)

[72] Amadi (1983:19) Doing justice without State, p. 191

[73] Bari Elder interviewed in Juba on 7th August 2010

commission of the offence. The chiefs were responsible for settlement of the act which has upset the harmony in the society[74].

The types of crimes that were being committed by children or young persons to which customary laws could suitably get remedies have challenged during the war. The current crimes being committed children were not known and had no definition in the customary laws.

The most frequently reported juvenile crimes in Southern Sudan after the end of the war include drug abuse, adultery, alcoholism; robbery and violence that have proliferated among young persons. Before the war, some of the crimes such as robbery were not heard of and when they occurred, it would be solved informally by conducting trial and the arraignment of juvenile before elders in the traditional set up where the elders would counsel and discipline the young for the offending actions. Customarily, the solution to juvenile offences to date is still applauded for its effective restoration of harmony, values and normalcy of the community after the commission of an offence by juvenile especially in serious offences such as homicide. Other known customary sanctions against juvenile offenders were social reprobation, unpopularity, loss of the privileges[75]. With the trend of new crimes by juveniles, certain matters have now been taken outside the function of the customary and family settlement. For instance, in intrafamily murder cases, jurisdiction is with the state courts, although the tort aspect remains a family matter[76]

3. Conflict o f Customs and the Laws on Juvenile Justice System

Customarily, the reasons for awarding damages or the manner in which it was realized for criminal acts were immaterial. According to Charles T. Call, one of the most difficult tensions in democratizing post-war societies is addressing traditional authorities and local informal mechanisms of justice since *"the new central regime cannot sweep aside such authorities without jeopardizing their own legitimacy"*[77]. This implication prompted the Interim Constitution of Southern Sudan to recognize the importance of customs and traditions as evidenced under Article 5 (c) of the ICSS which provides that one of the

[74] Information collected during an interview with the elder of the Bari Community in Juba by the researcher of this dissertation
[75] Stubbs,Customary of the Aweil Dinka, Sudan Law Journal Report 45753 (1962)
[76] Stubbs,Customary of the Aweil Dinka, Sudan Law Journal Report 45753 (1962)
[77] Charles T. Call, Constructing Justice and Security After the War, 2007

sources of legislations in Southern Sudan shall be customs and traditions of the people of Southern Sudan. It is also provided under the same constitution that the judicial power in Southern Sudan is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspirations of the people and in conformity with this constitution and the law[78].

As for the application of customary laws in Southern Sudan, Article 174 (3) of the ICSS provides that, the courts shall apply customary law subject to this constitution and the law.

The foregoing constitutional provisions are the endeavours to harmonize the customary laws with the statutory laws in Southern Sudan so as to achieve dominance of the rule of law. Professor Allott states that *"any new law must, in my submission, therefore try- so far as possible – to build on what is already there. He acknowledged that to introduce a novel law having no previous connection with the country would be an exercise doomed to failure in modern African context. According to him, new laws must build on the existing ones so that changes take gradual process without friction[79]"*.

Francis Mading Deng in acknowledging the entrenchment of traditional authorities states that *"the institution of chieftainship is far too deeply rooted to be suddenly eliminated if at all; and that, it is crucial that chiefs be equipped for their role in contemporary society. One obvious qualification should be a certain amount of education. While allowance should be made for the present generation of illiterate chiefs, some sort of training for them should be introduced. For long-range purposes education should be a prerequisite to chieftainship. The primary step along the lines of reform on the national level is to remedy ignorance. The maxim should be "study now, reform latter" or at best do both concurrently. Once court is integrated and judges well trained in handling the complex problems of legal synthesis, evolutionary integration should lay stress on case-law rather than on legislation. Although legislation is vital in defining goals and laying standards, the courts are continually confronted with the particular problems of social*

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[78] Article 126 (1) of the ICSS, 2005

[79] Allot: the Codification of the law of civil wrongs in common law African countries August 1964 (unpublished paper prepared for the conference on integration of customary and modern legal system)

change, and it is necessary that the law be left flexible[80]". The point to draw from this intellectual proposition is that abrupt change will do more harm than allowing the traditional practices to be faced out gradually.

Since the position of the constitution on the customary law is explicit, the other relevant laws would not be expected to deviate contrary to the recognition accorded to customs and traditions by the constitution. This is because the constitution does not only recognize the customs and traditions but also recognizes the institutions that administer them. This is provided under Article 174 (1) of the ICSS that: the institution, status and role of traditional authority, according to customary law, are recognized under this constitution. Traditional authorities are believed to hold such important position in the administration of justice as revealed by the research carried out for the UK Home Office in 2000 on the relative merits of lay and professional magistrates. This research found that although the magistrates were not representative of the community, the use of lay magistrates generally commanded public confidence and should be retained[81].

As customary institutions or authorities are recognized by law, they are expected to play significant role not only in general justice system but also in the administration of juvenile justice system. It is on this basis that the Local Government Act, 2009 also recognizes the application of customary law in matters of customary nature. Section 99 of the Act[82] provides for the court known as the 'C' Court, and it is to the effect that; there shall be established in each county a 'C' court which shall be the highest customary law court of the county. The 'C' court shall have the competence of deciding inter alia on; criminal cases of customary nature referred to it by a competence statutory court. Under this Act, the rights of children are provided for and as such, section 111 provides that every child has the right to life, survival and development; to be free from any form of discrimination and to be free from corporal punishment, cruel and inhuman treatment by any person or institution.

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[80] Francis Mading Deng, Tradition and Modernization, P. 38
[81] Morgan & Russell
[82] The Local Government Act, 2009

It is upon this background that, *"there is a rift between statutory law and the customary law with regard to the treatment of juveniles*[83]*"*. It must be noted that many children whose cases are dealt with within magistrates' courts do not have birth certificates. As a result, it is not uncommon for judges to treat children as adults"[84]. The professional judges are more efficient while the lay magistrates depend mostly on the clerks for interpretation of written laws[85].

Roscoe Pound once said: *"what the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste"*[86]. Therefore, what needs to be remembered is that *"the conflict between statutes and customary law in the proclamation of local authority area can be explained as a clash between traditional authorities and modernism. Traditional authorities can strategically use tradition to resist the homogenizing, atomizing and alienating effacement of history and particularity. The cost paid by post-modernity that to many, seems inevitable in the new global order*[87]*"*. This is the situation in Southern Sudan where customs and traditions are legally recognized in generality without clear delimitation or definition of what constitutes crimes of customary nature. This is based on the belief that African societies have no criminal law as understood by Europeans and that, *"their customs aim at adjusting the balance of values upset by the accused. It follows also that when a crime has been committed, the damages are awarded and the reasons or manner in which the harm was inflicted is immaterial"*[88].

It could be observed from the foregoing notion of the customs in regard to criminal justice as a whole that modernization of society ought to be objectively pursued at extra paces with special indulgences to the modernizers, actual or potential to accelerate the process to the conventional justice system though the tradition still predominates. This is because *"reversing the situation into a new inequitable structure in which traditionals and their traditions are disregarded would only replace old problems with new ones. The*

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[83] Luther Sumo, Protection Lawyer with International Rescue Committee
[84] Protection Lawyer with International Rescue Committee
[85] Morgan & Russell
[86] Justice According to Law p. 29
[87] Cf Glenn, Legal tradition of the World, (Oxford University Press), P. 2000
[88] Captain Stubb, Readings in African Law, Vol. I at p. 178

law must integrate competing interests if justice is to be done and modernizing forces are to be mobilized with minimum disruption[89]".

Therefore, the quest for phasing out the traditional notion of the administration of justice requires collective adherence to the legislated laws. For instant, traditional authorities do not know the age of criminal responsibility in the sense that it is now understood in modern societies. This implies that traditional authorities may apply rigid customary sanctions upon young offenders and for that reason, a juvenile would end up being treated as an adult. This is not currently the case in Southern Sudan because the new Child Act sets the age of criminal responsibility under section 138 (1) at twelve years. This is a great shift from the traditional maturity which is marked by the age sets that do not necessarily reach 18 years. For instant *"initiation (head Marks) in some communities takes a person out of social infancy which carries certain duties and assumed capacities and from which every young cultural youth longs to get away"* [90] though such assumptive capacities may lure them into the commission of criminal acts.

[89] Francis Mading Deng,
[90] Francis Mading Deng, Tradition and Modernization, P. 38

CHAPTER 3: Stakeholders in Juvenile Justice in Southern Sudan

This chapter discusses the roles of the institutions and/or stakeholders in the administration of juvenile justice in Southern Sudan. The institutions responsible for the juvenile justice system in Southern Sudan were identified through the provisions of the Interim Constitution of Southern Sudan, 2005 and the Child Act, 2008. They include statutory institutions, customary authorities and Non Government Organizations (Both CBOs and INGOs).

1. The Police

This section defines the police, the powers and procedures that the police follow in the administration of juvenile justice system and the units designated within the police that deal with the juvenile offenders.

The term 'police' refer to the governmental department charged with the preservation of public order, the promotion of public safety, and the prevention and detection of crime[91]. The Southern Sudan Police Act under section 7 (b) provides for functions and powers of the police services personnel which are to ensure security of Southern Sudan and protecting people's lives and property[92].

The UK Police Act of 1861 defines the police force as an instrument for prevention and detection of the crimes. It said that *"since the first contact an offender has with criminal justice is usually with the police or law enforcement agency that investigates a suspected wrong-doing and makes an arrest, policing has included an array of activities in different contexts, but the predominant ones are concerned with order maintenance and the provision of services"*[93]. The police are primarily concerned with keeping the peace and enforcing criminal laws based on their particular mission and jurisdiction"[94]. In Southern Sudan, the constitutional mission of the police service is to prevent, combat and investigate crime, maintain law and public order, protect the people in Southern Sudan and their properties[95]. This mission is further expanded in the southern Sudan Police Act,

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[91] Brayan A. Garner(Editor-in Chief), Black Law Dictionary, 8th Edition at page 1195
[92] Section 9 of the Southern Sudan Police Act, 2009
[93] Ibid
[94]Neocleous Mark, Fabricating Social Order: A critical History of Police Power (2004) London: Pluto Press. Pp. 93-94. ISBN
[95] Article 162 (1) of the Interim Constitution

2009 under section 15 which provides for the Community Policing and it is to the effect that without prejudice to the generality of the Act, the community police shall endeavour to achieve inter alia, enhance respect of human rights, study the nature of the problems and factors in connection with crime and delinquency and to provide assistance to crime victims[96]. It is because of these preventive measures that the police Act embraces the involvement of the community through the unit called community police.

a. Procedure for Arrest of a juvenile offender by the police

The term arrest is not defined in the relevant laws of Southern Sudan. The Code of Criminal Procedure Act, 2008 under section 30 (2) (g) only provides that the police shall have the power to arrest, in accordance with provisions of this Act and any other applicable law; and that the police shall execute summons, warrants of arrest and search, in accordance with the provisions of this Act. The Police Act, 2009 on the other hand had not also been helpful for the definition of the term arrest either[97] i.e. the manner in which arrest can be effected or in other words, what amount to an arrest? The duties of the police service under the Act are to pursue and arrest offenders[98].

According to Gerald N. Hill and Kathleen T. Hill, "*an arrest may occur (1) by the touching or putting hands on the arrestee, (2) by any act that indicates an intention to take the arrestee into custody and that subjects the arrestee to the actual control and will of the person making the arrest, or (3) by the consent of the person to be arrested. There is no arrest where there is no restraint, and the restraint must be under real or pretended legal authority*[99]". Precisely, arrest means a seizure or forcible restraint, the taking or keeping of a person in custody by legal authority, especially in response for criminal charge; and specifically, the apprehension of someone for the purpose of securing the administration of the law, especially of bringing that person before a court[100].

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[96] The Southern Sudan Police Act, 2009
[97] Laws of Southern Sudan
[98] The Southern Sudan Police Act, 2009
[99] Gerald N. Hill and Kathleen T. Hill, Burton's Legal Thesaurus, 2007
[100] Bryan A. Garner (editor-in-Chief, Black Law Dictionary at P. 116

In the words of Francis Ayume, arresting a person, therefore, means interfering with his personal liberty and therefore cannot move about as he likes[101]. In making an arrest the arresting person shall actually touch or confine the body of the person being arrested unless that person submits to custody either by word or conduct[102].

The purpose of arrest is that "*an arrest serves the function of notifying the community that an individual has been accused of a crime and also may admonish and deter the arrested person from committing other crimes. When warranted, the police officers are empowered to use force and other forms of legal coercion and means to effect public and social order*"[103].

An arrested person should not be subjected to more restraint than is necessary. For example if a police officer comes across a young lad trying to steal a tyre from a motor vehicle and asks the lad to follow him to the police station and the lad willingly agrees without any danger of his escaping, there is no need to handcuff him and push him around.

It is to be noted that normal arrest requires a written warrant[104], and every warrant of arrest issued by a Public Prosecution Attorney, Magistrate or Court shall be in writing, signed or sealed by the Public Prosecution Attorney, Magistrate or Court as the case may be. It is provided under the Criminal Procedure Act that:

(a) any police ... may arrest any person for whose arrest he or she has a warrant, or whom he or she is directed by a Public Prosecution Attorney, Magistrate or Court; or

(b) who has been involved in an offence for which pursuant to this Act, or any other law, the police may arrest without a warrant[105].

This means that an arrest may be effected with or without a warrant; but in most cases warrant of arrest must be obtained.

In the US case of **Warden v. Hayden**[106], the Supreme held that felony arrests in places not open to the public generally do require a warrant, unless the officer is in hot pursuit of a fleeing felon. Under the English law, the police constable may reprimand and/or give a

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[101] Francis J. Ayume, Criminal Procedure and Law in Uganda, 1986
[102] Ibid
[103] Harper, Douglas, Police: online Etymology Dictionary. http://www.met.etymonline.com
[104] Section 78 (1) of the Code of Criminal Procedure Act
[105] Section 76 of the Criminal Procedure Act, 2008
[106] 387 U.S. 294, 87 S. Ct. 1642, 181. Ed. 2d. 782 (1967)

warning to the juvenile. The position is that where a constable has evidence that an offence in respect of which there is a realistic prospect of conviction has been committed by a child or young person who has not been previously convicted of an offence, the offence is admitted, and the constable is satisfied that it is not in the public interest to prosecute that child or young person the provision of CDA 1998, section 55 relating to reprimand and warning apply[107].

In Southern Sudan, special attention has been paid under the Child Act for the procedure and manner in which a juvenile offender can be arrested. According to the Act, the arrest of a juvenile offender under section 139 (1) of the Child Act[108] is that the police shall arrest a child only if there is reasonable suspicion that the child has committed a serious crime and there is no alternative to arrest can be found. Subsection 4 of the same section is to the effect that an arrest of a juvenile shall be made with due regard to the dignity, well-being and special status of the child.

When the arrest of the child is effected as provided under section 139 (1) above, the arresting officer must comply with the provision of section 145 (1) of the Child Act, 2008 which provides that the police officer must inform social worker in whose area of jurisdiction the arrest of a person under the age of eighteen but above the minimum age of prosecution has taken place, of such arrest within 12 hours.

It is also required under section 146 (1) of the Child Act, 2008 that where a child has been arrested, the police officer who has arrested the child, must notify the child's parents, guardian or a family member of the arrest within twelve hours, and give relevant person or persons a written notice requiring such person to attend an assessment at a specified time and place.

This provision is compatible with rule 10 of the Beijing Rules that "*upon the apprehension of a juvenile, his or her parents or guardian shall be immediately notified of such apprehension, and where such immediate notification is not possible, the parents or guardian shall be notified within shortest time thereafter*". The Child Act also provides that if a police officer is uncertain about the exact age of the person suspected of

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[107] Jack English and Richard Card, Police Law, Tenth Edition at page 656

[108] Laws of Southern Sudan, 2008

having committed an offence, but believe that the age render that person protection under this Act, he or she shall take such person to social worker for age assessment within 24 hours[109].

The juvenile offenders like adults should be free from torture in all processes of criminal proceedings as per Article 22 of the Interim Constitution of Southern Sudan which provides that:

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This means that the police and the prison service which are entrusted with custody of juvenile offenders should refrain and desist from any act which may torture the juvenile both physically and mentally".

It should be noted that arrest of the child should only be resorted to where there is no alternative to arrest. This is made clear under section 141 which provides for alternative to arrest of a child and it is to the effect that an alternative to arrest shall include the followings:

i. requesting a child in a language he or she understands to accompany the policeman or policewoman to the place where an assessment be made

ii. Written notification to the child and, if available, the parents, guardian or family of that child to appear for an assessment

iii. Accompany the child to his or her home, where a written notice can be given to the child and parents, guardian or family.

Failure to inform the person arrested of the reason for his/her arrest in other jurisdictions results into a civil action for wrongful arrest and false imprisonment[110].

In Southern Sudan, arbitrary arrest without informing the arrested person of the reason for his/her arrest is a common practice. In an interview with the juvenile detainees in Juba main prison, the researcher confirmed the practice of arbitrary arrest and unlawful

[109] Section 162 of the Child Act, 2008
[110] Christie v. Leachinsky (1947) AC 573; (1946) KB 124

detention. For the purposes of example, one of the juvenile convicts Martin[111], a 17 years old accused under section 305 and 231 of SPC 2008 of stealing motor bike, a crime of which he was sentenced to serve one month under the supervision of the social workers; and the motor bike was surrendered to the owner, during the interview narrated the process of his prosecution which was smeared with a lot of irregularities starting from arrest, investigation and during the trial. He emphasized the cruelty of his arrest by the police who neither informed him of the reason for his arrest nor informed his parents or relatives as required by law.

b. Investigation of juvenile by the police

Criminal investigation is a lawful search for people and things useful in reconstructing the circumstances of an illegal act or omission and the mental state accompanying it. As such, investigation is said to be *"a probing from the known to the unknown, backward in time, and its goal is to determine truth as far as it can be discovered in any post-factum inquiry"*[112]. In general, an investigation is an official examination of the facts about a crime[113]. Useful definition of the term investigation is provided under section 5 (1) of the Criminal Procedure Act, 2008 that, investigation means the act of or process of finding out relevant facts that concern a crime, and includes all proceedings by the police acting pursuant to the directives of the Public Prosecution Attorney, Magistrate or Court, as the case may be, for the collection of evidence.

The authority to conduct investigation is provided under section 52 of the Code of Criminal Procedure Act, and it is to the effect that investigations shall be conducted by the police under the supervision and directive of the Public Prosecution Attorney, or the Magistrate, as the case may be, in accordance with the provisions of this Act. It follows also that the Public Prosecution Attorney or Magistrate may exercise the powers of investigation, or complete the investigation himself or herself, where necessity requires[114]. This is also echoed under section 8 (c) of the Police Act which provides that

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[111] Real name withheld
[112] Paul B. Weston & Kennth M. Wells, Criminal Investigation: Basic Perspectives, 7th Edition, 1997
[113] Oxford Advanced Learner's Dictionary
[114] Section 52 (1) Laws of Southern Sudan, 2008

the police shall carry out criminal investigation under the directives of public prosecution Attorneys[115].

As for the investigation of juvenile offender, section 144 of the Child Act, 2008 provides for the procedure after arrest of a child above the minimum age of prosecution and it is to the effect that:

"Where an arrest of a child above the age of twelve years, being the minimum age of prosecution, has taken place, the policeman or policewoman must observe the following procedures: if the child is in custody, bring such child to social worker in the area of jurisdiction for assessment. Notify the child in a language the child understands of the allegation against him or her. Notify the child in a language he or she understands of the followings: (i) The right to remain silent (ii) The right to have the child's parents, guardian, chief or any appropriate adult contacted (iii) The right to choose and to be represented by a legal representative on his or her cost; and (iv) The right to be provided with a legal representative by the state in serious offences".

Although the law is clear on the procedures to be followed in the investigation of juvenile offenders, practices had revealed that such procedures are not followed by the police investigators in Southern Sudan. A case in point is that of **Re Lokukulo**[116], a 16 year boy who narrated to the researcher that when he was arrested, the police did not caution him, among others, of his right to remain silent if he so wishes before extracting information from him which was later used against him. He was arrested by the police and investigation was conducted in absence of his parents and no social worker was present either despite the fact that he was legally unrepresented. Lokukulo was eventually convicted on his admission of guilt and sentenced to 3 years imprisonment for having stolen a motor bike.

The police investigators should ensure that juvenile offenders are investigated in present of their parents or in present of social workers or legal representative in serious crimes. The importance of investigation in present of the parents or the right for notification of

[115] The Southern Sudan Police Act, 2009
[116] Not real name

the charge was discussed in the case of **Re Gault**[117], where a child was arrested in absence of his parents, was not legally represented and was not notified of the charge against him. In its decision, court stated that a juvenile has the right to notice of charge, assistance of legal counsel, confrontation and cross-examination of witnesses, and the protection of the privilege against self-incrimination. In Southern Sudan, the researcher had the chance to see several juveniles incarnated in the police detention centres when their parents or relatives were not aware of their detention. In a conventional criminal justice system, investigations are conducted by trained police personnel. This was not found to be the case in Southern Sudan where most institutions lack skilled personnel. Hence, the investigations are sometimes conducted by any police officer. The Department of investigation is supposed to be manned with specialized trained personnel. This was confirmed by one of the police officer interviewed at Munuki Police Station in Juba who told the researcher that *"although there are departments within the police, what had happened is a mere restructuring of the police*[118]. According to him, *"a successful police reform requires more than simply tinkering with policing organizations; it requires transforming the relationship between police institutions and society"*[119].

c. Detention of juvenile in the police station

Detention is the state of being kept in a place, especially a prison, and prevented from leaving[120]. It is one of the police powers to arrest and detain a person accused of any crime either through directive in the warrant or without a warrant in which case the police must report the arrest and detention to the public prosecution attorney or to the court as soon as possible. A detention may also be as a result of remand in custody for the purpose of investigation. This is explicitly provided under section 64 of the Criminal Procedure Act[121], that:

"*A person arrested by the police as part of the investigation, may be held in detention, for a period not exceeding twenty-four hours for the purpose of investigation. The public*

[117] 387 U.S. 1 (1962),
[118] Interview with Col. Izakaho Lado, officer in charge of Munuki Police Station, Juba West
[119] Charles T. Call, Constructing Justice and Security After the War, 2007
[120] Oxford Advanced Learner's Dictionary, 7th Edition
[121] The Criminal Procedure Act, 2008, Laws of Southern Sudan

prosecution attorney, or in his absence the magistrate as the case may be, where the matter requires the same, may renew detention of the arrested person, for a period not exceeding one week, for the purpose of investigation. The magistrate upon the recommendation of the public prosecution attorney may order detention of the arrested person, for the purposes of investigation, every week, for a period not exceeding in total two weeks, and he or she shall record the renewal in the case diary. The magistrate, in the case of an arrested person who is charged, may order renewal of his or her detention for the purposes of investigation every week, provided that the period of detention shall not in total exceed three months except upon the approval of the competent President of the Court of Appeal".

Such tedious procedures and prolonged detention can be of a grave injustice to an accused child. Hence, the juvenile justice system requires special treatment of child offenders. This is recognized under the Child Act[122], that detention of a child in police custody, whether in a police cell, police vehicle, lock-up or any other place shall be used as a measure of last resort and for a period not exceeding twenty four hours.

For the detention of juvenile offenders, detention must be in separate centre specifically designed for young offenders. The Child Act is very explicit about the detention of children and for that matter, it provides that any police officer in charge of police station shall cause a separate cell to be kept, in which details regarding the detention in police cells of all persons under the age of eighteen years must be recorded[123] and that no child shall be held in detention in police custody for a period exceeding 48 hours prior to appearing before a Public Attorney or Judge[124]. A child shall be remanded in police custody for a period of 48 hours and for one further period of a maximum of twenty four hours where no alternative action can be taken[125]. As to the procedure after arrest of a child above the minimum age of prosecution, section 144 (1) of the Child Act[126], provides that where an arrest of a child above the age of twelve years, being the minimum age of prosecution, has taken place, the policeman or policewoman must observe the following procedures-

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[122] Section 150 (1) of the Child Act, 2008
[123] Section 150 (2) (supra)
[124] Section 150 (5) of the Child Act, 2008
[125] Section 150 (6) (Supra
[126] Ibid

(a) if the child is in detention in police custody, bring such child to the social worker in whose area of jurisdiction the arrest of the child has taken place promptly for assessment, but not later than 24 hours after arrest; provided that, if by the expiry of this period a social worker cannot practically be traced, the police officer must request the prosecutor to set the matter down for holding of a preliminary inquiry as soon as possible. This must be done with unnecessary delay. The police under Criminal Procedure Act are empowered to conduct prosecution if the Public Prosecution Attorney is absence[127]. It is yet to be seen whether this provision is observed by the Southern Sudan Police Administration. Section 184 of the Child Act provides for limitation on detention of a child. Detention of a child pending trial shall take place only in exceptional circumstances, for most serious cases, as measure of last resort and for the shortest possible period[128].

In Southern Sudan, it was found that juvenile offenders are detained even for very minor offences. For instant, in a visit to Hai Malakia police station in Juba by the researcher of this work, one Elizabeth[129], a 15 year old girl in primary 7, was detained without charge allegedly on the suspicion by her step father for pre-marital sexual intercourse. It should be remembered that in Southern Sudan, there is no law prohibiting unmarried woman or girl from having pre-marital sexual intercourse. The point here to note is that detention of this kind could not be justified because it is unlawful to detain a person for a crime that does not exist.

It should also be reiterated that the detention of a child shall take place in a reformatory, where possible, which shall be administered by an authorized person; and that the detention of a child shall be undertaken in a manner suitable to the child's legal status and age in conditions and circumstances which ensure respect for the right of the child[130].

It should also be noted that the child in detention is entitled to all the rights that are appropriate for his stage in life. These rights include the right to adequate and nourishing food and clean drinking water, regular and adequate medical care; adequate clothing, bedding, basic sanitation, education, vocational training, reading materials and to be

[127] The Criminal Procedure Act, 2008, Laws of Southern Sudan
[128] Section 184 (1) of the Child Act, 2008
[129] Not real name
[130] Section 184 (4) (Supra)

detained as close as possible to family and to have regular contact with family and guardians[131]. It is provided also under the Child Act that all disciplinary measures in places of detention constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including chaining, whipping, placement in a dark cell, closed or solitary confinement or other treatment or punishment that may compromise the physical or mental health of the child[132].

Despite this legislated framework, the practice is hardly near to the acceptable standards. This was evidenced by the testimonies of some juveniles whom the researcher had the opportunity to interview. According to one 16 year old juvenile[133], who was arrested and detained in an adult police cell in Juba North Police station for one week *"the conditions inside the cell are filthy and not good for human living"*. This means that the practice of the police of detaining juveniles in deplorable cells is contrary to the principle that juveniles should be detained in suitable condition in accordance to their stage in life.

2. The Directorate of Public Prosecutions and State Attorneys

This section discusses the functions and powers of the Directorate of the Public Prosecution and State Attorneys in the administration of juvenile justice system in Southern Sudan.

The Directorate of Public Prosecutions and State Attorneys are constitutionally created under Article 138 (3) of the Interim Constitution of Southern Sudan which provides *inter alia that; the public attorneys shall give legal advice to all levels of Government in Southern Sudan, and in particular represent them in public prosecutions, litigation and adjudications, and conduct pre-trial proceedings.* This is also echoed under the Ministry of Legal Affairs and Constitutional Development (MOLACD) Organization Act, 2008 which provides for the establishment of the Directorate of Public Prosecution. Under section 8 (b) of this Act, it is provided that the function of the directorate of Public prosecution shall be the supervision of investigations, taking cognizance of and prosecuting criminal cases at the GOSS and state level in accordance with applicable law. Section 42 (2) (c) of the same Act provides for functions and duties of public prosecution

[131] Section 187 (1) of the Child Act, 2008
[132] Section 190 (5) (supra)
[133] Charged under section 48/293 of SPC, 2008 (Not real name)

attorneys and legal advisors and it is to the effect that they shall conduct pre-trial proceedings.

The provision of legal aid is given to the Directorate of Contracts, Conventions and Treaties, Human Rights and Legal Aid of the MOLACD and as such, section 10 (2) (c) and (d)[134] provides that the Directorate shall exercise all powers necessary to fulfill the following functions of the Ministry... and in particular provides legal aid for persons in need and overseeing the implementation of conventions and treaties and human rights in Southern Sudan.

In relation to juvenile cases, section 22 (1) of the Code of Criminal Procedure Act[135], provides that the Minister of the Ministry of Legal Affairs may identify specialized Public Prosecution Attorneys to handle specific types of cases. This implies that juvenile cases are some of the types of specific cases that require specialized Public Prosecution Attorneys. This provision remains in the legal book but not in practice because when the researcher endeavoured to know the presence of specialized Public Prosecutions Attorneys especially in juvenile department, there were no such personnel in the department.

a. Nature of prosecutions

The term prosecution refers to setting of the criminal law into motion against a person. There are two types of prosecutions allowed by law. These include prosecution by the Public Prosecution Attorney which are initiated by or on behalf of the state; and the prosecution by private person[136]. On the issue of private prosecution it is said that usually, the victims of the crime or the person feeling offended or aggrieved by the crime, would be most likely to be interested in setting the criminal law in motion; and that justice and reason would suggest that persons should not be allowed but also be given all

[134] MOLACD (Organization) Act, 2008
[135] Laws of Southern Sudan, 2008
[136] B.J. Odoki, A Guide to Criminal Procedure in Uganda, 3rd Edition, 2006

the facilities to move the machinery of law against the alleged culprit[137]. This justifies prosecution by private person.

The purposes of conducting criminal proceedings are, mainly *"to give the prosecution an opportunity to prove their case against the accused; to enable the accused to exercise the fundamental right to defend himself/herself if he or she wishes; to ensure that the accused is tried by an independent and impartial court; and to punish the accused if found guilty of the charge laid against him or her"*[138].

The uniqueness of the juvenile justice system requires special procedure for the prosecution of juvenile offenders. This is provided under section 152 of the Child Act, 2008 that a child is not charged until the preliminary investigation is completed. This section goes on to provide that for the purposes of judicial proceedings under this Act, a child is deemed not to be charged until, the preliminary investigation has been finalized and the public attorney submits the case to the court under the provisions of this Act and the charges are read and explained to the child.

b. Investigation of a Child

The term investigation as mentioned earlier is defined under section 5 (1) of the Criminal Procedure Act, 2008 to mean the act of or process of finding out relevant facts that concern a crime, and includes all proceedings by the police acting pursuant to the directives of the Public Prosecution Attorney, Magistrate or Court, as the case may be, for the collection of evidence. It is on this basis that section 173 of the Child Act provides for a mechanism for investigation of an accused child. Further, every case involving a child shall be determined in an individualized manner with due investigation into the background and circumstances in which the child is living, the intellectual, emotional, psychological and social development of a child, the material situation of his or her family, and the conditions under which an offence was committed.

This is compatible with rule 10.3 of the Beijing Rules which is to the effect that contacts between the law enforcement agencies and juvenile offender shall be managed in such a

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[137] R. V. Kelkar, Criminal Procedure, 5th Edition at Page 31

[138] B.J. Odoki, A Guide o Criminal Procedure in Uganda, 3rd Edition, 2006

way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to him or her, with due regard to the circumstances of the case.

The prosecuting agency is required under the Child Act to make preliminary investigation within 24 hours and under section 167 thereof, it is provided as follows:

(1) A preliminary investigation shall be conducted into any case involving a child within twenty four hours of his or her arrest by the police officer under the directives and supervision of the public attorney.

(2) The purpose of a preliminary investigation is to establish whether a matter can be diverted before charges are instituted before the court, and assess whether there is sufficient evidence to warrant a prosecution

The accused should also not be denied bail because of the delay in police investigation. In spite of diligent investigations, inquiries cannot be completed within a reasonable time and it is not fair to expect the police to do miracles to get evidence. The researcher's opinion is that it would be unfair for the court to summarily dismiss such argument as being unworthy of credence. In **Kamulegeya vs. Uganda**[139], Phake, Ag. J. (as he then was), *"the investigation of a charge of murder and the preparation of the summary evidence, especially in a complex case, necessarily involve a great deal of work for the prosecution who are engaged in dealing with numerous cases of crime. I do not wish to be understood as saying that the prosecution may complete their part of the work at their sweet will and may ignore the provision of the Constitution, but I do think that they should be given reasonable sufficient time and not to be expected to perform in the manner of a machine set to time".*

At the conclusion of the investigation, the Public Prosecution Attorneys may release the juvenile after having considered the nature of the offence or direct special procedure or action to be taken for solving the case. According to one of the Legal Counsel in charge of Juba North State Prosecution Department, *"the State Attorney sometimes reconciles*

[139] M. B. 155 of 1969

the parties involved in juvenile cases or may set the child free when the offence is a minor offence and advises appropriate measures concerning the case".[140]

It should also be noted that after the investigation, the Public Prosecution Attorney should ensure that criminal proceedings against the juvenile are as expeditious as possible. This is not the case in Southern Sudan where juvenile justice faces a lot of challenges. For example, a 10 year male juvenile was remanded for the charge of murder[141] of a 12 year old killed by a gun carelessly put in the cattle camp where the accused found it. While he was playing with the gun, he shot and killed the victim from a distance. He was taken to court but the complainants/relatives of the deceased were not present for the hearing. At the moment, he was being detained pending trial because the relatives of the deceased child demanded that this juvenile offender must either be killed or they revenge by killing the juvenile or his relative.

This case illustrates that the delay of juvenile proceedings may not be caused by the prosecuting public authority but by the victim or their relatives.

It should also be noted that juveniles are charged without considering the fact that they lack criminal responsibility. For example, the accused in the above case, a 10 year old was charged despite the fact that he lacks mental element (mens Rea) of the crime. Mens Rea was defined by Lord Simon in **DPP vs. Majewski**[142] as... the state of mind stigmatized as wrongful by the criminal law which, when compounded with the prohibited conduct, constitute a particular offence.

It is observed in this case that there was unnecessary delay in the trial meaning that "justice delayed is justice denied". A delay in judicial proceedings violates the right of the accused person to have an expeditious trial. The court said in **T.J. Stephen v Parle Bottling Co. (P) Ltd**[143] that a criminal trial which drags on for unreasonably long time is not a fair trial and the court may drop proceedings on account of long delay even in a case where the delay was caused due to the mala fide moves by the accused; and further that "the concept of speedy trial is an essential art of the fundamental right to life and liberty guaranteed and preserved under the Constitution which provides that: *"the right to*

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[140] Interview with William Jada, Legal Counsel in charge of Juba North State Attorney Office
[141] Under section 206 of the Penal Code Act, 2008
[142] (1977) AC 443
[143] (1988)

speedy trial begins with actual restraint imposed by arrest and consequent incarceration, and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal; and revision so that any possible prejudice that may result from impressible and available delay from the time of the commission of the offence till it consummates into a finality, can be averted" [144].

3. The Social Workers in the Juvenile Justice System

The term social work is not defined under the Child Act, 2008 but according to Mwene Mushanga, social work is *"a branch of sociology which is used to describe the variety of organized methods of helping people with needs they can not satisfy unaided*[145]*"*. In other words, social work is a paid work that involves giving help and advice to people living in the community who have financial or family problems[146]. Social work is done by trained skilled persons who are known as social workers. The term social worker is defined under section 5 of the Child Act[147] to mean a person who holds a qualification recognized by an authorized person to conduct social work. In general, social workers tend to be concern among others with the … delinquents who need assistance and support[148].

a. The Function of Social Workers

Social workers in Southern Sudan are employed by the Public Service like other civil servants to serve under the Ministry of Gender, Child, Social Welfare and Religious Affairs. It is on this basis that a Directorate of Social Welfare which deals with general social problems including those of children is established in the Ministry of Gender, Child, Social-Welfare and Religious Affairs. Within this Directorate, a Department of Child Welfare which specifically deals with children's welfare affairs in Southern Sudan is established.

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[144] T. J. Stephen V. Parle Bottling Co. (P) Ltd, (1988)
[145] Dictionary of Criminology
[146] Oxford Advanced learner Dictionary 11th Edition
[147] Laws of Southern Sudan, 2008
[148] Mwene Mushanga, Dictionary of Criminology, (Fountain Series in Law and Business Studies), First published, 2008 at page 168

This is a partial fulfillment of the international requirement that *"states are required to pass specific laws, regulations at the national level... and to promote the establishment of procedures and institutions specifically applicable to children alleged as accused of, or recognized as having infringed the penal law*[149]. It is on this basis that, the Child Act under section 194 provides that the Minister of GCSWRA shall issue rules and regulations for the proper implementation of the provisions of this Act. The said rules are yet to be formulated for proper implementation of juvenile justice system in Southern Sudan. When such rules are formulated, they are expected to fulfill the aspirations envisaged under the Child Act for the promotion and protection of children including juveniles' rights which will be sped up as oppose to the current slow trend that has cursed the implementation of the Child Act. The MGCSWRA is "expected to be able to afford to the juvenile offenders, an access to child-friendly justice systems"[150].

In order to do this, the Ministry should ensure that the institutions that play roles in the administration of juvenile justice system in Southern Sudan adhere to the principles that protect, promote and safeguard against abuses of children in general and juveniles in particular.

b.The Role of Social Workers before and During the Arrest of Juvenile Offenders

The role of social workers in the administration of juvenile justice system like their police counterparts starts immediately before and after a child is arrested and continues through investigations, court proceedings and during the detention/imprisonment of a child.

The duties of social workers are provided under section 175 of the Child Act to the effect that; a social worker has a duty of conducting age assessment to all children who have been arrested and who remain in detention in police custody, within forty eight hours of such arrest subject to the proviso set forth in subsection 2. This involves the duty that, the social worker shall make every effort to locate a parent or a guardian for the purposes of concluding assessment process of the child; provided that, where all reasonable efforts to locate a parent have failed, the social worker may conclude the assessment in absence of such a person.

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[149] Article 40 (3) of the Convention on the Rights of the Child

[150] MGCSWRA, Initial Report to the African Committee on the Rights and Welfare of the Child, 2008

c. The Role of a Social Worker During the Investigations

Besides assisting in an age assessment of the accused child, the Social Worker is required under Section 175 (3) of the Child Act to explain to the child in the language that he or she understands the purposes of the assessment. The child has the right (i) to contradict or challenge any information against the child; (ii) remain silent; (iii) to have the parent or guardian contacted and (iv) be provided with legal representation by the Ministry of Legal Affairs and Constitutional Development[151]. Unless the child is below the minimum age of prosecution, the social worker shall make a report with the following recommendations: (a) the prospects of diversion; (b) the possible release of the child into the care of a parent or guardian; or (c) the placement 'where applicable' of the child in a place of safety[152].

The term diversion as provided under section 175 (6) (a) of the Child Act above is explicitly explained in the commentary to Rule 11 of the Beijing Rules to mean *"removal from criminal justice processing and, frequently, redirection to community support services" and "is commonly practiced on a formal and informal basis in many legal systems"*. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration. For example, diversion is effective against the stigma of conviction and sentence (emphasis added).

It is also during the investigation that transfer or conversion of a matter to the court may be considered by the social worker[153]. If the Social Worker recommends that the matter be referred to the court the report shall reflect his or her recommendation and reasons as well as recommendations as to the temporary placement of the child pending the opening of the court inquiry[154].

The foregoing position of the social worker in the administration of juvenile justice system is very important and Southern Sudan's Juvenile justice system. However, it requires empowerment of social workers in different fields so that they can play their role efficiently and effectively. Part V. 81 of the UN Rules provides that personnel involved

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[151] Section 175 (3) of the Child Act, 2008
[152] Section 175 (6) (Supra)
[153] Section 175 (7) of the Child Act, 2008
[154] Section 175 (8) of the Child Act, 2008

in the administration of juvenile justice should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counselors, social workers, psychiatrists and psychologists[155].

d. The Role of a Social Worker After Court Sentence and During Imprisonment of a Juvenile

In Southern Sudan, none of the child legislations provides for the role of the social worker after the sentence or suspended sentence against the juvenile. The general practice is that *"after the juvenile case is heard, the social worker still has a role to play whether the juvenile is sentenced or given a suspended sentence. If incarcerated, the social worker continues with his supervision and counseling[156]"*. The Social Worker also sees to it that the juvenile continues his or her education; and writing of reports on the juvenile and submitting the same to the head office as to the rehabilitation of the juvenile[157]. It should be remembered that a social worker may recommend for the suspension of a sentence or penalty by the court. According to section 183 (2) of the Child Act, it is provided that request for the suspension of sentence shall be considered before the enforcement of a penalty on medical, vocational or scholastic grounds. As such, a social worker would be useful to the juvenile as well as to the court for the monitoring of the impact of the sentence against the juveniles.

e. The Tripartite Role of the Social Worker in Juvenile Justice

When a juvenile is accused of contravening the penal law, the social worker is required to coordinate the assessment of the child's age between the prosecuting statutory body and the parents or guardian of the child. This intermediary role is important for any lawful dispensation of juvenile justice system. This is provided under section 179 of the Child Act which provides for the assessment of the age of the child accused of committing an offence. This section also provides that after an assessment, the probation officer may

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[155] UN Rules for the Protection of Juveniles Deprived of their Liberty. (GA Res. 45/113. Annex, 45 UN GAOR Supp. (No. 49A) at 205, UN Doc. A/45/49 (Dec. 1990)

[156] Joanna W. Mensah, The Role of Social Workers Concerning Juveniles in Court, (A Paper Presented at Seminar on Problem Areas in Juvenile Justice, Ghana) 19-20 July 2007

[157] Ibid

recommend: the diversion of the child to a specified process programme or appropriate alternative order; or that no further action be taken in respect of the alleged offence. In lieu of parent or guardian for information relevant to the child, section 175 (5) of the Child Act provides that Social Worker may contact or consult with any other person who has any information relevant to the assessment of the child.

It should be noted that assessment of age enables both the prosecution and the social worker as to the course of action to be taken against the juvenile and the appropriate order that may be passed against the juvenile respectively. **In F. v. Padwick**[158], it was stated that in order to ascertain the child's ability to determine right from wrong the court should hear evidence of his back ground and not rely on his demeanor in court.

It is also the duty of the social worker to coordinate the family conference where parents of the children concerned should be present. It is this reason that section 155 of the Child Act provides for convening of the family conference which involves the juvenile, all the families of the children concerned and the public prosecuting authority. The salient feature of this section is to the effect that "a family group conference shall be convened by the Chair Person of the Child Justice Committee in consultation with the families of the children concerned. Under subsection 4 of this section, a social worker, where the conference is convened on the basis of a report from him or her, shall be the chair person of the Child Justice Committee in that area.

This role was explained by one of the social workers serving in the Juba main prison who informed the researcher that: *the main duty of social workers in prison is counseling the juveniles who are in detention* [159]*facilities. Contact and inform the parents on the conditions of the juvenile and make recommendation to the court on any measure that may be made depending on the condition of the juvenile which include recommendation to be released if the juvenile has improved his conduct.*

The neutral role of the social worker between the child, the parents and the judicial authority should be encouraged so that a juvenile does not suffer in the complicated legal environment as well as the adversarial formal legal procedures.

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[158] (1959) Crim. L.R. 439

[159] Betty Paul, Social Worker, Juba main prison

4. Jurisdictions of Courts and Judicial Treatments of Juvenile Offenders

This section discusses the establishment, structures, powers, competence, jurisdiction and procedure of the courts in Southern Sudan. It also appraises the judicial mechanism of dealing with juvenile offenders in Southern Sudan since 2005 following the promulgation of the Interim Constitution of Southern Sudan and the Child Act, 2008.

The source of judicial power in Southern Sudan is provided under Article 126 (1) of the ICSS which provides that judicial power in Southern Sudan is derived from the people and shall be exercised by the courts in accordance with the customs, values, norms and aspirations of the people and in conformity with this Constitution and the law. The Independence of the Judiciary in Southern Sudan is provided under Article 128 (1) of the ICSS which is to the effect that the judiciary of Southern Sudan shall be independent of the executive and legislature. Article 127 of the ICSS provides for the establishment and structure of the judiciary of Southern Sudan which ranges from the Supreme Court as the Highest Court in Southern Sudan followed by the Court of Appeal, the High Court as the Highest Court at the State level, the county court at the County level and the Payam Court as the lowest and the last in the hierarchy of the courts.

The Constitution requires that all cases shall be disposed of expeditiously; and that *"in adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply, inter alia, the principle that justice shall not be delayed; and that substantive justice shall be administered without undue regard to technicalities"*[160].

In Southern Sudan, all languages are national languages and therefore there is no single official language recognized as the language of the court in Southern Sudan but the Constitution under Article 6 (2) provides that English, as a major language in Southern Sudan, and Arabic, shall be the official working languages of the Governments of Southern Sudan, and the states and the languages of instruction for higher education. The implication of this provision is that English and Arabic are the languages of the court with exception of customary courts where local languages are used.

[160] Article 126 (5) (a) and (e) of the ICSS provides that

The Constitution also provides that judges are to be appointed on merit for independent and impartial judicial work. This is consonant with what Keith Evan said as the essence of a meritorious judge that *"to appear in court before a wise and impartial judge who regards impartiality as his duty and who understands what the legal system was really intended to be about to appear before such a judge is a true privilege and exhilarating experience*[161]*"*. According to him, judges as "decision-makers should be faithful both to laws as a whole, and also to the principles contain in them"[162].

While the English juvenile justice system requires certain qualification and training of juvenile court justices; when appointing members of the juvenile court penal the justices, or in the case of metropolitan area, the Lord Chancellor, are required to choose justices who are specially qualified for dealing with juvenile cases[163]. This later training is designed to enable juvenile court justices: understand the place of the juvenile court in the judicial system and certain special aspects of procedure in that court; appreciate the social and educational background of juvenile before court; know the services available to them, particularly the educational, medical and psychiatric services; and learn the various courses which may be taken in dealing with juveniles who are brought before the court because they are in need of care or control so that they understand the nature and purpose of the methods of treatment which they may use and their effects.

In Southern Sudan, the Child Act is silent on the issue of prior qualification of judges who are to serve in juvenile courts. What is provided under section 192 (7) of the Child Act is that judges serving in juvenile courts shall receive in-service training and other appropriate methods of instruction on children's rights. Thus, prior qualification to serve in juvenile court is not a pre-condition in Southern Sudan.

It was found by the researcher that the judges are yet to be trained in the judicial administration of juvenile justice system. This situation provides no dispute to the fact that *"ignorance in any person at all is a formidable tyrant. It deprives an open eye of*

[161] Keith Evans p. 85
[162] Ibid
[163] Juvenile Court Constitution Rules 1954 r. 1 (1)

vision so that the ignorant looks but cannot see. Listens but cannot hear. When ignorant rules the eye of a judge, it results into pathetic drama accruing in his court day in and day out. The judge out of sheer lack of intellectual capability fails to grasp any of it"[164]. For the effective functioning of the criminal courts, it is important that Judges and Magistrates be persons having adequate qualifications, ability and wisdom[165]. So lack of adequate and appropriate training for judges in juvenile matters contributes to detrimental decisions against juvenile delinquents.

In an interview with the 2nd Grade County Judge in Konyokony Magisterial Area, a satisfactory narrative of juvenile justice was given in that *"a juvenile justice system is not appropriately applied in Southern Sudan because the stakeholders are not aware of the new law" (Child Act, 2008). She (the Magistrate) gave an example of the punishment by whipping or canning of the juveniles which was in the old law but is now abolished by the new law. That because of ignorance, the police still apply whipping and this violates juvenile right of physical integrity. Whipping or canning also amounts to torture which is prohibited by the constitution and the Child Act*[166]*. According to the judge, the juvenile justice system requires not just a degree from law school but also sufficient training to handle juvenile cases. In other words it requires experienced judicial officers. As one of the judges who got training in juvenile justice, the decisions she passed in juvenile cases were found commendable as reflected in the following cases decided by this judge".*

In the case by the parent against S. Lomoro[167], a 16 year old female charged under section 315 and 250 of the SPC 2008 brought by the mother, it was alleged that the daughter at night had fought her and taken the family clothes and burnt them. The accused admitted the action. The court found that she was developing delinquent behaviours and sent her to reformatory centre for counseling for 3 months.

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[164] Manual on professional skills, 2nd Edition Produced by RCN, Justice & Democratie 2008
[165] R. V. Kelkar, Criminal Procedure, 5th Edition, 2008
[166] 2nd Grade Magistrate, Judge Dudu
[167] Criminal Case N0 88/2010

a) Jurisdiction in Matters of Juvenile Offenders

Generally, a criminal jurisdiction is the power which the Sovereign Authority of the State has vested in a court and other tribunals established by law to take cognizance of and determine questions which arise out of crimes committed in that state[168]. The criminal jurisdiction of the court may be territorial or depends on the gravity of offence in which case, the court must be mandated by law to try specific offences. It is a legal requirement that the court must have jurisdiction to try a particular case otherwise, any decision it arrives at will be a nullity. This is expressed in Latinized phraseology as *"Actus judiciaries coram non judice irritus habetur"* which means that "a judicial act before one not a judge (or without jurisdiction) is void"[169].

In Southern Sudan, the issue of criminal jurisdiction poses confusion especially in offences committed by children. For instant, there was lack of jurisdiction in the case of an infant **Santino**[170], a 9 year old charged and convicted by the lay Magistrate of 3rd Grade for having stoned another child of 7 years of age while they were playing with a bicycle tyre. He was sentenced to pay 300 SDG as court fine and in default to pay, to be imprisoned for three months and to pay 5, 216 SDGs to the complainant through a civil suit action. This decision was appealed against not only on the grounds of an excessive sentence but on the ground that the Magistrate of 3rd Grade did not have the jurisdiction to try juvenile cases. The attempt of the 3rd magistrate judge in trying a juvenile case contravene section 192 (3) of the Child Act which provides that; pending the establishment of permanent juvenile courts, the county court of the First or Second Class shall try juvenile cases. In this case, the First Magistrate on appeal reversed the sentence of imprisonment and the fine.

In Southern Sudan, the only court that has unlimited jurisdiction is the High Court. According to Article 132 (1) of the ICSS, the High Court shall be the highest court in the level of the state in Southern Sudan and its establishment, competence, jurisdiction and procedure shall be determined by law. Under section 12 (a) of the Criminal Procedure

[168] Francis J. Ayume, Criminal Procedure and Law in Uganda, 1986 p. 15
[169] (Black Law Dictionary)
[170] Not real name, Summary Trial No TBC/S/78/2010

Act, 2008, a High Court shall have the following powers and competence in the area of criminal law...serves as the exclusive tier of any offence punishable with death or life imprisonment. The High Court also has the competence to direct the release of an individual on probation. Other courts below the High court have specific jurisdictions conferred upon them both in term of local limits according to their establishment.

The issue of jurisdiction is very important and therefore, even if an offence is committed within the local limits of jurisdiction, the magistrate still has to answer the question whether he or she has power to try the case[171]. In Southern Sudan, section 42 of the Criminal Procedure Act, provides that criminal proceedings, orders and judgments of any court, shall not be deemed to be invalid by reason of the fact that... such proceedings should have been taken by or before some other local jurisdiction, provided that, such actions were taken in good faith. It seems that judicial jurisdiction can be compromised in Southern Sudan if the decision did not cause miscarriage of justice.

As the importance of jurisdiction in criminal litigation requires, courts in Southern Sudan try cases to which they have conferred jurisdiction. As such, the jurisdiction of the courts in matters of juvenile cases is provided under section 192 of the Child Act and it is to the effect that juvenile courts shall be established to hear and determine:

a. all applications relating to criminal charges against children subject to the provisions of this Act,
b. all applications relating to child care and protection; and
c. Any other competence conferred upon them by this Act or any other written law.

A juvenile court is defined to mean a court of law that deals with young people below the age of eighteen years[172] whereas the jurisdiction over it is provided under section 13 (1) (c) of the Criminal Procedure Act which confers jurisdiction of County Court to a Magistrate of First Class. It specifically states that in the case of an offender who, in the

[171] Francis J ayume, Criminal Procedure and Law in Uganda 1986 at page 16
[172] Section 192 (5) of the Child Act, 2008

opinion of the magistrate, is under eighteen years of age, criminal resolved or tried case, shall be in accordance with the procedures applicable to the juveniles[173].

Although the jurisdiction of juvenile cases is exercised by the county court, it is to be noted that customary courts still have jurisdiction over certain juvenile cases. Under the Local Government Act, section 97 (2) which provides that a customary law courts shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent statutory court[174].

In England, a juvenile court usually consists of three justices of the peace who are specially qualified to deal with cases concerning juveniles. A juvenile court panel must meet at least twice a year to make arrangements with regard to the holding of juvenile courts and to discuss questions concerning their working. Such arrangement is very important because it allows evaluation of policies and recommends new strategies. This is not the situation in Southern Sudan where there is no law providing for a panel to hear juvenile cases. Currently, juvenile courts have not yet been established in Southern Sudan and for that matter, the Child Act provides that pending the establishment of such courts, criminal cases involving children shall be determined in the county courts in accordance with the provisions of this Act[175].

The Act provides that the procedures of courts determining child matters pending the establishment of juvenile courts shall be subject to the procedural and other safeguards for children outline in this Act; the courts shall sit as often as necessary; proceedings shall be held in camera; and proceedings shall be as informal as possible and not of an adversarial nature[176].

The procedures in juvenile cases in the American Legal System were explained by the U.S. Supreme Court in **Kent v. United States** where it was held that under a District of Columbia Statute, the informal process of determining whether a juvenile should be tried in juvenile or in adult court failed to provide sufficient due process protection for

[173] Section 13 of the Criminal Procedure Act, 2008
[174] The Local Government Act, 2009
[175] section 192 (3) of the Child Act, 2008
[176] Ibid

children. The court held that before a minor is transferred to adult court the child is entitled to an informal hearing where trial court must articulate the reasons for the transfer so that the child can have an adequate record for appellate review.

The reason for informal procedure in juvenile cases is to protect the child so that complicated proceedings do not prejudice the interest of the child and not to affect him psychologically. This was explained by Blackstone in **C v DPP**[177], that the capacity for doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.

Harpur J in **R** v **Whitty**[178], Supreme Court of Victoria, Australia, held that "no civilized society regards children as accountable for their actions to the same extent as adult... the wisdom of protecting young children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed.

In Southern Sudan, the Penal Code Act provides that: "*A child under twelve years of age shall be deemed to lack criminal capacity and shall not be tried for or convicted of any offence, which he or she is alleged to have committed*[179].

Thus the protection accorded to children can not be underestimated unless the child has attained the age of criminal responsibility at the time of the commission of the crime.

b) Conducting Juvenile Offender Cases

The normal procedures for conduct of a trial applies to the juvenile court save as to the extent that it is specifically excluded. A trial in the juvenile court begins with the substance of the charge being explained to the juvenile in a simple language. Unless the juvenile is legally represented, his parents or guardian must be allowed to assist in conducting his or her defence, including cross-examination of witnesses[180]. In every criminal proceeding, the prosecution is given the first opportunity to present their case

[177] (1995) 2 ALLER 43
[178] (1993) 66 A Crim R 462
[179] Section 30 of The Penal Code Act
[180] Clarke Hall & Morison on Children

against the accused. It is required that the prosecution proves its case beyond reasonable doubt. The accused is also allowed to present his defence.

As for the hearing of a juvenile case, the position in the UK is that criminal proceedings must be brought before juvenile court except for the offence of homicide[181]. In Southern Sudan, the legislated laws accord similar procedures in handling juveniles cases but the practices of the stakeholders is contrary to this unique procedure for instance, it is common place to find a juvenile before any court which may not be acquainted with procedures that are applicable to juvenile cases.

The legislations in Southern Sudan require that, juvenile cases should be presented before county court as provided under section 192 (3) of the Child Act, 2008 which provides that pending the establishment permanent courts, criminal cases involving children shall be determined in the county courts in accordance with the provisions of this Act.

If the juvenile is unable to present his defence, reliance should be had as to the provision of section 184 of the Criminal Procedure Act which provides for the right to be defended by pleader[182]. It is provided that: *Every person accused before any court under this Act, may as of right, be defended by a pleader; provided that in the case of serious offence, if the accused, and if the accused is a pauper the Minister, on application by the accused, and if satisfied that it is necessary in the interest of justice, shall appoint an advocate to defend the accused and pay all or part of the cost.* The Act does not define a pleader but in a legal parlance, a pleader is any person who defends another in court proceedings. It is not necessarily limited to trained lawyers.

It is clear that a juvenile may be unable to defend himself or herself. A good example was given in the case of **Darren Coulburn**[183] where a 13 year old boy who fatally stabbed a fellow school boy was found guilty of murder by Manchester Crown Court. It was stated that the court is to have regard to the welfare of the child or young person but as this is

[181] Clarke Hall & Morison on Children
[182] Criminal procedure Act, 2008
[183] (1988) 87 Crim. App. R. 309

not the only consideration, the court may find persuasive for example the need to deter certain kinds of criminal activity such as football hooliganism.

In Southern Sudan, the system of pleader exists since an analogy can be drawn from legislated instruments that require the presence of parents in the trial of a juvenile offender but the practice as found out in the case of one 9 year old boy who was tried in the absent of his father illustrates that authorities do not comply with the provision of the law.

In hearing juvenile cases, the legal requirement for a fair trial must be observed. The principle of fair hearing is provided under Article 23 (1) of the ICSS[184] that an accused is presumed to be innocent until his or her guilt is proved according to law. It follows that in all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with the procedures prescribed by law[185]. This includes the right for any accused person having the right to defend himself or herself in person or through a lawyer of his or her choice and to have legal aid assigned to him or her by the government where he or she is unable to defend himself or herself in serious offences[186].

One principal object of criminal law is to protect society by punishing the offenders; however, "*justice and fair play require that no one be punished without a fair trial. A person might be under a thick cloud of suspicion of guilt, he might have been even caught red-handed and yet he is not to be punished unless and until he is tried and adjudged to be guilty by a competent court*"[187]. In the administration of justice, *it is of prime importance that justice should not only be done but must also appear to have been done.* This principle is implicit in the administration of juvenile justice system where unique rights of the children must be protected. Southern Sudan juvenile justice system must uphold the principle of fair hearing in juvenile cases because, "*to stand trial, the accused must be... of sufficient intellect to comprehend the course of the proceedings in the trial*

[184] Interim Constitution of Southern Sudan, 2005
[185] Article 23 (3) of the ICSS, 2005
[186] Article 23 (6) of the ICSS, 2005
[187] Jefferson, Criminal Law, 8th Edition

so as to make a proper defence, to challenge a juror to whom he might wish to object and comprehend the details of the evidence" [188]. In **R vs. Z**[189], it was stated that, *"there is not fixed age below which children are incompetent to give evidence. In criminal proceedings, a person of any age is competent to give evidence if he or she is able to (1) understand questions put him or her as a witness (2) gives answers to them which can be understood".*

In order to ensure the principle of fair hearing in juvenile cases, reasonable assistance must be availed to the juvenile in the proceedings and this assistance includes the presence of the parents of the child and a legal counsel. According to section 192 (5) of the Child Act, it is provided that, apart from members and officers of the court, only the following persons may, at the discretion of the judge, attend any sitting of a court. These persons include parties to the case before the court, their legal counsels, witnesses and other persons directly concerned with the case; parents of guardian of the child; and any other person whom the court authorizes to be present.

Courts are also empowered under subsection 6 of section 192 to appoint a guardian ad litem to any child for the purposes of the proceedings and to safeguard the interest of that child. Section 138 (4) of the Child Act provides that an inquiry to establish whether a child appreciates the difference between right and wrong and is able to act in accordance with that appreciation, must be conducted by a judge.

The Presumption of innocence is also applicable to juvenile offenders. This principle states that *"the accused is presumed to be innocent unless his guilt is proved beyond reasonable doubt, and this is of cardinal importance in the administration of criminal justice"*[190]. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the court cannot record a finding of the guilt of the accused[191].

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[188] S. H. Kadish, quoted from Jefferson, Criminal Law, 8th Edition

[189] (1990) 2 QB 355

[190] (Babu Singh v. State of Punjab (19810 1 Crim. LJ 566)

[191] (Kali Ram v. State of H.P., (1973) 2 SCC 808

c) Hearing of a Case involving a Juvenile and an Adult Offender

In cases where a juvenile is charged jointly with an adult defendant, *"the normal procedure is that, the juvenile and the adult will appear together as defendants in an adult magistrates' court. What will happen next is governed by the classification of the offence"*. While in England, "the youth court is empowered to commit a juvenile defendant to the crown court for trial, where either: he/she is charged with homicide (in which case the defendants must be sent to crown court for trial; or if he/she is charged with a grave offence for which the sentence may be one of long-term detention"[192]; in Southern Sudan cases have shown that juveniles who commit crimes with adults end up affected more severely than adults. This is because a co-accused who is an adult may defend himself while the juvenile who is legally unrepresented may be unable to defend himself. This happened in William's case where a 16 year old who was convicted under section 48/383 of the Penal Code Act, 2008 for two years to be served in a reformatory institution after being arrested with eight adult co-offenders. The adults were not convicted partly because some of them paid the money to the security personnel to release them before the trial while others who were sentenced with him paid money in order to be released.

It should be noted that child related legislations in Southern Sudan hardly provide for the procedure of prosecuting a juvenile jointly charged with an adult but in other jurisdictions, the position is that "where a juvenile is charged jointly with an adult and the offence charged is an indictable one, other than homicide, the magistrates' court must, if it considers necessary in the interest of justice and there is sufficient evidence commit them but for trial"[193]. What needs to be considered is whether such child possessed the ability of knowing whether the act he was participating in, was wrong and had acted in that belief (Emphasis).

In order to charge a child, evidence of the intellectual, emotional, psychological and social development of a child is relevant to any inquiry into whether such a child possesses the capacity to appreciate the difference between right and wrong and has the

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[192] The Hon. Mr. Justice Elias, Criminal Litigation and Sentencing, p. 127
[193] Section 6 (1) of the Children and Young Persons Act (UK) 1969

ability to act in accordance with that appreciation[194]. In **R v. Windle**[195], it was held that the child's knowledge that his act was legally wrong, that it would excite the attention of a policeman is a sufficient rebuttal, even though there was no knowledge that the act was morally wrong. So a 10 year old boy who shoplifts while is looking over his shoulder for any shop-walker but who does because he believes that he is morally justified in so acting in order to provide the necessities of life for his widowed mother will be held to be guilty.

d) Hearing of a case Involving Several Juvenile Offenders

The principle of criminal law is that those who commit criminal acts jointly are to be tried jointly provided the prosecution proves beyond reasonable doubt that there was common intention to commit the act in question. As such, the Southern Sudan Penal Act provides under section 48 that persons who commit unlawful acts in furtherance of a common intention or who cooperate in the commission of several acts that constitutes the offence are jointly criminally responsible[196].

It is to be remembered that a joint trial which involve several juveniles must be handled with care because juvenile cases involve other parties who may influence the evidence. In **Sudan Government vs. Ragab Koko**[197], it was held by Omer Hassan Ali Ahmed J that, the evidence of a child need not be corroborated as a matter of law, but jury should be warned, not that they must find, corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys and girls though they may do so if convinced that the witness is telling the truth. Great caution is required in accepting their evidence because, although children may be less likely to be acting from improper motives than adults, they are more susceptible to the influence of third persons, and may allow their imaginations to run away with them.

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[194] Section 138 (6) of the Child Act, 2008, Laws of Southern Sudan
[195] (1952) 2 QB 826
[196] section 48 and 50 of the Penal Code Act, 2008

[197] Quoted with approval from Cross on Evidence (3rd edition, 1969) p. 178

It should be noted that children of tender years can not be able to form a common intention to commit crimes, hence; the application of Latin phraseology *"Actus non facit reum nisi sit rea"* which means that an act does not make a person guilty unless the mind is guilty; and act does not make the doer criminal unless his mind is criminal must be made use of in the joint juvenile cases.

The practice in Southern Sudan is that children who commit criminal acts should be tried jointly. In the judgment of Lindsay CJ in **Sudan Government vs. Gebra Hamad**[198], the evidence of the children was taken on oath, although at the magisterial inquiry, they were regarded as too young to take the oath. (Magisterial inquiry is also known as committal proceedings in other jurisdictions). The issue of corroboration in juvenile cases poses danger of self incrimination as was held in **The Sudan Government v. Mohamed Ahmed Abu Kakr**[199], it was held that a child of tender years who may not be sworn because of incapacity to understand the meaning of oath cannot corroborate the evidence of another child.

e) Sentencing of Juvenile Offenders

When a juvenile case is heard, the court shall make appropriate orders for the offence putting in mind that in sentencing a juvenile, the words 'conviction' and 'sentence' may not be used in relation to juvenile dealt with summarily[200]. It also follows that usually, the maximum penalty should not be imposed on a first offender except in exceptional circumstances[201]. This is because the condition of childhood exempts young children from accountability for actions; they are deemed not to be responsible actors and are excused or given leniency when sentencing. Where this state ends and responsibility begins is, in reality, a gradual process with the child becoming more and more aware of

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[198] (1952) ACCP 10152, DP Maj. Court 41C1852, Unreported
[199] (1967) SLJR 103
[200] In Ex parte N, 1959 Crim. L.R. 523
[201] R v. Yozefu Maria Matovu, Crim. Rev. No. 36 of 1961 (unreported)

his place in the order of things[202]. The child must know that his or her act was gravely wrong, seriously wrong[203].

Although the traditional view is that evil men deserved to be punished as the ultimate justification for imposing sentences of imprisonment, sentencing of juveniles is giving way to the more modern approach which views the punishing of criminals as having three main purposes, namely, the need to deter the criminal himself and those members of the society who might similarly be inclined to committing crimes; the desirability of rehabilitating him; and the necessity to restrain him by keeping him away from the law-abiding members of the society[204].

It is to be remembered that in imposing a sentence against a juvenile, considerations must be had as to the age of the child. The range of sentences available is considerable but is dependent upon the age of the offender, the facilities available locally and the policy of the particular government in power[205]. The Interim Constitution of Southern Sudan 2005 provides restrictions on sentences that can be imposed on the juveniles. Among these restrictions is that no death penalty shall be imposed on a person under the age of eighteen…[206]".

The same constitutional provision is echoed under section 11 of the Penal Code Act[207] which provides that: when an accused person who is twelve and less than eighteen years of age is convicted by a High Court of any offence, or by the Court of a Magistrate of the First or Second Class of any offence not triable 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 for the purpose for a term which shall not be less than two or more than five years. This provision can also be illustrated by the East African case of **Turon V. R**[208], where Sir Charles Newbold P. held that a death sentence cannot be

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[202] C.M.V Clarkson & H.M. Keating, Criminal Law: Text and Materials, 2nd Edition1990 P. 397
[203] R v. Gorrie (1918), 83 J.P. 136
[204] Francis J. Ayume, Criminal Procedure and Law in Uganda, 1986
[205] Quoted from Jefferson, Criminal Law, 8th Edition
[206] Article 25 (2) of the ICSS 2005
[207] Laws of Southern Sudan, 2008
[208] [1967] EA 789

pronounced on a person who was below the age of 18 years at the time the offence was committed.

In Southern Sudan, the appropriate possible sentences that may be imposed on a juvenile offender are enumerated by the Criminal Procedure Act[209] which provides limitation on the court to impose sentences. The county court of a first class which tries juvenile cases is required under section 13 (2) (a) (iv) to impose compensation to the victim of the juvenile crime and a care order and/or reform measures for the juvenile offender[210]. The same section empowers a Magistrate of Second Class to conduct a summary trial and to impose a sentence of: (i) imprisonment for a term no exceeding six months; (ii) fine not exceeding SDG 150 and (iii) compensation, care and reform measures.
On the issue of possible compensatory sentences that can be imposed on a juvenile, the researcher benefited from an interview with Judge Awan Maper who explained a case that happened in Yirol County of Lakes State where he once worked as a County Judge. According to the judge, "*a child of 14 years jumped over an adult in the water pond while playing and the adult was drowned to death. He was arrested but the relatives were made to compensate the deceased with 16 head of cattle as half of normal 31 head of cattle for compensation in homicide cases*[211]".

It should be noted that although the laws are clear on the sentences that can be passed in juvenile cases, problems appear when dealing with young female offenders who get married during their adolescence. In a controversial case of Rebecca[212], a 17 years old girl who burnt her husband to death by petrol, it could be realized that early marriage is a disadvantage to the girls who marry before their 18th birth day because they do not benefit from the treatment accorded to juvenile offenders. In this case the girl was married to a man who had two other young wives of her age. She was sentenced to 10 years imprisonment and not to reformatory centre. The question is whether the imprisonment conforms to the provision of the Child Act, 2008 which provides for a

[209] Laws of Southern Sudan, 2008
[210] Section 13 (2) of the Criminal Procedure Act, 2008
[211] Interview with Judge Awan Maper on 20th July 2010
[212] Not real name

juvenile to be sent to reformatory centre. Does the fact that she is a married woman mean that she could be treated like any other adult? Marriages of young girls pose confusion in dealing with female juveniles.

In another case, **Wani**[213] was charged under section 293 of SPC 2008. It was alleged that the accused took a phone and ran away. He denied committing the offence; however, the Magistrate sentenced him and the social workers to keep him in a reformatory center for one month and ordered his parents to pay 200 SDG to the owner of the phone through a civil suit.

It should be noted that the time of criminal responsibility for the purpose of sentencing is the time of the commission of the offence and not the time of the trial. If a juvenile attains the age of maturity after the commission of the offence but before commencement of proceedings, then his latest maturity age will not be considered. In **R v. Chelsea Justice ex parte DPP**[214], a 16 year old boy was charged with wounding with intent. He appeared before juvenile court and was remanded, at first in custody, and then on July 3, 963 released on bail until July 31, with the view to being tried summarily for the indictable offence, on July 28. He attained the age of 17 immediately before the hearing on July 31 and the police preferred a further charge of attempted murder which was based on the same facts as the earlier charge. The justices knowing his age decided that they would at a later date hear both offences summarily. An order for prohibition was issued to prevent them from dealing with the charge of attempted murder. References in the judgment of ROSKILL J. to the fact that the charge was preferred after 17th birthday might suggest that that is the moment for determining whether criminal jurisdiction exists rather than the date of first appearance before the court. Further in **R. v. Rider**[215] it was held that although there appears to be conflict between these views the date that is be considered is the date when the charge is preferred.

In Southern Sudan, the date of the commission of the crime is the date which the offender is deemed to have committed the crime and not any other date. Therefore, the date of the commission of the crime cannot be backdated or postdated and for this reason, Article 23

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[213] Criminal Case N0 107/2010 (Not real name)
[214] (1963) 3 ALLER 657
[215] (1954) 1 ALLER 5)

(4) of the ICSS provides that *"No person shall be charged with any act or omission which did not constitute an offence at the time of its commission"*.

f) Other Orders that can be Made Against a Juvenile Offender

The Child Act requires that sentencing of a child shall be reasonable and proportionate to the circumstances and gravity of the offence as well as the circumstances and needs of the child. It follows under this Act that sentencing shall be non-custodial where possible and may include orders for any of the following relieves in respect of a child against whom an offence is proved.

These reasonable and proportionate sentencing includes, reconciliation, compensation, restitution or fine, apology, caution; a probation order, or sending him or her to reformatory centre[216].

A release on probation is also provided under section 284 (1) of the Criminal Procedure Act, 2008 which is to the effect that: when any juvenile is convicted by any such court or by a Magistrate of First Class or of Second Class, of an offence...and if in either case no previous sentence of an imprisonment exceeding six months is proved against such a person during the period of five years preceding the present conviction...and taking into consideration the age, character and past story of the offender, and to the circumstances in which the offence was committed.

The reason for probation under the Criminal Procedure is that:

"it is expedient that the offender be released on probation, the court may instead of sentencing him at once to any punishment, direct that he or she be released on his or her entering into a bond with or without sureties to appear and receive sentence, when call upon during such period not exceeding three years, or as the court may direct, and in the mean time to keep peace and be of good behaviour, and the court may make it a condition of such bond that the victim be paid by or on behalf of the offender such damages for injury or compensation for loss caused by the offence, as the court deems reasonable".

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[216] Section 182 (1) of the Child Act, 2008

g) Orders against Several Juvenile Offenders

Where an offence is committed by several juveniles, there is usually a problem of establishing element of mens rea. For example, in **S. (an infant) v. Manchester City & Recorder**[217], the juvenile court may then deal with him in any way in which it might have dealt with him if he had been tried and found guilty by that court, but apparently it may allow the juvenile to change a plea of guilty before the remitting court to one of not guilty.

Section 137 of the Child Act provides for the protection of child witnesses and the victims and it is to the effect that child witnesses and victims shall be afforded protection where necessary, including protection from intimidation.

Article 21 (2) of the ICSS, states that in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.

h) The Right of Appeal in Juvenile Cases

An appeal is a formal request to a court of appellate jurisdiction by an aggrieved party for a judgment or a decision to be revisited[218]. The general rule is that there is no automatic right of appeal from a judicial decision. The right of appeal is a creation of statute and no party, even the state, has such right unless it is clearly given[219]. In Southern Sudan, section 186 (2) of the Child Act, 2008 provides for the right of juvenile to appeal against his or her case and it is to the effect that upon admission to a place of detention, every child shall have the right to appeal against his/her case and shall be assisted to do so by the prison authorities. The right of a convict to have his/her case seen by an appellate court is considered to be important in every justice system. It is this reason that the Indian

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[217] (1971) AC 481 (HL) (11969) 3 ALLER 1230

[218] Oxford Advanced Learner's Dictionary, 11th Edition

[219] R v. Dunn (1965) EA 567

Supreme Court observed in **M.H. Hosket v. State of Maharshtra**[220], that *"one component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where conviction is fraught with loss of liberty is basic to civilized jurisprudence..."*[221]

For juvenile cases, the English position is that any party or any person aggrieved by the order of a magistrates' court may ask the justices to state a case for the opinion of the High Court on the ground that the justices were wrong in law or were in excess of jurisdiction. The reference to "a person aggrieved may be wide enough to include the parent[222]. A juvenile may, in the same way as an adult who has been convicted and sentenced by a magistrates' court appeal against his/her conviction or sentence or both or where he pleaded guilty against his sentence[223]. This is an acknowledgement that human judgment is not infallible; and that despite all the provisions for ensuring a fair trial and a just decision, mistakes are possible and errors cannot be ruled out. Therefore, the English code provided for an appeal and revisions and thereby enabled the superior courts to review and correct the decisions of the lower courts[224].

The researcher did not come across a case that had been reviewed during a visit to the Judiciary of Southern Sudan. This might partly be due to lack of proper case tracking system which makes it difficult in Southern Sudan for higher courts to review errors made by lower courts or due to axiomatic that even the victims of wrong decisions do not know that they have right to appeal for review and revision to the higher courts.

In Southern Sudan, cases of persons serving sentences of wrong decisions may not be ruled out since there are no proper judicial recordings. It is to be noted that non-observance of the right of juveniles to appeal against their sentence is an impediment that defies the provision of Article 24 of ICSS that the right to litigation shall be guaranteed for all persons, no person shall be denied the right to resort to courts of law to redress grievances whether against government or against any individual or organization.

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[220] (1978) 3 Sec 544
[221] Ibid P. 24
[222] Clarke Hall and Morison, Law Relating to Children and Young Persons, 9th Edition, 1977
[223] Ibid
[224] R.V. Kelkar's, Criminal Procedure at page 24

The case of **Francis R**[225] who was charged and sentenced under section 383 (2) (b) of the Penal Code Act, 2008 for involvement in drugs dealing serves to illustrate the difficulty for making an appeal by the juvenile. In this case, the judge told the convict that he had the right of appeal but it was not possible for him to appeal because he could not afford the fees for legal representation. This means detention because of his inability to afford legal representation is inconsistent with the provision of section 187 (1) (l) of the Child Act which provides that every child in detention has the right of access to legal counsel. This right includes the right to be assisted in making an appeal. The Ministry of Legal Affairs and Constitutional Development as stated earlier under section 175 (3) (VI) is also required to provide legal representation to juveniles who can not afford legal fees. Therefore, juveniles who are not satisfied with their sentences should be assisted to appeal against their sentences.

5. Parents/Guardian of both Juvenile Offender and the Victim of Juvenile Offence

This section discusses the parents or guardian of both the juvenile offender and of the victim of juvenile offence. It defines who a parent or guardian is and the role they play when offence is committed by juvenile or parents or guardian of the victim of juvenile offence.

a. Parents/Guardian

A parent is defined under section 5 of the Child Act to mean the mother or father of a child and includes any guardian or person who is liable by law to maintain a child or is entitled to his or her custody. Parental liability on the other hand is defined under section 5 of the Child Act as meaning all the duties, responsibilities, rights, powers, and authority which, in accordance with law, a parent of a child has in relation to the child and the property of the child to enable him or her fulfill those responsibilities in a manner consistent with the evolving capacities of the child. The term guardian is also defined

[225] Not real name

under section 60 of the Child Act to mean a person appointed by will or deed or customarily by a parent of a child, or by order of a court to assume parental responsibility for a child upon the death of a parent, either alone or in collaboration with a surviving parent of the child.

b. The Role of Parents/Guardians

When a juvenile appears in court, accused of a crime, it is understandable that his/her parents may want to be present to support their child. This is not always the attitude of parents, however, and the trial courts possess the power to compel parents to attend court. The common practice is that "if a juvenile is aged 15 or under, the court must order a parent to attend, unless it would be unreasonable to do so"[226].

The parents or guardian of juvenile offender play a big role during the arrest, investigation, during trails and when a juvenile is convicted or sentenced by court for any offence. These roles range from social and economic role. For instant, a parent or guardian is bound to compensation, pat fine and other pecuniary payments.

In Southern Sudan, section 33 of the Criminal Procedure Act, 2008 provides that: no relief from criminal liability; and it is to the effect that the provisions regarding criminal responsibility as they apply to children, shall not, however, affect any civil claim by the aggrieved party against the parents or guardian of the child. In essence, it means that parents or guardian of juvenile offender bear the consequences of juvenile delinquency. This is also the position in UK where section 55 of the 1933 Child Act provides that the parents or guardian of a young person may and or a child must be ordered to pay any fine, costs, or compensation instead of the juvenile unless the parent or guardian cannot be found or the court is satisfied that he has not conduced to the commission of the offence by neglecting to exercise due care and control[227].

According to Clarke Keating, *"a juvenile may be ordered to pay a fine, damages for injury, compensation for loss and costs, but the power of the court to make any of these*

[226] Criminal Litigation and Sentencing by Mr. Justice Elias, Chairman of the Advisory Board of the Institute of Law, City University, London August 2002 P. 114

[227] Clarke Hall & Morrison, Law Relating to Children and Young Persons, Ninth Edition, 1977

orders in respect of him differs in two respects (1) there are limits for magistrate court to order the juvenile's guardian/parents compensation instead of juvenile. But where the property has been stolen an order for restitution may be made[228]*".*

In Southern Sudan, the parents of delinquent children mostly avoid their responsibility towards the children who commit crimes. The scenario in which parents would avoid their responsibility is where the child is the offender. According to the police crime investigator in Juba North Police Station while admitting that children are not properly treated in line with the existing laws, said that *"when children are the victims, a parent is always willing to come in order to claim compensation and the reverse is not true"*[229].

c. Adopted Juvenile Offender

In Southern Sudan, foster care exist but not adoption in western sense, this is because a parentless child is taken care of by the closest relative mostly maternal relative but this care ends when the child reaches the maturity age.

The adoption is relevant in juvenile justice because a person who legally adopts the child would be bound for any delinquent wrong doing of the juveniles. It was observed during the field work for this research that the majority of juvenile offenders were children without parental care of child under the care of relatives. It was also revealed that most of the guardians of the delinquent children do not attend to them when they are incarcerated for fear that they would be made to pay the victims of the juvenile offences. It would be important for the juvenile justice system that those who assume responsibility for children should be held responsible for wrongdoing the child if it results from negligent care of the child.

The effects of an adoption order under section 88 are that upon adoption order having been made: the parental responsibility of natural parents of a child, or of any other person connected with the child ceases. The adoptive parents assume the parental responsibility for the child; and the adopted child becomes a member of the adoptive parents' tribe, clan lineage or other group, and as such shall has all the rights to the family rituals in

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[228] C. M. V Clarkson & H.M. Keating, Criminal Law: Text and Materials, 2nd Edition 1990 at Page 116

[229] Investigator S/M Joseph Nastory

accordance with customary law. It is my observation that the law of adoption in Southern Sudan is not very clear in case of an adopted child committing an offence.

One would suggest that although placing legal conditions on foster care would be caused more harm to parentless children, it would force foster parents to take good care of the child who they may voluntarily accept to foster. This would strengthen the implication of the fact that upon adoption order, an adopter takes all the responsibilities pertaining to the child including legal representation.

d. The Reintegration of Juveniles into Community

Reintegration of juvenile into community is a process of receiving back the juvenile offender after having completed the period of detention in the reformatory centre. In order to protect the interest of the juvenile, it is advisable that a parent or guardian must be ready to receive back the juvenile after a release from a reformatory centre. This should be done with the assistance of social workers to ensure the interest of juvenile are not prejudiced. The social worker should continue the supervision of juvenile after release from detention. Where the juvenile had acquired skills during detention, the juvenile is also to be helped to get a job to sustain his or her live in the community.

It should be noted that since Southern Sudan lacks reformatory facilities, reintegration of juvenile into the community without having skills that would be useful to the juvenile future life poses a threat to the community. The fear is that a released juvenile who has no parents or has no ability to sustain his livelihood outside detention centres may revert to the former conditions that lured him or her to delinquent behaviours. It follows also that when a child is released from the detention centres, the authorities must ensure before reintegration of juvenile into the community that necessary reconciliatory processes have been initiated between the child and the person who was the victim of juvenile crime. Section 153 (c) of the Child Act provides for restorative justice and it is to the effect that: *crimes committed by a child shall be dealt with in accordance with the principle of restorative justice which aims to promote reconciliation between a child and the person (s) or community affected by the harm caused.* The researcher did not come across any legislation that provides for the procedures during and after the release of juvenile from

the detention centre. The significance of a due reintegration of juvenile into the community is that juveniles who once caused harm due to delinquent behaviours may reiterate the same antisocial wrong-doings when they come back to the same environment. Social reintegration according to one supervisor of Juba Orphanage School who talked to the researcher during the field *"is paramount for the survival for a delinquent child because if a child is released into hostile community, the life would be very harsh lest the child return to the centre"*. It should be noted that lack of the provision in the Child Act which provides for reintegration of juvenile into the community may be a loophole in the implementation of the provisions of section 135 (b) of the Child Act which provides inter alia *"that the main objectives of the juvenile justice is the restoration of harmonious relationships between the child offender and the victim through reconciliation, restitution and compensation"*.

6. The Prison Services

This section discusses the Prison Services, its purpose and the importance it plays in the juvenile justice system.

Prison is defined as a state or federal facility of confinement for convicted criminals, especially felons. It is also termed as penitentiary, penal institution or adult correctional institution.[230] In Southern Sudan, "Prison Institution" is defined to include any whole or part of a building, place or vehicle, but excludes military detention facilities[231].

Conventionally, every criminal justice system needs dedicated facilities in which to house persons held in pre-trial detentions, suspects and the accused persons and persons convicted of criminal offences[232]. Although juveniles can also be put in prisons, the law requires that putting juveniles in prison should be for their protection and not as punishment but for their reform. Otherwise, concurrence could be had to the view that "Locking children away in juvenile prisons steals a piece of humanity from all of us. That when we condone putting young people behind bars in desolate, violent institutions far

[230] Brayan A. Garner(Editor-in Chief), Black Law Dictionary, 8th Edition at page 1232
[231] Section 5 of the Prison service Bill, 2009, Laws of Southern Sudan
[232] Clarke Hall & Morrison on Children

from their homes and communities, we are complicit in the destruction of their childhood"[233].

According to section 185 (1) of the Child Act[234], it is provided that no child shall be received in any detention facility without a valid order from the Public Prosecution Attorney or judicial order from the court. Subsection 2 of the same section went further by providing that, before making a judicial order on detention, a court shall be satisfied that a suitable place is readily available. There must also be juvenile confinement centers, in other words, prisons cells specifically designed for children who commit serious crimes. These are often called juvenile detention centers.

A prison system must be capable of providing for the housing, care and security of prisoners, of respecting international standards for prisoner's rights, and of catering to the special needs of juvenile ...in detention. Prisons in principle should not serve as places for torture and inhuman or cruel treatment but should be a place of corrective and reformatory services. It is in this notion that the words of **Dwight S. Eisenhower** could be adored when he said that *"if you want total security, go to prison. There you are fed, clothed, given medical care and so on. That the only thing lacking... is freedom"*.

Therefore, juveniles in detention should be treated humanly and as such, section 190 (5) of the Child Act, provides that all disciplinary measures in places of detention constituting cruel, inhuman or degrading treatment shall be prohibited, including chaining, whipping, placement in a dark cell, closed or solitary confinement or any other treatment or punishment that may compromise the physical or mental health of the child. Section 190 (1) of the Child Act[235], provides that no child shall be disciplinarily sentenced more than once for the same infraction except in accordance with the law; he or she shall be fully informed of the alleged infraction and given a proper opportunity to present his or her defence, including the right of appeal to a competent authority of the prison.

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[233] JJPL Report, Louisiana 1998
[234] Laws of Southern Sudan, 2008
[235] Ibid

Southern Sudan has not yet enacted its Prison Service Act, but it has the Prison Services Bill, 2008 which is to be passed by Southern Sudan Legislative Assembly (SSLA). Under this Bill, clause 3 thereof provides for the purpose of the Prison Services; and it is to the effect that the purpose of this Bill is to establish an open, transparent, responsive, decentralized, professional prison services in Southern Sudan. Its mission shall be correctional, reformative and rehabilitative. It shall respect the will of the people, rule of law, order, civilian Government, democracy and human rights. Under its clause 5, the Bill defines "Juvenile Prisoner" to mean a Prisoner who is under eighteen years of age[236]. The Bill further states that prison service shall administer the safe custody, health and welfare of Prisoners.

The more explicit provision in regard to juvenile is clause 66 of the Bill which went further to provide for the juvenile prisoners and it is to the effect that: (1) Every Juvenile Prisoner (a) shall be subject to compulsory education, where available, and shall attend and have access to educational programmes of the same quality and nature to other education programmes available outside the Prison Institution; (b) shall have access to social work services, religious care, recreational programmes and psychological services, where available; and (c) shall be permitted to remain in contact with their families through additional visits and by other means; and that (2) The regulations shall provide for any other requirements to ensure the welfare of Juvenile Prisoners.

Whether this has been the practice in Southern Sudan considering the impacts of the civil war that characterized it with abrogation of legal machinery and a pitiful destruction of infrastructures is to be found out in Chapter Five which discusses the challenges facing the stakeholders in the administration of juvenile justice system.

a. The Facilities Required for Juvenile Detainees

Juvenile justice system requires that children who come into conflict with the law should be detained in places that take into account their status in life. For this reason, clause 64 (1) (c) of the Prison Service Bill provides for the separation of prisoners and it is to the effect that Juvenile Prisoners shall be kept separate from adult prisoners and shall be

[236] The Prison Service Bill, 2008 (Laws of Southern Sudan)

provided with the necessary requirements for their care and treatment. Clause 63 (1) of the Prison Service Bill provides for the Accommodation of prisoners and it is to the effect that; each Prisoner shall be placed in accommodation that- (a) is of such size, and is equipped with adequate lighting, ventilation, sanitary installations, bedding, clothing and other equipment, as is necessary for the preservation of the Prisoner's physical and mental health; (b) is organized in a way that is culturally appropriate; and (c) meets all other requirements provided for in the regulations.

Clause 77 of the Prison service provides for the Prisoner Rights and it is to the effect that Every Prisoner has a right to (a) adequate and nourishing food and clean drinking water;(b) regular and adequate medical care; (c) privacy; (d) adequate clothing; (e) bedding; (f) keep personal effects; (g) basic sanitation; (h) education, vocational training and reading materials; (i) all necessary individual assistance that is required in view of a Prisoner's age, sex and personality; (j) regular recreation and exercise; (k) practice any religion; (l) where possible, be detained as close as possible to family and to have regular contact with family and guardians; (m) defend him or herself if accused of an infringement of a disciplinary offence in the Prison Institution; (n) appeal; (o) make requests or complaints; (p) access legal counsel; and (q) receive visitors.

In Southern Sudan, one would not be exaggerating to say that although the laws exist for the treatment of juveniles, the reality is that juveniles that come into contact with the law face the wrath of a broken justice system. In an interview conducted with some of the juveniles in the Juba main prison, one Malual[237], a 16 year old boy charged with murder under section 206 of the Penal Code Act, 2008 described the conditions in the prison thus: *"the conditions of the prison are not good because two of us sleep on one mattress without bed sheet. That we are beaten 5-10 lashes when one makes mistake. That we eat once a day at 9 pm and the water provided is not sufficient".*

For this reason, one would conclude that having the written laws is one thing and the implementation of those laws to cure the intended mischief is another. Hence, the right of

[237] Real name withheld

juvenile to reformatory facilities is well entrenched in the legal books but difficult to benefit the intended beneficiaries (the juveniles).

b. The personnel

In southern Sudan, the war has not only caused the destruction of prison facilities but also caused lack of trained prison personnel for the administration of prisons in general and juvenile detention facilities in particular. This has resulted into a new recruitment of which the current cadres in charge of prisons were drawn from the former SPLA soldiers who are not only unskilled in prison services but also comprised mostly with majority of illiterate men and women who could not even read the laws or understand that the prisoners have the rights to be treated humanely. These lack of facilities and trained personnel run contrary to the spirit of Article 163 (1) of the ICSS which provides for the establishment of prisons service whose mission shall be correctional, reformative and rehabilitative; and the provision of section 135 of the Child Act[238] which is to the effect that the main objectives of the juvenile justice system are (a) reformation, social rehabilitation and reintegration of the child, while emphasizing individual accountability for crimes committed and (b) restoration of harmonious relationships between the child and the victim through reconciliation, restitution and compensation.

The management of juvenile facilities requires skilled personnel and for that reason, "the administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles, as well as suitability for the work"[239]. This is ambiguously mentioned under section 13 of the Prison Service Bill, 2009 which provides that the President shall appoint Officers to the Prisons Service following completion of the required training and on recommendation by the Minister.

The general rule for the prison administration where juveniles are detained is that weapons such as guns should not be carried in the facilities. This is stipulated under

[238] Laws of Southern Sudan, 2008
[239] UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990

section 190 (4) of the Child Act which provides that the carrying and use of weapons shall be prohibited in facility where children are detained. It is also a requirement under section 185 (4) of the Child Act that a police or prison officer of a sex different from that of a detained child shall not have any physical contact with such a child, except in the presence of a police or prison officer of the same sex as that of the child.

The personnel in the administration of prison service should also facilitate the right of appeal by the prisoners. This is the spirit of section 81 of the Prison Service Bill that the Prison Director shall ensure that Convicted Prisoners are given every opportunity and assistance to appeal against their sentences.

Clause 73 (1) of the Prison Service Bill provides for Access to Legal Services and it is to the effect that each Prisoner shall be entitled to consult on any legal matter with a legal practitioner of his or her choice and in a manner which preserves legal confidentiality between the Prisoner and his or her legal representative.

c. Reformatory Programmes

Every prison is expected to have reformatory programmes not only for juveniles but also for adult prisoners. According to the Gladstone Committee[240], *"Prison treatment should be effectually designed to maintain, stimulate, or awaken the higher susceptibility of prisoners... whenever possible and turn them out of prison better men and women, both physically and morally than when they came in"*. Therefore, since juveniles are supposed to be sent to reformatory centres by the courts in Southern Sudan; it should always be the first consideration for the court before sentencing a juvenile offender to prison to ensure that the Reformatory programmes or also known as diversion programmes are available and are in compliance with provisions of section 159 (1) of the Child Act which provides that such programmes should meet the following standards:

a. promote the dignity and wellbeing of the child and the development of his or her sense of self-worth and ability to contribute to society;
b. not be exploitative, harmful or hazardous to the child's physical or mental health
c. be appropriate to the age and maturity of the child

[240] (1895) C. 7702, para1 25

d. not interfere with the child's schooling
e. where possible impart useful skills
f. be reasonably accessible in term of transport and means.

The sole aim should be rehabilitation rather than punishment. It is widely acknowledged and Southern Sudan is of no exception that *"to punish with aim of reforming or rehabilitating the offender has constituted one of the most ambitious development in penal theory"*[241]. It is for this reason that the Prison Service Bill, 2009 provides under clause 70 for a right to exercise and recreation. This section provides that each Prisoner shall be allowed at least one hour each day of walking or other suitable exercise in the open air; and that the Prisons Service shall provide means for physical education, including cultural and recreational activities. Clause 72 (1) of the Prison Service Bill provides for Education and Vocational Training and it is to the effect that each Prisoner shall enjoy the right to education and vocational training.

The Comprehensive Peace Agreement (CPA) provides that before the enactment of relevant laws in both Southern and Northern Sudan, the current laws (meaning the laws that were prevailing before the CPA) will continue having force of laws until duly repealed. Because of this, the Prison Services in Southern Sudan had been using some of the relevant provisions in the 2004 Sudanese Child Act which was drafted in Arabic and had some elements of Sharia Law which are not applicable in Southern Sudan. The reality is that, in Southern Sudan, it is not lack of legislated laws that impede the adherence to the rule of law but the systematic institutional incapacities and lack of adequate facilities are the cause of ill-functioning of the system. Therefore, although the laws provide for the rights of juvenile to be sent to reformatory facilities, this right cannot be enjoyed by the juveniles because reformatory facilities are not in existence.

[241] C. M.V Clarkson & H. M. Keating, Criminal Law: Text and Materials, 2nd Edition 1990

CHAPTER 4: Challenges Facing Juvenile System in Southern Sudan

The challenges facing the juvenile justice system in Southern Sudan are too many to be enumerated, but in general, all the institutions face problems of institutional incapacities, inadequate facilities and negative attitudes towards the changes from the traditional old practices to new juvenile justice system embodied under the Child Act. Although the institutions charged with the administration of juvenile justice system in Southern Sudan were found to be trying their best in improving the juvenile justice system, their efforts are faced with other variety of complex hurdles ranging from ignorance of the existing law to improper institutional staffing and lack of cooperation among the institutions. Ignorance of the existing law was observed during the field work. The researcher found that most of the institutions do not make use of the principles embodied in the Child Act simply because the majority of personnel in these institutions do not know its existence or do not know the English language in which the Child Act is drafted. Since the challenges facing each institution will be explained herein below, it needs to be pointed out at the onset that in Southern Sudan, there is also lack of cooperation within the institutions charged with the administration of juvenile justice system. It should be noted that *"for juvenile justice to be rendered accessible and enforceable there must be cooperation between institutions in administration of juvenile justice processes. Such cooperation will positively impact on the quality and effectiveness of juvenile justice system"*[242]. In Southern Sudan, the cooperation between the stakeholders in the juvenile justice system is lacking". For instance, police may arrest children with out involvement of social workers in the process of arrest as well as during investigation. The courts on the other hand may go ahead and try cases without correcting mistakes made by the police and without according the due process of juvenile trail such as the present of social worker in the trail and holding of juvenile in camera. This is also true for prison services that receives and detains juveniles without lawful warrant to that effect.

[242] Nuchunu Justice Sama, Director of Lawyers for Human Rights and Environmental Protection providing Legal Aid in Criminal justice in Cameroon

A. The Challenges Facing Prison Service in Juvenile Justice:

The challenges facing the Prison Services in Southern Sudan in the administration of juvenile justice like for the other institutions include lack of trained personnel, poor or inadequate facilities and budget deficit. In an interview with the Director of Probation and After-Care in the Southern Sudan Prison Services, it was revealed that the problems facing juvenile department in the Prison Service include inadequate accommodation for juveniles, lack of reformatory facilities and lack of trained personnel[243].

According to the Director, the infrastructures for the accommodation of juveniles were destroyed during the war and no renovation has ever been undertaken because of budgetary problem. It should be noted that this has resulted into the fact that, *"prisoners are held under conditions that violate basic human dignity and threaten prisoner's health and physical integrity"*[244].

The few reformatory facilities that were established before the war such as Logolo Reformatory Centre and Maridi Reformatory School are not functioning. This has resulted into juveniles being released after their sentences without skills in their future lives.

In term of personnel, according to the Director is that his directorate lacks trained personnel, hence plans were underway for the prison to have required trained personnel. There were only three personnel trained in juvenile care but out of these three, one got pensioned and the other died. The one that remained is now a director. So there are no trained personnel in the directorate of probation and because of this no trained personnel that care for juveniles in the prisons. The current prison cadres were drawn from the former SPLA personnel who turned prison warders after the war with hardly skills in prison services. This makes prison conditions more appalling, cruel, inhuman and degrading thereby making the prisoners in general and juveniles in particular stay at fear. The prison is also overcrowded due to rampant arrest by the police of the law breakers coupling with the judicial delays in disposal of cases[245].

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[243] Brigadier Alex Manase Wani, Director of Probation and After Care, SPS- Juba

[244] Charles T. Call, Constructing Justice and Security After the War, 2007

[245] Charles T. Call, Constructing Justice and Security After the War, 2007

The other thing to note is poor keeping of juvenile registers in the detention centres. It is acknowledged that *"the creation of a unified system of prison registers should be an unprecedented improvement in the monitoring of the legality of detention to help end the formerly common place phenomenon of the forgotten prisoners. The treatment of pre-trial detainees and sentenced prisoners has been a difficult matter in post-conflict reconstruction around the world,*[246] *and Southern Sudan is of no exception. The circumstances of imprisonment should not therefore be used as an additional punishment and any adverse effect of imprisonment must be minimized. Although life in prison can never be normal, conditions in prison should be as close to normal life as possible, apart from the loss of liberty*[247]*".*

Institutional inefficiency is a common problem in Southern Sudan and juveniles in prisons run the risk of the violations of their human rights. For example, prison conditions according to the Southern Sudan Human Rights Commission are *"extremely poor across Southern Sudan, with many facilities lacking the most basic infrastructure which exhibit poor sanitation, lack of ventilation, lack of beds, the failure to separate children from adults, and lack of remedial care and food"*[248]. It can be unequivocally stated that *"the predicament of detainees is compounded by overcrowding and poor sanitary condition of the prisons. Some of the cells are infested with parasites and communicable diseases. Consequently, the prison harbor serious health hazards such as tuberculosis, pneumonia, and scabies which not only put the lives of the detainees in great peril but also pose a serious health risk to the wider community"*[249]. It can be concluded that the main challenges facing prison services in Southern Sudan include lack of appropriate staffing of prison with trained personnel and poor facilities for detention and reformatory facilities for sentenced juveniles.

B. The Challenges Facing the Police Services in Juvenile Justice

The police in southern Sudan needs tremendous reforms because "policing stands at the intersection of human rights, justice and security. Police reform is one of the most

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[246] Ibid
[247] Ibid
[248] (SSHRC- First Annual Report July 2006- Dec. 2007)
[249] Nuchunu Justice Sama, Director of Lawyers for Human Rights and Environmental Protection providing Legal Aid in Criminal justice in Cameroon

important components in post conflict societies and for this to happen, there is a need for *"institutional modifications of police organizations, including merit-based selection criteria, more professional training, the inclusion of important ethnic and religious groups and women and restructuring are quite feasible and important in the post war settings*[250].

A research conducted by Save the Children Sweden found that investigation of crimes allegedly committed by children is usually conducted while the children are already in custody; and that persons dealing with juvenile cases are not aware of the concept of child abuse, restorative justice, child rights and juvenile justice[251]. There is a wide gap between the police practices and legislations and this requires regular sensitization and dissemination of the Child Act to the police force who deal with juvenile delinquents. It is only when the police force is educated on the values for juvenile justice that a conducive environment for juvenile human and legal rights can be realized. This is important because *"the initial experience at the police station is the decisive first stage of the criminal justice chain*[252]*";* it is equally true that for juvenile justice system in Southern Sudan to be implemented, the police force needs to be sensitized, trained and restructured to include effective juvenile departments in every police station. The current state of police practices according to the report by UNMIS on the Southern Sudan Police revealed that *"police practices and lack of capacity violates human rights of detainees"*[253]. This report goes on to say that *"while some are held inappropriately, some inmates spend more time in pre-trial detention than the maximum imprisonment period fixed by the law for the alleged offence. Consequently, it is not uncommon for detainees to get lost in the system and spend months or years in jail. Among these suffering masses are vulnerable groups to which the category of juvenile offender falls"*[254]. It may be said that in Southern Sudan, institutions are created by legislations but the presence and practices of those institutions on the ground is a different history to ponder. The police in Southern Sudan currently faced several challenges which include lack of properly trained

[250] Charles T. Call, Constructing Justice and Security After the War, 2007, P. 387
[251] Alphaxard K. Chabari, Adapting Restorative Justice Principles to Reform Customary Courts in Dealing with Gender-Based Violence in Southern Sudan, November 2008
[252] The Lilongwe Declaration: Accessing Legal in the Criminal Justice System in Africa
[253] UNIMIS- Human Rights Bulletin, issue 13 August 2009 at page 6
[254] Nuchunu Justice Sama, Director of Lawyers for Human Rights and Environmental Protection providing Legal Aid in Criminal justice in Cameroon

personnel such as investigators, charge officer, administrative police officers as well as poor and insufficient infrastructures for the detention of juveniles. The researcher found that juvenile detainees were not being separated from the adults.

C. Challenges Facing Courts in Southern Sudan

Among all the problems that face the Judiciary of Southern Sudan in the administration of justice in general and juvenile justice system in particular is lack of trained judicial officers which is attributed to the war. Unless judicial reform takes place, the plight of juveniles remains undesirable. The other challenges facing judicial administration of juvenile justice system range from the fact that institutions envisaged under the Child Act have not yet been established. These include the juvenile courts are; the Independent Child Commission and the Child Justice Committee. It follows also that although the County Courts are empowered under section 192 (3) of the Child Act to handle juvenile cases, the judges have no prior training nor in-service training as provided under section 192 (7) of the Child Act which requires that judges serving in juvenile courts shall receive in-service training and/or other appropriate methods of instruction on child's rights. The conclusion would be that *"judicial reforms have generally accomplished less than security reforms in Southern Sudan. They have tended to be less ambitious, less strategically planned, less coordinated, less swift, and less publicly understood and supported than security reforms*[255]. There could be no dispute that *"legal reforms are insufficient without institutions that can guarantee rights protection to citizens and enforce laws. It is said that "institution building of police, prosecutor, courts, bar associations, and relevant civil society actors is crucial to the perception and existence of justice*[256]*"*.

Although there exist in Southern Sudan legislations that match international standards, it is to be noted that "written guarantees have done little to protect human rights in most of the post-conflict countries such as Southern Sudan. This is because the courts in Southern Sudan continue to be badly managed, in part because of poor delineation of judicial functions. It is also an indisputable fact in Southern Sudan that *"judges vary*

[255] Charles T. Call, Constructing Justice and Security After the War, 2007
[256] Ibid

tremendously in their qualifications, but the average skill level is poor like prosecutors, because judges typically show little ability to identify the most salient facts, to render decisions that are explicitly based on a combination of fact and applicable law[257]". For example, Deng, a juvenile, was charged by the police under wrong section of The Penal Code Act and eventually sentenced by the 3rd Grade Judge who failed to correct the charge. The judge could not also realize that he had no jurisdiction to try juvenile offenders. This is a justification to the fact that "judges routinely accept arrest reports that are patently unlawful. Therefore lack of skills combined with intentional resistance to change usually prompt the police, the prosecutors and the court in allowing illegal procedures to persist[258].

The other challenge facing the judiciary in Southern Sudan is that most of the young judges serving at county courts which are the only courts empowered under the Child Act; pending the establishment of juvenile courts to deal with juvenile offenders is language problem and proper training. This is because these judges were trained in Arabic language. When the CPA was signed in 2005 and Southern Sudan was granted an autonomous government with its own judiciary, the laws were to be legislated and promulgated in English, a language which is not familiar to most of the junior judges who were trained in Arabic. The language problem in the judiciary of Southern Sudan persists tremendously in the sense that even the judicial judgments tend to be much more shorter than were in Arabic because the judges could not think of precise and safe English terminologies equivalent with Arabic legal terms, hence a translation would be required from Arabic to English.

It is to be remembered that not only the codes are imposed upon a legal profession which has no formal training or instruction in English, but they were introduced without making available to the lawyers the essential and basic works annotating and explaining the new English version of the law.

As such, one Zaki Mustafa, the Attorney General once said in 1973 when judges in Sudan were to shift from English to Arabic language that *"The Code is drafted in Arabic*

[257] Charles T. Call, Constructing Justice and Security After the War, 2007
[258] Charles T. Call, Constructing Justice and Security After the War, 2007

a language which the vast majority of judges did not use for their law studies. And because of this abrupt shift, two major aspects have so far manifested themselves. The code has introduced a considerable body of legal terms and legal concepts which are new to all those lawyers who have had their training at Khartoum University with no prior training in Arabic, and that those terms are not easily understandable. That the majority of Sudanese lawyers who were trained in the common law find it much easier to express themselves in English than in Arabic when discussing any legal issue. The judges do not feel as much at home with Arabic legal jargon as they do with English. Whenever judges referred to authorities, be they Sudanese precedents, English precedents or American books, the part referred to had to be translated. Since this is a fairly tedious job, judges were discouraged from referring to foreign authorities"[259]*. But apart from that, the language problem has another very important dimension viz that Arabic could not be suddenly made the language of the entire legal profession when there is a Southern Sudanese who barely speak simple colloquial Arabic let alone read and understand a code drafted in Arabic, which the Arabic speaking lawyers found it difficult to understand"*[260].

As this passage explains, now that the current laws are written in English and the judges were trained in Arabic, a shift from Arabic to English is not an easy task. It is also true that short courses which are being conducted for judicial officers in English language cannot be said to have solved judges' language problem in Southern Sudan. Therefore, juvenile justice system faces a problem of interpretation of the Child Act. It is said that *"applying the law always involves interpreting it. That any norm posed in an authoritative legal text has to be understood before it can be applied and accordingly, in a wide sense of the term 'interpretation' every application of law requires some act of interpretation, since one has to form an understanding of what the text says in order to apply it, and any act of apprehension of meaning can be said to involve interpretation"*[261].

It should be remembered that for Southern Sudan to have a sound juvenile justice system, the judicial officers must be recruited to juvenile courts with prior qualification since it is

[259] Zaki Mustafa, Attorney General 1973, Journal of African Law, Vol. 17 at page 133
[260] John Morison, Judges, Transition and Human Rights, 2007
[261] Neil MacCormick, Rhetoric and the Rule of Law, 2005

believed that *"the most indispensable condition for a fair criminal trial is to have an independent, impartial and competent judge to conduct the trial"*[262]. Therefore the judge cannot administer justice with understanding to the provisions of the laws.

D. Challenges Facing Public Prosecutions in Juvenile Justice System

In Southern Sudan, it is the role of the Directorate of Public Prosecutions and State Attorneys to ensure that institution of criminal proceedings against any person are initiated in accordance with acceptable due process of criminal law, lest the routine functioning of the judicial system remain extremely deficient to protect the public.

The main challenges facing the Directorate of Public Prosecutions and State Attorneys in the administration of juvenile justice include lack of trained legal counsel. This justifies the fact that, the Public Prosecutions and State Attorneys in Southern Sudan showed sign of systemic incompetence like the police who were reformed more in name (numbers) than in practice. The conclusion would be that *"intelligence reform lagged, and resources are being wasted through a lack of coordination and failure to hold agencies responsible for effective use of resources for the end of justice*[263].

The other challenge is that most of the legal counsels in the Ministry of Legal Affairs like their counterparts in the judiciary were trained in Arabic and therefore, it may be difficult for them to understand and appreciate the English drafted legal text such as the Child Act. It is true that one cannot change to something which he/she hardly understands.

It is said that "change requires transforming not just codes, but the very mind set of the legal profession and institutions themselves. Charles T. Call said that *"without effective checks on state institutions, they are likely to continue to engage in discriminatory or incompetent corrupt behaviour, despite laws to the contrary*[264].

It should also be noted that a juvenile offender in Southern Sudan faces the wrath of legal machinery without legal representation. Although legislations such as the ICSS, the Criminal Procedure Act and the Child Act among others provide for Legal Aid to be provided by the Ministry of Legal Affairs and Constitutional Development, it is evidence that accessibility to legal aid is constrained in Southern Sudan for many reasons. Firstly;

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[262] Kamal Hossain, Leonard F.M Besselink, Human Rights Commissions and Ombudsman, 2000 P. 135
[263] ibid
[264] Charles T. Call, Constructing Justice and Security After the War, 2007, P. 397

although *"it is the objective of the law to extend legal aid to every pauper who is unable to pay an advocate's costs, in practice the vast majority of Southern Sudanese litigants or accused persons do not benefit from the system for a variety of reasons"*. This was confirmed by the Director in the Directorate of Contract, Conventions and Treaties, Legal Aid and Human Rights in the Ministry of Legal Affairs and Constitutional Development that his Directorate had never had any case for which legal aid could have been rendered. The attitude of the officials charged with responsibility of determining who is entitled to legal aid and who is not may lead to the rejection of genuine cases of indigency if there is no devised system of cross-checking.

The Public Prosecution Attorneys in Southern Sudan are not only responsible for investigations and prosecutions in juvenile justice system but also responsible for the provision of legal aid to those who may not afford legal representation by private lawyers. Juvenile offenders because of their vulnerable status in society fall within those persons who would be entitled to legal representation on the expense of state. The provision of legal aid is recognized under section 175 (3) (b) (vi) of the Child Act which provides that it is the right of the child to be provided with legal representation by the Ministry of Legal Affairs and Constitutional Development. This will alleviate the fact that *"where the accused is unrepresented in the court, it is often the case that he/she faces the double prospect of a hostile bench and a hostile prosecutor*[265]*"*.

In Southern Sudan, it is not with prejudice to say that Public Prosecution Attorneys are rarely seen in courts conducting prosecutions but also leave the police to represent them even in serious criminal cases. The same practice applies when dealing with juvenile offenders. There is hardly a system of accountability for institutional roles in Southern Sudan and this hinders the fact that judicial authorities are responsible for ensuring respect for principle of equality in the courts and for procedural rules in prison and police stations. It is not uncommon to encounter a highly placed official in Southern Sudan sitting in an office while doing nothing due to ignorance which he/she hardly admits. The Public Prosecution Attorneys like the police investigators, judges and prison personnel

[265] Nuchunu Justice Sama, Director of Lawyers for Human Rights and Environmental Protection providing Legal Aid in Criminal justice in Cameroon

are also inefficient because they were trained in Arabic thereby making them unable to implement the English written law such as the Child Act effectively.

The Department of Women and Juvenile Justice created in the Ministry of Legal Affairs and Constitutional Development is ill-staffed to the extent that there are no records of juvenile cases. It is also true that the few legal counsels who are there do not even know the level of juvenile delinquency in Southern Sudan leave alone their supposed appearance in juvenile cases.

In this state of affairs, juvenile offenders suffer as a result of inefficient public prosecution attorneys who control proceedings at every stage. This problem was clearly stated in **The people Vs Asanga Asongwe**[266], that *"considering that the investigation and prosecution of criminal matters is substantially within the purview of the Legal Department, lawyers usually have very little to do with the lengthy delays"*. Therefore, it is advisable that personnel in the institutions dealing with juvenile justice system should not only be qualified but also committed to their work.

e. Challenges Facing Social Workers in the Administration Juvenile Justice

The role of social workers in the administration of juvenile justice is to ensure the welfare of juvenile offenders. These include making assessment of juveniles who are arrested before court trials and to assist the juvenile during investigations[267]. The social workers are also supposed to render counseling services to juvenile offenders.

It was found during the research that social workers have no presence in the administration of juvenile justice system in Southern Sudan. Investigations are conducted by the police without social workers. The courts also decide juvenile cases without social workers.

It was revealed that social workers like the rest of their colleagues in other institutions dealing with juvenile justice system face similar problems of trained personnel shortage, inadequate mobility facilitation and poor financial motivation which is one of the most problems complained of both by the social workers and the Ministry responsible for

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[266] CFIBA/1128C/01-02

[267] Secton 140 (2) of the Child Act, 2008

social work whose budget is the least in the yearly budget of the Government of Southern Sudan.

The other challenge is lack of trained personnel. In term of trained personnel, *"social workers should receive training to enhance efficiency in their work"*[268]. The Directorate of Child Welfare in the MGCSWRA acknowledges that social workers are not involved in the process of criminal proceedings against the juveniles and this can be partly attributed to the police and courts that do not recognize the role of social workers in juvenile justice system. In its report, the Directorate says that "in theory the laws for the protection of the rights of the children do exist which needs to be administered through the judiciary, police and prison services. The Director says that, lack of sensitization is a major problem in most institutions that deal with delinquent children. Because of poor skills for the social worker, the duty of social workers to carry out the surveillance for the conduct of the juvenile in the society is not being done.

It should be noted that there is lack of cooperation among the stakeholders and therefore, social workers are not involved because the importance of their role is not appreciated by the judges, the police and prisons authorities. These institutions have limited knowledge of the current statutory children laws specially the Child Act, international human rights laws and customary laws[269]".

[268] Initial Report to the African Committee on the Rights and Welfare of the Child by MGCSWRA, 2009
[269] Ibid

Chapter 5: General Conclusion and Recommendations

This chapter summarizes the real problems that impede the implementation of the statutory juvenile justice system in Southern Sudan in light of the legislated domestic laws and the ratified international and regional instruments. As revealed in the respective chapters, the recommendations advanced in this chapter are based largely on the adored concepts and principles that uphold the best treatment of juvenile offenders while maintaining the reactionary measures for the need to control juvenile delinquency. This chapter draws conclusion that although the hypotheses on which this research is based bear significant implication on juvenile justice system in Southern Sudan, one hypothesis, the weaknesses in term of efficient staffing and sufficient facilities for the administration of juvenile justice system feature notably as the major challenges that need urgent attention. This research is a critique on juvenile justice system in Southern Sudan with the aim of finding out how adequate or inadequate it is in controlling juvenile delinquency. It also makes critical analysis on the challenges facing the stakeholders as discussed in Chapter 4 and the traditional systems that were/are being used before and during the enactment of the Child Act, 2008.

This research has drawn a clear picture of what the real problems facing juvenile justice system in Southern Sudan are. It is upon this background that the recommendations that are deemed appropriate for the improvement of the practices that bolster the impediment of sound juvenile justice system in Southern Sudan are made.

It is recommended that the need for good juvenile justice in Southern Sudan requires not only the child legislations but also an adherence these legislations and good practices. It is said that *"if people believe in and orient their conduct towards a body of norms regarded as a system of law, this is one way of achieving a measure of order and security among themselves*[270]. The reforms that have been initiated only need change of attitudes by the stakeholders in the justice system in general and juvenile justice system in particular in Southern Sudan so that legislations that are in place are implemented to the letter and spirits in which they were promulgated. **Neil MacCormick** said that *"a legal system is not of course a tangible physical entity. It is an ideal constructed of thought*

[270] Neil MacCormick, Rhetoric and the Rule of Law, 2005

object. A legal system belongs to the real social world a distinct from pure world of ideas, to the extent that a corresponding legal order exists, however imperfectly"[271]. Therefore, juvenile related legislations in Southern Sudan would be mere lip services if there is no will to enforce them. This is true as that saying goes *"there cannot be a rule of law without rules of law"*[272]. *Where the law is faithfully observed, the rule of law obtains; and the societies that live under the rule of law enjoy great benefits by comparison with those that do not*[273]. *Where the rule of law is observed, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions*[274]. *Ronald Dwokin contends that "the most basic legal right of human beings is to be treated with equal concern and respect by agencies; and the citizenship rights and rights to fair administration of justice require institutions of democratic political participation, and well-organized and properly staffed tribunals, courts and legal professions*[275].

Based on the discussions on the existing child legislations, the prevailing practices and challenges found during this research, this chapter makes the following recommendations to the respective stakeholders. This is because juvenile justice system involves several stakeholders and therefore, it is prudent that recommendations should be made based on the roles of each institution. Thus the following recommendations are proposed.

1. Recommendations to the Ministry of Legal Affairs and Constitutional Development:

The Ministry of Legal Affairs and Constitutional Development's role in the administration of justice in general and juvenile justice in particular is very important for juvenile justice system can only achieve its purpose if the Ministry does the followings:

i. Ensures that appropriate legal mechanisms that match international and regional standards are followed and where necessary, legislations be initiated

[271] Ibid
[272] Ibid
[273] Neil MacCormick, Rhetoric and theRule of Law, 2005
[274] Ibid
[275] Ibid

in pursuant to the need of having a sound juvenile justice system in Southern Sudan.

ii. Trains specialized staff to man its women and juvenile justice department

iii. Discourage the imprisonment of child offenders except as a matter of last resort.

iv. Staffs all State Legal Administrations with state attorneys possessing necessary knowledge in juvenile justice system.

v. As most of the stakeholders complain of insufficient dissemination of the Child Act, 2008, the Ministry needs to prioritize the dissemination of the Child Act not only to the institutions but also to the general public who still adhere to customary practices in juvenile matters.

vi. translates the Child Act from English into Arabic and local languages so that the police, prison services personnel, social workers and judges who are literate in Arabic can make use of the law of the Child Act. This will discourages judges who are still using 2004 Child Act which is in Arabic language but not comprehensive.

vii. Makes regular assessment of implementation of the Child Act and if need be, further sensitization and the dissemination to be done. Otherwise, involvement of NGOs with unfamiliar programmes may cause problem of unfamiliarity to the stakeholders.

viii. Organizes and promotes necessary research as a basis for effective planning and policy formulation for juvenile justice system

2. Recommendations to the Judiciary

Judicial decisions if improperly made affect the future of every person and juveniles are of no exception; hence the judges should be persons of upright professional characters and competence in the dispensation of justice. The rule of law cannot prevail without efficient and sufficient judicial establishments. It is upon this notion and in light of reflections gathered from the discussions on the prevailing improper juvenile trial procedures and treatments exhibit by the judicial officers that it is necessary to make the following recommendations for the judiciary in Southern Sudan to be able render the

required juvenile justice. The recommendations envisaged to improve the judicial effectiveness in the administration of juvenile justice include:

i. Training of the judges serving in juvenile courts for proper adjudication of juvenile cases should be the top priority of the judiciary. This is because it is believed that the most indispensable condition for a fair criminal trial is to have an independent, impartial and competent judge to conduct the trial[276].

ii. The establishment of the necessary juvenile courts as provided under section 192 of the Child Act in all the ten States of Southern Sudan

iii. Judicial Service Council as mandated to ensure effective functioning of the judiciary should speed up establishment of independent Child Commission and Juvenile justice Committee in conjunction with the Ministry of Gender, Child, Social Welfare and Religious Affairs.

iv. Strengthen the cooperation and involvement of social workers in the judicial trial of juvenile cases.

3. Recommendations to the Ministry of Gender, Social Welfare and Religious Affairs

The success and implementation of juvenile justice system cannot be achieved if the Ministry of Gender, Child, Social-Welfare and Religious Affairs has no proper plans for the protection and promotion of the rights of children in general and juvenile offenders in particular. This means that it is only when the MGSWRA is championing a lead role in the promotion and administration of juvenile justice system that all stakeholders will do the same. As such, the Ministry should do the followings:

i. Initiate programmes designed to decongest the facilities that combine street children with juvenile offenders;

ii. Organize registration for children who are born in the rural areas to ease the determination of ages of juvenile which is necessary juvenile trials;

iii. Strengthen the social workers' responsibilities and roles in the juvenile justice system;

iv. Establish information centres for juvenile cases;

[276] Kamal Hossain, Leonard F.M Besselink, Human Rights Commissions and Ombudsman, 2000 P. 135

v. Establish counseling centres for both the victims and juvenile offenders;
vi. Liaise with the police, prisons and courts in any settlement of juvenile offences;
vii. Promote the development of non-institutional alternatives to detention; and
viii. In view of the types of juvenile offenders which mostly hail from poor families, the Ministry should initiate programmes that encourage NGOs to supplement its efforts in providing facilities and services such as community based rehabilitation and reformatory programmes.

4. Recommendations to the Police Services

As the police are the first point of contact with the juvenile justice offenders, it is more important that they carry out their functions in an informed and appropriate manner. This can only be done if they are skillful and sufficient police services with adequate facilities. As such, the followings recommendations are proposed:

i. It is recommended that the police should strengthen the Gender and Children's Desks that are now established in all police stations by providing specialized training to those personnel to ensure proper custody of juveniles who come to police detention cells;
ii. Ensure sufficient and adequate sensitization and dissemination of the Child Act to all police personnel;
iii. The police to have specialized units that deal with the arrest, detention and investigation of juvenile offenders;
iv. Establishes child protection Units within all levels in Southern Sudan Police stations;
v. Ensure that the police apply the principles embody in the Child Act;
vi. Respect the rights of Juveniles that are detained in the police cells; and
vii. Establish separate juvenile detention facilities in all police stations

5. Recommendations to the Prison Services

It is a reality that reformations of prisoners in general and juvenile prisoners in particular lie in the hands of the institution whose custody they are placed. It is to be remembered

that the Beijing Rules for the Administration of Juvenile Justice draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice to ensure that children when detained are not mistreated This makes it imperatively important that the prison services should be well equipped both with trained personnel, adequate detention facilities and standard training programmes. In order to fulfil these, it is recommended that the prison services should do the followings:

i. Promote specialized training of prison services officers in all areas including children law, administrative law to ensure proper administrative functions of the juvenile institutions or detention centres;
ii. Make effort for the construction of separate remand homes for the detention of juvenile detainees;
iii. Establish administrative guidelines which must prohibit the corporal punishment of detained juveniles;
iv. Initiate renovation of reformatory centres for the training of juveniles and construct more reformatory facilities;
v. Renovate and constructs separate facilities for separation of juveniles from adult prisoners as well as separation of female juveniles from male juveniles;
vi. Lobby SSLA for the passage of the Prison Services Bill of 2009 which is still before it;
vii. Ensure that every detention facility has adequate food stuff which shall ensure that every juvenile receives food that is suitably prepared and presented at normal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements;
viii. Provide bore-wells to ensure safe and clean drinking water to every juvenile at any time; and
ix. Ensure that rehabilitative programmes are run for the training of juveniles.

As the foregoing recommendations explained, informed juvenile justice policy must be kept abreast of advances in knowledge and the continuing development and improvement of juvenile justice system both internationally and regionally. It is upon embracing and

incorporating theses recommendations into domestic legal systems that juvenile delinquency will be controlled in the bud before it gets sophisticated.

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