Born out of wedlock: An analysis of the Child Bill 2007 of Southern Sudan

The government of Southern Sudan, not being a state, by and of itself, lacks capacity to contract international treaty obligations. Mostly under classical international law, only states can be parties to bilateral or multilateral treaties. Therefore, whether or not Southern Sudan Child Bill (Bill) complies with international standards should not be a subject for serious legal engagement; after all it has no capacity, and consequently, an obligation of compliance. However, Southern Sudan presents a nuance reading.

Southern Sudan has the capacity to '*initiate, negotiate and conclude international agreements*' *with foreign governments and foreign non-governmental organisations*'.[1] Such contractual arrangements, laws or standards must 'comply with... the Interim Constitution'. Also article 27(3) of the Interim National Constitution (INC) provides '*all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill*' and article 13(5) of the Southern Sudan Interim Constitution (ICSS) concludes the picture, 'the rights and freedoms guaranteed by this Constitution supplement and complement the Bill of Rights in the Interim National Constitution'.

With respect to the rights of children, in addition to article 27(3) of INC replicated in article 13(3) of ICSS, article 32(5) of INC provides ' the state shall protect the rights of the child as provided in the international and regional conventions ratified by the Sudan'. Sudan has ratified the following international human rights instruments relating to children: the Convention on the Rights of The Child (CRC);[2] Optional Protocol on the Rights of the Child on the Involvement of Children into armed Conflicts;[3] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution

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[1] Concurrent Powers, Schedule D para.19 of the INC

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and Child Pornography;[4] and Convention Concerning the Prohibition and immediate action for the Elimination of the Worst Forms of Child labour.[5]

So even though there is real no marriage so to say between Southern Sudan is not a state for the purpose of international law, the fact that it has sovereignty over its internal operations, conduct diplomatic and consular relations independent of the national government; consequently, it stands in a class of its own, capable of being a direct subject of international law, to the extent that it can be held responsible for obligations it arrogates for itself under international law. Therefore, irrespective of the fact that there is no wedlock between Southern Sudan and the international community, the child should be treated equally before international law.

The symbiotic relationship between the ICSS and the INC on one hand and between INC and the international human rights instruments on the other hand establishes a direct and an indirect flow of international obligations into the Southern Sudan legal order. Therefore, to be valid the Child Bill must not only comply with the provisions of the ICSS and INC, but also with the provisions of all international human rights instruments relating to children to which Sudan is a signatory. I will attempt to analyse the Child Bill against the different benchmarks established by these instruments for compliance.

Background to the Child Bill

Reading the Bill, one is tempted to think that either its drafters were extremely ambitious or fanatics in their belief of law as an engine room for political and cultural transformation.

The history of Southern Sudan and how the law was used to create nourish and legitimise discrimination and exploitation might probably explain this ruthless belief in the law in general and human rights law in particular.

Southern Sudan was a colony of the most vulnerable. Men and women were dominated, marginalised, and completely excluded from power, wealth and other opportunities on the basis of race, religion, ethnicity, culture and sex. In this matrix of discrimination and disempowerment, women and children were further discriminated and alienated disproportionately by law religion and

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culture. Even among the children, the girl child invisiblised by further discrimination and exploitation.

Promoting justice, equal and equitable relationship between and among the people of Southern Sudan, becomes, therefore, the remedy. The Child Bill is one piece of the building block for a future based on equality for all. A future without a past will more likely become a past. Southern Sudan has a rich culture and 'traditional ways of protecting and promoting child rights.' The degree to which the Bill will be regarded as reflecting not only the cultural values of our people, but also their aspirations and expectation for change will to a large extent determine whether the Bill will achieve its purpose or not.

The National Legal Framework for the Protection of the Rights of Children

It is pertinent for a better understanding of the Child Bill of Southern Sudan to first situate it within the legal scheme of Sudan. Sudan was a colony of Britain. But British administered Sudan jointly with Turk-Egyptian in what was described as a condominium rule. As a result, the common law and Islamic legal system co-existed in the Sudan. Even though human rights and fundamental freedoms were part of successive constitutions of the Sudan from 1929, it was not until 1998 that children rights were mentioned for the first time.

As part of an agreement to end the civil war that was going on between the North and South of the Sudan, the parties (Sudanese People's Liberation Movement (SPLM) and the Government of the Sudan (GOS)) agreed to draft a new constitution for the Sudan. They equally agreed on the principles that must be complied with in the writing of the constitution. These principles were provided for in the final agreement called the Comprehensive Peace Agreement (CPA). They equally agreed on a asymmetrical federal system of government for the Sudan. In this system power was mainly shared equally between the Government of National Unity (GoNU) and the semi autonomous Government of Southern Sudan (GoSS). The proposed constitution and this system of government will run for the Interim period of six years from the time the constitution comes into force.

The Interim National Constitution (INC) was drafted, adopted and came into force July 2005. The INC provided for two groups of rights: one group housed under the Guiding and Directive Principles (GDP) chapter, which is non justiciable; and the other group under a Bill of Rights which to all intent and purpose is justiciable. Article 14 of the INC provides for children and youth rights to welfare, moral and physical development and protection against moral and physical abuse and abandonment. However, article 22 of the INC provides that these rights are '*not by themselves enforceable in the court of law.*' I have argued somewhere that these rights are actually justiciable for reasons I will come to later.

Article 27 of INC provides that the '*Bill of Rights is a covenant among the Sudanese people and between them and their governments at all levels*.' The words 'among' and 'between' suggests a vertical and horizontal application of the Bill of Rights in the Sudan it is submitted. Even though the word 'people' is used and not persons, a purposive interpretation of this section should bring legal entities under the direct application of the Bill.

Even though article 32 of the INC is titled 'Rights of Women and Children', it does not provide for a single substantive right for a child. What section 32(5) does however is to provide that '*the state shall protect the rights of the child as provided for in the international and regional conventions ratified by the Sudan.*' Since the Sudan has ratified the Convention on the Rights of the Child (CRC) for example, what this section attempts to do is first to recognise all the rights and freedoms provided for in the CRC as substantive constitutional rights for children in the Sudan. But, secondly and more importantly, it restricts the obligations of the government to only *protect* these rights.

With respect to the first issue it is submitted that section 32(5) is simply a tautology, which, apart from serving probably as an emphasis of the rights of children, does not add any value to the Constitutional framework for the protection of children in the Sudan. This is because section 27(3) of the INC already provides that '*all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Sudan shall be an integral part of this Bill.*' It is submitted therefore that the CRC for example is

already incorporated into the Bill via this subsection and need not be repeated in section 32(5).

The second issue is however, very important because it boarders not only on the proper construction of subsection (3), but of the entire provision of section 27 of the INC. In other words what does the phrase 'integral part of this Bill' means and secondly what is the nature of the obligations conferred by section 27(1)&(2) on the government of Sudan ; and the relationship of these obligations to each of the rights provided for in the Bill. Resolving this issue is extremely important not only to the proper understanding of the Southern Sudan Child Bill, but also for its effective operation. Secondly, since GoSS does not strictly speaking have direct obligation under the CRC, comparing the provisions of the Child Bill with that of the CRC will make more meaning once its layers of compliance is clarified.

It has been argued that the international treaties incorporated through section 27(3) are merely 'interpretative tools underpinning the Bills of Rights.' I respectfully disagree with this suggestion. It is submitted rather that, the phrasing of subsection(3) suggest that, the rights and freedoms provided for in these international human rights instruments(IHRIs) attains constitutional status in the Sudan simply by means of ratification. What this means in practical terms is that every rights and freedoms provided for in any IHRI ratified by the Sudan is a constitutional rights invokeable before the Courts in the Sudan.

This interpretation is consistent with the provisions of the CPA which is also an integral part of the INC. Paragraph 1.6.1 of the Protocol on Power Sharing – a component of the CPA provides ' the Republic of the Sudan shall comply with its obligations under the international human rights treaties to which it is or becomes a party.' Paragraph 1.6.2 continued ' the rights and freedoms to be enjoyed under Sudanese law, in accordance with the provisions of the treaties referred to above, include..' the word 'include' could mean in addition, in which case, what paragraphs 1.6.1 and 1.6.2 read together is saying is that what is expressly provided for in the Bill is not complete without what has already been provided for in the IHRIs referred to. According to the Committee on the International Covenant on Civil and Political Rights(ICCPR) which is also expressly mentioned in the CPA in addition to CRC and other IHRIs ''pursuant

to article 27 of the Interim National Constitution of 2005, the Covenant is binding and may be invoked as a constitutional text.'[6]

Technically therefore, each time Sudan ratifies an IHRI it amends its Constitutional accordingly. Article 5(8) of the Brazilian Constitution expressly provides for this kind of constitutional arrangement in which ratification with respect to IHRI is tantamount to amending the Constitution. Consequently, the INC Bill of Rights now contains all the rights and freedoms in the CRC should be read into the Bill as an integral part. What section 27(3) has equally done is that it serves as a bridge with respect to for example children rights provided for under the GDP, which are at the same time provide for in the CRC can equally be invoke before the courts. This is so because section 22 says 'unless this Constitution otherwise provides' the rights in the GDP cannot be enforced in court. It is submitted that by virtue of section 27(3) the Constitution by incorporating IHRIs that provides for the same rights and freedoms under the GDP as integral part of a justiciable Bill of Rights as already provided otherwise.

Having established that CRC and other IHRIs ratified by the Sudan are part and parcel of the Bill of Rights, the question as to the nature of obligations that follow from them and which the Constitution through the CPA states the Sudan 'shall comply fully' must be ascertained. International human rights instruments engender at least four levels of duties irrespective of whether they are civil and political rights or economic, social and cultural rights. By ratifying an IHRI, the state is undertaking the duty to respect, protect, promote and fulfil these rights. These obligations apply universally to all rights and entail a combination of negative and positive duties.

The obligation to respect demands that a state party should refrain interfering with the enjoyment of the rights by the right-holder. The obligation to protect entails that the state party take all legislative and other necessary measures to protect the right holder against other third parties interference. While the duty to promote obliges the state to promote the enjoyments of these rights and

[6] The CPPR Committee Concluding Observations for 2007 available at http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf(accessed 4 September 2008) Para 8

finally the obligation to fulfil entails that the state party should act positively to creating the enabling environment for the realisation of these rights.

In addition to the fact that by ratifying these IHRIs Sudan has undertaken to 'comply fully' with these obligations, article 27(1) and (2) of INC provides for these obligations and adds a new obligation on the government. Article 27(1) provides '…government at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution…' and 27(2) states ' the state shall guarantee, protect and implement this Bill'. Even though two different words are used 'government' under subsection (1) and 'state' under subsection (2) for the purpose of this discussion it means one and the same thing. Therefore, the Bill of Rights obliges the government of Sudan to: respect, protect, promote, guarantee and implement all the rights and freedoms provided for in his Constitution.

Once the Constitution has provided for these obligation for all the rights and freedoms it has provided for which includes as we have seen rights and freedoms enshrined in all IHRIs Sudan has ratified, it becomes difficult to understand how and why section 32(5) of the same Constitution could provide in respect to only one category of the IHRIs the obligation to protect without at the same time prejudicing 27(1) (2) and (3). It is therefore, submitted that either section 32(5) is redundant or is simply re-emphasising section 27(3). Singling our children related IHRIs for protection is just a way of emphasising this obligation without at the same time detracting from other obligations already provided for. The intention here is not to limit the obligations it is submitted. This is consistent with the provision of the CPA. As it was stated earlier on, paragraph 1.6. 2 of the Protocol on Power Sharing provides: the rights and freedoms to be enjoyed under Sudanese law' must be 'in accordance with the provisions of the treaties' which Sudan has ratified. The standard of protection therefore, is not the Constitution, but the IHRIs to which Sudan is a party.

Having established that the rights and freedoms provided for the Sudan child in the CRC are not only constitutional rights in the Sudan, but also standards to which any Sudanese law with respect to these rights and freedoms must ' comply fully'. It is pertinent to establish the nexus between the Child Bill of

Southern Sudan and the standards just discussed above so as to facilitate any comparative analysis.

As noted earlier on, the CPA created an asymmetrical federation a one-country-two system-kind of arrangement. The CPA provided that the GoSS would be autonomous with its own Constitution. Therefore, in 2005, the GoSS enacted the Interim Constitution of Southern Sudan (ICSS). Article 160 (1) of INC states that 'the Interim Constitution of Southern Sudan shall confirm to this Constitution.' Therefore, the provision of the ICSS and any other law made pursuant to it must comply with the provisions of INC. Appeals emanating under the ICSS go directly to the Constitutional Court. Since CRC is part of the INC, the Child Bill must comply not only with the ICSS, but also with provisions of INC.

Part two of the ICSS provides for a Bill of Rights. Article 13(2) provides that ' the rights and freedoms of the individual and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of the Government of Southern Sudan and by all persons.' Section 13(1) is an exact replica of 27(1) of INC. this Bill engenders the obligations to respect, promote, upheld. The obligation 'to promote' appears twice in subsections (1) and (2) of section 13 of ICSS. Although the word upheld is used, it is submitted that it should mean the same thing as protect. The Bill also has vertical and horizontal application and its provisions bind all 'persons'. Here again it is submitted that legal entities should be read into the words persons.

Section 13 (3) repeats exactly the provisions of 27(3) of INC completing the equation, although GoSS is not a part to the IHRIs directly, it is a party through the GoNU. In addition , it has reaffirmed its commitment to comply with the provisions of CRC via section 13(3). Section 21 provides for the rights of the child. Subsection (1) states every child has the right:

a. To life, survival and development;
b. To a name and nationality;
c. To know and be cared for by his or her parents or legal guardian;
d. 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;

e. To be free from any form of discrimination;
f. To be free from corporal punishment and cruel and inhuman treatment by any person including parents, school administrations and other institutions;
g. Not to be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity; and
h. To be protected from abduction and trafficking.

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

(3). All levels of government in Southern Sudan shall accord special protection to orphans and other vulnerable children; child adoption shall be regulated by law.

(4). For the purpose of this Constitution, a child is any person under the age of eighteen years.

Southern Sudan Child Bill 2007

Protecting the rights of children in societies emerging from conflict like Sudan has been identified as a crucial step to recovery and reconstruction. In this work, the author intends to see how the Child Bill sets out to achieve this aim of protecting the child in Southern Sudan. Part I will present a brief overview of the process leading to the drafting of the Child Bill, an outline of what is covered , and the purpose the Child Bill. Part II will cover critical and comparative analyses of some of the rights and freedoms provided in the Child Bill using the four pillars of the CRC: non-discrimination, right to life, survival and development, right to participate and the best interest of the child. Strength and weaknesses, opportunities and threats presented by the Child Bill shall be identified. In part III I will take a look at the juvenile justice system under the Child Bill. Conclusion and recommendation will be provided in part IV.

Process leading to the Drafting of the Bill

An Overview of the Child Bill

The Child Bill 2007 is a comprehensive piece of legislation covering the rights and duties of the child, parental rights and duties, guardianship, foster care and adoption, custody and maintenance, duties of local government, caring for children wrongfully taken, vulnerable children and children in conflict with the law and institutional arrangements.

The Purpose of the Child Bill

The purpose of the Bill, which when it is enacted will repeal all existing legislations protecting the interest of the Child is designed as a minimum standard is to 'extent, promote and protect the rights of the children in Southern Sudan. It is aimed at unpacking section 21 of the ICSS. The rights provided for in this Child Bill bear the meaning they have under the CRC and 'other international instruments, protocols, standards and rules on the protection and welfare of the children to which Sudan is a signatory.'

The phrase 'as defined in the 1989' CRC and other IHRIs relating to children protection and welfare is to my mind ambiguous. Is it referring to the definition section of the CRC in which case it would only be article 1 defining who a child is or does it refer to the content or meaning of all the rights provided for in the CRC in which case the rights and freedoms in the Child Bill would just have been copy- and –pest situation. It is submitted that, the phrasing of the section would suggest that aims at not only expanding section 21 of ICSS, but extend the protection and promotion of children rights by incorporating all rights provided for in the CRC, any international instrument, protocols, rules and standards which are not expressly mentioned in the Child Bill.

While section 13(3) of the ICSS requires ratification for these IHRIs to become an integral part of the Bill of Rights, section 3 of the Child Bill provides 'to which Sudan is a signatory.' What does the word signatory means in this

context? Would it mean the same thing as ratification as used in section 27(3) of INC and section 13(3) of ICSS? This word is not defined in the interpretation section to the Child Bill. It is pertinent for us to know what word means, to be able to ascertain what instrument is binding on the GoSS with respect to the rights and welfare of the child.

The Vienna Convention on the Law of Treaties 1969 is the main international instrument regulating the law of treaties. It provides for different ways of becoming a party to an International Treaty (IT). A state could express its intention to be bound through a 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if it so agree'.[7] A signature could be a sufficient means of conveying this intention if the state so desires. But usually, signature expresses just the willingness to accept the text of the agreement, which has to be ratified by the state party in order to be legally bound by the IT.[8]

The word 'ratification' appears 4 times in the INC.[9] The usage tends to suggest different meanings. The INC uses the verb form of the word 'to ratify' 3 times, first in article 58(1) (k) assigning to the President of the Republic the power to '*ratify treaties and international agreements with the approval of the National Legislature*'. However, article 91(3) (d) empowers the National Assembly '*to ratify international treaties, conventions and agreements*'. Article 109(4) goes on to say that the National Assembly may delegate to the President the '*power to ratify international conventions and agreements*' while it is not in session.

Since the INC does not use the word signatory or assign to it any special meaning, the author will presume that the drafter of the Child Bill intended it to bear the same meaning it has in public international law- signalling intention to be bound. It would then mean that the Child Bill provides a lower threshold for which instruments forms part of it. It also seems to incorporate soft laws on children protection and welfare as a part of the Child Bill.

Application of the Child Bill

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[7] Art. 11 of the Vienna Convention on the Law of Treaties 1969.

[8] V Jijk Domestic status of human rights treaties and the attitude of the judiciary: The Dutch case (1998)
Fesrschrift Fur Felix Ermacora 631.

[9] Art. 27(3); 58(1) (k); 91(3) (d) and 109(4).

Any Person

The Child Bill applies to any person residing within the confines of Southern Sudan irrespective of s/he nationality, country of origin or immigration status; in all proceedings affecting the child.

Who is under 18 years

Sudan is one of the country in which a child is defined not by age, but by what s/he can do. Puberty is used in the legislations to set age of maturity. So anyone who has 'manifested obvious external signs of puberty' is said to have reached the age of majority. As the age of majority oscillates between 9 and 15' and 14 and 18 for girls and boys respectively; while anyone under 16 is defined as a juvenile. A child is defined in section 21 of ICSS and under the New Sudan Code of Criminal Procedures as anyone under the age of 18. Unlike the CRC which defines the child as anyone under 18 unless majority is attained earlier, the Child Bill does not provide for an alternative age for majority.

Article 4 of the Child Bill describes it as a minimum uniform standard applicable to all civil and criminal proceedings and all judicial proceeding in or before any court in Southern Sudan. It will apply to 'any person in Southern Sudan irrespective of nationality, country of origin or immigration status who is under the age of 18.'

The Principle of Non-discrimination

The prohibition of discrimination is as old as the history of human rights codification itself. Non discrimination and equality as always been treated in human rights treaties as negative and positive statement of the same principle. This is so because one is treated equally, if s/he is not discriminated against, and one is discriminated against if s/he is not treated equally. Therefore, non-discrimination entails a negative and positive obligation for state parties. The negative duty obliges the state to abstain from discriminating, while the positive duty ensures that state parties promote equality.

What the CRC brought on board with respect to discrimination, apart from expanding the prohibited grounds of discrimination, it extended the scope of discrimination beyond that which is directly targeted to the child to those emanating from the attributes of the child's parents, guardians or family

members. Despite increasing the list of prohibited ground of discrimination, the CRC did not close to the door to possible grounds for discrimination.

As stated earlier on, a child is discriminated against in Sudan in multiply ways, first because s/he is a black child, secondly s/he belong to a specific gender, the background from which s/he is from etc. This might explain why unlike CRC's 10 explicitly stated prohibited grounds of discrimination, the Child Bill provides 16 prohibited grounds of discrimination. Age, HIV or health status, custom, rural or urban background, refugee status, socio-economic or political status and criminal record are added by the Child Bill to the CRC's prohibited grounds of discrimination.
In order to reflect the principle of non-discrimination, the Child Bill uses the phrase 'every child' to precede almost all the rights, freedoms and duties provided for in the Bill. The pervasive culture of primogeniture in Southern Sudan whereby daughters cannot inherit any part of the estate as they are considered potentially part of another family is prohibited in section 26. Children born in or out of wedlock enjoy equal rights to inheritance so also are children who are disabled physically have equal rights to all the rights provided for in the Child Bill.

The Child Bill is however, over preoccupied by formal discrimination as it is with formal equality. Even though it is conceded that all children were discriminated against in Southern Sudan, the girl child was worst off in all aspects of discrimination and exploitation. While article 20 of ICSS provides for affirmative action in respect of women, section 26 of the Child Bill dealing with the rights of the female child conspicuously omit any reference to affirmative action in respect of the girl child. It is submitted that formal equality without substantive equality will leave the boy child better off than the girl child. The girl child suffers from indirect and subtle discrimination that section 26 of the Child Bill offered the opportunity to address, but did not.

Right to life, Survival and Development

Article 6 of the CRC confers the right to life on the child and obligates the state parties to give meaning to this right by ensuring the survival and development

of the child. In other words, the state must ‘take positive steps to ensure and guarantee for the child an adequately provided for and fulfilling life’.

Article 15 of ICSS provides ‘every person has the inherent right to life, dignity and integrity...’ the Constitution places life, dignity and integrity side by side not by accident, but by design. Human dignity is an inherent basic rights to which all individuals are entitled, because it is an intrinsic part of the right to life, broadly construed, for the denial of the right to dignity would denude the right to life of its effective content and meaningfulness. This right gives the person his/her intrinsic worth as human being worth of respect. The right to dignity lays the foundation for the right to be treated equally and all other rights the human beings possess.

The right to life places both negative and positive obligations on the state, negative in the sense that the state has an obligation not to interfere unlawful with the right to life and positive obligation to create the environment necessary for the enjoyment of the right to life. The right to life is more than dying as a result of the actions of the state, it also includes conditions that permits survival and more broadly, to those that are more conducive to dignity and wellbeing.[10] In this sense, right to life is not only a legal foundation of all other rights, but also an integral part of all rights.[11] The right to life is not a mere existence, but dignified existence.[12] The right to life in its broader sense includes the provision of healthcare, food, shelter, healthy environment clothing etc. All these together will ensure the realisation of the right to survival and development.

Section 12 provides ‘Every child has an inherent right to life. It shall be the responsibility of the family and the Government to promote the survival and development of the child.’ The construction of this section suggests that the family and government have concurrent responsibility to promote the survival and development of the child. The section only speaks of the responsibility to promote. Article 6 of the CRC places this obligation first on the state parties to ‘ensure’ meaning to make certain that it happens. This obligation it is submitted encompasses the obligation to protect, respect and fulfil the right to life and survival of the child.

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12 (Protection Writ), judgement of Fabio Maron Diaz, Magistrado, 1-328/98

How the state ensures the realisation of the socio-economic rights of the child to a greater extent will determine whether or not this right will materialize. The ICSS provides for the right to own property, access to education and right to free and compulsory education at primary level, free basic medical care and emergency services for all citizens. The Child Bill provides for the right to free primary education, basic health care (to be provided by the parents and government) and free immunization. Although it was recommended that 'the right to basic nutrition, adequate water, and shelter for children,' be included in the Bill so as to give meaning to the right to life, survival and development; the drafter of the Child Bill omitted this all important recommendation for a country with a burgeoning number of street children and orphans.

The term "survival rights" covers a child's survival rights to life and the needs that are most basic to the child's existence which include an adequate living standard, shelter, nutrition and access to medical services. Ensuring survival and physical health are priorities, but States Parties are reminded that Article 6 encompasses all aspects of development, and that a child's health and psychosocial wellbeing are in many respects interdependent

Article 24 of the CRC provides for 'the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment…' and 'the provision of adequate nutritious foods and clean drinking-water.' In as much as the CRC permits states to provide for different standards of protection of children's right, the alternative standards must be a better and a higher one. In this case however, the Child Bill attempts to provide for lower standards of protection. Since the Child Bill provides that, the rights must be understood in the light of their meaning in the CRC, it is submitted that, the provisions of the CRC in respect to these rights supersede their actual content in the Child Bill. Or in the alternative, the Child Bill should be redrafted to take the CRC's provision with regards to these rights into consideration.

The Right to Participation

Participation rights has been described as'the keystone of the arch' that is the CRC. This is so because it is believed that without the active participation of children and young people in the promotion of their rights to a good childhood,

none will be achieved effectively. Participation rights refer to the freedom of religion, expression of opinion, and participation
in social, economic, religious, cultural and political life.

The CRC recognise children as autonomous being capable of forming and holding opinions. It gives them the right to express these opinions at least in matters affecting them, and obliges the state to take into account opinions so expressed depending on the age and level of maturity of the child offering the opinion.

Article 28 of the ICSS guarantees the 'unrestricted right to the freedom of expression, reception and dissemination of information…' section 16 of the Child Bill provides 'every child has right… to participate… in activities that fosters the development of the potential of the child.' Section 17 goes further to state that 'Every child has the right to seek, receive and impart information and ideas of all kinds'; and that every child has 'the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting him or her'.

In addition to being limited by the right of others, the child's exercise of the right to participation is subject to his or her age and maturity. Even though age can be ascertained objectively, maturity is a subjective notion. The tendency to link child's children's competence to age has a bearing on how and for what purpose children should participate. Care should be taken that this subjective element is not used to frustrate the purpose of the right. It is important to note that, the Child Bill provides that, the child's opinion must be taken into consideration. As good as this section is, it goes only as far as to cover 'any matter or procedure affecting him or her'. It does not suggest whether it should affect the child directly or indirectly. It is opined that has long as the issue affects the child directly or indirectly, the child has the right to participate. Since it is difficult to think of any government decision on political, economic or social issues that will not affect the child in either of the way, it is submitted that, this provision covers the right of children to participate both in public and private decisions makings.

The Best Interest of the Child

The CRC in article 3 provides that in all actions affecting the child, the best interest of the child 'shall be a primary consideration. Article 21(2) of the ICSS states 'in all actions concerning children…the primary consideration shall be the best interest of the child.' It has been suggested, and rightly so, that the use of the indefinite article *a* in the CRC puts the best interest just as one of the factors to be taken into consideration. The Constitution, however, uses the definite article *the* to qualify the word 'primary' suggesting that the best child principle shall be the major, if not, the only consideration.

The Child Bill seems to have taken the principle even higher. In section 6 it provides 'whenever…any person determines any question with respect to the upbringing, care or welfare of a child…the best interest of the child shall be the paramount consideration.' The word 'paramount' is equally used in article 28(2) of the South African Constitution of 1996. It has been suggested in the South African context that the word could literally mean that the children's interests should trump all other rights and interests.

There is no consensus even in South Africa that, this was the intention of the drafters of the Constitution, because this would mean that there should be no point considering any other interest and rights of other parties, which would in the first place defeat the purpose why the principle is best interest is put into the constitution – balancing competing rights and interests. It is submitted that even if the interpretation that child rights and interest should trumps all other rights were to be accepted, it is submitted that, it would not have meant the same thing in the context of Southern Sudan. While the phrase 'paramount importance' is used in the South African Constitution, 'paramount consideration' is how it is rendered in the Child Bill. While the word 'importance' would suggest a value judgement, 'consideration' would suggest a directive it is submitted.

But what is the best interest principle? It has been observed that, 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself', thereby rendering it very amorphous. Which raises the question why should such an indeterminate concept be so determinate to the realisation of the children's rights? Or why, even, should it be included in a

legal document such a constitution or child bill? It has been argued that one of the reasons is to serve as a benchmark for review of all proceedings in which decisions are taken regarding children and as a 'minimum guarantee that the interests of children cannot be ignored. Thus it serves as an interpretative aid, as a compass determining the nature and scope of other fundamental right and finally as a right in itself. In the context of Southern Sudan, it is a constitutional value that permeates all actions and decisions regarding children.

Substantive Rights and Freedoms provided under the Child Bill

Children rights have been grouped into: protection rights, provision rights and participation rights. Protection rights cover the right to be protected from abuse, exploitation, neglect, torture, arbitrary detention etc. Provision rights cover healthcare, nutrition, shelter, education, adequate standard of living, social security etc. Participation rights relates to the opportunity to have a say in all the things that affect then and their societies. I shall discuss only protection rights and provision rights and where possible mention the participation rights because I have already said something about it. I will also not discuss all the rights in these categories because of space.

Protection Rights

The Child Bill provides for the right to a name and nationality, right to birth registration, the right to grow in a family environment, right to liberty and security of persons, right to be free from torture, degrading treatment and corporal punishment, right to protection from abuse, right to protection from early marriage and harmful cultural practices, harmful substances, adoption and right of protection from child labour. I will discuss briefly freedom from torture, degrading treatment and corporal punishment, child labour and adoption.

Corporal Punishment

Southern Sudan probably is the first place in the world to constitutionally prohibit corporal punishment. Article 21(1) (f) outlaws this form of punishment both by public and private persons and institutions. Section 21 (b) of the Child Bill equally prohibits it.

There is no express provision in the CRC prohibiting corporal punishment. Article 37 prohibits torture, cruel and other degrading and inhuman treatment of punishment. Article 19 on the other hands protects the child from 'all forms of physical or mental violence'. The Committee on the CRC in its 8 General Comment reasoned that since corporal punishment is a physical form of punishment and a form of violence, it is prohibited under articles 19 and 37 of CRC. Whether this interpretation is correct is not is not the preoccupation of this work.

It is however, not only the Committee that thinks that corporal punishment is prohibited. The African Commission in *Debbler v Sudan* held that:

> There is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

In as much as one would agree that all forms of punishment should be regulated, I would think that the Constitution in this case is really not the right place to do this. Corporal punishment in Southern Sudan is not so lethal as poverty, HIV and other life threatening factors, which the Constitution has no place for. Without detracting from the importance of this provision either in the Constitution or the Bill, I would say, if the government would enforce this provision, the entire nation will be awaiting trial. Enforcing this provision in every home will be impracticable.

Child labour

The CRC does not prohibit the child from working. It protects the child from economic exploitation and hazardous work or work that is likely to interfere with the child's 'education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. The International Labour Organisation (ILO) Convention 182 prohibits all forms of worst labour. What amounts to a worst form of labour is left to member states to define.

There is no consensus on whether or not children should be allowed to work. Some people believe that work is beneficial for children because it gives me the 'the development of skills and self confidence necessary for successful adulthood [and] constitutes an apprenticeship in life'. Some even argue that

many families in the developing world will starve if children are not allowed to work. But, some works seriously jeopardise the health and safety of children and could condemn them to a lifelong illiteracy because they cannot go to school. Finding the right balance could mark the difference between good law and bad one.

Article 21 of the ICSS prohibits exploitative or hazardous work. Section 25 of the Child Bill enumerates but not exhaustively. It prescripts 14 and 12 years as minimum age for the admission or the engagement of a child into paid employment and light work respectively. The condition under which the child is employed is provided. The child can be employed unless there is a satisfactory proof of age, and the child's entitlements and benefits must be made known to the child and displayed publically so that any person who suspects that a child is been abused could report for appropriate action. His way, the Child Bill tries to balance those tensions mentioned earlier on.

There is however, one concern some of the prohibited forms of work are contentious. Take for example animal herding. Majority of Southern Sudanese are animal herders. This provides the family with means of subsistence. In some instances, children have been unable to go to school because they are away every day herding their family cattle, while in other circumstances children have been able to help their parents with herding and still go to school. Outlawing such form of work for children has potential destabilising effects in homes. It is submitted that for the nomadic tribes, mobile schools could be provided for them and their children while they herd their cattle instead of banning the children from helping their parents.

Adoption

The CRC encourages the state parties to provide and recognise a system of adoption that is in the best interest of the child. However, the states must ensure that whatever arrangement is put in place to facilitate adoption, it must reliable. Article 21(2) of ICSS provides that 'adoption shall be regulated by law.' Section 70 of the Child Bill provides for adoption as a last resort.
Only a court could grant an adoption order pursuant to a declaration by the authorised person that the child irrespective of his nationality is adoptable.

Single of joint applicants are eligible provided the applicant has attained the age of 25 or 21 years older than the child. No lesbians or homosexuals are allowed to adopt. In issuing the order, the wishes of the child must be taken into consideration depending on the age and maturity of the child; and it must be in the best interest of the child. Although, a foreigner might adopt a child after satisfying the requisite condition, the Child Bill does not provide for inter country adoption.

Provisions rights

There are the right of the child to nutrition, shelter, healthcare, education etc. For a child in the context of Africa particularly Southern Sudan, where children wallow in abject poverty, provision rights or socio-economic rights are sine quo none to their survival and development. The CRC provides for the right to health, right to social security, right to an adequate standard of living and right to education. The Child Bill provides for right to education and wellbeing and right to basic health care. Article 14 that is titled right to education and wellbeing provides only for free education at primary level.

Given that the Covenant on Economic, Social and Cultural Rights is not only an integral part of the INC, but also of the ICSS, the high rate of child mortality in Southern Sudan, high rate of illiteracy abject poverty, the failure to adequately provide for socio-economic right is an unforgiveable disservice to the Child in Southern Sudan and posterity.

Duties of the Child and Rights and Duties of the parents

The child has a duty to respect his or her parents, guardians, superiors or elders, work for family unity, place his or her physical and intellectual talents at the service of his community, preserve and strengthen social and national solidarity and uphold the positive values of her or his community.

The parent has the right of guidance, determine a descent name, appoint a guardian, deal with the child's property (if need be), ensure the child resides with them or determine whether the child lives, arrange of restrict the child's movement outside the Sudan and upon death bury the child. They also have the duty to register at birth the child, protect and ensure education for the child and competent alternative care in their absence.

While the Child Bill saddles the government with the duty ‘to recognise, respect and ensure the rights enshrined in this bill’ everyone has the duty to report any infringement of the right, failing commits an offence. The nature of government obligation under this bill is obscured. It is therefore submitted as earlier that, irrespective of the ambiguity, the government has an obligation to respect, protect, promote and fulfil these rights.

Rights of the most vulnerable children

Article 34 of ICSS provides for the protection of the rights of persons with special needs. The Bill protects the rights of the girl child, children with disabilities, rights of the children of the minority tribes, rights of refugees and displaced children, rights of children in institutions, and children wrongly taken.

In this regard the Child Bill is fairly comprehensive. It provides a credible system of protection for these children in need of special care and protection in my opinion.

Juvenile Justice System.

There is no reference in the ICSS to a separate justice system for children. The Constitution provides that other court or tribunal may be established if needed by the constitution or any other law. Section 135 of the Child Bill provides for a juvenile justice system with reformation, restoration and reintegration as the guiding principle. The wellbeing and the protection of the child shall the uttermost consideration for contact between law enforcement agencies and the child, removing the child from the parental custody as a last resort.

No child bellow the age of 12 years is incapable of committing any offence. The child Bill establishes a rebuttable presumption a child younger than 14 is equally incapable of committing an offence. A child can only be detained as a last resort and only for the period of 24 hours. Any crime committed by a child shall be dealt with in accordance with restorative justice such as family group conference, victim-offender mediation and any other restorative justice processes. Ultimately diversion will be used to ensure accountability and in accordance with the dignity of the child as well as the child’ other rights. Sentencing shall ne non custodian as much as possible

Section 193 provides that ‘family and children court may be established to hear and determine’ applications relating to children. The phrasing of this section suggests that it is an optional arrangement or even ad hoc provision. This is obvious when section 194 of the same Bill states that ‘there shall be established Children’s Commission’ whose function shall be promotional. It is submitted that the robust juvenile justice system provided for in this Bill cannot only function effectively if there is a specialised court to administer and oversee its operation.

Conclusion and recommendation