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The Implementation of Environmental Treaties in Kenya

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R50/81296/2012

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A project presented in partial fulfilment of the Degree in Masters of Arts in International Studies, Institute of Diplomacy and International Studies, University of Nairobi

October 2013

Declaration

I, Mathenge Gitonga declare that this is my original work and that it has not been submitted to any other institution for an award of any degree.

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This study has been forwarded for examination with my approval as University supervisor.

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Acknowledgment

I wish to sincerely acknowledge the efforts of the following people: first and foremost, I would like to thank Professor Mwagiru of the Institute of Diplomacy and International Studies of Nairobi University for his insight and commitment in enabling me to compile this document. To Mercy Kamau, who introduced me to the finer points of International law, the Director Kenya Forest Service Mr David Mbugua for providing assistance and encouragement and my career family Rosemary Wairimu who had the patience and resolve during this challenging time. Their words of encouragement and wisdom were well timed and greatly appreciated. Special thanks to the academic and support staff of the Institute of Diplomacy and International Studies of University of Nairobi and the National Defence College, Karen who facilitated my acquisition of knowledge and wisdom during my time of stay and the Kenya Forest Service for providing the opportunity to undertake the studies.

Dedication

To God Almighty for His Grace and Mercy. In memory of my father Cyrus Gitonga Muhoya who passed away during the period of this study. To my family, Rosemary Wairimu, Valentine Nyambura, and Eyan Gitonga for the support that they gave me during the period and the hardship they endured.

Abstract

This project investigates the implementation of environmental treaties particularly the multilateral environmental agreements (MEAs). The project uses a conceptual framework of analysis that looks at the conversion of treaties from initiation through negotiation, transformation and implementation. The project begins by examining the historical aspects of environmental treaties in Kenya, and the effect on them by changing national constitutions. It investigates the role, adaptation into the legal system and the importance of environmental treaties in the country. The methodology of investigation includes an inventory of the signed treaties, the level of completion of these treaties up to their implementation stage. This project used information collected using interviews and discussions with government officials, review of literature on treaty development processes and examination of the influence of the executive, legislature and other interests on the treaties. The study concludes that the implementation of the MEAs in Kenya is lead by the executive, tends to be done in a piece meal basis notwithstanding the adoption of policies and laws that would support the implementation of the MEAs. It is also clear that there is a delink between the treaty implementers and the treaty negotiators resulting in poor adoption of the treaties.

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List of Abbreviations /Acronyms

AFF	African Forest Forum
AG	Attorney General
ASAL	Arid and Semi Arid Lands
AU	African Union
BC	Before Christ
CBD	Convention on Biological Diversity
CFC	CloroFloroCarbons
CITIES	Convention on International Trade In Endangered Species
CKRC	Constitution of Kenya Review Commission
COP	Conference Of Parties
CS	Cabinet Secretary
CSD	Commission on Sustainable Development
EAC	East African Community
EAP	East Africa Protectorate
ECOSOC	United Nations Economic and Social Council
EMCA	Environment Management Co-ordination Act
FAO	Food and Agricultural Organisation
G7	Group of Seven
GDP	Gross Domestic Product
IBRD	International Bank of Reconstruction and Development
ICJ	International Court of Justice
IFF	Intergovernmental Forum on Forests
IGAD	Inter Governmental Agency on Development
ILO	International Labour Organisation
IMF	International Monitory Fund
IPCC	Intergovernmental Panel on Climate Change
ITTA	International Tropical Timber Agreement
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KARI	Kenya Agriculture Research Institute
KEFRI	Kenya Forestry Research Institute
KFS	Kenya Forest Service
KNBSAP	Kenya National Biodiversity Strategy and Action Plan
KWS	Kenya Wildlife Service
LEGCO	Legislative Council of Kenya
MDA	Ministries, Departments and Agencies
MEA	Multilateral Environmental Treaties
MENR	Ministry of Environment and Natural Resources
MEWNR	Ministry of Environment Water and Natural Resources
MFA	Ministry of Foreign Affairs
NAP	National Action Plan
NEMA	National Environment Management Authority
NES	National Environment Secretariat
NGO	Non Governmental Organisations

NIP	National Implementation Plan
NLBI	Non Legally Binding Instruments
NMK	National Museums of Kenya
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SG	Secretary General
UN	United Nations
UNCCC	United Nations Convention on Climate Change
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Convention on Law of the Sea
UNCRC	United Nations Convention on the Rights of the Child
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework on Convention on Climate Change
UNFF	United Nations Forum on Forests
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WCED	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development

Chapter 1

Introduction to the Study

1.0 Introduction

In 1886 an Anglo-German Treaty was signed between Britain and Germany to determine their spheres of influence in East Africa.[1] Under this treaty, the borders of the East African Protectorate (EAP) were set, this protectorate was renamed Kenya in 1920. This study examines how Kenya implements treaties or bilateral agreements of which it is party so that the rights and duties contained in such treaties and agreements may become applicable and enforceable domestically. As treaties cover all spheres of human life, the study narrows down to the treaties in the environmental sector particularly multilateral environmental agreements (MEAs). This is mainly because for a long time the subject of environment was absent from the foreign policy priorities of African countries except for isolated instances. The lack of interest in environment was not only regional but worldwide and only began to change in the early 1970's as the result of debate that culminated in the United Nations Conference on the Human Environment (UNCHE) in Stockholm in 1972.[2]

Following this landmark conference, environment has now become a political priority in the foreign policy of most countries including the most developed. Examples such as the Paris meeting of the Group of seven most industrialised countries (G7) in 1989 was dubbed "Green Summit" because of the importance it accorded to

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[1] Mwaruvie J (2011) The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast *International Journal of Humanities and Social Science* Vol. 1 No. 20; December 2011 p.176.

[2] Heraldo Munoz (1992) *Environment and Diplomacy in the Americas* : Lynne Reiner Publishers Bo Colorado USA p.1.

environmental problems. The Huston G7 meeting of the mid 1990s also had a final communiqué that cited environment as one of its most important responsibilities.[3] This change in attitude is in part attributed to non-governmental ecological organisations and the Green Parties of the United States and Western Europe. Their activism has to a large part contributed to elevating the importance of the environmental issues in the foreign policy agenda.[4]The international dimension of the environment and its impact on security results from the fact that much of the aggression that the environment suffers has effects that go beyond the borders of the country where the abuse occurred or environment knows no borders.[5] The interest for instance in relocating in the south industrial plants that produce negative environmental impacts which are unacceptable to the developed countries, are examples of non military aggression to which the environment in the south is being exposed. Some environmental aggression is worldwide, such as the global warming phenomena, destruction of the ozone layer, the loss of biodiversity and the contamination of oceans. Other environmental problems are more regional in scope, such as the deterioration of water basins and ecosystems shared by various countries for example deforestation and misuse of land in higher elevations of the basins causing siltation at the lower elevations.[6]

MEAs have thus become more important as mankind recognises the strain caused by development demands on the earth's physical and biological systems. The study therefore follows through by addressing the question of how Kenya implements domestically the treaties and the process of the transformation of the treaties, in the environment sector. The study is written against the backdrop of Kenya which is unique

[3] Heraldo Munoz (1992) *Environment and Diplomacy in the Americas* : Lynne Reiner Publishers Bo Colorado USA p.1.
[4] Ibid p.1.
[5] Ibid p.3.
[6] Ibid p.4.

in that the United Nations Environment Programmes (UNEP) headquarters is situated in the capital, Nairobi, and which itself is as a result of a treaty, the June 1972 United Nations Conference On the Human Environment (UNCHE) held in Stockholm. This places Kenya at the centre of the global environmental discourse in more ways than one. The second factor is that a new constitution was promulgated in Kenya in August 2010 that had implications on treaty practice in Kenya. The study therefore examines the role of the constitution and its promises on treaty practice. It further highlights the resultant current treaty practice and shows where Kenya is moving from and the consequences to the country as a result of statutes developed under the Kenya Constitution 2010 authority like the Treaty Making and Ratification Act No 45 of 2012.

1.1 Statement of the Research Problem

Environmental issues emphasise the world's interdependence. The nature of most of these environmental issues are such that they cannot be adequately addressed by a single country acting alone and hence make the need for environmental treaties more important and urgent. Acting cooperatively at the international level becomes essential for a country to protect its own interests. Environmental treaties began to be implemented in the world system from the 1970s and have maintained a strong drive for such treaties since then. Endeavours on the national and international level to mitigate and avoid environmental risks and infringements have intensified since the United Nations Conference on Environment and Development (UNCED) that took place in 1992 in Rio de Janeiro, Brazil. This United Nations summit focused on three broad concepts: An "Earth Charter" covering principles aimed at development and the protection of the environment, the "Agenda 21" which was intended to be a global action plan for sustainable development in the 21st Century and finally the demand by

developing countries for increased in new funding from developed countries in order to make development sustainable in the South.[7] This was in recognition that the most urgent problems at global level are now related to the global environmental crises. This study reviews the theoretical debates underpinning treaty practices and the implication on the implementation of the environmental treaties of Kenya. The study examines the development of the constitution and the effect that it has on the environmental policies and implementation of the treaties in Kenya. This study also answers the question of the extent to which the environmental treaties have been implemented in Kenya.

1.2 Objectives

The objectives of the study are

(1). To understand environment

(2). To review the politics of treaty negotiation process

(3). To examine Kenya's treaty practice

(4). To examine the implementation of multilateral environmental agreements in Kenya

1.3 Literature Review

1.4.1. Introduction

This section deals mainly with treaties. It first identifies treaties, and why they exist in the first place. It looks at the different types of treaties and explores their relationship with the implementation of law. The section also looks at the formation process for treaties and the way that they become binding to the parties. The section then examines the different schools of treaty implementation and the debates surrounding these. Finally it looks at the relationship between treaties and international and domestic law.

[7] Martin Khor (1992) *Earth Summit Briefings* Third World Network

1.4.2. Treaties

Treaties are the more direct and formal method of creating international law. Invariably treaties become necessary with inter-state interaction; treaties have been in existence for thousands of years. One of the earliest recorded peace treaties was concluded between the Hittite and Egyptian empires after the ca.1274 BC Battle of Kadesh.[8]

Treaties have a legally binding nature that has an effect on national sovereignty. A treaty is a surrender of some of the national sovereignty, and therefore represents a threat to national interest. Ironically, the right to enter into a treaty and to be legally bound by it is a fundamental aspect of any nation's sovereignty. Without that right, a nation could not take its place in the civil society of nations. Due to surrender of sovereignty a country cannot become party to a treaty lightly. Consequently treaties have now become important in the understanding of how nations are governed.[9] The Vienna Conference on the Law of Treaties by virtue of its wide ratification has assumed an authoritative place in international law on questions relating to the interpretation and enforcement of treaties,[10]indeed it has been called 'the treaty on treaties.' Internationally, the 1969 Vienna Convention on the Law of Treaties now constitutes the basic framework for any discussion of the nature and characteristics of treaties. The 1969 Vienna Convention on the Law of Treaties states that

> "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. [11]

It observes that in order for a state to bind itself to an international agreement, it must "express its consent". But how this consent is expressed is left entirely to domestic

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[8] Bryce, Trevor (1999) *The Kingdom of the Hittites.* Oxford University Press. USA, p. 256.
[9] Ghai Y.P & McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya*, Oxford University Press. Nairobi Kenya p. 507.
[10] D'Amato A (1992) "Good faith" *Encyclopedia of Public International Law* Amsterdam: North-Holland. vol. II pp. 599-601.
[11] United Nations. (2005). *Vienna Convention on the Law of Treaties(1969)* Article 2 (1). UN *Treaty Series*, vol. 1155, p. 331.

law.[12] Here it should be noted that how the consent is expressed is a matter of international law and diplomacy, for example through the instrument of ratification, but the process through which the consent is reached or the treaty practice is a matter of domestic law. This expression of "consent to be bound" is determined by individual treaties which will generally require its ratification (through an instrument of ratification) or accesion (through an instrument of accesion). To be a treaty an agreement also has to have an international character.[13] The fundamental principle of treaty law is *pacta sunt servanda* that proposes that treaties are binding upon the parties and must be performed in good faith. The Vienna Convention on the Law of treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.[14] This is defined as a standard that is to be observed not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requisite of justice or fairness or some other dimension or morality.[15]

Treaties can be bilateral as between two countries or multilateral between three or more countries. Multilateral treaties are generally developed under the auspices of international (inter-governmental) organisations such as the United Nations (UN) or the International Labour Organisation (ILO) or regional organisation such as the African Union (AU) or sub regional organisations such as the East African Community (EAC) and the Inter Governmental Authority on Development (IGAD). Different countries have different treaty practices and this is normally reflected in their constitutions. Various authorities have extrapolated the designations of treaties to include

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[12] United Nations. (2005).*Vienna Convention on the Law of Treaties* (1969) Art 11-17.
[13] Aust Antony (2000) *Modern Treaty Law and Practice*, Cambridge University Press p.14.
[14] United Nations. (2005). *Vienna Convention on the Law of Treaties(1969)* Article 2 (1)Article 31 (1).
[15] Johnson Conrad (1993): *Philosophy of Law: Concepts of Law and legal System*; Macmillan Publishing Co New York p.101.

conventions, protocols, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other.[16] Frequently, declarations, such as Declaration on the Rights of the Child, are adopted by the UN General Assembly. However, those declarations are not treaties as they are not intended to be binding by reason of their adoption. Such declarations may, however, be part of a long process that leads ultimately to the negotiation of a UN convention such as the United Nations Convention on the Rights of the Child. In some cases international organisations can be parties to treaties. The Universal Declaration of Human Rights is the most prominent and which entered into customary international law, this means that it is binding on everybody, some scholars even argue that it has reached the status of *jus cogens*. Treaties are now being made in a variety of arenas including defence and security, the environment, civil aviation and all sphere of international life. The need for treaties has increased as the world's interdependence has intensified.

The increasing intensity of the present relationship between international and domestic law should be the subject of a serious discussion about the best way in which each domestic legal system could face the problems posed by the incorporation of international norms into municipal law. It is clear that international law is no longer limited to the regulation of diplomatic relations between states and the allocation of spaces and competences between countries. International rules today aim at the regulation of matters which belonged exclusively to the domestic jurisdiction of states. Matters that cover a range of questions, from the way in which a state deals with its own population to the emissions of greenhouse gases, a subject which puts almost all

[16] Brownlie Ian. (2008) *Public Principles of International Law*. Ed 7th Oxford University Press Oxford p. 608.

economic activities under the eye of international law.[17] Continuing technological innovation, economic globalisation and the growth of transnationalism has resulted in an enormous increase in the frequency and rapidity of global interaction. Such challenges require both national and international responses. As a result of this interdependence there is an increased number of subjects for treaty making. The need for global rules on the protection and promotion of human rights, education, the environment, wildlife and the world's cultural and natural heritage is now widely accepted. Where a problem cannot be adequately addressed by a country acting alone, cooperation at the international level becomes necessary for the country to protect its own interests.

Process of treaty formation

Treaties become operative when and how the negotiating states decide. A treaty enters into force when a given number of states (provided for in the treaty) have ratified it. But in rare instances, the absence of any provisions or agreement regarding this, a treaty will enter into force as soon as consent to be bound by the treaty has been established for all the negotiating states. This is discouraged in order to prevent one or two states holding others hostage by not ratifying a treaty. In order to negotiate and finalise agreements or treaties, principles and rules have evolved to ensure that persons representing states indeed have the power to do so. For example, for treaties negotiated under the UN, article 7 of the VCLT, requires such persons to produce "full powers" before being accepted as capable of representing their countries. Mwagiru categorises this as the distinction of being given the authority to negotiate through credentials or documents that show they are officially empowered to represent their states at the

[17] Hans Kelsen (1966), *Principles of International Law* 2nd ed. by Tucker.New York, p. 291.

conference[18] and authority to sign,[19] these constitute the credentials of the delegates. A sovereign agent will be given full powers to negotiate and bind his principal. In modern practice this includes authority to negotiate and to sign and seal a treaty. Certain persons however do not need to produce such full powers, by virtue of their position and functions in a sovereign state. These include the heads of state, heads of governments and ministers of foreign affairs for the purpose of performing all acts relating to the conclusion of the treaty and heads of diplomatic missions for the purpose of adopting the text of the treaty.

The successful outcome of negotiation is the adoption and authentication of the agreed text. The adoption of a treaty in international conferences takes place by the vote of two thirds of the states present and voting, outside the international conferences, adoption will be by way of the consent of all the states involved in drawing up the text of the agreement. Once a treaty has been drafted and agreed a number of stages are then necessary before it becomes a binding legal obligation upon parties involved.

Law of Signature

The consent of the state parties to be bound is critical. Mwagiru interprets Article 9 of the Vienna Convention on the Law of Treaties as indicating that a state may be regarded as having given its consent to the text of the treaty by signature where the treaty provides that signature shall have that effect.[20] Signature has as one of its functions that of authentication but a text may be authenticated in other ways for example by incorporating the text in the final act of a conference by initialling. Signature does not establish consent to be bound. Mwagiru narrows the allowance of consent to be bound by signature to three situation only, if the treaty itself provides that

[18] Mwagiru M (2009) *Documents of Diplomacy* IDIS UoN Nairobi p. 77.
[19] Ibid p. 81.
[20] Mwagiru M (2004) *Diplomacy: Documents. Methods and Practice* IDIS UoN Nairobi p.112.

this can happen, if it is shown that the negotiating state intended it to reflect the consent to be bound and if a state made the provision in its full powers that it intends to be bound by signature alone.[21] If the treaty itself requires ratification, then states must ratify it. Mwagiru however notes that signature qualifies the signatory state to proceed to ratification of good faith and to refrain from acts calculated to frustrate the objects of the treaty. Often signatures are affixed in a formal way in an elaborate ceremony. In multilateral treaties, a special closing session will be held at which authorized representatives will sign the treaty. Signature does not create an obligation to ratify. A signatory state is one that has signed a treaty but not ratified it.

The period between signature and ratification provides extra time for consideration, consultation and reflection once the negotiating process has been completed.[22] Ratification means the act of the appropriate organ of state, in the constitutional sense and the international procedure which brings a treaty into force by formal exchange or deposit of the instruments of ratification. To ratify a treaty essentially means to express consent to be bound by it. Treaties which a country ratifies may influence the way in which the country behaves, internationally and domestically. The decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement. Mwagiru cautions that if this is not done carefully, it will raise the problem of having domestic law that does not conform to the requirements of a treaty.[23] Historically the device of ratification by the competent authorities of the state was originally devised to prevent a representative from exceeding his powers or instructions with regard to the making of a particular

[21] Mwagiru M (2004) *Diplomacy: Documents. Methods and Practice* IDIS UoN Nairobi p.113.
[22] Ibid p.105.
[23] Ibid p.105.

agreement. Ratification of international treaties does not involve a handing over of sovereignty to an international body. Normally the signing of the treaty is followed by ratification. In this case, signing a treaty can either be putting a signature subject to ratification by the state or it can involve signing only where the treaty so permits. However when you have accession, the requirement for prior signature is not there.

When a treaty is expressed to be open to signature 'subject to acceptance" this is equivalent to 'subject to ratification'.[24] In bilateral treaties ratification may be accomplished by exchanging the requisite documents while in multilateral treaties the usual procedure is for a depository to collect the ratifications of all states, keeping all parties informed of the situation. Article 14 of the VCLT regulates the matter by the reference to the intention of the parties.[25] Article 13 provides that consent of states to be bound by a treaty constituted by instruments exchanged between them maybe expressed by that exchange when the instruments declare that their exchange shall have that effect or it is otherwise established that those states had agreed that the exchange of instruments should have that effect.[26] In some cases, signatures to treaties may be declared subject to acceptance or approval. In recent times signature has not featured in the adoption of all important multilateral treaties; adopted text is submitted for accession.[27]

Accession to Treaties

An instrument of accession has the same effect as an instrument of ratification. [28]Acceding is the act by which the state signifies its consent to be bound by the terms of a particular treaty. Mwagiru identifies three occasions which lead to the requirement of

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[24] Brownlie Ian (2008) *Principles of Public international Law* 7th Edition. Oxford University Press p.611.
[25] Ibid pp.610-11.
[26] United Nations. (2005). *Vienna Convention on the Law of Treaties(1969)* . UN *Treaty Series*. vol. 1155. Article 13.
[27] Brownlie Ian (2008) *Principles of Public international Law* 7th Edition. Oxford University Press p.610.
[28] Mwagiru M (2004) *Diplomacy. Documents. Methods and Practices.* IDIS UoN p.28.

an instrument of accession as opposed to an instrument of ratification. The first is where the state did not participate in the negotiation of the treaty;[29] The second is where the treaty has already entered into force and the third is where a state participated in the negotiations, but did not sign a treaty, which has already entered into force. According to the VCLT; consent by accession is the normal method by which a state becomes a party to a treaty it has not signed. Article 15 provides that consent by accession is possible where the treaty so provides, or the negotiating states were agreed or subsequently agree that consent by accession could occur in the case of the state in question.[30]

Important multilateral agreements often declare that specific entities may accede to the treaty at a later date. The 1958 Geneva Conventions on the Sea are conventions that provided for accession by any member states of the UN or any specialized agencies of the UN. This is the normal method by which a state becomes a party to a treaty it has not signed. A party the negotiations identify acts as a depository for ratifications. In rare cases in a treaty that is not subject to ratification, acceptance or approval, signature creates the same obligations of good faith and establishes consent to be bound: signature, ratification, accession, acceptance and approval are not the only means by which consent to be bound may be expressed. Any other means may be used if so agreed, for example an exchange of instruments constituting a treaty.[31]

The Law of Reservations

Article 2 of the Vienna Convention of the Law of Treaties, allows states to have reservations to the treaties. It defines the reservation as a unilateral statement, however phased or named, made by a state, when signing, ratifying, accepting, approving or

[29] Mwagiru M (2004) *Diplomacy, Documents, Methods and Practices*, IDIS UoN p.28.
[30] United Nations, (2005), *Vienna Convention on the Law of Treaties(1969)* . UN *Treaty Series*, Vol. 1155, Article 15.
[31] Brownlie Ian (2008) *Principles of Public international Law* 7th Edition. Oxford University Press p611

accenting to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.[32] It however requires that reservations must be in writing and communicated to the contracting states and other states entitled to become parties to the treaty. Mwagiru clarifies that the right to make a reservation to a treaty will reflect the sovereignty and the independence of a state.[33] The same applies to the acceptance of and objection, to reservations. Under the law of reservations a state may not entre a reservation on a fundamental part of the treaty.[34] Mwagiru further notes that some treaties just do not allow any room for reservations, these include the Genocide Convention and the Statute of The International Criminal Court.[35] The judgement of the International Court of Justice (ICJ) in the Reservations to the Genocide conventions case established the contemporary interactive law on reservations. Article 19 of the VCLT indicates the general liberty to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty.[36]

Declarations Recommendations and Resolutions

Generally, declarations and recommendations are documents of intent, which in most cases do not create legally binding obligations on the countries that have adopted them. A declaration and or recommendation may gain the force of binding law if its contents are widely accepted by the international community. It then achieves the status of customary international law. The Universal Declaration on Human Rights of 1948 is an example of a declaration, of which a large part has gained the force of binding (customary) international law and there are persuasive arguments that its provisions

[32] United Nations. (2005), *Vienna Convention on the Law of Treaties(1969)*. UN *Treaty Series*, Vol. 1155. Article 2.
[33] Mwagiru M (2004) *Diplomacy. Documents. Methods and Practices.* IDIS UoN p.28.
[34] Ibid p.29.
[35] Ibid p.29.
[36] United Nations. (2005). *Vienna Convention on the Law of Treaties(1969)*). UN *Treaty Series*. vol. 1155. Article 19.

especially those on fundamental human rights have become *jus cogens*. Resolutions are documents without legally binding force (except for the resolutions of the UN Security Council). However, as they are usually adopted by UN bodies, they can carry considerable weight and often are much more detailed on one particular subject than other international instruments.

International Law and Municipal Law

Sources of law and attitudes towards law are relevant in any attempt to understand how states are governed today.[37] The fundamental distinction holds that a rule may be binding because it is accepted or because it is valued.[38] National law is also known as municipal or domestic law. It regulates relations within a state (intra-state) and is concerned with the rights and duties of legal persons within the state and the relationships between them and the state. International law regulates the relationships between and among subjects of international law (those with international legal personality) such as states, international organisations and individuals. It is concerned with the rights and duties of states in their relations with each other and with international organizations.

International law does not have a law-making body, instead treaties are negotiated between states and only bind states which are parties to a treaty. Treaties are part of the international law which becomes national law through the ratification process. However there are aspects of a treaty that become customary international law, and are binding on states whether they are parties or not. In this case the customary international law is defined as acts concerned as a settled practice, that must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is

[37] Ghai & McAuslan (2001) *Public Law and Political Change in Kenya*, Oxford University Press. Nairobi Kenya p.507.

[38] Johnson Conrad (1993): *Philosophy of Law: Concepts of Law and legal System*: Macmillan Publishing Co. New York p.99.

rendered obligatory by the existence of a rule requiring it. The states concerned must feel that they are conforming to what amounts to a legal obligation.[39] International law does not have an enforcement agency, rather it is hortatory in that states abide by it because it is in their best interest to do so. Enforcement may be through methods such as national implementation, diplomatic negotiation or public pressure, mediation, conciliation, arbitration and judicial settlement. The two different theories of monism and dualism provide for how states deal with treaties and the relationship between international law and national law.

Monist School

In this theory all law is part of a universal legal order and regulates the conduct of the individual state.[40] Monist thinking maintains that municipal law must be consistent with international law and that both municipal law and international law must respect the values of the overarching legal system which is founded on natural law thus internal and international legal systems are one. Kooijams argues that all law is part of the same legal order, international law is automatically incorporated into the domestic legal order. Since they are part of the same legal system, and because there is no competing relationship between them, treaties that a state has ratified are automatically part of municipal law, and are binding in national legal rules and international rules and determine whether actions are legal or illegal.[41] Hence at the international level, the consequences of the law will be attributed to the state. Some of the monist theorists consider that international law is supreme even within the municipal sphere. Brownlie views international law as the best available moderator of human affairs and also as a

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[39] Greenwood C (2008) *Sources of International Law: An Introduction* UN Treaty UN Org

[40] Makumi Mwagiru (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice 2011. *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No.1 p.145.

[41] Pieter Kooijmans. (1994) *Internationaal publiekrecht in vogelvlucht*, Wolters-Noordhoff. Groningen. p.82.

logical condition of the legal existence of states,[42]with international law prevailing over domestic law if they are in conflict.

The monist school also prescribes the methodology of incorporating treaties into the domestic domain. Theoretically in a pure monist state, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of municipal law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because the latter has priority. Wiarda opinionates that pure monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution and not in conformity with municipal law.[43] In some states such as in Germany, treaties have the same effect as legislation, and by the principle of *lex posterior*, only take precedence over national legislation enacted prior to their ratification. In most monist states, a distinction between international law in the form of treaties, and other international law, for example customary international law or *jus cogens* is made; such states may thus be partly monist and dualist. Monism is established if international and municipal law are part of the same system of norms receiving their validity and contents by an intellectual operation from a basic norm. Basic norm of the international legal order which is the ultimate reason of validity of the natural legal orders too. Wiarda maintains that "primacy" can only be decided on the basis of considerations that are not strictly legal.[44]

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[42]Brownlie Ian (2008) *Principles of Public International Law* 7th Edition. Oxford University Press p.32.
[43] G.J. Wiarda. (1992) in Antonio Cassese. *International Law in a Divided World.* Clarendon Press, Oxford. p.17.
[44] G.J. Wiarda.(1992) in Antonio Cassese. *International Law in a Divided World.* Clarendon Press. Oxford. p.12.

Dualism School

Dualism presents the second perspective on the relationship between international law and domestic law. Here it is postulated that the two systems of law (international and municipal) are different systems of law, each independent of the other in its own domain. The main differences stem from the sources of law, its subject and subject matter.

It is argued that international law derives from the collective will of states, its subjects are the states themselves and its subject matter is the relations between states. Domestic law on the other hand derives from the will of the sovereign or the state, its subjects are individuals within the state and its subject matter is the relations of individuals with each other and with government. From the dualist perspective, states may therefore apply municipal law with no obligation to make it conform to international law. This difference between national and international law, requires the translation of the latter into the former. Without this translation, international law does not exist as law domestically. International law has to become national law first or it is no law at all. In dualism, international law is binding municipally if the state automatically allows it to do so. If a state ratifies a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly to incorporate the treaty, then it violates international law. Here however, the treaty does not become part of national law. National laws that contradict this treaty will remain in force. Under dualism, national judges cannot apply international law that has not been translated into national law. Thus the rules and principles of international law cannot operate directly in domestic law, and must be transformed into domestic law before they can affect individual rights and obligations.

In case of a conflict between international law and municipal law, the dualist would assume that a municipal court would apply municipal law.[45] Brownlie reports that Sir Gerald Fitzmaurice challenges the premise that international and municipal law have a common field of operation. In this coordination theory, he argues that the two systems do not come into conflict as systems since they work in different spheres. Each is supreme in its own field. However there may be a conflict of obligations. The only issue is the inability of the state to act domestically as required by international law. Thus states choose whether they want to be monists, or dualists, or how they wish to coordinate the two systems of law.

Transformation Theory

Article 46 of the Vienna Convention on Laws of Treaty provides that states cannot plead a breach of constitutional provisions (municipal law) as to the making of treaties as a valid excuse for condemning an agreement.[46] It is a general principle of international law as embodied under Article 27 of the VCLT that a state may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation. [47] The responsibility of the state is that it has full and sovereign control over its municipal law. Brownlie reports that Rousseau characterised international law as a law of co-ordination which does not provide for automatic abrogation of internal rules in conflict with obligations on the international plan.[48] Normally international law does not interfere with the local law but the state may be held responsible for the acts of its nationals through attribution. This happens when the officials of a state fail to conduct themselves as prescribed in the law.

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[45] G.J. Wiarda,(1992) in Antonio Cassese. *International Law in a Divided World*, Clarendon Press, Oxford, pp.31-32.

[46] United Nations. (2005), *Vienna Convention on the Law of Treaties(1969)* Art 2 (1), UN *Treaty Series*, vol. 1155, p. 342.

[47] Ibid p.345..

[48] Brownlie Ian (2008) *Principles of Public International Law* 7th Edition, Oxford University Press p.33.

There are three theories that are used to make international law applicable in domestic circumstances. The first is the transformation theory which conforms closely on the dualistic theory. This views the systems of international law and municipal law as being two completely separate and distinct systems. It also presumes that international law binds states only and the municipal law applies to individuals and requires the transformation of treaties into municipal law for their enforcement. Starke considers the transformation of international law as a prescription of a methodology by which the treaty will be stated as municipal law.[49] According to this theory it is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements. Mwagiru notes that the dualist school is supported by the methodology of transformation. In that methodology, treaties do not become automatically binding on states unless they have first been transformed into municipal law. The methodology of transformation requires that the legislature which makes laws domestically, must first of all transform treaties into municipal law. The transformation of treaties into municipal law entails clothing them domestically, by making them part of the statutes of the country.[50] The transformation is not merely a formal but a substantial requirement. International Law according to this theory cannot find place in the national or municipal law unless the latter allows its machinery to be used for that purpose. If international law is not directly applicable, as is the case in dualist systems, then it must be translated into national law, and existing national law that contradicts international law must be adjusted to conform to it.

The second theory is the delegation theory. Under this theory, every state has a right to decide for itself when the provisions of a treaty or convention are to come into

[49] Starke. J. G. (1936) *Monism and Dualism in the Theory of International Law*;
[50] Makumi Mwagiru (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice 2011, *Journal of Language, Technology & Entrepreneurship in Africa* Vol.3.No1, p.146.

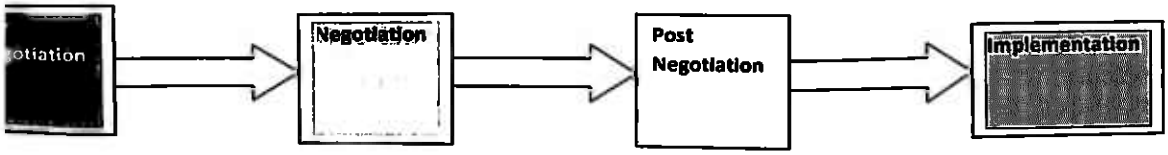
effect and in what manner they are to be incorporated in the law of the land or municipal law. There is no need for transformation of a treaty into national law but the act is merely an extension of one single act. The third theory is the doctrine of incorporation, that holds that international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure.[51]The treaty practice of the state allows it to interact with the treaties in the international system. In some states this may be an *ad hoc*, system or may be structural in the form of constitutional law.[52]

1.5 Conceptual framework

Kuhn (1962) suggested that the history of science is characterized by revolutions in scientific outlook. Scientists accept the dominant paradigm until anomalies are thrown up. Scientists then begin to question the basis of the paradigm itself, new theories emerge which challenge the dominant paradigm and eventually one of these new theories becomes accepted as the new paradigm. [53] This theory of science as a paradigm informs the framework that is being used in this study. The project reviews the development process of treaties along the paradigm concept, hence Pre science (Pre negotiation), Normal Science (negotiation), crisis and negotiation (post negotiation) and then the new paradigm (implementation)[54] There is therefore conversion from one state to another followed by implementation of action. A mishap at any stage affects the outcome

[51] Malcolm Shaw, *International Law* (5th ed, 2003), pp.128-9.
[52] Makumi Mwagiru (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice , *Journal of Language, Technology & Entrepreneurship in Africa* Vol.3 No1. p.145.
[53] McLeod, S. A. (2010).*Thomas Kuhn | Science as a Paradigm - Simply Psychology*. Retrieved fromhttp://www.simplypsychology.org/Kuhn-Paradigm.html
[54] Kuhn, T.S. (1962).*The Structure of Scientific Revolutions*. Chicago: University of Chicago Press

negotiation stage	Negotiation stage	Post negotiation stage	Implementation
e 1: Diagramatic representation of the paradigm shift			
National interests Treaty making prescription Constitutional values	• Discussions and alignment • Documentation • Agreed minutes	• Reports • Cabinet consideration • Parliament for ratification	• Road map • Composite reports • Implementation



1.6 Hypothesis

There are four hypothesis implied in this study.

(1). Kenya has a clear delineation of the importance of environment

(2). The politics of the treaty negotiation process are a consideration in treaty negotiation.

(3). Kenya has a comprehensive treaty practice

(4). Implementation of multilateral environmental agreements takes place in Kenya

1.7 Methodology and limitations of the study

This project makes an analysis of the relevant available literature on the subject and relies on practical sources of research. In regard to the literature research, the study relies on primary sources including international law instruments, constitutions, environmental legislation, reports of environmental law commissions, National Environmental Management Authority (NEMA), resolutions, declarations, general comments, state reports under the various international and regional environmental declarations. The study also places considerable reliance on secondary sources including background papers, books and academic articles. Various internet sites have been consulted for relevant data and information. At a practical level, the thesis relies on structured interviews and observations during visits to the various offices that are part of the environmental treaty development system of the country, the study also relies on information obtained from government departments, civil society and other stakeholders in the field of environmental within Kenya.

1.7.1 Limitations of the study

The first constraint encountered in this study was that while the subject of environment has been generally well researched, it is in most cases not based on a treaty evolution in

Kenya. Although the thesis aims at contributing to the process of bridging this gap, there was scarcity of research sources in relation to a number of specific environmental issues considered. The thesis makes an attempt at remedying the problem of the dearth of literature by placing reliance on the constitutional requirements of the Kenyan Constitution 2010.

There are obvious disparities in relation to the fact that in certain respects there were more resource materials in relation to some countries than was available for Kenya. Particularly significant is the fact that USA treaty practice have been far more documented and dealt with than Kenya. This obviously resulted in an imbalance in the sense that in many respects, USA is used as a basis for comparison in the thesis. However, the thesis attempts to limit this imbalance by taking into account information drawn from resource materials (both published and unpublished) that could be obtained in relation to Kenya. These include, field research undertaken by the author and the available research reports from government and non-governmental organizations.

1.8 Chapter outline

Kenya is a country that has been in the fore front of the environmental discourse in the world. Kenya's economic well being is based on an agricultural background, the need to have a stable environment is of critical importance.[55] The country has a thriving tourism sector that is dependent on the unique environmental conditions that it has inherited. The importance of the environmental sector is its interdependence across all the countries of the world. This has resulted in the environment sector having a large number of treaties that bind countries across the globe. As a result the thesis focuses on how treaties and in particular environmental treaties are implemented in Kenya. In

[55] *Kenya Vision 2030*

order to achieve this, focus was placed on the underlying aspects of the unique treatment of treaties in Kenya and the major factors that affect this implementation.

This chapter (Chapter 1) introduces the study, its aims, approach and scope. Chapter 2 is the theme of the thesis, defining elements of the primary subject matter, the environment and its importance in Kenya. It discusses the importance of environment and the understanding of environment, historical aspects of treaties in environment and basic definitions of the terms used. It shows the treaty movement at the global, the regional and local levels, this includes the Multilateral Environmental Agreements (MEAs), the bi lateral, treaties and the multilateral treaties. Chapter 3 discusses Kenya's negotiation of treaties. This looks at the actual process of developing treaties, negotiating them and conversion into the law of the country. It identifies the historic role of the legislature and the negotiation processes. An important issue is the effect of the changes brought about by the Constitution of Kenya 2010 and the Treaty Making and Ratification Act no 45 of 2012. Chapter 4 then looks at treaty practice in Kenya. A review of the constitutional requirements over time on treaties and benchmarking with the treatment of treaties in other countries is also done. Chapter 5 then looks at the domain of MEAs in Kenya. It investigates the gaps between the treaty development process and the treaty implementation. Here an analysis of how the country has dealt with the treaties is done using pie charts and notes done using charts and notes developed from the interviews conducted. Chapter 6 forms the recommendations and conclusion of the project.

Chapter 2

Defining Environment

2.0 Introduction

Environment has now become one of the most important areas in diplomacy primarily due to its borderless nature. This section defines environment, looks at the components of environment, reviews the historical aspects of environment and treaties and the evolution of the treatment of environment in international treaties. It reviews the importance of environment in the context of Kenya, highlights why environment is important in the world today and investigates the major environmental treaties and trends.

2.1. Understanding of environment

The traditional understanding of nature has been that it is a system created by God for the sustenance of humans. It has been generally believed that nature is what man has not made. Nature has been defined as 'the material world itself, taken as including or not including human beings. The term has been traced to mean the 'countryside', the unspoiled places, plants and creatures other than man.[1] The general belief was that the Earth was the hub of the universe and man had a central place in it. It was also believed that the environment was a static entity with little or no possibilities of change. This had been the dominant view until the advent of enlightenment in the early modern era. However, with the growth of scientific thinking and reason it came to be gradually accepted that neither the earth was at the axis of universe, nor were humans the core of the earth. Science also established that there has been continuous change in the nature of environment all along the history of the Earth, though the speed of change differed

[1] Raymond Williams (1980) *Ideas of nature: In problems in materialism and culture.* Verso London p.69.

for different components of nature and even this speed had not been a uniform speed. This holds true for the evolution of both living and non-living components. The industrial revolution heralded a completely new era in which the term 'environment' attained new dimensions. The present day concerns of environmental pollution, decay of bio-diversity and the green-house effect have necessitated a redefining of the concept of the man-nature relationship. Environment is broadly understood to mean our surroundings. It can be divided into non-living and living components.

The environment provides resources which support life on the earth and which also help in the growth of a relationship of interchange between living organisms and the environment in which they live. In the recent past the term nature has been used as parallel to word environment. Environment may be defined as a generic concept under which are subsumed all external forces and factors to which an organism or aggregate of organisms is actually or potentially responsive, or environment may be limited to the material or spatial aspects of the surrounding world to the exclusion of the melee of human social relations.[2] Humans enjoy a unique position in nature due to their exceptional ability to influence and mould the environment.

Environment has been studied though a combination of methods. Ecologists are biological scientists who focus on relationships between environment and the living being in general. Environmental scientists are a set of scientists who try to examine the functioning of the earth and the nature of human interactions with it. Le Roy and Vernadsky developed the term biosphere while theorizing on the environment.[3] Vernadsky, (1944) defined biosphere as the qualities, of living and non-living matter. It is a definite geological envelope markedly distinguished from all other geological

[2] Harold and Margaret Sprout (1965) *The ecological perspective on Human Affairs with special reference to International Politics* Princeton University Press , Princeton: p.27.
[3] Le Roy E.. 1927.*L'exigence idéaliste et lafait de l'évolution (Idealistic Exigency and the feat of Evolution)*, Boivin: Paris.

envelopes of our planet. Le Roy understood the biosphere as a shell of the earth or a "thinking stratum", including various components, such as industry, language, and other forms of rational human activity.[4] From an environmentalist perspective the biosphere represents the single greatest geological force on earth, moving, processing, and recycling several billion tons of mass a year.[5] Conservationist biologists stress application of scientific knowledge for conservation of bio-diversity, which they consider as centre of existence of life on earth. Human agency has a critical role in the deterioration of environment; the environmentalists suggest scientific interventions to mitigate the ill impacts of human activities. Conservationists recognise the needs of present and future generations of humans and stress the prudent use of resources.

The role of disparity both economic and social within the society and among societies and nations has defined the agenda for the study of the environment by social scientists, particularly at the level of policy formulation. Another corollary has been the problems related with the modern concept of development and resultant compulsions of conservation. For instance the discounted value of the economic benefits derived from forest clearing, simply does not stand up to the social costs that will burden current and future generations.[6] Today environment decay is linked to both excess of prosperity and the conditions of poverty and both have in common a style of development that assumes natural capital is infinite.[7] This may be the reason why many of the countries of the south are of the view that developed countries often tend to associate the deterioration of the ecosystems with the pressures derived from high demographic

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[4] Arbatov A. and Bolshakov B, 1987. Peace and the Noosphere: The Issues and Development Prospects. In: *The Environment and Peace on Earth*, Nauka Publishers: Moscow, pp. 65-83.
[5] Grinevald J., 1988. Introduction: The invisibility of the Vernadskian Revolution. In: V.I. Vernadsky, *The Biosphere*, A Peter A. Nevraumont Book, N.Y., pp. 20-32.
[6] Palloni A, (1994) Population and Deforestation, sited in *Population and Environment: Rethinking the debate* eds. Arizpe L, Stone M.P, Major D.C, West View Press Inc, Colorado p.130.
[7] UN (1991) CEPAL *El Desarrollo Sustainable: Transformacion Productiva. Equidad. y Medio Ambiente.*

growth[8] yet the countries of the south argue that certain consumption habits in the developed nations generate demand for products that result in environmental damage or the depletion of natural resources in third world countries. They feel that environmental concerns in industrialized countries are a hypothetical attempt to deny economic growth to poor countries in order to conserve their natural beauties for the sake of developed countries ecotourism. In their attempt to conserve the dwindling bio-diversity, humans started demarcating fragile ecological zones ranging from forests, wet lands, bio-sphere reserves, mangroves, etc., as reserves to preserve not only the flora-fauna but also the physical attributes of ecological niche itself. It often led to conflicts with the communities sustaining on such resources such as forest-dwellers. Similar kinds of conflict can be located on the sites for big-dams and ancillary activities which necessitated displacement.

2.2. International environmental issues

Environmental law constitutes a large and rapidly changing corpus of rules, quasi-rules, and precedents that set down new directions in legal thinking, the implications of these for the balance between state power and global and regional authority remain fuzzy in many respects.[9] International environmental treaties, regimes, and organizations have placed in question elements of the sovereignty of modern states – that is, their entitlement to rule exclusively within delimited borders – but have not yet locked the drive for national self-determination and its related "reasons of state" into a transparent, effective, and accountable global framework.[10] Initially environmental matters were handled through limited agreements, regional agreements and a few international

[8] Heraldo Munoz (1992) Environment and diplomacy in the Americas : Lynne Rienner Publishers Bo Colorado USA p.7.
[9] Held, D. (ed.) (2003) *The Changing Structure of International Law* . Cambridge: Polity Press. p.170.
[10] Ibid p.170.

agreements. It was not until the post war period that high level global conferences to discuss environmental questions were held. Most of these early and post war agreements only contained the jurisdiction, regulation and enforcement provisions and had no scientific advice or institutional implementation aspects for proper and effective conservation and management.[11] Some of the early treaties included the international convention for the prevention of pollution of the sea by oil in 1954 and the Ramsar convention of 1971. In 1967 the concept of "common heritage of mankind" was popularized as a way of rethinking the basis of the use of natural resources. Key elements included rethinking about the exclusion of a right of appropriation; the duty to use resources in the interest of the whole of humanity; and the duty to explore and exploit resources for peaceful purposes only.[12] Later in the 1970's scholars and statesmen developed further the notion of environmental security, at this time they began to realise that threats to state security were broader than the cold war and nuclear brinkmanship. A range of threats such as drought, floods, hurricanes, environmental degradation and disease needed recognition if they were to be tackled. In 1972 the Stockholm conference of the United Nations Conference on the Human Environment (UNCHE) was held. The concern for the environment and the realisation that, for such concerns to be met successfully there must be international cooperation and international responsibility has increased over the last 20 years.[13]

By 1990's there was widespread recognition of the phenomenon of climate change and spread of biodiversity loss.[14] These were broader threats to human needs, health, human safety and wellbeing brought about by various agents like drought,

[11] Barson R.P (2006) *Modern Diplomacy* 3rd edition Essex: Pearson. Education Limited p.150.
[12] Held, D. (ed.) (2003) *The Changing Structure of International Law* . Cambridge: Polity Press. p.170.
[13] Njenga F.X (2001) *International Law and World Order Problem*, Moi University Press, Eldoret p.56.
[14] Hulme Karen (2012) *Yearbook of International Environmental Law*, pg 1 downloaded from Oxfordjournals.org Nov 17 2012

floods, hurricanes, environmental degradation and disease. At the UN level, two treaties, the 1979 Convention on the Moon and Other Celestial Bodies and the 1982 Convention on the Law of the Sea (UNCLOS) were developed and recorgnised the impact new technologies would have on the further exploitation of natural resources and resources that were beyond national jurisdiction on the seabed or on the moon and other planets. It was a basis for arguing that the vast domain of hitherto untapped resources should be developed for the benefit of all, including the developing nations.[15] The introduction of the concept of "heritage for all" was a turning point in legal considerations, even though there was considerable argument over where and how it might be applied. It was significantly revised and qualified by the 1996 Agreement relating to the Implementation of Part XI (of the Law of the Sea).[16] This principle has been extended in recent times to cover the control of resources in a variety of areas (including the continental shelf and "economic zones" that stretch up to 200 nautical miles from coastal states).

2.3. Environment and its importance in Kenya

The environment sector in Kenya is a cross-sectoral and cross-cutting pillar that involves all natural resources their exploitation, management and conservation. Some of the sectors include water resources, forestry and wildlife, marine and fisheries, tourism, agriculture and livestock, and mineral resources. These sectors are responsible for most of the country's GDP (more than 60%) and employ a majority of the population. The environment is also the main source of livelihood for most of the human population in the country.[17] In Kenya for instance, the Forest Resource Assessment of the FAO in 2010 has estimated Kenya to have a 5.9% Forest cover (or 3.45m ha) with a 2.4 %

[15] Held, D. (ed.) (2003) *The Changing Structure of International Law*. Cambridge: Polity Press. Pg 170
[16] Ibid p.171
[17] GoK Kenya Vision 2030

(1.405m ha) of the total area comprising of indigenous closed cover forest area[18] Vision 2030 is a government development strategy that is aimed at steering Kenya to a middle income country by the year 2030. The vision's key goal statement recognises the environment and states the attainment of a 'nation living in a clean, secure and sustainable environment' driven by the principles of sustainable development. This vision is mounted on 3 pillars of political, social and economic advancement. Environmental considerations of development are stated within the social and economic pillar. The forestry sector in Kenya provides Kshs 20 billion of goods to the economy and has over 1 million people directly dependent on the forests that they live close to. National wood consumption is 37m m^3 with an annual deficit of 7m m^3 per year. Further 80% of the people use fuel wood as their primary source of energy.

Economists measure development using the bottom line figure of the gross domestic product (GDP) of a nation. This does not look at the real costs of development. The sustainability of the production of the GDP is almost always undermining the environment. For instance, the value of the environmental goods and services is never considered in the calculation of the GDP. It is an assumption that water resources, the wood resources, the mined resources, the foods such as the fish resources are of 'free' value. It is thus becoming increasingly clear that for a nation to grow it must grow in tandem with conservation of the environment. The state however only gives token support to the responsible institutions that provide the vital environmental good and services. Vision 2030 however states that the nation will be a clean environment. The city of Nairobi for instance, has a daily input of 250m^3 of water, year has a sewerage capacity of the 70m^3 giving a deficit of 220m^3 of sewerage that is left to drain into the environment and cause future environmental problems. The

[18] KFS Strategic Plan (2009) p. 9.

solid waste management is another issue with 174,497 m tonnes in 1999 that has risen to 600,213m tonnes in 2012.[19]

Environmental coordination in Kenya is a responsibility of the National Environment Management Authority (NEMA), a state agency within the Ministry of Environment Water and Natural Resources (MEWNR). The Environment Management Co-ordination Act 1999 (EMCA) No 8 of 1999, provides the regulation for environmental activities in Kenya. EMCA was given presidential assent on 6th January 2000 and deals with international treaties, conventions and agreements in the environment sector. It is the section of the Kenyan law that is charged with the responsibility of domesticating the environment protocols, treaties, conventions and amendments into legislation in Kenya.[20] It is also required to keep a register of all international treaties, agreements or conventions in the field of the environment to which Kenya is a party.[21]Environment being a multi-sectoral phenomenon however has several other government agencies that play a role as they manage their sectors. These include but are not limited to public health and sanitation with environmental health including; public health, the working environment radiation control and management of hazardous wastes; water development-through management of water resources utilization; urban and local government-through management of urban environments by county authorities, forestry and wild life, agriculture and farming practice controls to enhance soil utilisation.

2.4. Environmental laws in Kenya

In Kenya the environment sector consists basically of the wildlife, forest water and mining sectors. Over the recent past there has been a series of reviews of the regulations

[19] Angila E (2012) *Urban Planning and Development: A case study of Nairobi*, Presented to National Defense College on 3rd August 2012, Kenya Institute For Public Policy and Research Nairobi p.38.
[20] *EMCA* (1999) Part XI subsection 124 Government Printer GoK.
[21] Ibid Sub-section 124.

that govern the environment sector in Kenya. The Constitution of Kenya 2010 article 42 deals with the rights of the people of Kenya to the a clean and healthy environment.[22] Chapter 1 of the constitution deals with the sovereignty of the people and the supremacy of the constitution, section 2 (5) states that the general rules of international law shall form part of the law of Kenya.[23] Article 69 deals with the obligations in respect to the environment Article 69(1) of the constitution sets out certain obligations contingent on the Kenyan Government relating to environmental management. It is useful to highlight that these obligations represent some of the legislative and other measures set out as part of realization of the right to a clean and healthy environment held in article 42. These obligations compel the Kenyan Government to firstly ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits. This obligation combines the human need to utilize resources, with the contingent duty to sustainably manage and conserve these resources. Therefore for the first time, within the Kenyan legal system, the constitution creates a sound basis for subsequent review of sectoral statutes with competence over natural resources to ascribe by these obligations. It is also noteworthy that the constitution calls for equitable sharing. Article 70 deals with the enforcement of the environmental rights, these allow a citizen to sue for any environmental rights that he feels will be denied, violated, infringed or threatened, and may apply to the court for redress. The complainant does not have to prove that the right will be violated. Article 71 specifies that a transaction is subject to ratification by parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of

[22] GoK (2010) *Constitution of Kenya 2010* Government Printer Nairobi p. 31.
[23] Ibid p.13.

any natural resources of Kenya. Presumably it is intended to achieve certain goals such as transparency and accountability, involuntary displacement and resettlement of people whenever major mining operations are implemented, specific environmental requirements for natural resource exploitation undertakings such as mining. This implies that giving effect to this constitutional provision will require a review of the Mining Act (1940). Chapter 5[24]part 2 from section 69 to section 72 deals with the obligations of the environment It requires for instance that the forest cover in Kenya will be maintained at 10%. The current forest policy was developed in 1968[25] and the Forest Act 2005 has been operating without the enabling policy.[26] The wildlife policy is in the 1975 policy document[27] and the act is the 1976 wildlife bill.[28] The Water Act of 2002[29] does not mention any of the obligations in the government on the international conventions treaties or agreements. Kenya's recognition of the importance of the international conventions and agreements is only stated in the EMCA Act of 2000 where the where the authority states how it shall deal with international conventions. [30] The fifth schedule to the constitution requires legislation regarding the environment to be enacted within four years from the effective date, which was 27 August 2010. Legislation regarding natural resources agreements, and land use and property should be enacted within a period of five years

Biodiversity

Biodiversity is defined as the number and variability of all the life forms pertaining to plants, animals and micro-organisms and the ecological complex they inhabit.

[24] GoK (2010)*Constitution of Kenya 2010* Government Printer Nairobi pp 47-48
[25] GoK (1968) Sessional Paper no 1 (1968) *Forest Policy* Government Printer Nairobi
[26] MoFW (2012) *The National Forest Policy* (2012) , Revised Harmonised Draft
[27] GoK (1975) Sessional Paper No. 3 of 1975 *"A Statement on Future Wildlife Management Policy in Kenya"* Government Printer Nairobi
[28] GoK (1976) *Wildlife (Conservation and Management) Act* of 1976 Government Printer Nairobi
[29] GoK (2002) *Water Act* 2002, No. 8 of 2002 Government Printer Nairobi
[30] GoK (1999) *The Environmental Management And Co-Ordination Act*, 1999 , No 8 of 1999 Government Printer Nairobi Part 11, Section 127 g

Biodiversity is a mixture of two words namely biology and diversity it means the diversity of life forms. As biodiversity refers to the entire range of life forms, the relationship between plants and animal life and with other living organisms is also covered under this definition. Biodiversity has been an important aspect of human existence as it meets the basic survival needs of a vast number of people who depend, wholly or partially, on the surrounding natural resources for their daily needs.[31] Biodiversity also ensures the preservation and continuance of the food chain. This is based on the food web where each species is dependent on the other. The extinction of one species disrupts this food chain equilibrium and may lead to the extinction of the dependant life forms. It should also be noted that each species is of potential value to humans.

Healthy Ecosystems

The current and future survival of the human being will continue to depend on the global wealth of genes, species, habitats and ecosystems. Humans depend on other species for all of their food and for medical remedies and industrial products. Genetic diversity is important in breeding crops and livestock. The loss of crop species has severe repercussions for worldwide food security. Crop breeders need a diversity of crop varieties in order to breed new species that resist evolving pests and diseases. There are instances where crops have been "rescued" with genetic material from wild relatives or traditional varieties.

Even with the knowledge of the benefits of biodiversity, the problem of accelerated extinction of life forms remains with us. This depletion and extinction is driven by non sustainable exploitation usually for commercial purposes, at time competition on unstable ecosystems through purposeful introduction of exotic species,

[31] Kiran B. Chhoka (1997) *Biodiversity*, Delhi, p.20

outbreak of diseases, environmental change through ever-increasing air and water pollution, soil degradation, climatic change, in addition to the natural rates of extinction of flora and fauna culminating in the total extinction of many species while others are endangered. It is important to note that many species may already have been lost without being documented, the level of destruction is that there would be no quick fix for example if human activities were to cease with immediate effect. The latent impact of the past will continue for a long time before an equilibrium is reached.

Forests

Forests are one of the planet's major natural resources. Much of the Earth's above-ground biomass and biodiversity is held in forests. They are the sources of food, fuel, construction materials, fibres and biological diversity. They also provide water and air filtration, carbon sequestration, stabilization and tourism. It is estimated that roughly three-fourths of a hectare of forestland is now needed to supply each person on the planet with shelter and fuel. But our forests are being diminished rapidly.[32] Agricultural lands mainly consist of croplands and grasslands. These produce the bulk of man's agricultural products and feed livestock, provide wildlife habitat and other resources. These areas have been successfully exploited to keep the human population fed, even as it expands rapidly. But cropland and grassland use comes at a cost as topsoil erodes in one-third of our croplands. Depleting these two valuable eco-systems threatens future food security, especially as we add some 3 billion more people to the planet in the next 45 years. Sustainable cropland and grassland management is essential to protect the

[32] UNEP (2006) One Planet More People *Atlas of our Changing Environment* IUCN Academy of Environmental Law & UNEP Division of Environmental Law and Conventions p 15

world's food supply.[33] The Chinese have discovered that reversing desertification once it begins is no simple matter.[34]

Water

Water is fundamental to almost all living things on the Earth. Human health and survival depend on a clean and reliable supply of fresh drinking water as well as water for crop irrigation, sanitation and livestock. During the past century world population has tripled and water use worldwide has increased six-fold. As a consequence, we are drawing down our precious water supply.[35] In Kenya the water supply to the city of Nairobi has risen from 34.9million m^3 per year in 1999 to 253milliom m^3 per year in 2012.[36] The combined effect of drought, rapid population growth and water use, unsustainable development and climate change are a recipe for future problems. Drought and excessive water withdrawals combined can have disastrous results in water bodies. A case in point is seen in the death of Lake Hamoun between Iran and Afghanistan in west Asia. The lake is fed by water from Afghanistan. Between 1976 and 2001, nature and mankind so depleted the lake that they left a dry lakebed in Iran. Fortunately, by 2003 changes in water policy and heavy rains had brought much of the lake's water back, though much of the damage done will take time to be repaired.[37]

Wetlands

A wetland is defined as areas that are permanently, seasonally or occasionally water logged with fresh, saline, brackish or marine waters at a depth not exceeding six meters including both natural and manmade areas that support characteristic biota. In Kenya, wetlands cover approximately 2-3% of land area, carry and store a substantial

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[34] UNEP (2006) One Planet More People *Atlas of our Changing Environment* IUCN Academy of Environmental Law & UNEP Division of Environmental Law and Conventions slide 23

[35] Ibid slide 26

[36] Nairobi *City* Water *and Sewerage Company.* (2010). *Draft Strategic Plan* for the Period 2010/11 to 2014/15

[37] UNEP (2006) One Planet More People *Atlas of our Changing Environment* IUCN Academy of Environmental Law & UNEP Division of Environmental Law and Conventions slide 30

proportion of national water resources, they are important as they provide a continuous source of water as one of the main receiver and storage facility to be discharged through rivers, springs, and aquifers. They manage flood control, water purification, shoreline stabilization, sequestration of carbon dioxide, recharge of underground water that is used through wells, springs, aquifers and help to raise the water table making ground water easily accessible. Wetlands provide natural water filtration systems of surface runoffs from water carrying sediments, organic matter, nutrient leakages and residual pesticides from farms, industry, effluent discharges and other matter. Wetlands also play a role as protector from abrasion and erosion due to surface runoff and tidal waves. Wetlands have and continue to provide a habitat for a wide range of flora and fauna while adding economic benefits through fisheries, fuel wood, building materials medicine, honey and natural foods. They are important grazing zones and sometimes the only source of water, pasture and fodder for communities living in the arid semi arid lands (ASAL) during the dry season. Worldwide there has been a decline in continual surface water flow, water table and underground water due to the depletion of the wetlands.

Global Warming

Global warming is recognized as one of the greatest environmental threats facing the world today. There is a gradual increase in the temperature of the atmosphere, largely because we are introducing greenhouse gases, carbon dioxide, methane and water vapour which trap the sun's heat and is changing the earth's climate. The February 2, 2007 report of the UN Intergovernmental Panel on Climate Change (IPCC) says that

man-made greenhouse gases have caused most of the planet's warming; it says that eleven of the past twelve years have been the hottest in history.[38]

Global warming is most readily evident in the polar regions, especially in the north. This rapid warming in the northern hemisphere over the past 25 years is dramatically melting Arctic sea ice. Estimates are that arctic ocean ice has declined some 30 percent since 1978. In 2002, the extent of multi-year ice was the lowest on record since satellite observations began in 1973. Studies indicate that ice is melting at 9 percent per decade; still others indicate that summer sea ice in the Arctic ocean will disappear by the year 2041. Disappearance of this ice will also hasten global warming because ice reflects some 90% of the sun's rays, whereas the ocean will absorb 90% of the rays, hastening the warming. Studies show that Greenland and Antarctic ice is melting more rapidly that earlier thought, which may contribute to sea level rise and will endanger many of the world's seaport cities. Melting Greenland's ice sheet alone is estimated to add 23 feet to the world's oceans.[39]

Global warming is not confined to the polar regions alone, in the Sahel region of Africa, lake Chad illustrates the effects of climate change, in this case caused by severe drought and to a lesser extent human diversion. It was once the sixth largest lake in the world and the second largest wetland in Africa, the lake is now one-tenth its former size. It is a shallow lake of between 16 to 26 feet deep, drawing 90% of its water from the Chari river. The lake's water depends almost entirely upon rainfall. But drought and water diversion, from 1963 to 2001, have shrunk the lake surface from 8,843 square miles to 117 square miles.[40] Another illustration is through the snows of Mt.

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[38] UNEP (2006) One Planet More People *Atlas of our Changing Environment* IUCN Academy of Environmental Law & UNEP Division of Environmental Law and Conventions Slide 33

[39] Ibid slide 35

[40] UNEP (2006) One Planet More People *Atlas of our Changing Environment* IUCN Academy of Environmental Law & UNEP Division of Environmental Law and Conventions slide 36

Kilimanjaro, the highest mountain in Africa, which are also melting rapidly. Kilimanjaro is located 186 miles south of the equator in Tanzania, the mountain's forests host a wide range of wildlife and plant and animal species. In 1976 glaciers and snow packs covered most of the mountain's summit. Today, some 82 percent of the icecap present in 1912 is gone, and the thinning continues. Predictions are that the remaining glacier could vanish in 15 years.

Ozone Layer

Stratospheric ozone shelters the earth's surface and living creatures, including humans, from excessive amounts of the sun's ultra violet radiation, which can cause skin cancer, cataracts and harm the ocean's food chain. Human release of ozone depleting gases, principally CFC's and chlorine and bromine compounds, attacks and depletes the sheltering ozone layer. These gases have long staying power and may take almost 50 years to be removed. The Antarctic Stratospheric Ozone Hole is still growing, though expectation is that its decline will begin soon and the problem should be removed by the middle of this century.[41] Governments agreed in the Montreal Protocol of 1987 to cut back on the production and use of ozone destroying products.

Sustainable Utilisation

Various nations have recognised the need for environmental conservation and the utilization of sustainable means. Various efforts include wind farms; solar rooftops; paper recycling mills; steel recycling; drip irrigation systems; reforested mountains; bicycling networks have been tried. Some countries such as Iceland are seeking to develop a hydrogen economy; Costa Rica is shifting to renewable energy by 2025; Denmark has banned construction of coal-fired power plants, banned the use of non-

[41] Ibid slide 40

refillable beverage containers and now has an estimated 32 percent of all trips in Copenhagen done on human powered bicycles.

2.5. Environmental coordination in Kenya

Environmental issues in Kenya were for a long time coordinated by the National Environment Secretariat (NES) but with little statutory legal status, making enforcement difficulty.[42] Since the enactment of the EMCA (1999), Kenya has signed a number of treaties in the environment sector. NEMA coordinates the management of biodiversity resources in Kenya. However this led to fragmented legislation, policies and implementation mechanisms largely influenced by the interests of the major lead agencies such as the Kenya Wildlife Service (KWS), the Kenya Agricultural Research Institute (KARI), the Kenya Forest Department (now Kenya Forest Service KFS), Kenya Forestry Research Institute (KEFRI) and the National Museums of Kenya (NMK). In 2000, the Kenya developed the Kenya National Biodiversity Strategy and Action Plan (KNBSAP). The KNBSAP recognized that the government's plan to industrialize in the 21st century was also dependent to a large extent on national biodiversity resources. Kenya is party to a large number of environmental treaties.[43]

United Nations and Environmental treaty making.

In the last 40 years the United Nations has been in the forefront of developing Multilateral Environmental Agreements (MEAs). The justification for the UN to work in the environment and sustainable development sector appears to be derived from the preamble to the charter that states that the United Nations is determined "to promote social progress and better standards of life in larger freedom" and "to achieve

[42] Manek M (2001) *The Implementation of Biodiversity-Related Conventions; A Kenyan Case study*. UNEP-BPSP Project/ FIELD Nairobi p3

[43] Mwendandu (2012) *List of Environmental Conventions, protocols and treaties signed by Kenya* (Unpublished)

international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[44]Environment issues were first considered by the United Nations during the 45th session of the Economic and Social Council (ECOSOC). This session made a resolution 1346 (XLV) of 30 July 1968 recommending the General Assembly consider convening a United Nations conference on "problems of the human environment." The General Assembly at its 23rd session noting the "continuing and accelerating impairment of the quality of the human environment" and its "consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries," it adopted resolution 2398 (XXIII) of 3 December 1968 convening a United Nations Conference on the Human Environment. This was the first time the UN Charter was related to the emerging environmental issues. The resolution also recognized that "the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments"

United Nations Conference on Human Environment

The United Nations Conference on the Human Environment (UNCHE) took place in Stockholm. Four years later between 5 to 16 June 1972, it led to the establishment of the United Nations Environment Programme (UNEP), the lead programme within the UN working on environmental issues. This was established as the global body to act as the environmental conscience of the UN system. In response, the UN General Assembly adopted Resolution 2997 on 15 December, 1972 . This resolution created the UNEP Governing Council, responsible for assessing the state of the global environment,

[44] UN Charter (1947) Chapter 1

establishing UNEP's programme priorities, and approving the budget; the UNEP Secretariat, with its headquarters in Nairobi, Kenya, to provide a focal point for environmental action and coordination within the UN system and a voluntary Environment Fund to finance UNEP's environmental initiatives, to be supplemented by trust funds and funds allocated by the UN regular budget.[45] The UN system has developed a number of functional bodies. These include the principal environmental bodies that support environmental; forums, the treaty based bodies that conduct the environmental forums and the conference of parties (COP) that provide the route towards developing agreements.

Principal Environmental Bodies

The various principal environmental bodies that support environmental; forums include the Intergovernmental Panel on Climate Change. (IPCC) This is a worldwide network of 2,500 leading scientists and experts who review scientific research on the issue and provide support to the UN. United Nations Environment Programme (UNEP) that is managed by a governing council. The council meets annually and reports to the General Assembly (GA).[46] The Commission on Sustainable Development (CSD), meets annually and reports to the Economic and Social Council (ECOSOC). Its role is to ensure effective follow-up to the United Nations Conference on Environment and Development (UNCED)[47] The United Nations Forum on Forests (UNFF) was established to "strengthen political commitment to the management, conservation and sustainable development of all types of forests". The Forum meets annually and reports to the Economic and Social Council.[48] The Intergovernmental Forum on Forests (IFF)

[45] UNEP (2005) *Organisational Profile* UNEP Nairobi p9
[46] UN General Assembly resolution 2997 (XXVII) of 15 December 1972.
[47] UN Economic and Social Council decision 1993/207 of 12 February 1993.
[48] Ibid resolution 2000/35 of 18 Oct. 2000

met annually from 1997 to 2000 and reported to the Economic and Social Council.[49] The *ad hoc* Inter-governmental Panel on Forests that met at irregular intervals between 1995 and 1997 also reported to ECOSOC.[50]

Treaty-Based Bodies

In order to monitor the progress of the MEAs that states sign, the UN has created treaty based bodies. The main such bodies in the environment sector include the United Nations Framework Convention on Climate Change (UNFCCC), this is an annual conference.[51] State parties to the convention are required report on the steps they are taking to implement the convention.[52] Under this arrangement is the Subsidiary Body for Scientific and Technological Advice (SBSTA)[53] that traditionally meets in parallel with the Subsidiary Body for Implementation (SBI)[54] at least twice yearly. The Kyoto protocol COP takes place annually to review the implementation of the protocol.[55] Annex I parties to the protocol are required to submit annual greenhouse gas inventories, as well as regular national communications, demonstrating their compliance with the Protocol.[56] The Vienna Convention for the Protection of the Ozone Layer has a COP that currently meets every three years to review the implementation of the convention.[57] State parties to the convention are required to conduct research and scientific assessments and to exchange scientific, technical, socio-economic, commercial and legal information.[58] The Montreal Protocol has the meeting of the parties to review the implementation of the Protocol.[59] This meeting takes place

[49] UN Economic and Social Council resolution 1997/65 of 25 July 1997
[50] Ibid decision 1995/226 of 1 June 1995
[51] United Nations Framework Convention on Climate Change Article 7
[52] Ibid Article 12.
[53] Ibid Article 9.
[54] Ibid Article 10.
[55] Kyoto Protocol Article 13.
[56] Ibid Article 7.
[57] Vienna Convention for the Protection of the Ozone Layer Article 6.
[58] Ibid Articles 2-4
[59] Montreal Protocol Article 11.

annually and the state parties to the protocol are required to report annually on their production and consumption of ozone-depleting substances.[60] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal COP was established to review the implementation of the convention.[61] State parties to the convention are required to submit annual reports on the generation and movement of hazardous wastes.[62] The Convention on Biological Diversity (CBD) conference of the parties was established to review the implementation of the convention. The conference meets annually.[63] State parties to the convention are required to report on measures taken to implement the convention and their effectiveness in meeting its objectives.[64] The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) was established to provide advice on the implementation of the convention. The SBSTTA reports to the conference and has met at irregular intervals since 1995.[65]

The Role of NGOs and Technical Experts

Expert and technical views are often needed by officials at international negotiations. The Treaty Making and Ratification Act no 45 of 2012, is designed to encourage participation and advice from representatives of the industry sector, the professional bodies, associations and other NGOs to serve as advisers to the delegations. Such processes may be employed when key new multilateral regimes are being negotiated in areas like the environment, trade and human rights.

2.6. Conclusion

Implementation of treaties is therefore determined by the laws of the state. These laws are in turn determined by the particular constitutional provisions that allow the state

[60] Montreal Protocol Article 7
[61] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Article 15
[62] Ibid Article 13
[63] Convention on Biological Diversity Article 23
[64] Convention on Biological Diversity Article 26
[65] Ibid Article 25

transform the treaties into domestic law. This implementation is informed by the various state practices that have been developed by the representative system or parliaments of the country. MEAs have also become very important in the last half century and are now part of the consideration in treaty negotiations.

Chapter 3

The Politics of the Negotiation Process

3.0 Introduction:

Negotiations are the most important function of diplomacy, and of diplomatic missions and agents. In multilateral diplomatic missions the core function is negotiating. Bilateral diplomacy has become increasingly multilateralised, so the function of negotiation has also come to dominate it. Negotiations are an important part of the implementation of foreign policy where the task of coordinating negotiations forms an important element of the management of foreign policy.[1] The domain of foreign policy is influenced by the executive and the legislative arms of the Government. This chapter puts the issue of negotiation into context by tracing the historical changes in Kenya's parliamentary representative system and their role in treaty negotiation. The chapter explains the various treaty negotiation laws that are in the country and ends with a detailed examination of the treaty negotiation process both at the bilateral and multilateral levels.

3.1. The Parliamentary System of Kenya

3.1.1. Representation in pre-independent Kenya

In 1905, the British East Africa Protectorate developed the first legislative institution, this was a decade after she had been declared part of the British protectorate in East Africa (1895).[2] The local Colonists Association requested the secretary of state to consider nominating a legislative council with unofficial representation arguing that

[1] Mwagiru M (2010) The Missing Link in the Study of Diplomacy: The Management of the Diplomatic Service and Foreign Policy *The Journal of Language, Technology & Entrepreneurship in Africa*, Vol. 2. No.1. p.243.

[2] Mwaruvie J (2011) The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast *International Journal of Humanities and Social Science* Vol. 1 No. 20; December p.176.

there should be no taxation without representation. [3] To effect this change, the East African Order in Council of 1906 was promulgated. It provided for the establishment of an executive council, and a legislative council (LEGCO) with the powers to make ordinances, subject to the Governor's veto, and the assent of His Majesty.[4] This LEGCO was a unicameral legislature[5] under an incipient unitary governmental system. Prior to this, the commissioner had limited powers to legislate on matters relating to commerce, agriculture and public order. In 1919, the LEGCO enacted the Legislative Council Elections Ordinance. Under this ordinance Kenya was split into eleven constituencies. This provided for the election of eleven representatives- all Europeans. The first elections were held in 1920, after which consideration for the provision of similar treatment to other races was initiated. Between (1907-1961) in the pre-independence period Kenya had a unicameral legislature system.

3.1.2. The first bi-cameral parliament

The Lancaster Constitution of 1962 promulgated a legislative system which was bicameral replacing the Legislative Council (LEGCO). This bi-cameral system consisted of two houses, the Senate and the House of Representatives. The constitution had divided the country into 117 constituencies. Administratively, the country had been divided into 40 administrative districts. Under this new arrangement, the Senate was composed of 41 members, one drawn from each of the 40 districts in the country and one from Nairobi Area, and the Speaker. The House of Representatives consisted of 117 constituency elected members, twelve specially elected members chosen by the House sitting as an electoral college, the Speaker and the Attorney General.

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[3] Gicheru, H.B. N. (1975) *Parliamentary Practice in Kenya*. Nairobi: Transafrica Publishers.
[4] Ibid
[5] Stultz, N.M. (1968) Parliaments in former British Black Africa. *Journal of Developing Areas*, Vol. 2 (4) July: pp. 479-494.

Between 1963 and 1964, Kenya had a dual executive system based on the Westminster structure in which the Governor-General exercised executive authority while the Prime Minister shared in the day-today running of government.[6] This constitution was a negotiated settlement,[7] and these negotiations led to the introduction of a bi-cameral legislature. However, it was not a unanimous decision by the Kenyan political actors. Some proponents of bi-cameralism argued that a second chamber was imperative to protect the minority tribes in Kenya.[8] Constitutional changes took place between 1963 and 1967 with profound impact on governance in Kenya. They focused mainly on the transfer of power from other arms of government to the presidency. During this period, parliamentary ability to check the executive was eroded and parliament worked at the behest of the executive. The majority political party at that time was the Kenya African National Union (KANU) while the major opposition party was the Kenya African Democratic Union (KADU). KANU managed to coerced KADU to dissolve and join KANU so as to build "one nation'. KADU eventually dissolved, and merged with KANU in November 1964.

3.1.3. The second unicameral system

In December 1966, both houses of the original national assembly, through the seventh constitution of Kenya (amendment) (No 4) Act No. 19 of 1966, resolved to merge the senate and the house of representatives into one house, and to create 41 new constituencies to be represented by the 41 existing senators.[9] The national assembly was prorogued on 3rd January 1967. A unicameral Legislature was thus reconstituted.

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[6] Ghai, Y.P. and J.W.P.B. McAuslan (1970) *Public Law and political change in Kenya.* Oxford University Press: Nairobi p.105

[7] Okoth-Ogendo, H.W.O. (1972) The Politics of Constitutional change in Kenya since Independence, 1963-69 *African Affairs* Vol 71 (282) pp. 9-34.

[8] Iqbal, Z (2010) Kenya's New Constitution: Erasing the imperial Presidency *IIJD Newsletter* (August)

[9] Kirui, K. & Murkomen ,K . (2010) *The Legislature: Bi-Cameralism under the New Constitution,* SID Constitution Working Paper no 8, Nairobi Regal Press p.4.

The constitution of Kenya (amendment) (No. 2) Act No. 16 of 1968, also altered the method of electing the president. It provided that henceforth, the president would be elected directly by the people, literally taking away the election of the president from the party. While remaining constitutionally responsible to parliament, the president became politically more independent of it, because he was no longer dependent upon the parliamentary members for his election.[10] The role of parliament as an electoral college was thus lost. [11] This old constitution of Kenya developed significant anomalies over time; and in doing so, it was unable to solve important problems of the day in Kenya. Consequently, because of these significant anomalies, the 1963 constitution was replaced by the 2010 constitution.[12]

3.1.4. The second bi cameral parliament

From 1968 the next major constitutional adjustment was the development of a new constitution the Constitution of Kenya 2010. This introduces a pure presidential system with clear separation of powers under the bicameral parliament.[13] This is supposed to enhance the quality of representation where a second chamber of parliament is linked to some level of federalism or quasi-federal states where a country is divided into small units, which are either independent or quasi-independent.[14] The bicameral system of Kenya, has the senate representing a geographical area called a county, which is the unit of devolution, while the national assembly represents a geographical area called a

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[10] Gertzel, C. (1971) *The Politics of Independent Kenya, 1963-8*. London: Heinemann.
[11] Kirui, K. & Murkomen ,K . (2010) *The Legislature: Bi-Cameralism under the New Constitution*, SID Constitution Working Paper no 8, Nairobi Regal Press p.4.
[12] Makumi Mwagiru (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1 p.148.
[13] Kirui, K. & Murkomen ,K . (2010) *The Legislature: Bi-Cameralism under the New Constitution*, SID Constitution Working Paper no 8, Nairobi Regal Press p.15.
[14] Kirui, K. & Murkomen ,K . (2010) *The Legislature: Bi-Cameralism under the New Constitution*, SID Constitution Working Paper no 8, Nairobi Regal Press p.15.

constituency which is the unit of population representation.[15] The senate shall therefore be the backbone of the counties, and its actions will determine the effectiveness of the devolved units in delivering services to Kenyans.[16] This new constitution for the first time enshrined Kenya's treaty practice in the constitution and made a shift from a dualist treaty practice to monism.[17]

3.2. Treaty making

It is against this legislative background that the treaties in Kenya are being negotiated. Following the shift in the constitution, again for the first time the Treaty Making and Ratification Act No 45 of 2012 was legislated. This is now an act of parliament to give effect to the provisions of article 2(6) of the Constitution of Kenya 2010 and to provide the procedure for the making and ratification of treaties and connected purposes. The Treaty Making and Ratification Act No 45 of 2012 defines "treaty" as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes a convention. [18] This in conformity with the VCLT (1969).

3.2.1 Treaty initiation

Treaty initiation and negotiation is the responsibility of the executive of the government. The actual responsibility may be delegated to a relevant state department. In Kenya the new regulations require that the relevant national executive or the relevant

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[15] Republic of Kenya (2010) *Constitution of Kenya 2010* Government Printer GoK Nairobi Article 89(5)
[16] Kirui K & Murkomen K (2010) *The Legislature: Bi-Cameralism under the new Constitution*, SID constitution working paper no 8, Nairobi Regal Press p 16
[17] Makumi Mwagiru (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1 p.144.
[18] Republic of Kenya (2012) Treaty Making and Ratification Act No 45 of 2012 Government Printer GoK p.4.

state department initiate the treaty making process in such manner as may be prescribed by the cabinet secretary.[19] The Treaty Making and Ratification Act No 45 of 2012 has determined a clear strategy for defining whether the negotiations should go on. This structured approach requires various questions be asked in order to help crystallize the national interest.[20] These include identifying the need that the new treaty is to meet; reviewing the existing legal regime, including the extent of its applicability to the perceived problem; estimating the probability of reaching the required measure of agreement on the solution aimed for; identifying any relevant legislative efforts related to the perceived problem, identifying the optimal form for the proposed treaty; predicating the likelihood that the proposed treaty shall be accepted by a sufficient number of states, where the treaty is multilateral; working out the anticipated time schedule for completing the treaty-making process; working out the expected costs of formulating and adopting the treaty to Kenya and when looking at the technical and scientific treaties determine whether extensive scientific studies or research have been carried out to determine the parameters of the problem and the lines of potential solutions.

3.3. Treaty Negotiations

3.4.1 Pre-negotiation phase

The Treaty Making and Ratification Act No 45 of 2012 of Kenya reorganises the pre negotiation phase and has in part II a section that governs the process of this pre negotiation as shown below. [21]

[19] Republic of Kenya (2012) Treaty Making and Ratification Act No 45 of 2012 Government Printer GoK p.5.
[20] Ibid
[21] GoK (2012) *Treaty Making and Ratification Act* No 45 of 2012 Government Printer pp. 4-5.

Treaty making

The pre – negotiation process

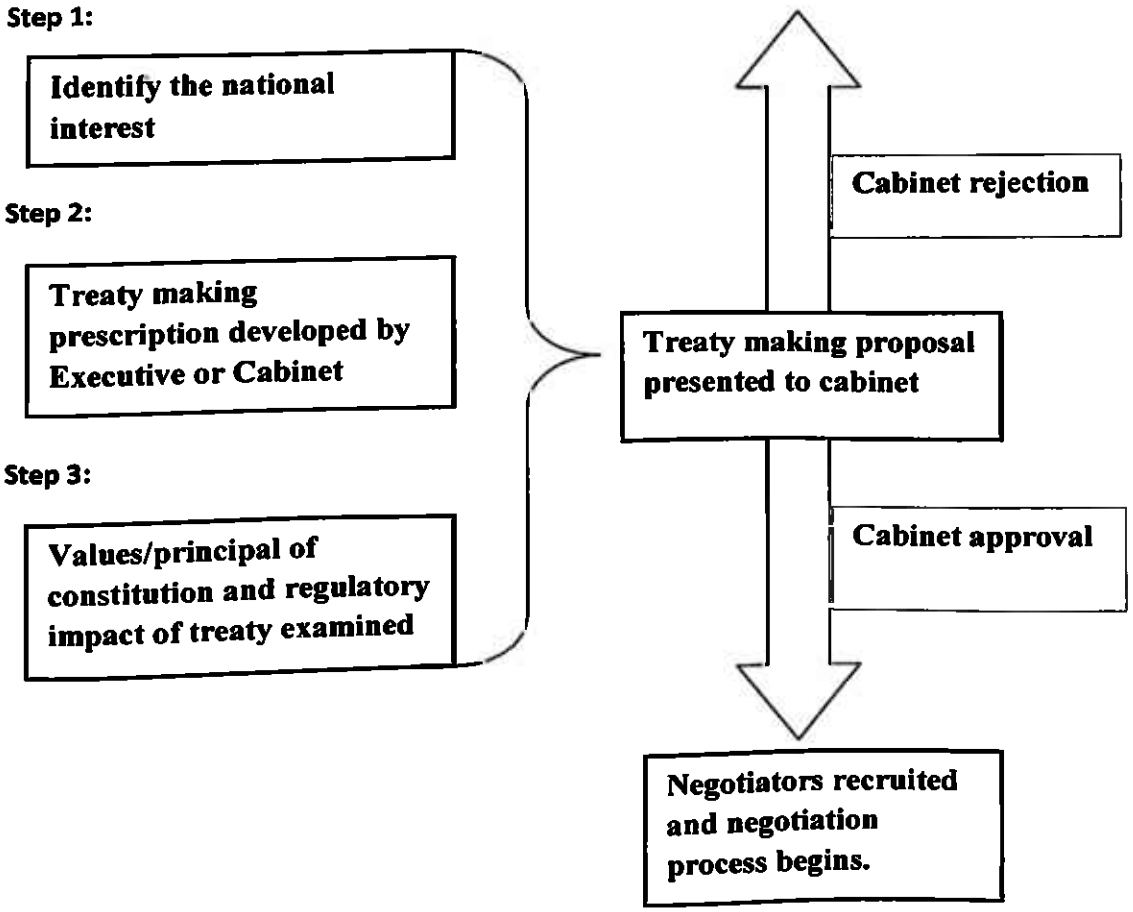

Figure 2 Pre - negotiation of Treaties

Here the three steps are taken before the treaty proposal is sent to cabinet for approval. This is done before the negotiation is allowed to start. This will apply to both the bi lateral and multi lateral treaties. Mwagiru contends that analysts and practitioners of negotiations consider the pre-negotiation phase as the most important phase of any negotiation, he is of the opinion that this phase determines the overall success of the negotiations.[22] In this phase the Ministry of Foreign Affairs (MFA) plays a crucial role as it is responsible for the external affairs of diverse types, and it also ratifies the agreements that are reached. Choice of delegation is based on the functional

[22] Mwagiru M (2004) Diplomacy: *Documents. Methods and Practice.* IDIS, UoN p.70.

consideration and the leader of the delegation usually determined by the subject matter of negotiation. This is because of the international levels of specialisation in negotiations. Size of delegation is usually determined by the level of efficiency that is needed.[23] This phase also constitutes the period that the inter-ministerial meetings take place in order to involve the ministries with an interest in the outcome and rationalise the sectorial interests so that a delegation will speak with one voice. This is also the stage that the secretary of the delegation is selected. This is important as the position maintains the detailed record of all the proceedings during the pre and negotiation phase. This phase includes securing the agreements to negotiate, the drawing up of an agenda, agreements on the venue and date of negotiations, choice of the delegation that conducts the negotiation and consultations with the requisite ministries in order to produce the necessary briefs. Much of this ground work constitutes negotiation and the table negotiation tend to be for ratification purposes.

3.4.2 The negotiation phase

The negotiation phase is the phase that is visible to the general public. At this stage the actual agreements or dis-agreements are discussed and aligned. Important documents or agreements are developed and the conclusion of this phase is seen in the agreed minutes and confidential memorandum of understanding.[24] Mwagiru intimates that in order for the foreign ministry to be successful at this phase of diplomacy, it is necessary for the staff to have professional qualifications, specialised qualification in areas such as negotiating and have knowledge on cutting edge developments in their respective areas of specialisation.[25] Other agencies such as the African Forestry Forum (AFF) and the

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[23] Ibid pp.72-73.
[24] Mwagiru M (2004) *Diplomacy: Documents, methods and practice.* IDIS, UoN p.71.
[25] Mwagiru M (2006) *Issues, Problems And Prospects In Managing The Diplomatic Services In Small States.* The Flecher Forum of World Affairs. Vol 30:1 Winter p.201.

University of Joensuu[26] in collaboration with UNEP provide training to negotiators in order to enhance their skills at the negotiating table.[27]

3.4.3 The post negotiation phase

During the post negotiation phase the parties implement the agreements that were reached. This stage starts with the development of documents that indicate that the negotiations have been completed, these include, reports of the negotiation, the process of implementation and what has been agreed. It is in this phase of bilateral negotiations that the authority to commit the state for certain agreements is secured.[28] This phase is also the phase where the cabinet secretary in Kenya submits the treaty to the cabinet for consideration. This submission must have a memorandum that outlines [29] the objects and subject matter of the treaty; any constitutional implications, the national interests which may be affected by the ratification of the treaty; obligations imposed on Kenya by the treaty; requirements for implementation of the treaty; policy and legislative considerations; financial implications; ministerial responsibility; implications on matters relating to counties; the summary of the process leading to the adoption of the treaty: the date of signature; the number of states that are party to the treaty; the views of the public on the ratification of the treaty; whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations; the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the constitution; and whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure. The delegation should after the

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[26] Carruthers C et al (2007) *MEA Negotiator's Handbook* University of Joensuu Finland
[27] Technical Support Team of the AFF www.afforum.org
[28] Mwagiru M (2004) *Diplomacy: Documents, methods and practice*. IDIS, UoN p.72.
[29] GoK (2012) *Treaty Making and Ratification Act* No 45 of 2012 Government Printer pp 5-6.

negotiation write a report of the negotiations. The process should follow the one of the pre negotiation phase where there will be the requisite inter-ministerial meetings and convened by the delegation leader. Here the delegation takes stock of the negotiations and provides a road map for implementation of the agreements. Implementation duties are also apportioned to the members by the leader of the delegation who also has the responsibility of ensuring that implementation it takes place.

After the negotiation phase, the treaty is put before the parliament for consideration. The cabinet will first approve the ratification of the treaty and the cabinet secretary shall submit the treaty and a memorandum on the treaty to the speaker of the national assembly. Parliament may approve the ratification of a treaty with or without reservations to specific provisions of the treaty. A proposed reservation shall be introduced as a provision into the treaty in accordance with the procedure set out in the standing orders. Where the treaty needs to be ratified, the implications of ratification need to be carefully analysed. Activities that need to take place in order for the treaty to be implemented also need to identified and stated in order to conform to the requirements of the treaty.

The various members of the delegations produce the reports of the various committees that they were in. These are combined and form the composite report of the whole delegation. Such reports are analytical in nature and state what should be the follow up actions that need to take place. The report also points out the important things that still need to be done to conclude the process. If the negotiations will be continued, this post negotiation report also develops the pre negotiation phase for the next round of talks.

Ratification of Treaties

The Ratification process

Step 1:

Memorandum outlining treaty details submitted to cabinet by CS and AG

Step 2:

Approval by cabinet and submission to the National assembly

Step 3:

Consideration by parliament, for approval, approval with reservations or refusal

Step 4

Approval for ratification

Step 5

Ratification of treaty

Figure 3: The treaty ratification process

3.5. Types of treaty negotiations

3.5.1 Bilateral Diplomatic Treaty Negotiations

Bilateral negotiations take place between two parties. [30] In this case between two subjects of international law or those with international legal personality. These may be conducted between two states, a state and an international organisation or between international organisations.

3.5.2 Multilateral Diplomatic Treaty Negotiations

Multilateral diplomatic negotiations involve many more parties than the bilateral negotiations. This requires the process to take into account more interests than with the bilateral system. Multilateral negotiations can either be institutionalized or *ad hoc*. All multilateral negotiations take place within an organ, either set up for the specific purpose or in *ad hoc* basis known as a conference or if permanent as part of an international institution.[31] Institutionalized multilateral negotiations take place within actors such as the international bodies (like the United Nations and the African Union) or within organs of such bodies. *Ad hoc* multilateral negotiations take place when states feel the need to address a specific issue, they are usually organized by states or international organizations with the agreement and support of the others. [32]

Most multilateral negotiations involve only states. Most are governed by rules of procedure. Hence for every standing deliberative organ, there are such rules while for the *ad hoc* conferences, rules of procedure must be adopted.[33]

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[30] GoK (2012) Treaty Making and Ratification Act No 45 of 2012 Government Printer GoK p2 Part I section 2 (1)
[31] Kappeler, Mwagiru & Odera (2010) *Diplomacy: Concept, Actors, Organs, Process and Rules* IDIS, UoN p.97.
[32] Mwagiru M (2004) *Diplomacy: Documents, Methods and Practice* IDIS UoN p.92.
[33] Kappeler, Mwagiru & Odera (2010) *Diplomacy: Concept, Actors, Organs, Process and Rules* IDIS, UoN p.98.

3.6. Conclusion

Negotiation of the treaties forms the genesis of the implementation of treaties. With adequate preparation and due diligence as to the national interests, treaties should technically be able to be implemented. The influence of the legislature on this process is also noted. Proper negotiation process does not however determine the treaty practice which is mainly a result of tradition and the constitution of the state. This influences the process of actual transformation of the treaty into law or into practice.

Chapter 4

Treaty practice in Kenya

4.0 Introduction

This chapter highlights the treaty practice of Kenya. This requires the review of the type of relationship that the country has towards international law and the theoretical that underlie that relationship. Treaty practice is a function of the executive and the legislature. To determine treaty practice the chapter looks at the national constitutional history of Kenya. The chapter traces the development of the various constitutions and versions of the constitutions that the country has had up until the present. The chapter also looks at the facets that make up treaty practice and the changes in this practice over the years. It also compares the treatment of treaties in other countries. The writer is of the view that it is necessary to lay this ground work to understand the issues of implementation of treaties in the country.

4.1. Treaty practice

All states have a treaty practice, although there are states that while having some kind of treaty practice have not enshrined it in their constitution. All states have a treaty practice because all states must in some way or the other interact with some of the thousands of treaties in the international system. Treaty practice is the embodiment of how a state relates to international law and to treaties it has ratified. In treaty practice is found the political philosophy which determines the relationship between international and domestic law. Treaty practice also specifies the role of each of the branches of government in the treaty domain, from its negotiation, ratification, and its interpretation. Treaty practice is concerned with how, domestically, international law and municipal law relate to each other.

4.2. Monist, dualist and the transformation theories

As discussed earlier, the terms monism and dualism have been employed by some scholars to describe contrasting theoretical perspectives on the relationship between international and domestic law.[1] Transformation theory is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements.

4.3. The Constitutional History of Kenya

4.3.1 Constitution

The definition of constitution carries a broad meaning today and has no single definition that has been accepted universally.[2] Constitutions in most definitions envisage the idea that constitutions are there to reflect the general will of the people and to control governments or associations. Constitutions need not only to reflect the rule of law but the aspirations or the realities of a given society. The community specifies its basic rules, agrees to abide by the rule of law and established governance structures which guarantee adherence to the set societal values.[3] Considering that some democracies like Britain do not have a written constitution but a system of customs and tradition the definition of constitution needs to take this into account. Thus the constitution is also an embodiment of a system of governance agreed upon by the governed irrespective of whether this is contained in a legal document or customs and usages.[4]

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[1] Ian Brownlie,(2008) *Principles of Public International Law* (7th edn OUP, Oxford) pp 31–33.
[2] Lumumba PLO (2005) *Constitutional Development in Kenya: Past Present and Future* A speech given at the NDC on Tuesday 12th April, 2005.
[3] Katz SN (1994) Constitutionalism in East Central Europe: some negative lessons from the American experience *German Historical Institute*. p.14.
[4] Lumumba PLO (2011) *The Constitution of Kenya*: Contemporary Readings, Law Africa Publishing Nairobi p.15.

A constitution is therefore an instruction for establishing and regulating institutions, often on the basis of written, formally enacted documents. The term constitution can thus be used both about a *de facto* practice and about the documents often underpinning such practices.[5] Scholars have assorted themselves with the idea that the existence of constitutions springs from the belief in limited government.[6] Constitutionalism is also defined as the evaluation of the extent to which the form and substance and legitimacy of constitutional principles as embodied in the constitution can be practiced. It elevates the rule of law and delineates the governance structures while subjecting them to various checks and balances to ensure that the citizen's fundamental freedoms and rights are safeguarded. This must however happen at both procedural and substantive levels. According to Baker, the days when constitutionalism was would be said to grounded in domestic laws or territorially defined demos are long gone. Modern constitutions require conformity with 'a system of universal norms as elaborated by a community of nations.[7]

4.3.2 Kenyan constitutions at independence

Wright has remarked that the dependent empire illustrates how in constitutional development the stage of judicial power precedes the stage of legislative power. Early or undeveloped constitutions are concerned with organising jurisdiction rather than with establishing legislature and executive organs. The foreign-jurisdiction act itself is mainly concerned with the establishment and regulation of courts.[8] The constitutional history of Kenya up to independence has been divided into five phases by Ghai and

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[5] Andreas Follesdal (2002) *Drafting a European Constitution* – Challenges and Opportunities, Http: / / les l .man.ac.uk/conweb/

[6] Bradley AW & Ewing K (eds) (1994) *Constitutional and Administrative Law* Pearson Education Ltd p.8.

[7] Baker LC (2009) From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power System 3 *Penn State Law Review* p.676.

[8] Wright, *Constitutions* p cit p. 19. (quoted Ghai 2001 pp. 36-37.)

McAuslan. The establishment of the machinery of government (1897-1905); the attempts by the European settlers to establish their supremacy (1905-23), a long and complicated period when the claims of the various races were balanced and adjusted (1925-54); a phase of multiracial experiments (1954-60); and finally in the few years preceding independence a period of conflict between two and more groups of African leaders (1960-63).[9] The era between 1879 and 1905 was the period when the development of judicial and legislative processes took place.[10] The East African Order in Council of 1897 establishing the administrative machinery for the East African region was the first legislation to be adopted. [11] This Order in Council was later to be replaced by another of 1902 that shifted emphasis from judiciary institutions to administrative. These administrative powers were also vested in the Commissioner but subjected to instructions from the imperial government. [12]1903 is usually regarded as the beginning of an active policy of European settlement, when it received great impetus under the Commissioner Eliot. The outstanding effect of European settlement was to accelerate constitutional developments. In so far as a constitution is generally accepted as being a body of rules which define and limit the exercise of governmental power and regulate major political activity in the state.[13]

The epoch of 1905 to 1923 was where the European settlers attempted to ensure the protection of their interests in the law.[14]This was accompanied by the formation of the legislative council and the executive council. The commissioner also became the

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[9] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya,* OUP, Nairobi Kenya p. 36.
[10] Ibid p.37.
[11] Ibid p.39.
[12] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya,* Oxford University Press, Nairobi Kenya p.42.
[13] Ibid p.509.
[14] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya,* Oxford University Press, Nairobi Kenya p.42.

Governor and Commander in Chief. In 1920 through a Kenya (annexation) Order- in-Council, the status of 'Kenya' also changed from an East African protectorate to that of a colony [15]and a protectorate. In 1924, the secretary of state issued an amendment to the 1919 royal instructions thus enabling the LEGCO to enact the Legislative Council (amendment) ordinance, The amended ordinance made provision of the election of five Indians to represent the Indian community and one Arab to represent the Arab community.[16]

According to Ghai and McAuslan, the period between 1954 and 1960 marked the fourth phase of constitutional development.[17] The Lyttelton constitution was introduced. It sought to introduce active participation of all races into the affairs of government irrespective of the numerical strength.[18] It also established a council of ministers while reducing the powers of the executive council. In 1958 the colonial government introduced the Lennox-Boyd constitution to cater for the pressure for majority rule by Africans. This however, did not please Africans who protested.[19] Later in 1960 the government held the first Lancaster house conference and developed the 'Macleod constitution', named after its chairperson, Iain Macleod, the Secretary of State for the colonies. Deliberations on the Macleod constitution were concluded and signed on February 21, 1960. After that the second set of Lancaster meetings produced the Lancaster constitution of 1962 which introduced a parliamentary system of government.

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[15] Kenya Annexation Order in Council (1920) as cited by Ghai Y.P , McAuslan J.P.N.P (2001) Public Law and Political Change in Kenya. Oxford University Press, Nairobi Kenya p50

[16] Ndindiri, M.S.W (2003) Parliament Buildings: A historical pictorial guide. Available at: www. marsgroupkenya.org/pdfs/2009/07/Budget/ parliament_guide.pdf (Accessed on October 22, 2012)

[17] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya,* Oxford University Press, Nairobi Kenya p.36.

[18] Ibid p.66.

[19] Goldsworthy, D. (1982) *Tom Mboya: The man Kenya wanted to forget.* Nairobi: Heinemann.p84

4.3.3 The Kenyan constitution after independence

At independence the constitution was to be regarded as permanent and as being the basic and fundamental law of the land hammered out by agreement between all relevant political groups in various pre-independence constitutional conferences.[20] The first post independence constitution was the Kenya (Independence) Order in Council 1963. Ghai contends that after 1966, the government became increasingly careless of the need for legitimacy and the dictates of constitutionalism in their alterations of the constitution and their administration of the laws relating to government and administration.[21] The clamor for a new constitution for Kenya started in 1964, after the first amendments were recommended.[22] The first amendment was the Constitution of Kenya (amendment) Act No 28 of 1964. This was done to make Kenya a Republic and introduced an all powerful president who became the head of state and government.

Within the same month, the second amendment was introduced through the Constitution of Kenya (amendment) (No.2) Act No. 38 of 1964. This removed the power to alter regional boundaries from the regional assemblies and transferred it to parliament. It also removed the title of regional presidents and replaced them with regional chairmen. Regions were also denied the power to collect revenue and made to depend entirely on the central government. Finally the amendments also empowered the president to be the one that appointed the chief justice and pusine judges prior to the amendment the president was required to consult at least 4 regional presidents before such appointment could take place. Several amendments were made to the federal constitution drawn at independence but they fell short of providing the country with the best institutional and governance structures and therefore failed to enable Kenya

[20] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya*, OUP. Nairobi Kenya pp 510
[21] Ibid p 506

achieve its full potential in fostering peace, economic growth and social harmony among its peoples. By December 1966, the seventh Constitution of Kenya (amendment) (No 4) Act No. 19 of 1966 was enacted and dissolved both houses of the original national assembly and lead to a unicameral system of government. This was followed with an additional amendment in the Constitution of Kenya (amendment) (No. 2) Act No. 16 of 1968, which changed the method of electing the president. It removed the election of the president from the party, and the electoral college role of parliament.[23] In 1969, by Act No 5 parliament consolidated all the previous amendments introduced new ones and reproduced the constitution in a revised form.[24] This was an attempt to tidy the constitution up and ensure that it eventually made sense.[25]

After the Cold War that ended in the late 1980s, there was a worldwide drive towards democratisation, scholars have observed that most of the constitutional changes that took place in the post 1982 era were efforts geared towards democratisation, hence the re-introduction of the multi party democracy in the early 1990s characterised the new wave.[26] The final amendment of the independence constitution of Kenya was the twenty ninth amendment. It came by virtue of the Constitution of Kenya (amendment) Act 2008. This created a coalition government and inserted a new section 15A[27] to provide for the establishment of the Office of the Prime Minister and Deputy Prime Minister. Section 17 of the constitution was also amended to include the Prime Minster and two Deputy Prime Ministers in cabinet.

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[23] Kirui K & Murkomen K (2010) The Legislature: Bi-Cameralism under the new Constitution, *SID Constitution Working Papers* no 8, Nairobi Regal Press p. 4.
[24] Njoya & 6 others v Attoney General & 3 Others, *Kenya Law Reports*, 1 (2004) pp.298-299.
[25] Ghai Y.P , McAuslan J.P.N.P (2001) *Public Law and Political Change in Kenya*, OUP, Nairobi Kenya p.512.
[26] Lumumba PLO (2011) *The Constitution of Kenya: Contemporary Readings*, Law Africa Publishing Nairobi p.14.
[27] Constitution of Kenya (Amendment) Act, 2008 section 3

4.3.4 The Kenya Constitution 2010

In response to the people's yearning for a new constitutional dispensation that would embody greater democracy, respect for human rights and accountability on the part of the Government, the Constitution of Kenya Review Commission (CKRC) embarked on a process of constitutional review in 2003. The process led to three draft constitutions: The Constitution of Kenya Review Commission Draft submitted to Bomas Constitutional Conference (Ghai Draft), the Constitution Conference Draft (Bomas Draft) and the Proposed New Constitution 2005 (Wako Draft). The Wako Draft was voted on in the 2005 referendum but was rejected. The Wako draft was defeated mainly due to issues that were identified as being contentious and were not agreed upon by a majority of Kenyans, thus killing the dream of a new constitution. To address the bone of contention, the committee reviewed all the existing draft constitutions, documents reflecting political agreement on critical constitutional questions, analytical and academic studies commissioned by CKRC, consulted with the people and unanimously identified the issues that were not agreed upon as; the executive and legislature, devolution of powers and bringing the constitution to effect (transitional clauses).

After the presidential elections of 2007, Kenya witnessed widespread violence in the country. Negotiations mediated by the African panel of eminent persons helped achieve a consensus through the signing of the national accord. In order to achieve lasting peace and prosperity, the accord under Agenda Four required a new Constitution for Kenya to be enacted. Lumumba credits this as having given a new push to the search for a new constitution.[28] Parliament enacted the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008 to serve as

[28] Lumumba PLO (2011) *The Constitution of Kenya: Contemporary Readings*, Law Africa Publishing Nairobi p.16

the legal framework for achieving a new constitution. The CKRC's functions were also spelt out in section (d) of the Act.

The functions also had a provision under sub section (xiii)

examine and recommend on the treaty-making and treaty implementation powers of the republic and any other relevant matter to strengthen good governance and the observance of Kenya's obligations under international law.[29]

After the referendum, the Constitution of Kenya 2010 was promulgated on 8th August 2010. All these have had an effect on the treaty practice in Kenya.

4.4. The old treaty practice

Treaty practice is concerned with how, domestically, international law and municipal law relate to each other.[30] Treaty practice is one part of the more general problem of how international law and municipal law interact with each other, and what their relationship should be. The other part of this problem is the status of customary international law in municipal law. The relationship between customary international law and municipal law has long been settled. It has been acknowledged that customary international law is part of municipal law, and is binding on all states. There is the outstanding problem that one part of international law is binding on states, while the other half is not immediately binding, and needs some specific action of states – in their treaty practice – to make treaties which a state has ratified binding municipally.[31] The common law of England was received into Kenyan law by way of the Judicature Act, 1897 (Cap 8). Kenya thus inherited from Britain a dualist concept whereby international law is considered a separate and distinct system from domestic law. As a

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[29] Lumumba P.L.O (2008) *Kenya's Quest for a Constitution: The Postponed Promise*, Jomo Kenyatta Foundation Nairobi p.51.
[30] Brownlie, Ian (1990) *Principles of Public International Law*. Oxford: Oxford University Press
[31] Mwagiru M (2011) From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice *Journal of Language, Technology & Entrepreneurship in Africa* Vol 3 No 1 p.145.

result, international law did not automatically become part of Kenyan law.

The executive could express its consent to be bound by a treaty first (ratification) without involving the legislature, thus making the treaty applicable to it internationally, then subsequently involve the legislature when transforming the treaty to make it enforceable domestically. In the majority of cases, the negotiation, conclusion and ratification of treaties by Kenya was done without the involvement of the national legislature. This is because treaty-making was regarded under the Constitution of Kenya (Independence constitution), as a function of executive authority. Section 23 (1) of the Kenya Constitution provided as follows:

"The Executive authority of the Government of Kenya shall vested in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him." [32]

In theory, however, treaty making functions could, on the basis of parliamentary authority, be exercised by any person or authority other than the president. Section 23 (2) of the Kenya Constitution provided as follows:

"Nothing in this Section shall prevent Parliament from conferring functions on persons or authorities other than the President."[33]

At that time the process of the country becoming party to a treaty normally involved a number of steps. The first step would have been the recommendation to negotiate a treaty, This is normally done by the line-Ministry or Department concerned. The recommendation would be made to Cabinet for their consideration and approval.[34] This would then allow the state to be involvement in the negotiations leading to the drafting of the treaty. In all cases, a Cabinet decision was required to enable Kenyan

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[32] Kenya Constitution (1963) Section 23 (1)
[33] Ibid Section 23 (2)
[34] UNEP/UNDP (1999) *Kenya Country Report: Development and Harmonization of Environmental Laws* Vol 6 1999 pp.23-26.

experts negotiate a treaty. At the very minimum, a Kenyan team negotiating a treaty would be composed of a representative of the Attorney General (AG) and representatives of the line-MDA concerned. The general practice was that a cross-sectoral team representing key national stake-holders was involved in the actual negotiations of a treaty. This was then followed by signing of the treaty by a government representative which was a ceremonial step signifying the country's support of the general principles of the treaty. The authority to sign a treaty was vested exclusively in the President or persons expressly authorised by him in writing. His authorisation was required to precede the signing of any treaty by Kenya. However, the decision that Kenya should sign a treaty was to be made by cabinet. The next step was ratification. This was usually done after review and internal debate of the treaty by the executive and if the executive approved the treaty, it "ratified" the treaty. The decision to ratify or accede to a treaty was a collective decision of the cabinet preceded by cabinet briefs on the relevant treaty. Ratified treaties did not have force of law in Kenya until the final step, the passing of an act by Parliament, domesticating the treaty. This meant that all international treaties ratified by the state did not become part of the domestic law.

Courts did not consider themselves bound by the treaty obligations without this passage of domestic implementing legislation. Treaty practice required the office of the attorney-general screen all international treaties before making them domestic in Kenyan. This was in order to uncover provisions that contravened Kenyan law. Contraventions were resolved in two ways, either by changing domestic law or by making reservations to the international treaty. The process of legislation that gave the treaty the force of law domestically or the "act of transformation" or 'domestication,' was done by the direct incorporation of the treaty rules through drafting and giving the

force of law to specified provisions of the treaty or indeed the whole treaty, usually scheduled to the transforming act itself. This approach was as inherited by Kenya from the British practice. The Kenya Constitution, however, vested the legislative power of the Republic in the Parliament of Kenya, which consisted of the President and the National Assembly (Section 30).[35]

Treaty-making in Kenya was thus not regarded as an exercise of legislative authority but rather, is seen as a function of executive authority. This being the case, the treaties to which Kenya is a party (as a result of executive act) did not constitute part of the municipal law and could not be applied by the local judicial authorities. The laws of Kenya at that time were set out as follows the constitution, the statutes, the English common law, doctrines of equity and statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date (all which apply subject to certain qualifications); and African customary law in respect of civil cases (which apply subject to certain qualifications). [36]Treaties that were not incorporated by way of enabling legislation were not considered part of municipal law in Kenya, and as such the High Court, Court of Appeal and all subordinate Courts in Kenya would not exercise their respective jurisdictions in conformity therewith. The Constitution of Kenya (1963) established a system of governance based on the doctrines of separation of powers, constitutionalism and the rule of law. It vests the authority to make law on the legislature, and the authority to settle legal disputes in the Judiciary. The Constitution as stated earlier, grants legislative supremacy to the Parliament of Kenya. The Parliament of Kenya has promulgated enabling legislation in respect of certain treaties. This act of legislative

[35] Kenya Constitution (1963) Section 30
[36] Laws of Kenya Cap 8, *the Judicature Act* Section 2

adoption, however, does not amount to ratification by the Executive. Examples of enabling legislation passed by the Parliament of Kenya in respect of certain treaties include The Privileges and Immunities Act, Chapter 179 of the Laws of Kenya, which incorporates the provisions of the Vienna Convention on Diplomatic Relations, (1961); The Geneva Conventions Act, Chapter 198 of the Laws of Kenya, which gives effect to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949); the Bretton Woods Agreements Act, Chapter 464 of the Laws of Kenya, which provides for the acceptance by Kenya of the Agreement for the International Monetary Fund and the International Bank for Reconstruction and Development; The International Development Association Act, Chapter 465 of the Laws of Kenya, which incorporates the International Agreement for the Establishment and Operation of the International Development Association, in particular, the Articles of Agreement; The Copyright Act, Chapter 130 of the Laws of Kenya, which recognises the Universal Copyright Convention.

Certain international legal instruments are treated as applied legislation. These include, for example, the Anglo- Italian Convention on the succession of Jubaland and the exchange of notes constituting an agreement between the government of the United Kingdom and the government of Ethiopia, amending the description of the Kenya - Ethiopia boundary. Even though the majority of treaties to which Kenya is a party were not incorporated by way of enabling national legislation, Kenya respected them and actually adhered to their provisions in practice. Certain legal questions, however, arise when discussing the provisions of such treaties in relation to individual rights, charged on public funds and criminal liability. In the absence of enabling national legislation, it was not possible to implement at the national level those provisions of any treaty affecting the liberty and rights of individuals, or requiring a charge on public funds or

imposing criminal liability for certain actions. No person would be held criminally responsible for breach of treaty provisions where such provisions had not been incorporated into municipal law by way of enabling national legislation. the Constitution of Kenya provided as follows:

"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is prescribed, in a written law." [37]

For example, provisions of an international legal instrument banning trade in specimen of species of wild fauna and flora, can only be implemented at national level on the basis of written municipal law defining the offence (ban) and prescribing the penalty thereof. Where a treaty to which Kenya is a party affected the fundamental rights and freedoms of individual Kenyans, its national implementation must be by way of an enabling legislation. Such legislation, was to be consistent with the Constitution of Kenya. In the absence of such an enabling national legislation, the provisions of that treaty could not be implemented within the municipal province.

In the environmental sector, the Environmental Management and Co-ordination Act (EMCA) 1999, contains provisions implementing the Biodiversity Convention (CBD), the Bamako and Basel Conventions on Hazardous Wastes and the Ramsar Convention. It further provided the statutory mechanism by which the Environment Management Authority implemented international legal instruments in the field of environment to which Kenya is a party. This domestication of treaties was done by the Office of the Attorney-General which was the lead office responsible for drafting and submitting new Bills to Parliament and or amendments to Acts of Parliament/or for consideration and passage by this House. Proposals for domestication of provisions of international treaties were normally presented to the House by the Attorney-General following the ratification of any particular treaty. In the process of preparation of a Bill,

[37] GoK (1963) *Constitution of Kenya* (1963) Section 77 (8)

the Attorney-General would consult with the relevant departments of Ministries dealing with the issues contained therein.[38]

4.5. The new treaty practice

The Constitution of Kenya 2010 was promulgated on the 8th of August. This constitution made a fundamental change as to the treatment of treaties. Article 2 (6) of the Constitution of Kenya came into force immediately after promulgation on the 8th of August 2010. This article provides that "Any treaty ratified by Kenya shall form part of the law of Kenya under this Constitution". The Article 2(6) and other provisions relating to Kenya's "international obligations" as well as the ratification process are largely silent and subject to various interpretations. In an effort to bring clarity to this provision, the Treaty Making and Ratification Act no. 45 of 2012 was constituted and assented to on 13th December, 2012 with a commencement date of: 14th December, 2012. The Constitution of Kenya 2010 thus fundamentally changed the process for treaty making in the country. The Treaty Making and Ratification Act No 45 of 2012 details the process for initiating, negotiating, ratification and registering the treaties. The act ensures that both legislative houses are actively involved in the process of ratification and treaty making. The act also clearly delineates the role of the executive. The act however fails to provide guidance on how to deal with issues of delay by the house of representatives on a treaty. Treaties will be subject to the priority established by each house. Delay of any of the houses in dealing with a treaty will not attract any penalty and treaties will be have to take their place in the house order of business. In other countries, there is provision for the, neither does it give direction on how the transformation of the treaties will take place. The Act now means that there shall be no

[38] Parliamentary Debates (2009) *Ministerial Statement: State of International Instruments Ratified By Government*: National Assembly Official Report Thursday, 27th August, p.3040-43.

new legislations that will be needed for the "act of transformation", into domestic law making Kenya effectively a monist state as opposed to a dualist state.

4.6. Conclusions

Prior to the new law, there was less significance placed on treaties as they had no binding effect until an Act of Parliament was passed incorporating it into domestic law. This has changed and it is now critical to establish which treaties Kenya has ratified. Section 15 of the act details the procedure for generating public awareness of the treaty. It should be noted here that the awareness shall be after the fact and not in the development of the treaty. The treaty practice will also affect the way that Kenya will implement the multilateral environmental agreements (MEAs).

Chapter 5

Implementation of Multilateral Environmental Agreements in Kenya

5.0 Introduction

This chapter reviews the domain of environmental treaties particularly the multilateral environmental agreements (MEAs). It first gives a historical perspective of the MEAs and their evolution. The chapter also looks at the regulations governing the MEAs as well as the institutional structures provided for MEAs. Finally the chapter review the MEAs that Kenya has signed and makes an analysis of the implementation of the agreements that Kenya has signed.

5.1 The history and context of MEAS

MEAs are subset of the universe of international agreements. Their distinguishing feature is their focus on environmental issues, their creation of binding international law and their inclusion of multiple countries. The term Multilateral Environmental Agreements or MEA is a broad term that relates to any of a number of legally binding international instruments through which National Governments commit to achieving specific environmental goals. MEAs form some of the most prominent features that regulate global environmental governance.[1]

5.1.1 The Stockholm Conference

Environmental treaties date back to the end of the 19th Century, the vast majority of MEAs have largely grown out of and been produced by large international conferences convened by the UN. Since the 1972 United Nations Conference on the Human Environment (UNCHE), often referred to as the Stockholm Conference there has been acceleration in the number of MEAs developed. The Stockholm Declaration was the

[1] Global Environmental Governance (2006) *A Reform Agenda*, International Institute for Sustainable Development p 3

first universal document of importance on environmental matters.[2] This conference gave birth to; the United Nations Environment Programme; an Environment Fund; an Action Plan; the Stockholm Declaration.

26 Principles were developed and gave prominence to eight major concepts that include; the interest of present and future generations (Principle 1); renewable versus non-renewable resources (Principles 2 to 5); ecosystems (Principles 2 and 6); serious or irreversible damage (Principle 6); economic and social development (Principle 8); transfer of financial and technological assistance to developing countries as well as the need for capacity building (Principles 9 and 12); the integration of development and the environment (Principles 13 and 14); the need for international cooperation (Principles 24 and 25).

International environmental law has gone from first generation agreements that primarily address the preservation and use of particular natural resources such as wildlife, marine and air environment, to 'holistic' second generation MEAs[3] with framework agreements and related protocols, as well as recent agreements of a highly regulatory nature. International agreements have been used as a basis to promote and establish management frameworks through which to structure practical international activity with respect to environmental protection and conservation. MEAs are living instruments, featuring annual or biennial meetings of the parties, intersessional meetings of technical and expert groups and intersessional written submissions. These various activities are intended to move the environmental agenda forward and keep pace with scientific developments. While intensified treaty-making is a sign that governments have recognized that many environmental issues cross national boundaries

[2] Carruthers C et al (2007) *MEA Negotiator's Handbook* University of Joensuu Finland p.8.
[3] UNEP (2010) *Auditing the Implementation of MEAs: A Primer for Auditors* UNEP Nairobi

and that international cooperation is required to address them, it has also been recognized that some areas of the planet are not the sovereign domain of any state. Some conventions have recognized certain environmental issues as the common concern of humankind. This fast pace of treaty-making may have obscured the fundamental question about whether environmental agreements are actually effective. In the last decade and a half, there has been an increasing focus on compliance with treaty obligations, along with methods of improving domestic implementation.[4]

5.1.2 Rio Conference of 1992

This conference was conceived through the work of the World Commission on Environment and Development (WCED) and its 1987 report entitled- Our Common Future- (known as the Brundtland Report for the President of the Commission, Gro Harlem Brundtland, former Prime Minister of Norway). In this report, the concept of sustainable development was defined as follows - development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The twin UN goals of environmental protection/ conservation and economic development evolved into the concept of sustainable development through the United Nations Conference on Environment and Development (UNCED) held in Rio in 1992. The Rio Conference results were numerous and included; the adoption of the United Nations Framework Convention on Climate Change (known as UNFCCC); the adoption of the Convention on Biological Diversity (known as CBD); the decision to negotiate the Convention to Combat Desertification; an Action plan called Agenda 21 (in reference to the 21st century); the decision to establish the Commission on Sustainable Development (CSD).

[4] Carruthers C et al (2007) *MEA Negotiator's Handbook* University of Joensuu Finland p.10.

The Rio Declaration composed of 27 Principles, many of which have, as in the case of the Stockholm Declaration influenced the subsequent development of international and national environmental law and policy. The Rio Declaration gave prominence to the concept of sustainable development; common but differentiated responsibilities (Principle 7); public information and participation (Principle 10); precaution (Principle 15); polluter pays principle (Principle 16); environmental impact assessment (Principle 17); states to cooperate in the further development of international law in the field of sustainable development (Principle 27). Since Rio, international environmental law has developed in tandem with domestic law to elaborate and give different aspects of sustainable development a more specific and concrete form. This focus on sustainable development helps to bridge the gap between developed and developing countries. Even prior to the Stockholm Conference and since, developing countries have made it clear that environmental protection and conservation should not come at the expense of their development. They have expressed the view that much of the pollution and destruction manifested today is a result of the industrial activities of developed countries. If developed countries want developing countries to forego the use of certain polluting technologies, then to avoid thwarting developing country growth, developed countries need to provide the financial and technological support this requires.

The following are some of the major MEAs that have been adopted since Rio; Framework Convention on Climate Change (UNFCCC); the Convention on Biological Diversity (CBD); The United Nations Convention to Combat Desertification (UNCCD) in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (know as the Desertification Convention – adopted in 1994); the Protocol to the London Dumping Convention (adopted in 1996); the Kyoto Protocol to the United

Nations Framework Convention on Climate Change (known as the Kyoto Protocol – adopted in 1997); the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (known as the Rotterdam Convention – adopted in 1998); the Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes (adopted in 1999); the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (known as the Biosafety Protocol – adopted in 2000) the Stockholm Convention on Persistent Organic Pollutants (POPs) also known as the Stockholm Convention – adopted in 2001.

5.1.3 The World Summit on Sustainable Development, 2002

In December 2000, the United Nations General Assembly adopted resolution 55/199, in which it decided to embark on a 10-year review of the Rio Earth Summit in 2002. This review was designed to track progress made since Rio and to take steps to move global action on sustainable development forward. The World Summit on Sustainable Development (WSSD) convened in Johannesburg, South Africa in 2002. It focused on implementing sustainable development and poverty alleviation as its key themes. It resulted in the adoption of a political declaration that, in paragraph 5, reaffirms the three pillars of sustainable development: economic development, social development and environmental protection. States also adopted the Johannesburg plan of implementation that sets priorities and targets in a number of areas of concern.

5.2 Types of MEAs

MEAs are categorised into different typologies. They come in a variety of forms but are mainly of three main types.[5] These include global or regional MEAs that have application throughout the world. Hence the Basel Convention (The Basel convention

[5] UNEP (2010) *Auditing the Implementation of MEAs: A Primer for Auditors* UNEP Nairobi p.12.

on the movement of Hazardous wastes and their disposal) applies throughout the world. Appendix Driven or annex driven conventions such as CITES or the Convention on International Trade in Endangered Species of wild fauna and flora is an appendix driven agreement. Three appendices list animals and plant species in different categories of endangerment, subject to different degrees of regulations and control. The framework conventions which are stand alone all inclusive agreements like the International Tropical Timber Agreement (ITTA) from 1994. Other examples include the UN Framework Convention on Climate change (UNFCCC) that anticipates the adoption of further protocols to achieve their objectives. Hence the UNFCCC was agreed on 1992, the Kyoto Protocol was later agreed in 1997 and builds on the UNFCCC.

5.3 Negotiation and entry into force of MEAs

MEAs may differ in scope and substance but tend to be formulated through a similar process as other multilateral treaties and agreements. The stages that they go thought include, pre negotiation, negotiation, adoption and signature, ratification and accession and entry into force. Adoption begins once the negotiation of a text has been finalised, a treaty will first be adopted then signed. The adoption of the treaty signals the end of the text negotiation and the beginning of the process that an international treaty passes through before enforceability. For multilateral treaties it is understood that when a country becomes a signatory, it expresses its readiness to proceed with the steps needed to fulfil entering into force procedures. This action is also known as signature subject to ratification acceptance or approval. Depending on the national constitutional procedures for ratification, acceptance or approval, a state specifies its assent to be bound by the treaty after completion of these procedures. The various treaties depository keep track of the ratification, acceptance and approval as some treaties have a minimum number of

states to ratify before a treaty enters into force. The ratification also implies that a country will enact national implementing legislation to put national effect to the multilateral treaty. Entry into force of multilateral treaties normally happens after an established period has elapsed subsequent to a set number of states ratifying or acceding to the agreement. Many agreements have terms that must be met so that it enters into force. Accession is the act when a state will accept to become a party to an agreement that has been negotiated, adopted and signed by other countries. This act has the same denotation as ratification with the exception that the accession takes place after negotiations have taken place. Withdrawal or denouncing countries are those that withdraw or denounce themselves from some international agreements in accordance with the procedures set in that instrument. If the treaty has a denunciation clause or is silent about the matter, a state may withdraw after a certain period of notice or after consent of contracting parties.

5.4 Implementation of the MEAs

Implementation of the MEAs starts once they have entered into force. This may be at two levels, at the national level and at the institution level where the COP represents the primary decision making body for the MEA.[6] Much of the national level implementation is done through domestic legislative and administrative arrangements, MEAs can provide for compliance mechanisms within their terms and structure to help, assist and ensure national level implementation. Such measures may be spelled out in the MEA, or the MEA may simply direct and empower the conference of parties (COP) to develop such measures and mechanisms by a certain date or as soon as feasible.[7]

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[6] UNEP (2010) *Auditing the Implementation of Multilateral Environmental Agreements (MEAs): A primer for auditors* UNEP, Nairobi p. 15

[7] Ibid p. 15

The project found that the mechanism for collecting information from the implementing MDAs was not structured and tended to be based on individual relations as opposed to structured information collection system. Interviews with the implementing MDAs indicated that they were not informed on the outcomes of the various COPs and even the content of the MEAs.[8] However the staff at the MEAs office were fully informed.[9] For positive implementation, National Implementation Plans (NIPs) are developed by the respective MDAs in order to guide the activities.[10] These NIPs help to identify sources of non-compliance such as laws, institutions, lack of capacity, social norms, public and private sector considerations, develop methods for addressing these sources, monitoring implementation, and identifying funding resources. NIPs may also provide for the establishment of a national implementation agency. Kenya has NIP for the Stockholm Convention on Persistent Organic Pollutants (POPs).[11] This was developed in 2007. However other MEAs like the CBD and UNCCD do not have NIPs which they require. The interviews also indicated that the MEAs office is under pressure as they have very many COPs that they are required to attend.[12] This means that national based activities such as the development of the NIPs are not implemented as staff are away on international duty.[13]

The fact that the Constitution of Kenya 2010 requires Kenya to transform all the ratified MEAs and the need for the Treaty Making and Ratification Act no 45 2012 require the public to be informed about the MEAs that Kenya has ratified will only add more workload on the MEAs office in Kenya. The investigation also found that the involvement of the key stakeholders is limited. It was for instance noted that the main

[8] Maina 06/10/13 Interview
[9] Mwendandu 13/06/13 Interview
[10] Ndonye 08/10/13 Interview
[11] Oyuke 12/06/13 Interview
[12] Mwendandu 13/06/13 Interview
[13] Ibid

agency dealing with forestry issue in Kenya was not party to the Rio 20+ convention though the implementation and adoption of the outcome will be left to that agency.[14] The interviews also found that the engagement of stakeholders was not very effective as very few stakeholder forums have been conducted to inform on the MEAs.[15] It was found that the MDAs have no idea what the office of the MEAs has committed them to.

The Kenya Wildlife Service also indicated that the latest protocol on the CITES was done without the involvement of the implementing MDA.[16] Below is the representation of the MEAs that Kenya has signed and ratified. Here there is a total of 61 MEAs with 38 requiring transformation activities to ensure that they are implemented in line with the Constitution of Kenya 2010. This means that there will have to be a programme to fast track this implementation and to inform the MDAs what the international obligations of the government will be and what the implications as detailed in Treaty Making and Ratification Act 2012 section 7.

[14] Maina 06/10/13 Interview
[15] Wanyiri 11/06/13 Interview
[16] Wamboi 10/09/13 Interview

5.5 Analysis of MEAS signed in Kenya

Kenya has signed 36 environmental convent ons

Conventions	Action	Number	%
1	Signature	2	5.6
2	Ratification	9	25.0
3	Accession	15	41.7
4	Succession	0	-
5	Adherence	1	2.8
6	Acceptance	1	2.8
7	Unknown	8	22.2
	Total	36	

Table 1 : Environmental Conventions that Kenya has signed

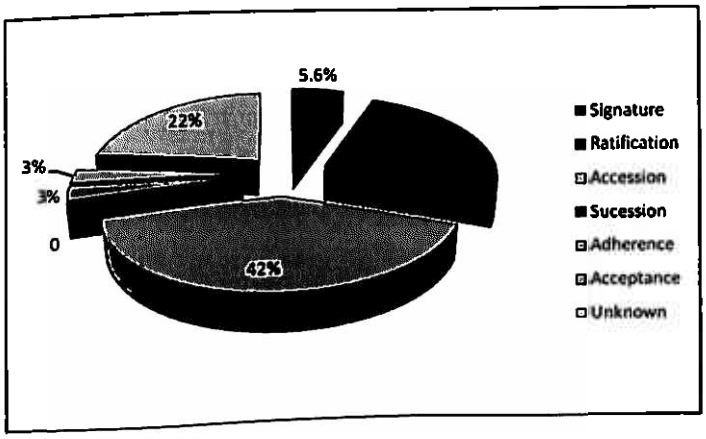

Chart 1 : Environmental conventions that Kenya has signed

Kenya has signed 36 Environmental conventions. Of this group nine have been ratified with 15 acceded to. Thus according to the Treaty making and Ratification act No 45 of 2012, at least 68% of the MEAs through conventions shall be implemented in the domestic laws of Kenya. The Treaty Making and Ratification Act applies to treaties that are concluded by Kenya after the commencement of the Act[1]. Based on this, the respective MDAs will have to transform the 14 ratified conventions so that they may be implemented.

[1] GOK (2012) *The Treaty Making and Ratification Act* No 45 of 2012, Government Printer, p. 4. Section 3.

Kenya has signed 11 Environmental protocols

Protocol	Action	Number	%
1	Signature	0	-
2	Ratification	4	36.4
3	Accession	4	36.4
4	Succession	0	-
5	Adherence	0	-
6	Acceptance	0	-
7	Unknown	3	27.3
	Total	11	

Table 2: Environmental protocols that Kenya has signed

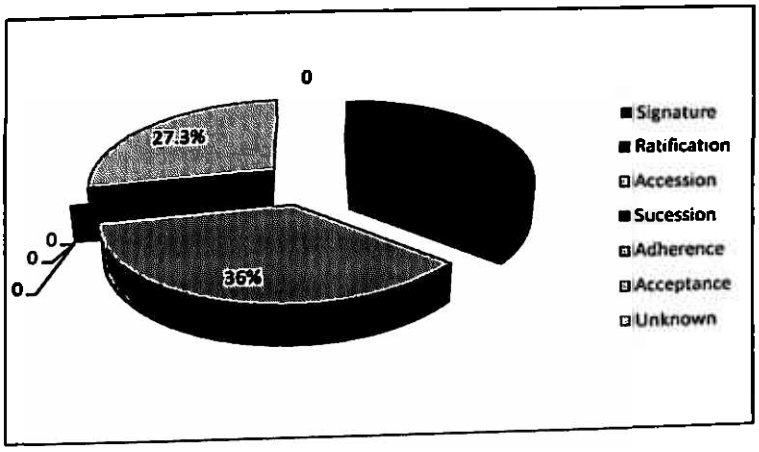

Chart 2: Environmental protocols that Kenya has signed

Kenya has signed and ratified and or acceded to 8 environmental protocols. These will be implemented through the Treaty Making and Ratification Act No 45 of 2012. The Act requires that the implementing MDAs transform the protocols for implementation.

Kenya has signed 10 Environmental Agreements

Agreement	Action	Number	%
1	Signature	3	30
2	Ratification	2	20
3	Accession	1	10
4	Succession	0	0
5	Adherence	0	0
6	Acceptance	0	0
7	Unknown	4	40
	Total	10	

Table 3: Environmental Agreements that Kenya has signed

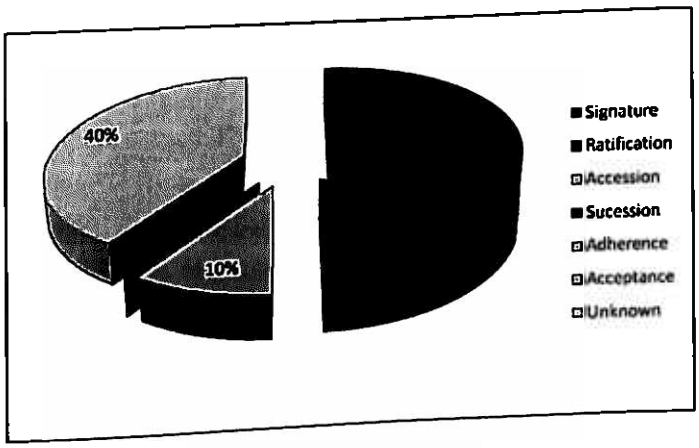

Chart 3: Environmental Agreements that Kenya has signed

Kenya has ratified and acceded to 3 environmental agreements which will require implementation. Under the Treaty Negotiation and Ratification Act 2012, these agreements will be transformed for implementation.

Kenya Has signed 4 Environmental Treaties

Treaty	Action	Number	%
1	Signature	0	0
2	Ratification	1	25
3	Accession	2	50
4	Succession	0	0
5	Adherence	0	0
6	Acceptance	0	0
7	Unknown	1	25
	Total	4	

Table 4: Environment treaties that Kenya has signed

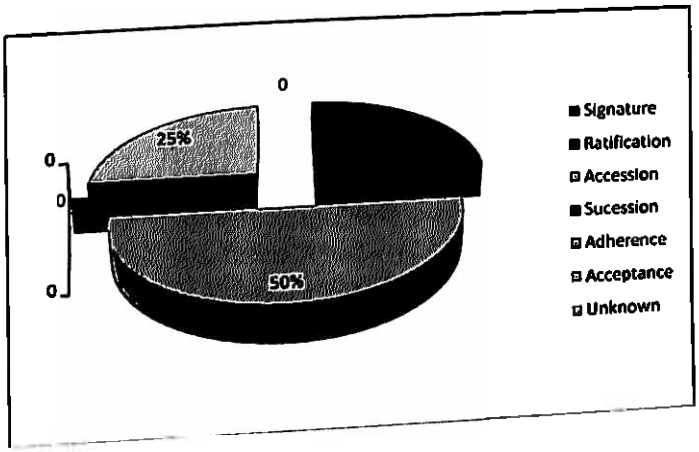

Chart 4: Environment treaties that Kenya has signed

Kenya has signed 4 environmental treaties with 3 ratified or acceded to. These treaties under the Treaty Negotiation and Ratification Act 2012, these agreements will be transformed for implementation by the respective MDAs.

Summary of the MEAs that Kenya has signed and the respective action taken.

MEAs	Action	Number	%
1	Signature	5	8.20
2	Ratification	16	26.23
3	Accession	22	36.07
4	Sucession	0	-
5	Adherence	1	1.64
6	Acceptance	1	1.64
7	Unknown	16	26.23
	Total	61	

Table 5: MEAs and action taken in Kenya

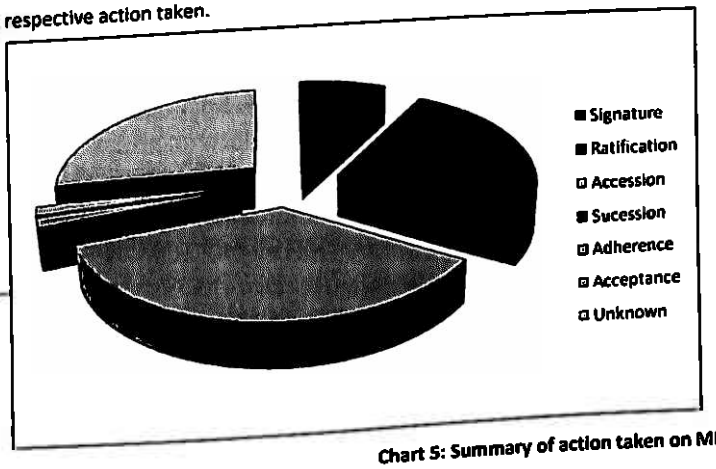

Chart 5: Summary of action taken on MEAs in Kenya

5.6 Conclusion

Kenya has signed a total of 61 MEAs. Of this group of MEAs 62% have either been ratified or acceded to by the government. This means that these will have to be implemented by legislation. Thus 61 MEAs are in record with 16 or 27% not having any specified action less than 2 % are at acceptance stage or adherence stage 0 have been on succession, and while 36% have been acceded to and 26% ratified and 8% signed. This means that 38 have been ratified and require to be transformed for implementation.

Chapter 6

Conclusion

6.0 Introduction

Kenya has taken membership action on a total of 311 MEAs, between 2003 and 2012 11 new MEAs were negotiated.[1] This indicates that the MEAs sector has gained importance with time and will continue to engage the state. The nature of MEAs is such that most of them have the conference of parties (COP) that takes place for monitoring the progress of implementation. The state therefore needs to ensure that there is commensurate staff available to attend to the demands of the MEAs.

MEAs monitor and review activities undertaken by Governments to implement the treaties through national reports. For most MEAs, the national focal point prepares the national report. Usually, the national focal point (for MEAs) is the Ministry of Environment Water and Natural Resources. National reporting is mandatory and reports are usually submitted in advance of COP meetings. The periodicity of national reports varies from one MEA to another, for example every six months for developed countries under the UNFCCC, to once every 3 years for the Ramsar Convention. Since 1963 at independence Kenya has taken signed 61 new agreements. It has however only acceded to or ratified 38 MEAs.

From the conclusion it would be expected that by now Kenya would have 38 pieces of regulation or NIPs that show how the implementation of the MEAs that have been ratified would be carried out. However due to the pervious dualist nature of the constitution and the lack of attention to the impact of international treaties few of the MEAs have been incorporated into the respective acts of the respective agencies. For

[1] Mitchell R B (2013) *International Environment Agreements Database Project* (Ver 2013.2) Available at: http: // iea.uoregon.edu/. date accessed 3 August 2013

instance, the Forest Act 2005 does not refer to or include any of the MEAs that are forest related nor does it relate to the Non Legally Binding Forest Instruments (NLBI) or the implementation of the seven principles of sustainable forest management. The new wildlife bill is still under review but the old Act does not have specific implementation action on the CBD or the CITIES. This tends to imply that there is a disconnect on the way that treaty negotiations are completed. There is lack of a road map, NIP or even the National Activity Plan (NAP), for the implementation of the respective MEAs. The MEWNR has only had the MEAs section for less than 10 years and it has still got much work to be done.

6.1 Recommendations

This study has revealed gaps in the implementation of the MEAs that the country has signed. The study also recommends that training in negotiation and preparation of briefs should be devolved to the agency levels. This way the ministries need not conduct all the negotiation themselves or may be guaranteed of more technical and effective support from the implementing agencies. There is need to engage the stakeholders either at the period of preparation of the COPs or conventions or after the event so that the information and obligations of the government will be clear to the implementing MDAs.

The study also noted the need for legal advice on the transformation of the MEAs in legal instruments. It was observed that even through most ministries departments and agencies (MDAs) have employed lawyers to help them review the existing legal instruments, most of the lawyers have not paid attention to the MEAs leading to an incomplete legislation that ignores the international treaties.[2] There is need to research the actual content of the treaties that have been ratified against the

[2] Kaudi 07/10/13 Interview

respective agency implementation acts. These should then make specific recommendations on what each agency has not conformed to and suggest the implementation action that should take place. This way the implementation of the MEAs in Kenya will be effectively and efficiently undertaken. There is also need for a clear understanding of the results that are expected from the various MEAs that Kenya has ratified. Most agencies do not seem to know what is expected of them in terms of reporting and even programming. The author also recommend that additional research be conducted on the implementation of the MEAs in order to finally establish the mechanisms of each of the individual MEAs implementation.

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Appendix

Research Letter

Telephone: 254-2-3884036
Fax: 254-2-3884036
E-Mail: info@ndc.go.ke

When replying please quote

Ref: NDC/G/209

National Defence College
71 Warai North Road
P.O Box 24381
Karen – Nairobi
Kenya

29 May, 2013

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

RE: ACADEMIC RESEARCH STUDY MR. MATHENGE GITONGA

The above named is a Masters student at National Defense College undertaking a course in the Institute of Diplomacy and International studies by the University of Nairobi. He is currently conducting an academic search study entitled
Implementation of environmental treaties in Kenya.

Any information obtained in the course of this study will be used for academic purpose only and will be treated with upmost privacy and confidentially.

Please provide the necessary assistance.

Yours Faithfully,

..... Colonel
J K MURREY Coordinator
Lt Col ... College
Coll Coord

Interviews Held

No	Name of Interviewee	Date of interview	Position
1	Nelson M Maina	10/06/2013	Deputy Director Forest Conservation
2	John M Wanyiri	11/06/2013/	KFS Legal office
3	Janet Oyuke	12/06/2013	MoA NEMA lead expert
4	Richard Mwendandu	13/06/2013	MEAs Director MEWNR
5	Dr Alice Kaudia	7/10/2013	Director Conservation
6	Parkinson Ndonye	8/10/2013	DD MEAs MEWNR
7	Jane Wamboi	10/09/2013	KWS Conservation officer

Interview Guide

The Implementation of Environmental Treaties in Kenya

A. The purpose of this interview guide is to collect information for a research project that is being undertaken in International relations.

B. All the information supplied will remain confidential and will not be disclosed to any person nor will the source be disclosed

Interview Guide

Q 1. How are the MEAs identified for Kenya to engage?

Q 2. How do you take care of the national interest in the MEAs

Q 3. What or how are the MDA involved in the pre negotiation and negotiation and post negotiation of the MEAs

Q 4. Who negotiates and how do you build the capacity for the negotiators?

Q 5. Describe the negotiation process (for those who have negotiated)

Q 6. How do you involve the implementing MDAs at each stage?

Q 7. What role do you play in developing implementing procedure for MEAs?

Q 8. How is information and public awareness on MEAs done to stakeholders?

Q 9. Information and public awareness on the MEAs

Q 10..How are the ratified MEAs implemented in Kenya? What activities do you undertake to implement MEAs in Kenya.

Q 11.What MEAs has Kenya signed that you know of?