

ACCESS TO JUSTICE FOR CHILDREN: SOUTH SUDAN¹

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Republic of South Sudan (“South Sudan”) acceded to the CRC on 23 January 2015.

² It is a dualist state, therefore international treaties such as the CRC do not form part of its domestic law unless the treaties have been specifically incorporated into South Sudan law through legislation.³

In principle, South Sudan has agreed to submit to other international human rights laws; ⁴ and, under international law, South Sudan is bound by the treaties to which Sudan was a party at the time of South Sudan’s independence.⁵ To date, South Sudan has adopted just a handful of international treaties.⁶

B. Does the CRC take precedence over national law?

No.

C. Has the CRC been incorporated into national law?

No. Although South Sudan has not yet ratified or incorporated the CRC through legislation, two key documents seek to incorporate many of the CRC’s provisions: (1) the Transitional Constitution of the Republic of South Sudan 2011 (“Transitional Constitution”),⁷ and (2) the Child Act 2008 (“Child Act”).⁸

¹ South Sudan is the world’s youngest nation, having become an independent state on 9 July 2011 following a referendum vote: UNMIS, ‘Independence of South Sudan’, available at: <http://www.un.org/en/peacekeeping/missions/past/unmis/referendum.shtml>.

² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

³ Human Rights Development Organisation - South Sudan, ‘The process of committing to international human rights treaties’, available at: <http://huridoss.org/conventiontreaties/>.

⁴ Transitional Constitution of the Republic of South Sudan 2011 (“Transitional Constitution”), article 9, available at: <http://www.refworld.org/pdfid/4e269a3e2.pdf> (“[A]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.”).

⁵ Amnesty International, ‘Annual Report: South Sudan 2013’, 23 May 2013, available at: <http://www.amnestyusa.org/research/reports/annual-report-south-sudan-2013>.

⁶ FIDH, ‘South Sudan: First Anniversary of Independence: Time to Act for Peace and Human Rights Protection’, 2012, p. 26, available at <http://www.fidh.org/IMG/pdf/sudsoudan591apdf.pdf>.

⁷ Upon independence, the Transitional Constitution of the Republic of South Sudan took effect. The National Constitutional Review Commission had one year to review the Transitional Constitution and propose a permanent constitution. However, the Committee is still working on drafting a permanent constitution, as the country is entangled in debate regarding what form of government to establish. In 2013, the National Legislative Assembly granted the Committee an additional two years to complete the task, making the new deadline 9 January 2015. Thus, to date, the Transitional Constitution is the supreme law of the land: FIDH, p. 18; Radio Tamazuj, ‘No Permanent Constitution in South Sudan Before 2015: Bill’, 20 February 2013, available at:

One of the 26 rights provisions in the Transitional Constitution's Bill of Rights is the "Rights of the Child".⁹ The "Rights of the Child" provision outlines the broad rights to which children in South Sudan are entitled. For example, children are guaranteed the rights "not to be subjected to exploitative practices or abuse, nor to be required to serve in the army[,] nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being", "to be free from corporal punishment and cruel and inhuman treatment by any person including parents, school administrations and other institutions", and "not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity".¹⁰ The "best interests of the child" principle and the definition of the child according to the CRC are also incorporated into this provision.¹¹

Second, the Child Act was enacted "to extend, promote and protect the rights of children in Southern Sudan, in accordance with provisions of Article 21 of the Interim Constitution of Southern Sudan, 2005, and as defined in the 1989 United Nations Convention on the Rights of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Sudan is signatory".¹² Sections 6 through 33 of the Child Act set forth the rights to which South Sudanese children are entitled under the Act.¹³ These include the "best interests of the child" principle, the child's right to be heard, non-discrimination, amongst others. The Child Act also provides for the establishment of an Independent Child Commission, whose functions include monitoring compliance with the CRC.¹⁴

However, an August 2012 UN report found that the Child Act had not yet been implemented, the Independent Child Commission under the Child Act had not been formed, and prosecutors and law enforcement officials were not familiar with the Child Act.¹⁵

D. Can the CRC be directly enforced in the courts?

As South Sudan has not ratified or incorporated the CRC into domestic law, it cannot be enforced in the courts.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

<https://radiotamazuj.org/en/article/no-permanent-constitution-south-sudan-2015-bill>; James T. Mathiang, 'South Sudan's Transitional Constitution and the Issue of Decentralisation', South Sudan News Agency, 14 May 2013, available at:

<http://www.southsudannewsagency.com/opinion/editorials/south-sudans-transitional-constitution>;

ConstitutionNet, 'Constitutional History of South Sudan', available at:

<http://www.constitutionnet.org/country/constitutional-history-south-sudan>.

⁸ Available at: <http://www.refworld.org/pdfid/49ed840c2.pdf>.

⁹ Transitional Constitution, article 17.

¹⁰ Ibid., article 17(1)(d), (g).

¹¹ Ibid., article 17(2) and (4).

¹² Child Act 2008, section 3.

¹³ Ibid., sections 6–33.

¹⁴ Ibid., section 193.

¹⁵ United Nations High Commissioner for Human Rights, 'Technical Assistance and Capacity-Building for South Sudan in the Field of Human Rights', 28 August 2012, p. 3, available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-34_en.pdf.

As South Sudan has not ratified or incorporated the CRC into domestic law, it has not been used in domestic courts. Similarly, there is no evidence that a court has applied the domestic Child Act or Bill of Rights.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

The Child Act mandates that “[a]ll levels of government . . . provide effective remedies to redress violations of the rights in this Act, including through access to child-friendly, independent complaints procedures and competent Courts”.¹⁶ Sections 6 through 33 of the Child Act set forth the rights to which South Sudanese children are entitled under the Act.¹⁷ Under the Act, the following persons have the authority to bring cases in domestic courts to enforce a child's rights: (a) the child, through a parent, relative, or guardian; (b) the child's parent, guardian, or custodian; (c) the child's relative; (d) a social worker; or (e) any other authorised person.¹⁸ In addition, every member of the community is required to report to a public official any instance in which he or she “reasonably suspects that a child's rights have been, or are being, or are likely to be infringed”.¹⁹ The public official then has the authority to investigate and bring a case on behalf of the child.²⁰

In addition, in both criminal and civil cases, guardians may bring cases on behalf of a child. The Code of Criminal Procedure Act 2008 provides that when a crime is committed against a juvenile, “any person competent as his or her guardian may present the complaint on his or her behalf”.²¹ Under the Code of Civil Procedure Act 2007, “[i]n every suit in which a minor is either plaintiff or defendant, he or she shall be represented by a guardian ad litem appointed by the Court”.²²

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Under the Child Act, a child may only bring a case via a parent, relative, or guardian,²³ and under the Civil and Criminal Procedure Acts, suits must be brought by the child's guardian.²⁴ However, every child has the right to be heard in any proceeding in which a matter concerning the child is discussed.²⁵

C. In the case of infants and young children, how would cases typically be brought?

¹⁶ Child Act 2008, section 36.

¹⁷ Ibid., sections 6–33.

¹⁸ Ibid., section 128.

¹⁹ Ibid., sections 34–35.

²⁰ Ibid., section 34.

²¹ Code of Criminal Procedure Act 2008, section 35, available at: <http://www.goss-online.org/>.

²² Code of Civil Procedure Act 2007, section 114, available at: <http://www.goss-online.org/>.

²³ Child Act 2008, section 128.

²⁴ Code of Criminal Procedure Act 2008, section 35; Code of Civil Procedure Act 2007, section 114.

²⁵ Child Act 2008, section 7.

As in part II.A above, a parent, relative, guardian, social worker, or other authorised person can sue under the Child Act on behalf of the child. Alternatively, a member of the community can report violations of the law to a public official who can then bring a suit on behalf of the child.²⁶

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Three provisions require the government to supply legal aid. First, the Transitional Constitution guarantees that “any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence”.²⁷ In addition, one of the Ministry of Justice’s mandates is to “[p]rovid[e] legal aid to those in need”.²⁸ And finally, the Constitutional Development Organisation Act 2008 requires that persons in need be provided legal aid and education through workshops, seminars, and media.²⁹

However, this government-provided legal aid currently is reserved for legal representation in only the most serious criminal, civil, land, and family matters.³⁰ According to some observers, “[t]he provision of legal aid [by the government], as it is known, is virtually non-existent”.³¹

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child’s parents or guardian have to agree to a case being brought)?

The Child Act does not explicitly require parental consent for suits to be brought on behalf of children, and no case law suggests otherwise.³² There are no other such conditions or limits.

III. How can children’s rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

See part II.A above.

Furthermore, under the Transitional Constitution, violations of children’s rights under the Bill of Rights may be brought to the Supreme Court and other competent courts,

²⁶ Ibid., section 128.

²⁷ Transitional Constitution, section 19(6).

²⁸ Government of the Republic of South Sudan, ‘Justice’, available at: <http://www.goss-online.org>.

²⁹ Constitutional Development Organisation Act 2008, section 10 (d), (g); Beny Gideon Mabor, ‘Lack of Legal Representation Jeopardises Right of Fair Trial in South Sudan’, Sudan Tribune, 27 September 2012, http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=44019.

³⁰ United Nations High Commissioner for Human Rights.

³¹ Victor Lowilla, “‘Guilty Until Proven Innocent’: Pretrial Detention in South Sudan”, The New Sudan Vision, 22 September 2013, available at: <http://www.newsudanvision.com/articles--publisher/2752-victor-lowilla-the-new-sudan-vision-nsv-newsudanvision-com>.

³² Child Act 2008, section 128.

which must uphold, protect and apply the Bill of Rights.³³ Article 17 entitled the “Rights of the Child” outlines the broad rights to which the children of South Sudan are entitled.³⁴

An individual or group can make a complaint about a violation of a child’s rights under the Bill of Rights or CRC to the South Sudan Human Rights Commission, whose functions include investigating such complaints.³⁵ The mission of the Commission is “the promotion and protection of the human rights and fundamental freedoms of the people of Southern Sudan as enshrined in the Bill of Rights... as well as the international human rights treaties and conventions ratified by the Republic of Sudan”.³⁶

Finally, South Sudan offers alternative dispute resolution mechanisms. The Child Act requires government officials to “mediate on behalf of a child in any situation where his or her rights have been infringed and especially in regard to the protection of the child”.³⁷ South Sudanese communities also have a number of traditional dispute resolution procedures, including mediation by family, friends and neighbours, negotiation, and settlement.³⁸

B. What powers would courts have to review these violations, and what remedies could they offer?

Statutory and customary courts have the power to review all claims under the Child Act.³⁹ Section 30 provides the following penalties for any wilful or culpably negligent infringement of any of those rights: imprisonment for seven years or less, a fine, and/or compensation to the child.⁴⁰ Section 32 establishes the penalties for recruitment of a child into an armed force as imprisonment for 10 years or less and/or a fine.⁴¹ Section 35 sets the penalties for failing to report the infringement of a child’s right as imprisonment for six months or less and/or a fine.⁴² Sections 69 and 106 provide the penalties for negligently or intentionally causing loss or damage to a child’s estate and for removing a child from lawful custody, respectively.⁴³ Finally, Section 125 allows for a recovery order when a child has been unlawfully taken or sent away (e.g., abducted or trafficked).⁴⁴

Additionally, general penalties for crimes are provided by the Penal Code Act 2008.⁴⁵ Sections 47 through 55 of the Interpretation of Laws and General Provisions Act 2006

³³ Transitional Constitution, articles 9(4) and 10.

³⁴ Ibid., article 17.

³⁵ Government of the Republic of South Sudan, ‘Human Rights Commissions’, available at: www.goss-online.org/...Commissions.../Human-Rights-Commissions.html.

³⁶ Government of the Republic of South Sudan, ‘Southern Sudan Human Rights Commission’, available at: <http://www.goss-online.org/>.

³⁷ Child Act 2008, section 115.

³⁸ David K. Deng, ‘Challenges of Accountability: An Assessment of Dispute Resolution in South Sudan’, 2013, p. 11, available at:

http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf.

³⁹ Child Act 2008, section 4.

⁴⁰ Ibid., section 30.

⁴¹ Ibid., section 32.

⁴² Ibid., section 35.

⁴³ Ibid., sections 69, 106.

⁴⁴ Ibid., section 125.

⁴⁵ Penal Code Act 2008, available at: <http://www.goss-online.org/>.

set forth the general rules governing the imposition of penalties.⁴⁶

The Supreme Court has original jurisdiction to decide on disputes that arise under the Transitional Constitution brought by individuals. It can adjudicate on the constitutionality of laws and set aside or strike down laws or provisions of laws that are inconsistent with the Constitution (including the Bill of Rights) to the extent of the inconsistency.⁴⁷

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

As discussed in part III.D below, the Code of Civil Procedure Act allows for representative litigation.⁴⁸ However, the law is unclear whether there must be a named victim. All the Act requires by its terms are multiple persons with the same interest in a suit.⁴⁹

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Code of Civil Procedure Act provides that “[w]here there are several persons with the same interest in one suit, one or more of the said persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of or for the benefit of all persons so interested”.⁵⁰ There are special provisions for notice and for absent parties in such cases.⁵¹ Courts may also join parties with an interest in the suit at any stage of the case.⁵²

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

As in part III.C above, it is unclear whether the representative litigation provided by section 37 of the Code of Civil Procedure Act enables non-governmental organisations to sue for the benefit of multiple interested parties – i.e., children.⁵³

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

The Judiciary Act, the Code of Civil Procedure Act, and the Code of Criminal

⁴⁶ Interpretation of Laws and General Provisions Act 2006, sections 47–55, available at: <http://www.goss-online.org/>.

⁴⁷ Transitional Constitution, article 128(2).

⁴⁸ Code of Civil Procedure Act 2007, section 37.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid., section 311.

⁵³ Ibid., section 37.

Procedure Act establish multiple statutory courts with original jurisdiction.⁵⁴ At the lowest level, there are three classes of county courts in which cases are filed based on the sentence they can impose. The Third Class Payam Courts cannot impose fines greater than 300 SSP and cannot impose prison sentences.⁵⁵ However, these courts have not yet been set up.⁵⁶ The Second Class Magistrate Courts cannot impose fines greater than 2,500 SSP or prison sentences greater than three years.⁵⁷ The First Class Magistrate Courts cannot impose fines greater than 5,000 SSP or prison sentences greater than seven years.⁵⁸ At the next level, the High Courts, in addition to hearing appeals from the lower courts, have original jurisdiction over suits “without limit as to value or subject matter”.⁵⁹ Finally, the Supreme Court, the nation’s highest court, has original jurisdiction over constitutional matters.⁶⁰

To file a civil case, a plaintiff must file a “plaint” complying with the rules set out in the Code of Civil Procedure Act.⁶¹ The Code of Criminal Procedure Act describe the procedures governing criminal summons and warrants.⁶²

South Sudan also plans to implement mobile courts to grant rural areas access to the legal system, however these have yet to be implemented.⁶³ Furthermore, juvenile courts have not yet been established.⁶⁴

Alternatively, a party may file a case in customary courts, which South Sudanese statutes recognise as legitimate. Customary courts decide cases based on the traditional practice, the discretion of the chief, the statutory provisions known to the chief, and any negotiation between the parties.⁶⁵ Customary courts do not have jurisdiction to hear criminal cases unless the case has been referred by a statutory court and has a “customary interface”.⁶⁶ Nevertheless, most cases are found to have a “customary interface,” and chiefs often decide cases outside their jurisdiction.⁶⁷

Although the organisation of customary courts varies widely in practice, there are generally three types of customary courts: Boma-level courts (“A courts”), Payam-level courts (“B courts”), and county-level courts (“C courts”).⁶⁸ The A courts have original jurisdiction over family cases, minor disputes, and local administrative cases.⁶⁹ B courts

⁵⁴ Judiciary Act 2008, available at: <http://www.goss-online.org/>.

⁵⁵ Paul Mertenskoetter & Dong Samuel Luak, ‘An Overview of the Legal System and Legal Research in the Republic of South Sudan’, Hauser Global Law School Program, NYU School of Law, November to December 2012, available at: http://www.nyulawglobal.org/Globalex/South_Sudan.htm#_edn42.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Code of Criminal Procedure Act 2008, section 13(2).

⁵⁹ Ibid., section 20(1).

⁶⁰ Judiciary Act 2008, section 11.

⁶¹ Code of Civil Procedure Act 2007, sections 33–37.

⁶² Code of Criminal Procedure Act 2008, sections 65–102.

⁶³ ‘With Prisons Full, South Sudan to Introduce Mobile Courts to Clear Backlog of Cases’, FoxNews.com, 11 October 2012, available at: <http://www.foxnews.com/world/2012/10/11/with-prisons-full-south-sudan-to-introduce-mobile-courts-to-clear-backlog-cases/>.

⁶⁴ United Nations High Commissioner for Human Rights, p. 11.

⁶⁵ Paul Mertenskoetter & Dong Samuel Luak.

⁶⁶ Local Government Act 2009, section 98(2), available at <http://www.goss-online.org/>.

⁶⁷ Paul Mertenskoetter & Dong Samuel Luak.

⁶⁸ Ibid.

⁶⁹ Ibid.

have original jurisdiction over suits that involve large fines and prison sentences.⁷⁰ C courts have jurisdiction over criminal cases referred by statutory courts, and often hear cases involving intercultural disputes.⁷¹

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

See part II.D above.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organization, or under an agreement that does not require the payment of legal fees up front?

The South Sudan Law Society (SSLS) provides free legal advice, mediation and representation to clients who cannot otherwise afford these services.⁷² The SSLS currently operates nine legal aid clinics across six of the ten states of South Sudan. In addition to its head office in Juba, the SSLS has legal aid clinics in Yei, Torit, Budi, Ikotos, Akobo, Renk, Yambio and Rumbek.⁷³ Some of the issues that the SSLS' legal aid program has targeted include: unlawful detention and extended remand periods, more appropriate use of civil remedies and criminal punishments by judges and traditional authorities, and the protection of girls from sexual violence. According to the SSLS, because other forms of legal aid focus only on very serious criminal cases, SSLS is the first organisation to provide widespread and accessible legal aid to South Sudanese.⁷⁴

In addition, People's Legal Aid Centre (PLACE) is a non-profit association of lawyers and other professionals who work with lawyers throughout South Sudan to assist South Sudanese in both civil and criminal matters.⁷⁵ Their work also includes research on how to incorporate international human rights laws into national law, as well as working on child rights legislation and education.⁷⁶ Other non-profit and foreign-sponsored projects also work to provide increased legal aid clinics and representation.⁷⁷

Despite these legal aid programs, there is both an under-supply of legal aid and lagging demand due to a lack of awareness of the availability of legal aid.⁷⁸ Although some of the above-mentioned groups are undertaking educational campaigns to increase awareness of the opportunities that do exist, much work remains before statutory and other forms of legal aid are truly a reality.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² South Sudan Law Society, 'Legal aid', available at: http://sslawsociety.org/programs_legal_aid.html.

⁷³ South Sudan Law Society, 'About us', available at: <http://sslawsociety.org/contacts.html>.

⁷⁴ South Sudan Law Society, 'Legal aid'.

⁷⁵ People's Legal Aid Centre, available at: <http://www.place-sd.org/>.

⁷⁶ Ibid.

⁷⁷ E.g., US Department of State, 'South Sudan: State Dept. Facts on Support to South Sudan's Justice Sector', 4 September 2013, available at: <http://allafrica.com/stories/201309050772.html>.

⁷⁸ Beny Gideon Mabor.

There are very few lawyers in South Sudan, particularly outside of South Sudan's capital, Juba.⁷⁹ Of these, even fewer take on pro bono work.⁸⁰ The SSLS currently is working to develop a pro bono case referral system; however, this effort is minimal in contrast to the needs.⁸¹

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

In statutory court, criminal cases are subject to a statute of limitations;⁸² civil cases have no corresponding limit to bring a case.⁸³ The length of the limitations period increases with the severity of punishment applicable to the crime: crimes punishable by death, or imprisonment for 10 years or greater have a 10-year limitations period; crimes punishable by imprisonment for greater than one year have a five-year limitations period; and all other crimes have a two-year limitations period.⁸⁴ Although the cases can have lengthy delays, bringing suit halts the limitations period.⁸⁵

However, neither the Child Act nor the procedure statutes discuss when a person can bring a claim arising from an event that occurred in childhood.

Customary courts are not subject to any uniform limitations period or other restrictions.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Code of Evidence Act 2006 prescribes the rules of evidence for statutory courts. The only rule addressing evidence presented by children concerns evidence used by the prosecution in a criminal proceeding.⁸⁶ In that instance, evidence from a child younger than seven is inadmissible.⁸⁷

Because very few cases, if any, have actually been brought under the Child Act,⁸⁸ there is no precedent for what a court would allow or require in proving a violation under the Act. In addition, in customary courts, where the vast majority of cases are brought, judges are not subject to any evidentiary rules.

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Victor Lowilla.

⁸² Code of Criminal Procedure Act 2008, section 47.

⁸³ Code of Civil Procedure Act 2007.

⁸⁴ Code of Criminal Procedure Act 2008, section 47.

⁸⁵ Ibid.

⁸⁶ Code of Evidence Act 2006, section 126, available at <http://www.goss-online.org/>.

⁸⁷ Ibid.

⁸⁸ E.g., US Department of State, 'South Sudan Office to Monitor and Combat Trafficking in Persons: 2013 Trafficking in Persons Report', available at: <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

The statutory courts are heavily clogged, so the judicial process can move very slowly.⁸⁹ The system is ill-equipped to deal with the demand, suffering a shortage of both judges and judicial infrastructure.⁹⁰ As of October 2012, South Sudan only had 120 judges as compared to its population of over 8 million people.⁹¹

G. Appeal. What are the possibilities for appealing a decision to a higher court?

In a statutory court, the Judiciary Act provides an appeals process among the different levels of courts discussed in part IV.A above. The State High Courts hear appeals from all lower courts; the Courts of Appeals hear appeals from the High Courts; and the Supreme Court hears appeals from the Courts of Appeal.⁹²

In the customary court system, A court decisions can be appealed to B courts, B court decisions can be appealed to C courts, and C court decisions can be appealed to the statutory magistrate courts.⁹³ However, in practice, the appeal process between customary courts and statutory courts is often ineffectual.⁹⁴

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Community traditions frequently conflict with statutory law. For example, although the Child Act prevents girls under the age of 18 from being married off, child marriage is part of the South Sudanese tradition, encouraged by the community, and rooted in customary law.⁹⁵ Thus a differing decision in a statutory court could lead to social repercussions for the child and the family. Moreover, because the community often sees the judicial system as corrupt, they are less likely to respect a judgment under the Child Act.⁹⁶ In turn, when the public opposes the judgments and the laws, there is the potential for a backlash against efforts to strengthen child rights, particularly where they conflict with South Sudanese custom.⁹⁷

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Enforcement of judicial decisions is very low in South Sudan, particularly in the customary courts and in rural areas. While police can enforce statutory court sentences and decisions in urban areas, customary judges and chiefs have few means of enforcing their decisions.⁹⁸ Moreover, because the relationship between the statutory and

⁸⁹ 'With Prisons Full, South Sudan to Introduce Mobile Courts to Clear Backlog of Cases'.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Paul Mertenskoetter & Dong Samuel Luak.

⁹³ Ibid.

⁹⁴ David K. Deng.

⁹⁵ Charlton Dok, 'Marrying off South Sudan's Girls for Cows', Inter Press Service, 24 May 2013, available at: <http://www.ipsnews.net/2013/05/marrying-off-south-sudans-girls-for-cows/>.

⁹⁶ Cherry Leonardi, et al., 'Local Justice in Southern Sudan', US Institute of Peace, 2010, p. 84, available at:

<http://www.usip.org/sites/default/files/PW66%20-%20Local%20Justice%20in%20Southern%20Sudan.pdf>

⁹⁷ Ibid.

⁹⁸ David K. Deng.

customary courts is muddled, parties can continue to pursue litigation in different courts, hampering final resolution of the case.⁹⁹ And finally, the militarisation of many rural communities – South Sudan is at war with numerous armed groups and embroiled in inter-ethnic warfare – further thwarts enforcement of court decisions.¹⁰⁰

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

The primary consideration when bringing a case is the institutional inability of South Sudan's judicial system to protect the children's rights defined in national law. Due to its youth and other pressing challenges, South Sudan has an undeveloped legal and judicial system. Even under the few laws enacted, little meaningful opportunity, and even less precedent, exists. The juvenile justice system, which is provided for by law in Chapter X of the Child Act, is non-existent.¹⁰¹ As the International Development Law Organisation summarises: "The institutional capacity of the justice sector remains low. The rule of law is weak. Existing laws are not consistently applied. Access to justice is poor, and human rights are far from protected".¹⁰²

South Sudan has a pluralistic legal system that applies both statutory and customary law.¹⁰³ Customary laws are recognised in customary courts, subject to the Transitional Constitution and statutory law.¹⁰⁴ Accordingly, the Transitional Constitution and statutory law, including the Child Act, set the minimum level of human rights protection and must supersede any less restrictive customary law. However, this is not generally the case in practice.¹⁰⁵ Many customary courts and even judges, prosecutors, and lawyers in statutory courts continue to apply and follow the often divergent customary law standards.¹⁰⁶ Customary courts – where approximately 90% of cases are brought¹⁰⁷ – often rule based on traditional laws that are less protective of children's rights than those the Transitional Constitution and the Child Act afford.¹⁰⁸ The application of customary law undermines CRC principles because the customary laws not only vary region-to-region, but often directly conflict with the international and national standards.¹⁰⁹

As for statutory courts, although the Judiciary Act requires their establishment, few actually exist below the state level.¹¹⁰ In addition, statutory courts are costly, frequently employ unfamiliar procedures and languages, and are inaccessible in rural areas.¹¹¹ Due

⁹⁹ Ibid., p. 18.

¹⁰⁰ Ibid., p. 30.

¹⁰¹ United Nations High Commissioner for Human Rights, p. 3.

¹⁰² IDLO, 'South Sudan', available at:

<http://www.idlo.int/english/WhereWeWork/Sudan/Pages/default.aspx>.

¹⁰³ United Nations High Commissioner for Human Rights, para. 34.

¹⁰⁴ Ibid.

¹⁰⁵ Child Act 2008, section 4.

¹⁰⁶ United Nations High Commissioner for Human Rights, p. 7; IDLO.

¹⁰⁷ Paul Mertenskoetter & Dong Samuel Luak.

¹⁰⁸ David K. Deng.

¹⁰⁹ United Nations High Commissioner for Human Rights, p. 7.

¹¹⁰ US Department of State, 'Country Reports on Human Rights Practices for 2012: South Sudan', 2012, available at:

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dclid=204169#wrapper>.

¹¹¹ Paul Mertenskoetter & Dong Samuel Luak.

to the lack of coordination, claims sometimes are adjudicated in both statutory and customary courts.¹¹²

The statutory courts are ill-equipped to handle the caseload. These include a lack of adequate financial and human resources for the courts to function properly. According to a report by the International Federation for Human Rights (FIDH), the courts do not have a sufficient number of judges; during a fact-finding mission by FIDH in 2012, the President of the Supreme Court was trying to recruit over 125 judges to preside over both the current backlog and over future cases. There are not enough functioning courtrooms; the ratio of rooms to the number of cases is low, and the few courtrooms available are thus overcrowded. There are also no mechanisms for ensuring judicial accountability.¹¹³

Gripping problems face the nation, including extreme poverty,¹¹⁴ vulnerability of children in different situations,¹¹⁵ and ongoing conflict,¹¹⁶ impacting both individuals' ability to access the courts and the government's ability to provide such access.

Thus, these practical considerations must be taken into account when determining the most effective means of protecting a child's rights.

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹¹² David K. Deng, p. 68.

¹¹³ See FIDH.

¹¹⁴ South Sudan is one of the most impoverished nations: more than 90% of the population lives on less than \$1 a day, and the under-five infant mortality rate is 135.3 per 1,000: Country-Facts.Com, 'South Sudan – Humanitarian Situation', p. 1, available at:

<http://country-facts.com/pt/country/africa/317-south-sudan/5054-south-sudan-humanitarian-situation.pdf>.

¹¹⁵ Children are abducted, raped, murdered, displaced, and hungry. Boys are forced to serve as child soldiers, and girls are married off by their families at a very young age. Numerous other children in South Sudan are engaged in the worst forms of child labour, including forced dangerous activities, commercial sexual exploitation, and drug trade: Marisa O. Ensor, 'Child Soldiers and Youth Citizens in South Sudan's Armed Conflict', 2012, 24 *Peace Review* 276, 276–83, available at: http://www.academia.edu/2014964/Child_Soldiers_and_Youth_Citizens_in_South_Sudans_Armed_Conflict; Charlton Doki; US Department of Labour, 'South Sudan: 2012 Findings on the Worst Forms of Child Labour', available at: http://www.dol.gov/ilab/reports/child-labor/south_sudan.htm#laws.

¹¹⁶ During its civil wars, more than 2.5 million people were killed and millions more displaced. Now, South Sudan remains plagued by war, internal rebellion, ethnic warfare, and disputes with Sudan over oil: Nicholas Kulish, 'South Sudan's Army Faces Accusations of Civilian Abuse', NY Times, 28 September 2013, available at: http://www.nytimes.com/2013/09/29/world/africa/south-sudans-army-faces-accusations-of-civilian-abuse.html?_r=0.