

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**Domestication of International Conventions: A Comparative Study of Kenya
and Sweden in their Domestication of the United Nations Convention on the
Rights of the Child (UNCRC)**

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**A Research Paper Submitted in Partial Fulfillment of the Requirements for
the Award of Master of Arts Degree in International Studies at the Institute of
Diplomacy and International Studies at the University of Nairobi**

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DECLARATION

I, Betty Wangari Kariungi, declare that this thesis is my original work and has not been submitted for the award of a degree in any university.

Signed_____

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This project has been submitted for examination with my approval as a university lecturer

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DEDICATION

To my loving parents

Edward Kariungi and Agnes Wanjiku

You gave me inspiration and ceaselessly encouraged me to accomplish this study

To my children, Minel and Tobyn

May you grow up with passion and desire for knowledge and wisdom
and pursue them to the highest level

ACKNOWLEDGEMENT

The success of this work was joint effort of many people. May God bless you all.

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Glory to God for being my strength, my guide and provider, from the beginning to the end of my studies. His grace is sufficient in all things!

ABSTRACT

This study focuses on domestication of international conventions as a way of making international instruments applicable at the national level. The study answers questions on how states domesticate international conventions, domestication processes in Kenya and Sweden and how both countries domesticated the United Nations Conventions on the Rights of the Child (UNCRC). The objectives of the study are to describe the processes of domesticating international conventions and assess the domestication processes in Kenya and Sweden and in particular how the two states domesticated the UNCRC. The findings of the study are intended to give more understanding on the two approaches of domestication; dualism and monism. Domestication brings the whole process of treaty negotiation and conclusion to a successful end because it would be a waste of time and effort for states to come up with international conventions which states do not implement. Domestication makes international conventions applicable at the domestic level thus making it possible to implement them for the benefit of citizens.

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CHAPTER ONE

1.0. Introduction and Background of the Study

This study will focus on how countries domesticate international conventions within their territories. Conventions also known as treaties are considered as one of the sources of International Law by the International Court of Justice (ICJ). They are formal agreements between states, which are important in guiding operations of States in the International System. States are involved in negotiations on different issues of concern globally such as human rights, environment, security, among others. The United Nations Convention on the Rights of the Child (UNCRC) is one of the international human rights treaties that has been negotiated and ratified by states. Ratification of the UNCRC or any other treaty is not enough. States should show further commitment to the provisions of treaties by respecting, protecting and fulfilling the rights contained in the treaties. This is done by states applying international treaties at the national level, which may require legislation of the provisions of the treaty, for those countries that have separated international law and domestic law, or simply integrating that treaty as part of the national law without any legislation. That is for countries that do not treat international law and domestic law differently.

The passing of international law through international conventions is only a beginning. Words must be translated to deeds.¹ The effect or impact of a treaty in a state can only be seen where provisions are implemented in practice. Implementation can only be possible if states domesticate these international conventions, so that they are applicable at the domestic level.

¹ Freeman, Michael. *The Moral Status of Children. Essays on the Rights of the Child.* (The Netherlands: 1997) p 29

1.1. Statement of the Problem

Treaties and other international instruments have been part of international law for a long time. Under the United Nations states come together and spend significant time and effort to negotiate and debate on issues of global concern and come up with treaties to guide their conduct on such issues. Human rights is one of the key areas where agreements have been reached on the rights of human beings as a whole and also rights of specific groups of people who are considered vulnerable, such as children, women and aliens. Countries may show commitment to conventions by ratifying them. States should take a further step and transform these treaties from being just written documents and ensure actual compliance with the standards of the treaties so that the effect of such treaties are seen in practical life. Domestic application of treaties may vary widely across countries and even across regions in these countries. This is because of variations between states politically, culturally, socially and economically. Kenya and Sweden are among the countries that ratified the CRC. These are two countries that differ in their development levels and in the lifestyle of its people. Therefore, domestication and implementation of the CRC in these nations may vary because of their differences politically, culturally, socially and economically.

This study will seek to analyze how the two countries domesticate international conventions. The study will focus on the process of domesticating the CRC in the two countries particularly in the area of legislation that enables the CRC to become functional in Kenya and Sweden. It will seek to determine whether there have been changes in laws, policies, procedures and structures in response to the CRC. Important questions regarding this research will be;

1. How do states domesticate international conventions?
2. What is the process of domesticating international conventions in Kenya and Sweden?

3. How did Kenya and Sweden domesticate the United Nations Convention on the Rights of the Child?

1.2. Objectives of the Study

The broad objective of this study will be to examine the process of domesticating international conventions. More specifically, the objectives will be to:

1. Describe the process of domesticating international instruments in Kenya and Sweden.
2. Assess the process of domestication of the UNCRC in Kenya and Sweden.
3. Compare the domestication processes in Kenya and Sweden.

1.3. Justification of the Study

International conventions are a flexible way of making International Law in the contemporary world because they may be reviewed over time and new laws created as new issues emerge in certain areas of interests. International conventions are about issues of global concern and because of the amount of resources spent to come up with them, they should not just remain as laws written on paper.

Most studies on international conventions concentrate on defining terms and discussing about the international conventions that are already in place. Some contain country reports on the implementation of these international conventions. Implementation is about activities. Activities can only take place after the international conventions have been accepted into a country. There is a gap on the topic of domestication, which is what makes international conventions applicable in every state that ratifies an international convention. This study will seek to bring out the processes of domesticating international conventions in Kenya and Sweden and give examples from other states. The information from this research will contribute to knowledge in the area of domesticating international conventions. It will show that unless

countries adapt their laws, programming and policy in response to international conventions, the ability for those conventions to bring about change in the areas concerned will be limited.

This may be useful information in the area of human rights because most conventions are about human rights.

1.4. Literature Review

Understanding international conventions is important because they are one of the common sources of international law in modern world. They are formulated with the agreement of state parties at the international level, with the intention of applying them at the national level where their effects on human lives are observed. It is important to understand how they become applicable at the national level through domestication.

1.4.1. International Conventions

In International Law, the terms convention and treaty mean the same thing. According to Halstead, a convention is a legally binding agreement between states, entered into voluntarily and enforceable only to the extent acknowledged by signatories, and used more or less interchangeably with the words covenant and treaty.² The Office of the United Nations High Commissioner for Human Rights states that a treaty may also be defined as an agreement by states to be bound by particular rules. International treaties have different designations such as covenants, charters, protocols, conventions, accords and agreements.³ Further definition of treaties and conventions is also taken from Article 2 (1) of the Vienna Convention on the Law of Treaties, which defines a treaty as an international agreement concluded between states in

² Halstead, Peter. *Human Rights: Key Facts*. Hodder Arnold. (London) p 3

³ Office of the United Nations High Commissioner for Human Rights. *Human Rights. A Basic Handbook for UN Staff*. (United Nations) p 4

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.⁴

International Conventions are concluded after a process of negotiation by all state parties involved. A major feature of treaties is that they are legally binding only for those states which have ratified them and have agreed to be bound by their provisions.⁵ However, they establish a standard to which all nations are expected to conform and although states which have not ratified them cannot be subject to their implementation, they are expected by the international community to live up to the standards of those treaties.⁶ A country expresses its consent to be bound by a treaty by ratifying it. Ratification is the international act by which the state's consent to be bound by a treaty is established and expressed at the international plane.⁷

International conventions are agreements between states, not governments. Governments operate as the formal representatives of states and represent the public interests of the states. The persons in government involved in concluding a particular treaty are the most qualified to do so. They could be heads of state, governments, ministries or other state organs or agencies.⁸ The state is the sum total of the entire country's population, social structures and institutions. The obligations of treaties are binding not only to the government, but also to all segments of society which are part of the state. These are; the private sector, voluntary and service organizations, academic institutions, cultural and sports groups, religious bodies or individual citizens. Therefore treaties cannot be terminated by governments. They can only be denounced by a state.

⁴ *The Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331.

⁵ Cassese, Antonio. *International Law*. 2nd ed. (New York: 2005) p 170

⁶ Wako, Amos S. *The Rights of the Child: Selected Proceedings of a Workshop on the Draft Convention on the Rights of the Child. An African Perspective*. (Nairobi: 1989) p 42

⁷ Rosenne, Shabtai. *Practice and Methods of International Law*. (New York: 1984) p 27

⁸ Aust, Anthony. *Modern Treaty Law Practice*. (Cambridge: 2007) p 19

Thus, the agreements made by states are binding on every successive government in the same measure and to the same extent as they bind the first government.⁹

Once parties have expressed consent to be bound by a convention it is assumed that parties should perform it in good faith.¹⁰ This is known as the principle of *pacta sunt servanda* which is contained in Article 26 of the Vienna Convention on the Law of Treaty of 1969. United Nations member states committed to its objectives and policies should ratify and accede to all International Instruments. In accordance with principles of sovereignty each country has a chance to consider and willingly ratify or accede to International Instruments. When it comes to human rights conventions, they are considered to be automatically binding to all states, because of their importance. Hayes says that;

through ratification and domestication, international human rights laws and standards become part and parcel of domestic law. Whether a state automatically acknowledges international law, entrenches human rights in its constitution or incorporates them through judicial interpretation rules, human rights are an important feature of almost every jurisdiction in one way or another.¹¹

According to Kusumowidegdo, treaty obedience can be affected by providing for sanctions in a treaty or by providing for other means which may encourage the voluntary co-operation of the parties. The treaty may provide means that are sanctions and others of non-punitive measures.¹² This means that it is not obvious that states will implement treaties just because they are party to them. It may be important to have measures to deal with those who do not obey. Danilenko argues that because treaties require co-operation of all members of the International Community, objective community interests and the will of the International Community should prevail over the interest and will of individual states. Therefore parties should act in accordance with at least

⁹ Lundy, Christine. *An Introduction to the Convention and the Rights of the Child*. (Canada: 1998) p 7

¹⁰ Aust, Anthony. *Modern Treaty Law Practice*. (Cambridge: 2007) p 179

¹¹ Hayes, Krissie in The Kenya Section of the International Commission of Jurists. *Human Rights Litigation and the Domestication of Human Rights Standards in Sub-Saharan Africa*. Ahraj Casebook Series. Vol. 1. (Nairobi: 2007) p 17

¹² Kusumowidegdo, Judo Umarto. *Consultation Clauses: As Means of Providing for Treaty Obedience. A Study in the Law of Treaties*. (Stockholm: 1981) p 29

the basic norms established by global treaties.¹³ One of the ways established by the United Nations to assist states in their compliance with the major human rights is reporting.¹⁴ States are required to submit periodic reports on their performance on certain treaties. This is also required for the United Nations Conventions on the Rights of the Child. The process of reporting is an important opportunity for the state to review how it is implementing the Convention, its success in promoting and protecting children's rights and what gaps remain.¹⁵

States which are parties to a treaty have to apply the treaty and therefore they need to interpret it. International treaties may be interpreted differently. According to Bederman, the real difficulty in observance of international agreements arises from their interpretation. This is because treaties may be more vague, ambiguous, and otherwise difficult to interpret than other kinds of legal writings.¹⁶ For example, article 4 of the CRC states that:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

Himes says that the interpretation of the phrase “maximum extent of their available resources” has raised fears that it could be used as an excuse for justifying poor implementation performance in low income countries.¹⁷ He suggests that instead of the phrase becoming a justification for poor performance, it should be used by agencies concerned with child rights to assist governments to undertake the planning required to ensure that they get the necessary resources to meet the challenging goals of the CRC.¹⁸ However, there are situations where the parties to a treaty agree on a common interpretation either by a formal treaty or otherwise. This

¹³ Danilenko, G.M. *Law-Making in the International Community*. (London: 1993) pp 66-67

¹⁴ Kenya Medical Women's Association. *World Summit for Children: A Kenyan Perspective*. (Nairobi: 1990) p 45

¹⁵ UNICEF. www.unicef.org. Cited on 2nd June 2013.

¹⁶ Bederman, David J. *International Law Frameworks*. (New York: 2001) p 33

¹⁷ Himes, James R. *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low Income Countries*. (The Hague: 1995) p 2

¹⁸ Ibid p 3

interpretation which is governed by legal rules, acquires an authentic character and prevails over any other.¹⁹ States should be careful how they interpret international conventions so that they are on the right track as they implement them domestically. Proper interpretation according to legal rules will also avoid conflicts between parties to that convention. Treaty interpretation should be holistic; primacy should be given to the text of the treaty but the context, object and purpose of the treaty should also be considered to ascertain its true meaning.²⁰

Sometimes the treaty body responsible for a certain treaty may give guidelines for interpretation which states parties should use to interpret that particular treaty at the domestic level. For example under the UNCRC, there are four general principles in the convention that have been identified by the Committee on the Rights of the Child, and are basic to all rights contained in the convention. They act as an interpretation and implementation guide to states. They are contained in the following articles: Article 2 on non-discrimination; Article 3 on the best interests of the child; Article 6 on the right to life, survival and development and Article 12 on respect for the views of the child. Each state should respect and ensure the rights set forth in the convention to each child within their jurisdiction without discrimination of any kind.²¹ States should take protective measures against child discrimination and where discrimination already exists, it should be abolished.²² Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes.²³

¹⁹ Reuter, Paul. *Introduction to the Law of Treaties*. (London: 1989) pp 73-74

²⁰ Tully, Stephen. *International Conventions*. New South Wales Young Lawyers International Law Committee. *The Practitioner's Guide to International Law*. (South Wales: 2010) p 21

²¹ Office of the United Nations High Commissioner for Human Rights. *The UN Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*. (United Nations: 2005) p 12

²² Save the Children Sweden. *Children's Rights: Turning Principles into Practice*. (Stockholm: 2000) p 16

²³ UNICEF. *General Comments of the Committee on the Rights of the Child*. (Florence: 2006) p 33

The best interest of the child must be applied to administrative decisions, policy formulation, diversion measures, etc.²⁴ Conflicts between international law and national laws regarding children should be resolved with the best interest of the child as the primary consideration.²⁵ Being a primary consideration means that the best interests of the child cannot normally be the only consideration. Situations may arise where other legitimate and competing interests should be considered. The principle should be among the first aspects to be considered in all decisions affecting children and especially on family issues such as parental visitation, foster placement and adoption.²⁶ Article 6 (1 and 2) of the Convention states that “State Parties recognize that every child has the inherent right to life and that States Parties shall ensure to the maximum extent possible survival and development of the child.” The article claims for the child not only the inherent right to life, but to survival – to be protected from dying from whatever life-threatening conditions that can be controlled by humankind such as infectious disease and organized violence.²⁷ The CRC recognizes the right of access to health care services such as immunization and oral rehydration therapy, and to an adequate standard of living, including food, clean water and a place to live.²⁸ The concept of development used in the convention is holistic, referring to all aspects of a child’s development. The convention contains provisions relating to the child’s right to parental love and care (articles 5, 9, 10, 18); to education (articles 28, 29); to health (article 24); to adequate standard of living (article 27); protection of children without families and adoption (articles 20, 21), right to social security

²⁴ Sloth-Nielsen, Julia and Jacqui Gallinetti. *Child Justice in Africa*. (South Africa: 2004) p 22

²⁵ Himes, James R. *The United Nations Convention on the Rights of the Child: Three Essays on the Challenge of Implementation*. (Florence: 1993) p 9

²⁶ Save the Children Sweden. *Children’s Rights: Turning Principles into Practice*. (Stockholm: 2000) p 32

²⁷ Black, Maggie. *Monitoring the Rights of Children. Innocenti Global Seminar Summary Report*. UNICEF International Child Development Centre, (Florence: 1994) p 22

²⁸ UNICEF. *The World Summit for Children: A UNICEF Contribution to the World Summit for Children*. (New York: 1990) p 12

(article 26); right of access to information (article 17) and right to recreation (article 31). All these rights ensure that children develop full potential mentally, physically and socially.²⁹

The Convention underlines the child's right to freedom of expression and information, and to freedom of thought, conscience and religion. Parents and society should give due weight to the views of children.³⁰ According to the Convention, the exercising of participation rights depends on the age and 'evolving capacities' of the child, depending on the personal interpretation of every parent, teacher, social worker and judge. Child participation is essential in preparing children to participate responsibly in democratic societies.³¹ The four principles are to be used by states to guide them in interpretation and implementation of child rights provided for in the UNCRC.

Treaties may have reservations. A state may ratify a treaty and enter reservations to that treaty indicating that, while it is bound by most of the provisions, it does not agree to be bound by certain specific provisions. Article 2 of the Vienna Convention on the Law of Treaties defines reservations as a "unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." Reservations are accepted only if they don't defeat the object and purpose of the treaty. The Vienna Convention in Article 19 allows countries to make reservations unless they are "incompatible with the object and purpose of the treaty".³² Reservations are not made on treaty

²⁹Kenya Medical Women's Association. *World Summit for Children: A Kenyan Perspective*. (Nairobi: 1990) p 45

³⁰UNICEF. *The World Summit for Children: A UNICEF Contribution to the World Summit for Children*. (New York: 1990) p 12

³¹ Himes, James R. *The United Nations Convention on the Rights of the Child: Three Essays on the Challenge of Implementation*. (Florence: 1993) p 3

³² UNICEF. *General Comments of the Committee on the Rights of the Child*. (Florence: 2006) p 34

provisions that have become customary international law or provisions that constitute peremptory rules of international law.³³

Treaties may also be followed by optional protocols. An optional protocol is a legal instrument related to an existing treaty which addresses issues not covered by or sufficiently developed in the treaty.³⁴ Only states that are already parties to the related treaty may ratify or accede an optional protocol, and even then, they are not under obligation to do so. However, it would be double standards to ratify a covenant and omit to ratify its protocol, as the protocol is part of the body of the Covenant. This is especially so in human rights treaties.³⁵

1.4.2. Domestication of International Conventions

Domestication means the process of treaty application at the domestic level. The status of international conventions within a domestic legal system is generally determined by domestic law. Every state has its own standard way of domesticating international conventions depending on its national legal and political systems, which may be applied on every international convention. Domestication may also mean the process of translating international conventions into country legislations and implementing programs that will lead to the realization of the aspirations of the conventions. Domestication ensures that the provisions of the conventions are applicable to the country.³⁶

Treaty application at the domestic level is not specified by International Law. Most treaties are not self-executing. In some states treaties are superior to domestic law, whereas in other states treaties are given Constitutional status and in yet others only certain provisions of a

³³ Office of the High Commissioner for Human Rights. *Human Rights. A Basic Handbook for UN Staff*. (United Nations) p 4

³⁴ The Kenyan Section of the International Commission of Jurists. *International Human Rights Standards: Making a Case for Kenya's Ratification of Optional Protocols*. (Nairobi, 2005) p 1

³⁵ Ibid p 8

³⁶ International Legal Instruments on Children. <http://www.annpcankenya.co.ke/index.php?option=com-content&task=view&id=20&Itemid=9>. Cited 22nd November 2012

treaty are incorporated into domestic law.³⁷ Rules governing the application of treaties in states vary depending on two doctrinal considerations; dualism and monism. Dualists regard international and municipal law as completely separate, except for the Head of State who is the only State organ to represent the State both in municipal and international law. According to the monist approach, municipal law is linked and subject to international law with regard to all State organs.³⁸ Both international law and domestic law are applied at the state level to govern state affairs. Treaties once ratified, are regarded as directly applicable and have force of law.³⁹ In the event of a conflict in the application of law, international law prevails.⁴⁰ In the dualist approach, in addition to ratification, there has to be an act of domestic legislation before the treaty provisions can be applied domestically. According to Rosenne, once a treaty enters into force for a state, it does not automatically become part of its law. Internal ratification may be needed such as a decision by the legislature, before the state can become bound by a treaty.⁴¹ A treaty is not like national legislation which once in force applies to all to whom it is directed. In a strictly dualistic system, courts cannot apply a treaty rule until it has been transformed into a municipal law, usually by way of a legislative enactment. In such a system, ultimate responsibility for the application of a treaty rests with the government and the legislature.⁴² It is argued that the dualist approach provides the opportunity for states to establish a legal regime that suits the state's unique circumstances.⁴³

³⁷ Office of the High Commissioner for Human Rights. *Human Rights. A Basic Handbook for UN Staff*. (United Nations) p 4

³⁸ Reuter, Paul. *Introduction to the Law of Treaties*. (New York: 1989) p 13

³⁹ Ibid p 15

⁴⁰ Jayawickrama, Nihal. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. (Cambridge: 2002) p 96

⁴¹ Rosenne, Shabtai. *Practice and Methods of International Law*. (New York: 1984) p 27

⁴² Reuter, Paul. *Introduction to the Law of Treaties*. (New York: 1989) p 16

⁴³ Buerghenthal, Thomas, Dinah Shelton, David P. Stewart. *International Human Rights: In a Nutshell*. 3rd ed. (Minnesota: 2002) p 15

According to the Office of the United Nations High Commissioner for Human Rights, the state has to ensure that rights contained in ratified human rights instruments which are also international conventions, become part of or are recognized by the national legal system.⁴⁴ This involves putting in place mechanisms through which human rights are protected. These mechanisms include adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment and strengthening of democratic institutions. National education and information campaigns on human rights issues are also important in promoting human rights. Himes also says that a state that is party to a convention ensures that obligations can be implemented domestically. This may require fresh legislation or amending existing legislation to cover the obligations contained in a convention.⁴⁵ Following the ratification of conventions, states should come up with ways of domesticating these conventions so that they can be applied locally. Attention must be paid to a broad array of legislative, administrative, judicial, regulatory and other measures at all levels of government, needed to achieve the goals or attain the agreed standards.⁴⁶ Mechanisms should be established at national and local levels to coordinate policies related to conventions and to monitor their implementation.

Alston and Tobin state that an appropriate legal framework is a central element in ensuring promotion and protection of child rights. Institutional arrangements and other mechanisms only complement and supplement this legal framework.⁴⁷ It is important for there to be constitutional arrangements and domestic laws for the protection of child rights. The

⁴⁴ Office of the United Nations High Commissioner for Human Rights. *National Human Rights Institutions: History, Principles, Roles and Responsibilities*. (Geneva: 2010) p 5

⁴⁵ Himes, R. James. *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low Income Countries*. (The Netherlands: 1995) p 22

⁴⁶ Ibid p 22

⁴⁷ Alston, Philip and John Tobin. *Laying the Foundations for Children's Rights. An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*. (UNICEF: 2005) p 9

UNCRC recognizes the importance of states making the provisions of the document applicable at the national level. Under Article 4 “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” States vary economically, socially and culturally and this determines what legislative and administrative mechanisms are put in place to domesticate international conventions. This may not always work positively. For example, in some Islamic states general or particular human rights obligations are only acceptable if they are consistent with the requirements of the Islamic Shari’a law. This in some cases has led to abuse of child rights.⁴⁸

According to UNICEF, states through governments play an important role in the implementation of conventions because they are the ones who are mainly involved in making economic decisions. Other parties involved in making decisions about resources are nongovernmental organizations, communities, households and the private sector. The result of such decisions should be to ensure that adequate resources are available for use, in the most productive way, for implementing child rights.⁴⁹ This should also apply to other conventions. Adequate resources should be available to meet the provisions of treaties ratified by states, so that those provisions benefit citizens. Parker says that one way to make state parties accountable to the CRC is for them to set time-bound objectives, with corresponding strategies, programmes, budgets and measurement mechanisms for assuring a minimum set of children’s rights.⁵⁰ This

⁴⁸ Freeman, Michael. *The Moral Status of Children: Essays on the Rights of the Child*. (Kluwer Law International: 1997) pp 65-66

⁴⁹ UNICEF. *Impact of the United Nations Convention on the Rights of the Child*. (UNICEF: 1994) p 39

⁵⁰ Ibid p 55

should also be applied to other conventions to enable states to measure progress in their obligations. Once international conventions are ratified at the international level, states should come up with domestic laws and policies which will enable the implementation of the treaty provisions at the domestic level. For countries that have Development Plans, they should include in these plans how obligations in international conventions can be met. This will help in progressive implementation of the standards contained in conventions. Himes says that most international systems have some capability to develop concrete plans or programs for action to achieve agreed goals. He further says that countries that have developed strong National Plans of Action or subnational programmes of action following the World Summit for Children, have a good basis for implementing the Convention on the Rights of the Child.⁵¹

1.4.3. Conclusion

According to the literature review, the following can be concluded; many states ratify international conventions out of good will and they are expected to make these international conventions a reality at the domestic level. However, each state has its own way of applying international conventions at the domestic level, using either the monist or dualist approach. Depending on the approach used, the duration taken to make a treaty applicable domestically will depend on when the necessary legislation is put in place by a particular country and also on political good will. For countries that use the monist approach, the treaty may become applicable as soon as it is ratified because no separate legislation may be required. For a country that uses the dualist approach, it may be some time before the treaty is made applicable as legislation is made and the legislation may not even involve the whole of the treaty. Some countries may choose to make legislation based on the provisions they feel are favourable to be

⁵¹ Himes, R. James. *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low Income Countries*. (The Netherlands: 1995) p 22

applied at a particular time. The government is the main representative of a state during treaty negotiations and ratification. But for the treaty to become effective at the national level, other players both at the national and local levels have to come in and play their part. These may include the private sector, nongovernmental organizations, and even the community itself.

1.5. Theoretical Framework

On the international plane states assume international responsibility for meeting treaty obligations. At the domestic level, how to implement such obligations and realize the rights and obligations of individual and legal persons depends on the legal system of each state and the way in which it handles the relations between international law and domestic law.⁵² There are two general approaches that explain how international treaties are applied at the domestic level. These are; dualism and monism.⁵³ In discussing the relation between municipal and international law, Brownlie says that both approaches assume that there is a common field in which the international and municipal legal orders can operate simultaneously in regard to the same subject matter and the problem is which is to be the master.⁵⁴ In monism, a treaty that has been concluded in accordance to the constitution of a state may become part of domestic law without legislation. For monists, International Law is automatically part of a state's domestic legal system and is just as much domestic law as is contract or tax law. International law is superior to domestic law. The national legislature is bound to respect International Law when passing legislation; and the executive is obliged to follow International Law, when in the face of contrary domestic law; and the judiciary is bound to give effect to International Law.⁵⁵

⁵²Hanqin, Xue and Jin Qian. *International Treaties in the Chinese Domestic Legal System*. Oxford Journals. Law and Sciences. Chinese Journal of International Law. Vol. 8 Issue 2. pp 229-322

⁵³ Aust, Anthony. *Modern Treaty Law and Practice*. (Cambridge: 2007) pp 182-195

⁵⁴ Brownlie, Ian. *Principles of Public International Law*. (Oxford: 1990) p 33

⁵⁵ Dunoff, Jeffrey L. Steven R. Ratner and David Wipman. *International Law: Norms, Actors, Process*. (New York: 2002) pp 253-254

In dualism the rights and obligations created by international agreements have no direct effect in domestic law. Legislation has to be specifically made for those rights and obligations to have effect in domestic law. International and domestic laws are in fact two totally and essentially different bodies of law which have nothing in common. For dualists, International Law governs relationships among states, while domestic law governs relations between a state and its citizens and among citizens. Neither legal order has the power to create or alter rules of the other.⁵⁶ Each state should determine for itself whether, when and how International Law will be incorporated into domestic law. When municipal law provides that international law applies in whole or in part within the jurisdiction, it is merely an exercise of the authority of municipal law on adoption or transformation of the rules of international law. In case of a conflict between international law and municipal law the dualist would apply municipal law.⁵⁷ Dualism, unlike monism has greater certainty and precision because a state makes it clear which international rules are accepted in its domestic law and which are not. Pure forms of monism and dualism rarely operate in one single country. Different states tend to fall along a continuum between pure monism and total dualism. Some jurists are of the opinion that there is no strict dichotomy between monism and dualism. Municipal law and international law do not have to be in conflict with each other since they work in different spheres and each is superior in its own field.⁵⁸

Dualism and monism apply only at the domestic level. At the international level, for instance in an international court, a state may not invoke its internal law as justification for its failure to perform a treaty obligation. This is according to article 27 of the Vienna Convention on the Law of Treaties (1969). It is assumed that a state which has contracted valid international obligations is bound to make in its legislation such modifications as are necessary to ensure the

⁵⁶ Brownlie, Ian. *Principles of Public International Law*. (Oxford: 1990) p 33

⁵⁷ Ibid, p 34

⁵⁸ Ibid p 36

fulfillment of those obligations.⁵⁹ This may be done by either transforming the rights recognized in the treaty into municipal law through a constitutionally entrenched, justifiable statement of rights or by regarding the treaty as self-executing.⁶⁰ Whether a state applies the dualist or the monist approach, once it has become a party to an international convention, it is assumed that it will make the provisions of that international convention applicable in its territory. This study will seek to find out what approaches are used by Kenya and Sweden and look at the step by step process of how the CRC was domesticated in the two countries.

1.6. Hypothesis of the Study

The following hypotheses will guide the study:

1. Domestication of conventions affects applicability of international conventions at the state level.
2. Domestication of conventions does not affect applicability of international conventions at the state level.
3. Lack of domestication means that international conventions cannot apply at the state level.

1.7. Research Methodology

1.7.1. Sources of Data

This research has used both primary and secondary sources of data. It involved a desk review of secondary sources of data through the collection and analysis of constitutions, periodic state reports on the implementation of the CRC and other reports, laws such as the Kenya Children Act 2001, books, newspaper articles and other reliable sources including the internet. The Department of Children's Services under the Ministry of Gender, Children and Social

⁵⁹ Jayawickrama, Nihal. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. (Cambridge: 2002) p 97

⁶⁰ Ibid, p 97

Development was contacted for more information on how Kenya domesticated the CRC. The Ministry of Foreign Affairs and the Attorney General's Office were contacted for information of how Kenya has been going about the ratification and domestication of international conventions. Information about Sweden was obtained with advice from the Swedish Ombudsman for children to consult Sweden periodic reports to the UN Committee on the Rights of the Child and Ministry of Foreign Affairs official.

1.7.2. Research Design

Descriptive Survey design was used to analyze, compare and interpret data collected on the various topics in the research. The study describes the different approaches used in domestication and examples of treaty practice by other states. Case Study design was used to analyze the processes of domestication in Kenya and Sweden. Simple interviews were conducted with relevant officials in both Kenya and Sweden. There was no need for a questionnaire to be given to the interviewees because the questions were few and not sensitive. The researcher needed to interact a lot with the interviewees for clarification on the processes. The intention of the information collected was to answer the questions in this research on how domestication of international conventions is done especially in Kenya and Sweden and how it was done for the United Nations Convention on the Rights of the Child in Kenya and Sweden. It will also help to understand the two approaches used in domesticating international conventions.

1.7.3. Data Analysis and Presentation

The data collected was analysed based on the topics under the study such as ratification of treaties, approaches used in domestication of treaties and treaty practice. This analysis helped in getting relevant information to the research questions and objectives. The data is presented and interpreted in essay form and in different chapters of the research. Essay form is an

appropriate way of presenting data in this research since a lot of information here is descriptive, for example describing the processes of domestication. Information on both Kenya and Sweden under different topics has been put in the same chapter for easy comparison. This is information that describes their domestication processes and the ways in which they have actually met the provisions of the CRC under domestic laws and policies.

The main limitation of the study is availability of data. It was difficult to get information on both Kenya and Sweden. An official at the Children's Department confessed that detailed information may be difficult to come by because by the time the UNCRC was domesticated in Kenya, the department was under the Ministry of Home Affairs and it has since moved to the Ministry of Gender, Children and Social Services. It has been some time since the enactment of the Children Act and most government officers involved in the process have moved across ministries and because of poor record keeping such information is challenging to obtain. It was challenging to get information about Sweden because it wasn't possible to get such information from the Swedish Embassy in Kenya. Information was gotten via e-mail from officials in Sweden working in the Ministry of Foreign Affairs and Children Ombudsman.

1.8. Chapter Outline

Chapter one contains Introduction and Background of the Study; Statement of the Research Problem; Objectives of the Research, Theoretical Framework; Hypothesis; Literature Review; Justification of the Study and Research Methodology. A lot of this information has been obtained from books, government publications, UN publications and also from the internet. This chapter forms the basis from which all the other chapters shall develop. Chapter two is dedicated to domestication of international conventions. The argument in this chapter is that states are free to domesticate international conventions based on the approach they choose,

between monism and dualism. It includes examples of different domestication processes of a few countries.

Chapter three includes case studies for Kenya and Sweden. It looks at the process of domesticating international conventions in Kenya and in Sweden. It narrows down to what Kenya and Sweden have done to domesticate the UNCRC. It highlights major steps taken towards domestication immediately after ratification and entry into force of the CRC. Chapter four is an analysis of the findings of this study based on research objectives and questions, hypotheses and research findings about Kenya and Sweden domestication processes. Chapter five contains summary of the findings from the research. Conclusions are drawn from these summaries and recommendations made on the different issues that arise from the study.

CHAPTER TWO

DOMESTICATION OF INTERNATIONAL CONVENTIONS

2.0. Introduction

This chapter discusses how countries apply international law and treaties at the national level. It discusses states' treaty practice by looking at the role of the Executive, the Legislature and the Judiciary in domesticating international law and treaties and the role of dualism and monism in transforming and incorporating international law and treaties into domestic law as well as prioritizing the two at the national level. It also gives detailed examples of states' treaty practice and a brief description on how each domesticated the UNCRC.

2.1. Domestication Processes

In the past, treaties, conventions and other international instruments used to regulate matters such as war, treatment of aliens, diplomatic immunities and a few others. In the modern world, international instruments have become a dominant source of international law by which states structure their rights and obligations through both bilateral and multilateral agreements. These agreements cover a variety of matters including human rights, criminal law, cyber crime, trade and trademarks, use of natural resources, environmental management, cultural heritage, chemical weapons, terrorism and so on. There are more than one international agreements covering one issue. States are bound by a number of agreements covering different issues of international concern. For example the USA is bound by 10,000 treaties and international agreements. France is party to 6,730 international agreements while China has more than 6,000

bilateral agreements and 273 multilateral agreements. South Africa is party to roughly 1,800 treaties.⁶¹

International agreements are important and states must in some way or the other interact with some of the thousands of international agreements in the international system. States have treaty practices which define how they relate not only to international law generally, but with those treaties that they ratify. Treaty practice refers to procedures and practices followed in the handling of treaties, conducted within the framework of international law as well as domestic law, including such matters as treaty drafting, adoption, processing for signature, signature, ratification, tabling of reservations and declarations; the management of treaty records and publications; management of domestic constitutional and parliamentary procedures; implementation of treaty obligations in domestic law and depositary functions.⁶²

Treaty practice establishes the political and legal philosophy which governs the relationship between international law and domestic law. It also specifies the relationship among the different branches of government, regarding treaties, describing the role of each of the branches of government in the treaty domain, from its negotiation, ratification, and its interpretation. In some countries, treaty practice is not enshrined in the national constitutions and is therefore ad hoc.⁶³ For example Kenya's treaty practice was ad hoc until it was enshrined in the Kenya Constitution, 2010. In others, treaty practice is enshrined in the constitution of the country. For example, in Article 8 (1 and 8) of the Constitution of Japan 1946, the Emperor has the functions of promulgation of amendments of the constitution, laws, cabinet orders and

⁶¹ Hollis, Duncan B. *A Comparative Approach to Treaty Law and Practice*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=790926 p 1 Cited on 25th November 2012.

⁶² Centre for International Law, National University of Singapore and British Institute of International and Comparative Law. *Workshop on Treaty Law and Practice*. Grand Copthorne Waterfront Hotel. 16-19 January 2012, Singapore. Workshop Report 10th October 2012. <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/12/Final-Treaty-Workshop-Report.pdf> Cited on 20th June 2013.

⁶³ Mwagiru, Makumi. From *Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice*. Journal of Language, Technology and Entrepreneurship in Africa. Vol. 3 No 1 2011. p 145

treaties; and attestation of instruments of ratification and other diplomatic documents as provided for by law. Under Article 73 (3), the Cabinet may conclude treaties with subsequent approval of the Diet (parliament in some states).⁶⁴ In France the Constitution has detailed provisions on treaty practice – Articles 52, 53, 53-1, 53-2, 54, 55, 61, 74, 88-1, 88-4 and 88-5. Article 52 states that the President of the Republic shall negotiate and ratify treaties.⁶⁵

Some states assign the power to negotiate and conclude treaties to the Executive. In states with presidential systems, the president has the authority to negotiate, sign and ratify a treaty on behalf of the state. The president may delegate this power to the Ministry of Foreign Affairs. Before the ratified treaty becomes enforceable at the national level, it must be debated upon by the legislature. If it is approved by the legislature, the president can sign it to become law. The president may object the proposed law and practice veto power by refusing to sign it. The proposed law may be taken back to the legislature who may override the president's veto power by passing the same bill again with two-thirds majority of members present during debate. Even if the legislature approves the proposed law after the president's veto, the president has to sign it before it can become law. For example in the American presidential system, the legislature must debate and pass various bills. The President has the power to veto the bill, preventing its adoption. However, the legislature may override the President's veto if they can muster enough votes.⁶⁶

In states with parliamentary systems of governance the Head of State and government bears the responsibility of making treaties. This treaty-making power is exercised only through

⁶⁴ Constitution of Japan 1946. <http://www.ndl.go.jp/constitution/e/elects/col.html>, and http://www.biicl.org/files/626_compilation_state_japan.pdf. Both cited on 17th July 2013.

⁶⁵ Constitution of France of 4 October 1958. <http://www.assemblee-nationale.fr/english/8ab.asp> and <http://www.ndl.go.jp/constitution/e/elects/col.html>, and http://www.biicl.org/files/6259_compilation_state_france.pdf. Both cited on 17th July 2013.

⁶⁶ Szilagyi, Ilona. *Presidentialism versus Parliamentary System*. AARMS. Vol 8, No. 2 (2009) p 308 <http://www.zmne.hu/aarms/docs/vol8/issu2/pdf/iszil.pdf> Cited on 3rd July 2013.

the legislature. Consultations are held with the legislature at every stage of treaty making before the treaty is finally ratified. In some cases, the government, through cabinet members, has the treaty-making power and not the Head of State. As much as the executive have the treaty-making power, the legislature, national courts and national populations may restrict when and how the executive may exercise this power. For example the judiciary may have to review a proposed treaty before it is signed by the executive. Some treaties may be consented to directly by the executive power and others may need parliamentary action or approval which may involve the enactment of legislation to ensure that the state can legally or politically implement the obligations of the treaty. Even where the executive concludes treaties without legislative approval, they always notify the legislative of their intention to consent to a treaty. For example in the United Kingdom, any treaty requiring ratification should be submitted to Parliament 21 days before signing by the Secretary of State for the Foreign Commonwealth Office. Treaties that require parliamentary action or approval may take some time before they are ratified because of debates and discussions held before approval. Treaties signed by executive's consent alone have to be brought to parliament for legislative enactment into domestic law.

The principles that govern international law, including international treaties, commit states to respect treaties that they establish. However, states remain free to determine how they may be regarded as law within their national law by domestic legal, executive and judicial institutions.⁶⁷ International law lacks effective enforcement mechanisms and for it to have effect on people's lives it should be applied at the national level. When applied at the national level it determines the extent to which individuals can rely on international law for the vindication of

⁶⁷ Marian, Brindusa. *The Dualist and Monist Theories: International Law's Comprehension of these Theories*. http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf p 1 Cited on 2nd December 2012

their rights within the national legal system.⁶⁸ At present, there is no general rule of international law providing how States should incorporate international law into municipal legal systems. There is not even a general obligation that States should make international law enter into the national realm.⁶⁹ Each state determines on its own how to domesticate international law depending on its views on the relationship between international law and municipal law.

A state can either follow the monist approach or the dualist approach in describing the relationship between international treaties and municipal law. The difference between the dualist and monist systems relates, at a practical level, to the steps needed before an international treaty has effect within the national system and what a court is to do in a situation where the obligations under international and national law differ.⁷⁰ For monists international law and municipal law are part of the same legal system and once a state has ratified treaties, they should automatically become incorporated into the municipal law of the country. In countries that follow the monist approach, once treaties they have ratified enter into force, they have direct effect on the national legal system. For example in Mexico, all treaties with Senate approval become law of the land directly. Article 133 of the Constitution states that all treaties which are in keeping with the Constitution and which have been or may be concluded by the President of the Republic with the approval of the Senate are the supreme law of the Union. Human rights instruments become part of internal law after ratification by the Senate. The courts of each state makes ruling on the basis of the Constitution, laws and treaties.⁷¹ Once Switzerland ratifies a treaty, it becomes

⁶⁸ Duru, Onyekachi Wisdom Ceazar. *International Law versus Municipal Law: A Case Study of Six African Countries. Three of Which are Monist and Three which are Dualist.* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142977 Cited 2nd December 2012.

⁶⁹ Torrijo, Ximena Fuentes. *International Law and Domestic Law: Definitely an Odd Couple.* p 3 http://www.law.yale.edu/documents/pdf/sela/XimenaFuentes_English.pdf Cited on 25th November 2012

⁷⁰ Kenya National Commission on Human Rights. *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities And Considerations. Occasional Report.* 2011 p 8

⁷¹ United Nations. *International Human Rights Instruments : Core Document Forming Part of The Reports of States Parties: Mexico* (1992) p 16

domestically applicable.

In some states a treaty is given direct domestic effect after ratification and completion of additional executive or legislative action. For example in Egypt and Netherlands, treaties become internal law once they are ratified and published. Other states may require publication and promulgation of treaties before they can become municipal law. This is the case in France, Chile and Japan, where treaties become domestic law upon public publication via a Presidential Decree. The Russian Constitution provides for international treaties to become part of domestic law. However, Russia's Supreme Court says that provision applies to treaties with legislative approval and not to executive treaties.⁷²

In dualism, international law, including treaties, operates at the international level. Treaties are applied at the domestic level only after states transform them into municipal law. After ratification at the international level, additional domestic procedures are required before a treaty can be accepted as law internally. Transformation requires that the legislature which is responsible for making laws domestically, adopt the legal measures from the treaty into a national provision or to introduce it through a legal plan that facilitates admission. This entails making treaties part of the statutes of the country.⁷³ The statutes reformulate the treaty obligations. Treaties are given indirect domestic effect through existing legislation or the enactment of new laws. The implementing legislation may read differently from the treaty or it may quote treaty obligations verbatim. Some countries may use both the monist approach and the dualist approach. In China, some treaties are directly applicable while others require implementing laws or regulations. In Germany, the executive has the authority to both approve

⁷² Hollis, Duncan B. *A Comparative Approach to Treaty Law and Practice*.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=790926 p 3. Cited 25th November 2012

⁷³ Mwagiru, Makumi. *From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice*. Journal of Language, Technology and Entrepreneurship in Africa. Vol. 3 No 1 2011. p 146

and to transform a treaty into domestic law. However, some treaties require a law of enactment to enter into force and to become national law. Each state must decide how to meet their international obligations whether they choose to be monist or dualist or to coordinate the two systems of law.

Dualism and monism also determine the priority given to domestic law and international law within a nation. For monists international law has a primary place over domestic law. Domestic legal systems must always conform to the requirements of international law or find themselves in violation. This should be the case whether or not international legal norms have been transformed into domestic law. For dualists when the two systems of law conflict, courts should use municipal law. A state can be monist with regard to treaty law but dualist with regard to customary international law. For example, according to the Netherlands Constitution of 1983 international treaties are above the Constitution, but customary international law does not have the same status. In Germany, Italy and Austria, by contrast, customary international law is superior to domestic statutes, but treaties are equal to domestic statutes, with the last in time rule determining which is valid. In Russia, principles and norms of international law and international agreements are part of Russia's legal system. Where there is conflict between an international agreement and internal law, then the rules of the international agreement shall apply. In France treaties have a higher status than domestic law and nothing is said in the French Constitution concerning the status of customary international law. In the United Kingdom customary international law is viewed as part of the common law. The Parliament however passes statutes that make other international rules applicable domestically. It has the sole responsibility of making national laws and it can even pass statutes that are in conflict with prior treaties.⁷⁴

⁷⁴Ginsburg, Tom. *Locking In Democracy: Constitutions, Commitment, and International Law*. 2006.

Treaties may also be applied by national courts of states. International treaties are enforced by courts in three circumstances. First, there is indirect enforcement where a right in a treaty is enforced through legislation that makes the right actionable. In indirect enforcement, a treaty that does not provide a private right of action, can be enforced indirectly through enacting an implementing legislation to give force and effect to a particular treaty obligation. In the United State of America, Congress has the authority to implement treaties through legislation that may create private rights that allow individual plaintiffs to sue to enforce international legal obligations. Several treaties that have been enforced through implementing legislation include private rights of action. For example, the UN Convention Against Torture is enforced partly through the Torture Victim Protection Act. The Hague Convention on International Child Abduction is implemented through the International Child Abduction Remedies Act. This act provides for a cause of action for individuals seeking to assert their parental rights in court.⁷⁵

Secondly, there is defensive enforcement where a treaty is invoked defensively by a private party who has been prosecuted or sued under a statute that is inconsistent with a treaty provision. In America, the defensive enforcement of treaties is permitted even for treaties that do not provide private rights of action. It can be used by a private party for defence against a claim by the US government. A private party may also seek defence against a claim by another private party under state or federal law.

Thirdly, there is interpretive enforcement where courts look to treaties when interpreting statutes and even constitutional provisions.⁷⁶ In enforcing international law, national courts are faced with the question of whether they interpret and apply these norms correctly. Common

www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName. pp 714-715.

⁷⁵Hathaway, Oona A., Sabria McElroy and Sara Aronchick Solow. *International Law at Home: Enforcing Treaties in U.S. Courts*. The Yale Journal Of International Law [Vol. 37: 1) pp 76 -77

⁷⁶ Ibid, p 77 - 78

international agreements may have different domestic translations and interpretations because national court judges are trained differently depending on the state system and access to and understanding of international law is often shaped by domestic law, language filters and local access. As much as treaties create common and reciprocal obligations for states parties, they may be interpreted and applied in many different ways at the national court level. To minimize these varying interpretations and applications, courts will frequently look at the case laws of other state parties to ensure that common obligations are interpreted in a consistent way.⁷⁷

2.2. Examples of States' Treaty practice

The following are detailed examples of states' treaty practice. Most countries practice dualism. States are not ready to incorporate treaties directly into the state. They analyze treaties to see whether their provisions conform to their existing national laws and consider whether new legislation is needed for provisions not covered in the existing laws. It is rare to approve a treaty that is in conflict with national laws. Under the country examples there is a brief description of how each country domesticated the UNCRC. The information in this section only covers what was done immediately after ratification because these countries are not the main focus of the study.

2.2.1. Australia

In Australia treaties are the responsibility of the executive. After treaties are signed, they are tabled in Parliament 15 days before legally-binding action is taken. The relevant government department with portfolio responsibility prepares a National Interest Analysis (NIA) which describes a treaty's potential economic, social, cultural, environmental and legal impact, direct

⁷⁷ Roberts, Anthea. *Comparative International Law : The Role of National Courts in Creating and Enforcing International Law*. Cambridge Journals. International and Comparative Law Quarterly. Vol. 60, January 2011. pp 74-84.

costs, any implications for national implementation, the possibility of denunciation or withdrawal and the extent of consultation. The NIA is finalized by the Department of Foreign Affairs and Trade and the Office of International Law of the Attorney-General's Department. There is a Joint Standing Committee on Treaties which inquires into and reports on matters arising from treaties, NIA's, proposed treaty actions and Explanatory Statements presented or deemed presented to Parliament; any question relating to a treaty or international instrument, whether or not negotiated to completion, referred to the Committee by Parliament or a Minister, and other matters as referred to it by the Minister for Foreign Affairs.⁷⁸ The Commonwealth of Australia is the one with international legal responsibility, but according to Australia's constitution, to give effect to Australia's treaty obligations, the Commonwealth depends to some degree upon State and Territory legislation. After concluding treaty negotiations and adopting a final text, consultations are held with interested constituencies in the Commonwealth, States and Territories to decide whether Australia should become a party to that treaty. There may also be public consultations to determine community views on the impact of a certain treaty. Views are sought on the provisions of the treaty, what needs to be done to implement it, likely financial costs and the foreseeable economic, environmental, social and cultural effects of implementation.⁷⁹ Ratification of a treaty is done when the law and practice of the Commonwealth and the States are in conformity with that treaty.

Australian courts can use treaties that are ratified by Australia to interpret domestic laws that are not very clear. But treaties used to do this are ones that parliament has made clear their

⁷⁸ New South Wales Young Lawyers International Law Committee. *The Practitioner's Guide to International Law*. (South Wales: 2010) p 13-14

⁷⁹ Ibid p 14

connection to the existing domestic legislation. In all cases, domestic interpretation of law should be done in a way that conforms or is consistent with ratified treaties.⁸⁰

Domestication of the UNCRC in Australia

In Australia state involvement in the UNCRC was great even during the negotiations before ratification. During the drafting stages of the UNCRC, the Federal government consulted the state and territory governments. State government representatives also participated in the Australian delegations to the UN working Group which drafted the Convention. Following further consultations with state and Territory Governments, the Convention was ratified on 17 December 1990 and entered into force on 16 January 1991.⁸¹

The general approach taken in Australia to human rights and other conventions including the UNCRC is to ensure that domestic legislation, policies and practice comply with conventions prior to ratification. Conventions are not enacted as domestic law. In December 1992, the Attorney General declared that the UNCRC would be made an international instrument for the purposes of the Human Rights and Equal Opportunity Commission Act 1986. The Commission would be able to handle acts and practices of the federal government which were against the Convention. This declaration took effect on January 1993. In addition to the rights provided for under the Human Rights and Equal Opportunity Act 1986, the provisions of the Convention are implemented by a wide range of federal state and territory legislation, policies and programs which affect children. There are laws, policies and programs in the areas of family law, social

⁸⁰ Ibid p 14

⁸¹United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1993. Addendum: Australia.* 1996. p 1

security, health and community services, education, employment, culture and criminal and juvenile justice.⁸²

2.2.2. India

India follows the dualist approach in its implementation of international law at the domestic level. International treaties do not automatically form part of national law. They must be transformed into the legal system by a legislation made by Parliament. According to the Constitution of India the Central Government of India has the executive power to enter into and implement international treaties.⁸³ The executive powers of Central government are derived from the legislative power of the Union of India. The executive powers of the Union of India are specifically vested in the President. The president can exercise such executive power by acting directly or through the officers subordinate to him in accordance with the Constitution. A treaty may be implemented by exercise of Executive power. Where implementation of a treaty requires legislation, the Parliament under Article 253 of the Indian Constitution has exclusive powers to enact a statute or legislation. Under the article, the Parliament is empowered to make any law, for the whole or any part of the territory of India, for implementing “any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”⁸⁴

Article 51 (c) of the Indian Constitution gives the basic provision for implementing international law through municipal law. The Article enjoins the State “to endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one

⁸² Ibid p 2

⁸³ Agarwal, Sunil Kumr. *Implementation of International Law in India: Role of Judiciary*. <http://ssrn.com/abstract=1864489>. Cited on 22nd November 2012

⁸⁴ Government of India. Ministry of Law and Justice. *The Constitution of India (As Modified upto the 1st December 2000*. p 183

another.”⁸⁵ Therefore, the government has to strive to achieve the objectives of international treaties ratified by it in good faith, through executive or legislative actions. Further, the decisions and practice of courts in India concerning issues of international law show that the judiciary, though not empowered to make legislations, is free to interpret India’s obligations under international law into the municipal laws of the country.⁸⁶

Domestication of the UNCRC in India

The government of India ratified the UNCRC on 2 December 1992.⁸⁷ The government took various initiatives to review the national and state legislations to bring them into line with the provisions of the Convention. At that time a wide range of laws together with provisions in the Indian Constitution guaranteed to a substantial extent the rights and entitlements provided for in the Convention, for example, the Apprentice Act (1861), the Guardian and Wards Act (1890), the Juvenile Justice Act (1986), the Hindu Adoption and Maintenance Act (1956), etc.⁸⁸ At the national level, the government through ministries and departments initiated measures to incorporate the provisions of the Convention in their programmes and activities. At the provincial level, the state governments incorporated articles of the Convention in their plans of action for children. The Department of Women and Children Development in the Ministry of Human Resources Development has the responsibility for coordinating the implementation of the Convention. It has set up an interministerial committee from relevant ministries to monitor

⁸⁵ Ibid p 52

⁸⁶ Agarwal, Sunil Kumor. *Implementation of International Law in India: Role of Judiciary*. <http://ssrn.com/abstract=1864489>. Cited on 22nd November 2012.

⁸⁷ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1995: Addendum: India:1997*. p 8

⁸⁸ Ibid pp 4-5

implementation. The government also works together with experts and nongovernmental organizations in areas related to child rights.⁸⁹

2.2.3. Ghana

Ghana is a dualist state. It ratifies a treaty internationally then proceeds to ratify the treaty in accordance to its Constitution. Article 75 of the Constitution of Ghana makes it clear that treaties, agreements or conventions executed by or under the authority of the President must be ratified by Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of the members of Parliament after the requisite Cabinet approval.⁹⁰ For domestic ratification of a treaty in Ghana, there are guidelines to be followed which are contained in the Republic of Ghana Treaty Manual.

After international ratification of the treaty, a domestic process follows which transforms the treaty from international law to domestic law.⁹¹ Advice must be sought from the Attorney-General and Minister for Justice in accordance with article 88 of the Constitution to determine the legal obligations of the Republic of Ghana under the treaty, agreement or convention and also determine if the treaty, agreement or convention conflicts with domestic legislation. The relevant Ministry prepares a Cabinet Memorandum which contains background information on the treaty and explains the contents of the treaty, agreement or convention. It also indicates what decision is required of the Cabinet concerning the international instrument and its benefits to Ghana. It should contain other information relevant to arrive at the Cabinet decision. It further spells out the financial and legal impact if such an instrument is ratified and must state that the Attorney General has been consulted. In Addition, the Memorandum states whether there is

⁸⁹ Ibid pp 10-11

⁹⁰ The Constitution of Ghana. Article 75 (1 and 2).

<http://www.ghanaweb.com/GhanaHomePage/republic/constitution>. Cited on 7th September 2012

⁹¹ Republic of Ghana. Treaty Manual.

need for a new law or an amendment to an existing legislation and specifies where there is need for any reservations to be made. The Cabinet Memorandum is signed by the relevant Minister or Ministers, then it is submitted to the Secretary of the Cabinet, together with the original copies of the international instrument. A Cabinet meeting is held where the treaty is discussed. The decision of the Cabinet is communicated to the relevant ministry or ministries and the Attorney General's department by the Secretary to the Cabinet.⁹²

Where ratification of the treaty is by Act of Parliament the Cabinet approves the relevant Ministry and the Attorney General's Department to draft a Bill and prepare an explanatory memorandum which is then submitted by the relevant Minister to the Cabinet. The Cabinet approves the Bill to be laid in Parliament where the Business Committee of Parliament designates a day for the instrument to be presented before Parliament by the sector Minister or any other Minister designated for that purpose. The instrument is then referred by the Speaker to the relevant Committee (usually the Committee on Foreign Affairs) or joint committee, which makes a report to be laid in Parliament. The report is adopted in Parliament where members debate on it, considering the principles of the instrument. Relevant arguments for and against the matter are raised which are responded to by the sector minister. A resolution is passed at the end of the debate, which is forwarded to the relevant ministry and also to the Ministry of Foreign Affairs and Regional Integration for the preparation of the appropriate instrument. The instrument is then forwarded to the Office of the President for the signature and seal of the President. It is then returned to the Ministry of Foreign Affairs and Regional Integration, which deposits the instrument with the appropriate depository and forwards copies of the instrument to

⁹² Ibid

the relevant Ministry and to the Ministry of Justice and Attorney-General's Department. Domestically the Act of Parliament is published in the Gazette.⁹³

Domestication of the UNCRC in Ghana

Ghana was the first country to ratify the UNCRC in February 1990. This could have been because the country already had in place structures to facilitate and accelerate planned programmes and activities aimed at promotion of child survival and development.⁹⁴ The Ghana National Commission on Children (GNCC) was established in 1979 in preparation for the celebrations of the International Year of the Child. Its objective was to see the general welfare and development of children and coordinate all essential services for children in the country that would promote the United Nations Rights of the Child. Immediately after ratification, GNCC became the main coordinating body for publicizing the Convention as well as facilitating the processes needed to give effect to its provisions. It drew up the National Programme of Action for Children whose principles were later included in the National Development Policy Framework prepared by the National Development and Planning Commission. It was also responsible for organizing seminars for government officials and child related agencies and community forums on child rights.⁹⁵

2.2.4. South Africa

South Africa followed the dualist approach of incorporating treaties until 1994.⁹⁶ Treaty-making fell exclusively within the competence of the executive. Treaties were negotiated, signed, ratified and acceded to by the executive. Only those treaties incorporated by Act of

⁹³ Ibid

⁹⁴ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1992: Addendum: Ghana*. 1995. p 5

⁹⁵ Ibid p 7

⁹⁶ Dugard, John. *Kaleidoscope. International Law and the South African Constitution*. p 81. <http://www.ejil.org/pdfs/8/1/1426.pdf>. Cited on 22nd November 2012

Parliament became part of South African law. All this changed in 1993 after the creation of the Interim Constitution which became the first Constitution of the Republic of South Africa. Under the Interim Constitution, the executive retained its power to negotiate and sign treaties. Parliament was required to agree to the ratification of and accession to treaties. Government departments scrutinized treaties before presenting them to parliament for approval to ensure that there was no conflict between the provisions of the treaty and domestic law. This delayed treaty ratification and only a few treaties were incorporated into municipal law. For example South Africa signed the Convention of the Rights of the Child in 1993 but it was ratified in 1995.⁹⁷

A new Constitution was created in 1996 based on the principles of the Interim Constitution. The new Constitution was signed into law by President Mandela on 10 December 1996.⁹⁸ The Constitution sought to solve the delay problems caused by the 1993 Interim Constitution. Under article 231 of the 1996 Constitution, the national executive has the responsibility to negotiate and ratify all international agreements. South Africa shall only be bound by international agreements that have been approved by resolution in both the National Assembly and the National Council of Provinces. However, South Africa shall be bound by an international agreement of a technical, administrative or executive nature, or an agreement entered into by the National Executive, which does not require either ratification or accession. These agreements do not need the approval of the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. Any international agreement becomes law in the Republic after enactment by national legislation. A

⁹⁷ Ibid p 82

⁹⁸ Statutes of the Republic of South Africa – Constitutional Law. *Constitution of the Republic of South Africa. No. 108 of 1996.* <http://www.info.go.za/documents/constitution/1996/a108-96.pdf>. Cited on 6th September 2013

self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.⁹⁹

Domestication of the UNCRC in South Africa

Following the ratification of the Convention in June 1995, the South African government sought to bring legislation, policy and practice in line with the requirements of the Convention.¹⁰⁰ This is clearly reflected in Section 28 of the Bill of Rights of the 1996 Constitution, which deals specifically with children's rights.¹⁰¹ The National Plan of Action, approved by the Cabinet in 1996, is the instrument by which South Africa's commitment to children is carried out. It is an integration of all the policies and plans developed by government departments, nongovernmental organizations and other child related structures. It ensures that these plans and policies converge with the framework provided by the Convention, the World Summit for Children goals and national development programme.¹⁰² Statutes affecting children have been approved by parliament. For example, the Films and Publications Act (1996) introduces measures to protect children from exploitation through child pornography and exposure to inappropriate material; the National Education Policy (1996) makes provisions for minimum norms and standards for education; the South African Schools Act (1996) provides for the transformation of South African schools; and the Child Care Amendment Act (1996) brings the 1983 Child Care Act in line with the new Constitution and the Convention.¹⁰³

⁹⁹ Ibid p 82

¹⁰⁰ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1997. Addendum: South Africa.* 1997. p 9

¹⁰¹ Statutes of the Republic of South Africa – Constitutional Law. Constitution of the Republic of South Africa. No. 108 of 1996. p 9 <http://www.info.go.za/documents/constitution/1996/a108-96.pdf>. Cited on 6th September 2013

¹⁰² Ibid p 9

¹⁰³ Ibid p 10

2.2.5. China

The constitution of China and basic laws do not contain any provision on the legal status of international treaties and their hierarchy in the domestic legal system. In practice, the constitution ranks the highest among Chinese laws. Treaties concluded and ratified should not contravene the Constitution or basic laws.¹⁰⁴ Conflict between international treaties and domestic law is rare, but when it arises, the international treaty takes precedence unless there was an earlier reservation on the issue of conflict.¹⁰⁵ The State Council has the power to conclude treaties and agreements with foreign states.¹⁰⁶ According to China's Constitution, under Article 67 (14) the Standing Committee of the National People's Congress approves China's accession to international agreements which are consistent with domestic law.¹⁰⁷ This is for treaties on important matters such as national sovereignty, fundamental rights of citizens, legal system on civil affairs, finance, taxation, customs and trade, etc. Ratified treaties do not automatically become part of national law or have automatic domestic legal effect. It is only through specific national laws that substantive treaty rules can be applied as part of domestic laws. This includes human rights treaty provisions. International human rights instruments for ratification or accession by China are first studied and discussed by the relevant Government departments. They are then referred to the Standing Committee of the National People's Congress for approval and ratification. Once approved the provisions of the instruments become applicable under provisions under Chinese law. They are publicized throughout the country and the departments

¹⁰⁴Hanqin, Xue and Jin Qian. *International Treaties in the Chinese Domestic Legal System*. Oxford Journals. Law and Sciences. Chinese Journal of International Law. Vol. 8 Issue .2 pp 229-322

¹⁰⁵ United Nations. *International Human Rights Instruments: Core Document Forming Part Of The Reports Of States Parties: China*. 1993. p 16

¹⁰⁶ State Council consists of the Premier, vice premier, state councilors, ministers, auditor-General and Secretary-General. The premier has overall responsibility for the State Council.

¹⁰⁷Constitution of the People's Republic of China (1982).

<http://www.purdue.edu/crcs/itemResources/PRDoc/pdf/constitution.pdf> p 13. Cited on 7th September 2013.

concerned start to put them into effect.¹⁰⁸ The judicial and executive authorities and all public associations concerned can apply international treaties' obligations once they have been approved by the legislature. There are cases where courts apply treaty provisions to give private parties additional legal protection. China has prescribed to many international treaties on crime and has adopted international crimes as criminal offences under its national criminal law.¹⁰⁹ Where an international instrument does not specify punishment or penalties for offenders, a domestic law corresponding in purpose to the treaty is used for guidance. Supervision of the enforcement of human rights treaties is done under the Chinese legal supervisory system which includes supervision by the organs of state power, administrative bodies, judicial organs and the public. Organs of State power supervise enforcement at different levels. The National People's Congress and its Standing Committee supervise enforcement of the Constitution and laws nationally. People's Congresses and the standing committees of people's congresses at the county level upwards supervise compliance with the Constitution, law, administrative regulations and local ordinances within their respective administrative districts. Supervision entails checking whether laws, administrative regulations, local ordinances and rules are consistent with what is laid down in the Constitution. It also checks whether the Constitution is breached by the actions of the State machinery, any public association or any citizen.¹¹⁰

The National People's Congress has authority to amend or rescind any law or regulation in breach of the Constitution. The Standing Committee of the National People's Congress can rescind administrative regulations, decisions and rulings that contradict the Constitution or

¹⁰⁸ United Nations. *International Human Rights Instruments: Core Document Forming Part of the Reports of States Parties: China*. 1993 p 16

¹⁰⁹ Hanqin, Xue and Jin Qian. *International Treaties in the Chinese Domestic Legal System*. Oxford Journals. Law and Sciences. Chinese Journal of International Law. Vol. 8 Issue .2 pp 229-322

¹¹⁰ United Nations. *International Human Rights Instruments: Core Document Forming Part of The Reports of States Parties: China*. 1993 p 18

national law, including local regulations and resolutions passed by the organs of State in provinces, autonomous regions and municipalities. Local people's congresses and their standing committees are empowered to rescind inappropriate decisions and rulings by the people's government and inappropriate resolutions passed by lower people's congresses.

The Supreme People's Court monitors verdicts and rulings by lower people's courts and higher people's courts monitor verdicts and rulings by people's courts below them. If errors are discovered in a case the courts can review the case or order the lower court to rehear it. The supervision at the different levels is to ensure compliance with and respect for laws and regulations. There is also public supervision which could be done by public organizations through people's political consultative conferences. In these conferences there are consultations, discussions, criticisms and proposals concerning enforcement of the law by State employees. There is also public opinion where people through the mass media, unmask any kind of unlawful and undisciplined behavior. They support and oversee the judiciary's ruling to punish crimes in accordance to law. The masses are also directly involved in statutory supervision, including the enactment, application and enforcement of legislation. The State has set up reception centres, mail offices and telephone links to safeguard and provide opportunity for supervision by the masses.¹¹¹

To heighten awareness the Chinese Government publicizes and disseminates human rights instruments through the daily news broadcasts, the press, etc. Television broadcasts and publications in minority areas use the language of the minorities. Government bodies and popular organizations hold meetings and organize campaigns and lecture tours to publicize information. They also print and distribute materials on different human rights subjects and even have photographic exhibitions and artistic displays on different issues. Human rights of the

¹¹¹ Ibid p 18-19

young, the elderly and the handicapped are taught in primary and secondary schools and also in the streets and houses. Specialized research on human rights is done by research institutes and institutions of higher learning. The general public is also informed on the legal system.¹¹²

Domestication of the UNCRC in China

China signed the UNCRC on 29 August 1990 and ratified it on 29 December 1991 after approval of ratification by the Standing Committee of the Seventh People's Congress. The Convention formally took effect in China on April 1992.¹¹³ Before and after the Convention was signed China's legislative organs drafted and promulgated the Protection of Minors Act, the Compulsory Education Act, the Adoption Act, the Protection of the Disabled Act, the Mothers and Infants Act and other such legislation and regulations to help codify and standardize state protection of children.¹¹⁴ In February 1992, the State Council issued a programme outline for the development of China's children in the 1990s, setting out ten specific strategic objectives for the advancement of the cause of Chinese children together with measures for accomplishing them. All legislative, judicial and governmental departments and public organizations have over the years set up machinery to promote and oversee the protection of children's rights and interests. This machinery is also at the province, autonomous region and municipality levels.¹¹⁵

2.2.6. The Netherlands

The Kingdom of the Netherlands comprises the Netherlands, Aruba, Curaçao and Sint Maarten. A treaty is signed for the entire Kingdom, after which the individual parts of the Kingdom decide whether the treaty should be effective for them. Netherlands considers

¹¹² Ibid p 19

¹¹³ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1994. Addendum: China.* 1995. p4

¹¹⁴ Ibid pp 4-5

¹¹⁵ Ibid p 6

concluding treaties as a way of forging relations with other countries in all manner of subject areas. It is currently party to over 6,000 treaties, and signs about 100 new treaties every year.¹¹⁶ Netherlands is a monist state.¹¹⁷ Current treaty practice is determined by two characteristics. The first is the constitutional provision that, except in certain specified cases, consent for the Kingdom of the Netherlands to be bound by a treaty cannot be given unless the treaty has been approved by Parliament. This enables the Government to conduct an efficient and effective foreign policy and at the same time allow Parliament to exercise proper supervision over that policy. Once treaties are approved for ratification by parliament they become legally binding in domestic law if they are self-executing.

The second characteristic is that, in applying these constitutional provisions the term 'treaty' is interpreted substantively. Whether an instrument substantively constitutes a treaty is also a matter of interpretation, since international instruments vary so much in form and content that many of them are scarcely covered by the brief constitutional provisions on treaties.¹¹⁸

The Ministry of Foreign Affairs is responsible for concluding treaties. The Treaties Division of the Legal Affairs Department carries out the procedures for approving and publishing treaties: formulation, signature, coordination of approval procedures, ratification, entry into force and publication of treaty texts and data in the Treaty Series (*Tractatenblad*). The Treaties Division is also responsible for depositary tasks and the publication of consolidated versions of the treaties on the internet.¹¹⁹

¹¹⁶ <http://www.minbuza.nl/en/key-topics/treaties/treaties-division.html> Cited on 5th September 2013

¹¹⁷ http://en.wikipedia.org/wiki/incorporation_of_international_law Cited on 5th September 2013

¹¹⁸ Netherlands Yearbook of International Law / Volume 19 / December 1988, pp 179-257

<http://dx.doi.org/10.1017/S0167676800001823> (About DOI) Cited on 5th September 2013

¹¹⁹ <http://www.minbuza.nl/en/key-topics/treaties/treaties-division.html> Cited on 5th September 2013

Domestication of the UNCRC in the Netherlands

Following entry into force of the Convention on 7 March 1995, there has been a trend in both legislation and policy towards compliance with the requirements of the Convention. Most of the provisions in the Convention are provided for in the Dutch Civil Code.¹²⁰ Immediately after ratification what is evident are the efforts made to make the Convention known. The first National Youth Debate was held in 20 November 1995 to mark the ratification of the Convention by the Netherlands. The first Children's Rights Festival and a Youth Referendum were also held in 1995. The Children's Rights' Campaign was launched in 1996.¹²¹

2.2.7. France

France is a monist state. According to Article 55 of France Constitution, duly ratified and published treaties take precedence over law.¹²² The terms of such treaties do not have to be translated into national provisions in order to apply in France. They are considered self-executing and can be invoked before the national courts.¹²³ In some cases, a convention or some of its clauses may not always be self-executing. Some conventions require a State Party to choose the modalities of application of certain terms of the convention and others may require implementing texts. In such cases, there is need to draft national implementing texts. Some legislation has developed and strengthened the protection of certain rights provided for in ratified treaties. For example, to give effect to the International Convention on the Elimination of All

¹²⁰ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1997: Addendum: The Netherlands:1997* p 6

¹²¹ Ibid pp 7-8

¹²² The Constitution of October 4 1958. <http://www.conseil-constitutionnel.fr/counsel-constitutionnel/root/bank-mm/anglais/constitution> p 23. Cited on 7th September 2013.

¹²³ United Nations. International Human Rights Instrument. *Core Document Forming Part of the Reports of States Parties. France. 1992.* p 16

Forms of Racial Discrimination, ratified in July 1971, Act No. 72-546 of July 1972 makes punishable incitement to discrimination and other offences under discrimination.¹²⁴

Treaties are negotiated on behalf of the president of France, but he ratifies them. In article 53, ratification of treaties is subject to parliamentary authorization.¹²⁵ Before treaties are ratified they are made public through the media and parliamentary reports. This gives the public opportunity to debate on the treaties before ratification.¹²⁶ Human rights principles and norms are provided for under the Constitution and Law of the French republic. In performing their duties, all French authorities including the administrative authorities within their respective jurisdictions, are competent to apply the human rights principles and norms set forth in the international instruments ratified by France. Constitutional court, council courts, ordinary courts and administrative courts are responsible for ensuring respect for human rights.¹²⁷

2.3. Conclusion

The differences in dualism and monism can be seen in the way international treaties are treated domestically, the way in which international laws and treaties are applied domestically and their usefulness in international human rights treaties.¹²⁸ The practice of dualism prescribes different methods of applying customary international law and treaties in municipal law. Customary international law is easily incorporated into municipal law while treaties have to undergo transformation to become part of domestic law. The monist practice treats both customary international law and treaty in the same way in applying them domestically. It creates unity of international law.

¹²⁴ Ibid p 12

¹²⁵ The Constitution of October 4 1958. <http://www.conseil-constitutionnel.fr/counsel-constitutionnel/root/bank-mm/anglais/constitution> p 22. Cited on 7th September 2013.

¹²⁶ United Nations. International Human Rights Instrument. *Core Document Forming Part of the Reports of States Parties. France.* 1992. p 16

¹²⁷ Ibid p7

¹²⁸ Mwangi, Makumi. *From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice.* Journal of Language, Technology and Entrepreneurship in Africa. Vol. 3 No. 1 2011 pp 152 – 153.

Monism allows direct incorporation of international law into domestic law. This means there is no delays in implementing international law at the domestic level. Dualism may lead to non-application of international law domestically, because states may delay in transforming international law into domestic law. International law may also be implemented in diluted ways depending on how it is translated and applied domestically. One of the major concerns about monism is that the legislative power of parliament may not be exercised if international laws ratified by the Executive directly apply domestically. But this should not be a cause for worry because parliament can still be involved in scrutinizing treaties before it votes on whether to allow the executive to ratify them.

Human rights treaties, especially those promoting and protecting fundamental human rights are applicable to states whether or not they have ratified them. The doctrine of dualism is not useful in this case. Countries practicing dualism may find themselves practicing monism when it comes to human rights treaties because in monism such treaties are immediately incorporated into municipal law. Judges in all countries should be well conversant with human rights treaties because they may have to use them together with municipal law in human rights cases. It is important for constitutions of states to state clearly the relationship between international law and treaties and domestic law to enable consistency in treaty practice. This is especially important for courts so that it is clear what international instruments' obligations may be used to make rulings and decisions in courts.

CHAPTER THREE

DOMESTICATION OF INTERNATIONAL CONVENTIONS IN KENYA AND SWEDEN

3.0. Introduction

This chapter is about how Kenya and Sweden domesticate international instruments and particularly the process of domesticating the UNCRC. In the case of Kenya, it will consider treaty practice before and after the Kenya Constitution 2010 came into force. This is because before the new constitution, treaty practice was ad hoc, but international customary law and treaties are now mentioned in the new constitution and their relationship to national law described. The Treaty Making and Ratification Act 2012 also describes how treaty practice will be handled in Kenya now. The domestication process described in this chapter was used before 2010 under the old constitution.

3.1. Domestication of International Treaties in Kenya

The old Constitution of Kenya did not specify the methods for transforming international treaties into domestic law. Kenya followed the English practice whereby for a treaty to apply, parliament must pass an enabling Act to give effect to it.¹²⁹ This means that Kenya was a dualist state; any treaty or convention ratified by the country did not have the force of law unless it was domesticated by passage of appropriate legislation by parliament.¹³⁰ But in practice, treaty practice was ad hoc. It was not possible to know which treaties were binding and which ones were not and what was the criteria for deciding which were binding or not. Some were binding

¹²⁹ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1992*: Kenya.

¹³⁰ Kenya National Commission on Human Rights. *Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations. Occasional Report*. (Nairobi: 2011) p 7

after ratification only while others were binding after ratification and transformation into Kenya municipal law.¹³¹ Elements of monism and dualism would merge but not consistently.

In practice, the Executive had the treaty-making power. The Executive negotiated and executed treaties on behalf of the country and also exercised powers of ratification. Parliament approval was not necessary for treaty ratification. The Parliament's role was to pass implementing legislation for ratified treaties to make them applicable in the country. Treaties were first ratified before they were tabled in parliament for amendments to other laws to make them conform to the treaties. In some cases parliamentary action was not needed for treaties whose provisions were consistent with the law of Kenya. Treaties containing provisions which were not catered for by existing laws, required parliament to enact a statute to give effect to such a treaty.¹³² In practice, the Office of the Attorney General would screen all international treaties before domestic adoption, to uncover any provisions that may contravene Kenyan law. The Judiciary would only apply treaty obligations that had already been domesticated. However, over the years, courts affirmed their willingness to apply treaty obligations of treaties ratified without reservations, even without Parliamentary legislation.

In the new Kenyan Constitution 2010, Kenya has been transformed from a dualist to a monist state. The Constitution recognizes both domestic law and international law as having effect at the domestic level. Article 2 (1) states that the constitution is the supreme law of the republic and binds all persons and all State organs at both levels of government.¹³³ In article 2 (4) any law including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is

¹³¹ Mwangi, Makumi. *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 2011 p 148

¹³² Ibid p 149

¹³³ National Council for Law Reporting. *Laws of Kenya. The Constitution of Kenya 2010*. Nairobi.

invalid. Article 2 (5) of the Constitution states that the general rules of international law shall form part of the law of Kenya and Article 2 (6) states that any treaty or convention ratified by Kenya shall form part of the law. Under Article 2 (5) international law, including customary international law, shall be a source of law in Kenya. Under Article 2 (6) treaties and conventions do not now have to be domesticated for them to have the force of law in Kenya.¹³⁴ This article will help avoid situations where the country signs a treaty more as a ceremonial gesture than because of real commitment to the tenets of the treaty and thereafter shelves its implementation.¹³⁵ Any treaty that shall be signed and ratified shall have to be applicable in Kenya. However, Article 21(4) of the Constitution provides: “the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.” This means that Kenya may not be a strictly monist state.

Generally treaties may be applied differently in the domestic system depending on whether they are self-executing or non-self-executing. Self executing treaties operate automatically within the domestic system without any form of legislation. Non-self-executing treaties require implementing legislation to have effect in a country’s legal system. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 requires that a state pass legislation in order to make the acts criminalised in the Convention illegal under its domestic law. Human rights treaties are supposed to apply automatically into national laws of states. It may be difficult to know which provisions are self-executing and which ones are non-self-executing. Article 21 (4) of the Constitution of Kenya addresses this problem by ensuring that all human rights obligations are effected through implementing legislation whether they are self-executing or not. The article could also make it necessary for parliament to pass

¹³⁴Kenya National Commission on Human Rights. *Making The Bill Of Rights Operational: Policy, Legal And Administrative Priorities And Considerations. Occasional Report.* October 2011. p 7

¹³⁵ Ibid p 11

implementing legislation for the many human rights treaties that Kenya ratified and did not domesticate before the new constitution.

The introduction of international law norms and ratified conventions directly into the domestic system will bring a change in the treaty practice of Kenya. Recently, the Treaty Making and Ratification Act (no. 45 of 2012) was passed.¹³⁶ It is an Act of Parliament to give effect to the provisions of the Article 2 (6) of the Constitution and to provide the procedure of the making and ratification of treaties and connected purposes. This Act will apply to treaties which are concluded by Kenya from 2012. Under the Act, the Executive is responsible for initiating the treaty making process, negotiating and ratifying treaties. This responsibility may be delegated to a relevant state department. Parliament will still maintain its role of law-making. It will be involved in the process of making or adopting treaties or conventions that will have force of law in Kenya. The public and the Parliament may have to scrutinize international instruments that the Executive signs and address issues of concern before final ratification by the Executive. Parliament may approve or refuse to approve a treaty for ratification. It shall not approve the ratification of a treaty that has provisions that are contrary to the Constitution. Ratified treaties will require immediate action to ensure compliance and enforcement by different state agencies and sectors. Some may necessitate policy change or development, while others may require national plans of action. Under the current constitution courts have a significant role to play in recognizing and applying principles of international law at the domestic level. They also have the role of interpreting provisions and implications of various conventions. The Judiciary must

¹³⁶ National Council for Law Reporting. *Laws of Kenya. The Treaty Making and Ratification Act No 45 of 2012.* Nairobi.

be well conversant with both the local laws and international instruments ratified by Kenya, in order to make correct decisions based on them.

3.2. The Process of Enacting Implementing Legislation for treaties in Kenya

Before a treaty gets to the point of legislation as domestic law, it is first ratified. Negotiations of international conventions are attended to by officials from the Ministry of Foreign Affairs, Attorney-General's office, civil societies and relevant ministry depending on the issue being discussed.¹³⁷ The Head of State is the one who has authority to sign a treaty and any other minister from the Ministry of Foreign Affairs must obtain full powers to sign treaties. Before ratifying, the relevant ministry prepares a memorandum to the Cabinet, with information on the background of the treaty, benefits of the treaty to the nation, implications of ratifying the treaty, etc. When ratification of the treaty is approved by the Cabinet, the Ministry of Foreign Affairs prepares instruments of ratification or accession stating that Kenya wishes to ratify the convention and to be bound by its provisions. This is signed by the minister for Foreign Affairs and forwarded to the UN Secretariat. The Secretariat acknowledges receipt and forwards it to member states. If there is no objection by member states, then it is considered that a country has ratified. The UN Secretariat then forwards the instrument to the depository of treaties in Geneva or New York.

3.2.1. Drafting of a Bill

When Kenya ratifies an international instrument, nationally, the relevant ministry involves all relevant stakeholders in discussing the instrument to come up with a draft / lay bill, in consultation with the Kenya Law Reform Commission (KLRC).¹³⁸ The draft Bill is then

¹³⁷ Information obtained during an interview with Christine Mukwenda, a legal officer at the Ministry of Foreign Affairs on 8th April 2013.

¹³⁸ Information obtained during an interview with Elizabeth Kabui, a state legal officer at the Attorney General's Office on 15th August 2013.

forwarded to the Attorney-General's (AG) office where its contents are checked whether they are consistent with the Constitution, and other existing legislation. The AG's office may redraft the whole bill putting it in proper legal language. It may seek consultations with the relevant ministry to seek understanding of some issues in the lay bill. The Bill is then taken back to the relevant ministry's office, and is signed by the minister. The Bill is published in the Kenya Gazette and is open to the public for debates and public participation. Comments and inputs are received from various stakeholders which may be considered in making amendments to come up with a final Bill. The final Bill is prepared by the AG and then it is released to Cabinet for approval. If need be, the Cabinet may make changes to the Bill before approving it. The AG then publishes the Bill as approved by Cabinet before it is tabled in parliament.

3.2.2. Parliamentary Debates

The Bill then goes through the parliamentary legislative process.¹³⁹ A first reading is when a Bill is introduced to parliament. The Bill is assigned a tracking number and immediately assigned to a Committee. In the Second Reading, the bill is read and discussed a second time. Proposals for amendments to the Bill are made at this stage. A vote is taken in the general outlines of the bill before it is sent to the designated committee which analyses the content of the Bill. During the third reading, the Bill is read with all amendments and given final approval by the parliament. The third reading occurs after the bill has been amended by the designated committee. After parliament debates and passes the Bill, it is taken back to the AG for preparation of the vellum copy. A vellum copy is a final Bill incorporating all amendments suggested during debates.¹⁴⁰ It is in A4 size, sealed and signed by the Clerk of the National Assembly and handed to the president for assent. The granting of Presidential Assent is the

¹³⁹ Kenya National Assembly. *Stages in the Legislative Process*. www.kenyalaw.org. Cited on 4th February 2013

¹⁴⁰ As explained by Elizabeth Kabui of Attorney General's Office.

formal method by which the head of the Executive arm of government completes the legislative process by formally assenting or giving his consent to an Act of Parliament. The President assents to the Bill by signing it. Thereafter, the Attorney-General, without delay, ought to publish the Bill in the Kenya Gazette. It is after publication that the Bill becomes law. The Bill which after passing by parliament becomes an Act of Parliament does not take effect of law immediately. Quite often, an Act of Parliament may provide that it will come into effect on a date to be notified. In such cases, after the Act has received Presidential Assent, notification of the date of its coming into effect is given through a legal notice usually by the Minister for the time being in charge of the matters with which the Act is concerned.

3.3. Domestication of the UNCRC in Kenya

Kenya ratified the Convention on the Rights of the Child on 30 July 1990.¹⁴¹ It ratified the Optional Protocol on the Involvement of Children in Armed Conflict on 28 January 2002. It has not ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the third Optional Protocol on Complaints Procedure for children. It ratified the African Charter on the Rights and Welfare of the Child in 2000.¹⁴² One of the immediate actions towards domesticating the UNCRC was the development of the National Programme of Action for Children in the 1990s (NPA) through a participatory process involving representatives of civil society and the government. The NPA informed subsequent government development plans and policy documents, with regard to issues concerning children.¹⁴³ Secondly, the Attorney-General directed the Kenya Law Reform Commission to review the existing laws

¹⁴¹United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention on the Rights of the Child. Initial Reports of States Parties due in 1992*. Kenya. p 14

¹⁴² Republic of Kenya. *Initial Report to the African Union on the Implementation of the African Charter on the Rights of the Child – 2003 to 2007* p 6

¹⁴³ Republic of Kenya. *National Report for the Special Session of the UN General Assembly on Follow up to the World Summit for Children*. (Nairobi: 2000) p 2

concerning children and recommend improvements that would give effect to the Convention. This was not the first time the Commission was reviewing laws on children. The process of reviewing children's laws had started back in 1984 and the ratification of the CRC only hastened the process. The review Commission of 13 persons which began work in March 1991 included government officers, children's rights advocates, experts and representatives of key child welfare organizations, and academicians. It was chaired by Lady Justice Effie Owuor¹⁴⁴, a judge of the High court and also a commissioner of the Law Reform Commission. It also included Mrs. Z. Wandera, the then Town Clerk of Nairobi; Mrs. Nyaga, Director of Children's Department; Muthoga, a prominent advocate; Dr. Onyango, a senior lecturer in Sociology at the University of Nairobi; Dr. S Muli Misime, a criminologist by profession; Dr. F. Manguyu, Chairlady of Kenya Medical Women's Association and vice president of the International Medical Women's Association; Mrs. Amadi E. Keziah; Mrs. E. Masiga, the chief Inspector of schools; Mrs. Makasi; Professor J. B. Ojwang, a well-known constitutional lawyer; Mrs. G. W. M. Katambo, Senior Principal state counsel, assisted by Mrs. Margaret Nzioka from the AG's chamber.¹⁴⁵

The Review Task Force was mandated to review the existing laws related to children. By this time there were at least 65 different statutes on children laws which made it difficult to offer children proper protection due to different interpretation of rights. In May 1994, the Commission submitted its report to the Government. It recommended that a new child law be enacted which would draw from all existing statutes on children and incorporate relevant principles from the CRC and the African Charter on the Rights and Welfare of Children (ACRWC). It would also attempt to resolve legal problems that affect the rights and welfare of children. As a result, a Draft Child Bill was prepared in 1995 and forwarded to the Office of the

¹⁴⁴ Kariuki, Gachau and Gad Otieno. *All Should Support Children's Bill*. Daily Nation. June 1 1995. p 7

¹⁴⁵ Kenya National Assembly. Parliamentary Debates. 21 July 1995.

Attorney General for drafting into a law on children. The AG Mr. Amos Wako published the Bill in a special issue of the Kenya Gazette Supplement dated 16 February 1995.¹⁴⁶

Parliamentary Debates

In the same year in February, the Draft Bill was forwarded to parliament for debate and approval. Section 3 of the Bill contained its objectives which were to; promote the well-being of children; implement the provisions of the Convention; promote the welfare of the family; assist parents in the discharge of their parental responsibilities and establish and promote the use of services and facilities within the community designed to advance the well-being of children.¹⁴⁷

In the second reading of the Bill which started in July 20 1995¹⁴⁸ criticism arose about the Bill. Those opposing the Bill said that it did not fully address the principles of the UNCRC, it gave greater focus on juvenile justice than in the protection of children and it did not adequately address the basic responsibilities for child care. It was felt that the Bill saw the child as a perpetual trouble maker and that mechanisms must be put in place for punishment. It did not address important issues like education and health.¹⁴⁹ The NGOs also expressed their dissatisfaction with the Bill citing anomalies which included lack of sensitivity to religious concerns and lack of provisions on social security, free and compulsory education, refugee and displaced children. The problems of children with disabilities and those accompanying mothers to jail and the protection of the girl child from a variety of disadvantages were also cited as anomalies. In general the NGOs felt that the Bill was not progressive and failed to implement the provisions of the CRC in a meaningful way. Parliament recessed when the Bill was still at

¹⁴⁶ Rogoncho, David. *Wako Publishes Bill on Children*. Daily Nation 21 February 1995. p 3

¹⁴⁷ Committee on The Rights of The Child. *Consideration of Reports Submitted by States Parties under Article 44 of The Convention. Initial Reports of States Parties Due In 1992*. Kenya (2000) p 14

¹⁴⁸ Kenya National Assembly. Parliamentary Debates. July 10 1995.

¹⁴⁹ Kenya National Assembly Official Report. 12 October, 1995.

second reading.¹⁵⁰

The NGOs suggested revision of the Bill to make it more child friendly and to provide a legal and institutional framework that would enhance protection of all children inside and outside the family environment. In 2000, a team comprising of parliamentarians, members of the Judiciary and representatives of the children sector worked on final amendments to the draft Bill. The amended Bill was forwarded to the AG. It was later reintroduced in parliament as the Children Bill 2000 in August 2001 for debate, still at the second reading stage. During this reading it received better support from members of parliament who suggested some amendments to be made before passing the Bill.¹⁵¹ It was read the third time in November 29 2001, where amendments were done. It was passed the same day. It received presidential assent on 31 December 2001 and entered into force on March 1 2002.¹⁵²

The Children Act is an Act of Parliament to make provisions for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions, to give effect to the principles of the United Nations Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.¹⁵³ It combines in one statute the public and private law provisions, consolidates and repeals three pieces of legislation that were guiding children matters in Kenya: The Children's and Young Person's Act (Cap 141), The Adoption Act (Cap 143) and The Guardianship of Infants Act (Cap 141). It ranks as a pioneering human rights' law in Kenya's legislative history providing social, economic and cultural rights along

¹⁵⁰ Republic of Kenya. *National Report for the Special Session of the UN General Assembly on Follow up to the World Summit for Children*. (Nairobi: 2000) p 4

¹⁵¹ National Assembly Official Report. 2 August 2001.

¹⁵² The Children Act Implementation Working Group. *Report on The National Stakeholders Consultative Conference on Implementation of the Children Act, No. 8 of 2001. Held at Amref Training Center, Nairobi on 26th June 2002*. (Nairobi: 2002) p 7

¹⁵³ National Council for Law Reporting. *Laws of Kenya. The Kenya Children Act, 2001. Act No. 8 of 2001*. (Nairobi; 2001) p 9

with some protection of civil liberties. Its enactment was widely seen as a new beginning for the development and effective protection of Kenya's children.¹⁵⁴

The Department of Children's Services (Children's Department) which is currently hosted under the auspices of the Ministry for Gender, Children and Social Development is the Government agency mandated to provide services for the welfare of children and secure their rights as stipulated in the Children's Act. The Department existed even before the Children's Act came into force and its main tasks include dealing with issues of implementation of child care, protection and juvenile justice. For example, the Department operates the child care and protection institutions, such as rehabilitation centers and rescue centres for children considered as being in need of care and protection. The department has offices at national, provincial and district levels.

The Act establishes statutory structures to facilitate the administration and safeguard the rights of children, including the creation of the National Council for Children Services (NCCS), Children's Courts and institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.¹⁵⁵

The National Council for Children Services (NCCS) was launched in September 2002.¹⁵⁶ The NCCS is charged with the responsibility to exercise general supervision and control over the planning, financing and co-ordination of child rights and welfare interventions including

¹⁵⁴ Republic of Kenya. *Initial Report to the African Union on the Implementation of the African Charter on the Rights of the Child – 2003 to 2007* p 6

¹⁵⁵ Ibid p 6

¹⁵⁶ Ibid p 8

monitoring, and to advise the Government on all aspects pertaining to child rights and welfare.¹⁵⁷ Through strategic plans the National Council for Children Services puts forward a monitoring and evaluation process for tracking progress, efficiency, effectiveness, outcomes and impact for implementation of various strategies aimed at meeting the rights of the child. By working closely with line ministries, NGOs and donor agencies it has been able to raise funds to address issues affecting children at national and local levels. At local levels it is replicated through Area Advisory Councils (AAC). The membership of AAC constitutes the Department of Children's Services, relevant Government ministries, non-governmental organizations, religious-based organizations and the private sector. In particular, District Children Advisory Committees (DCACs), chaired by District Commissioners, were established in 1993 to coordinate all activities relating to children in the districts of Kenya.¹⁵⁸

Children's Courts and institutions are responsible for the reception and care of children in need of care and protection. There are children's courts all over the country, with magistrates specifically assigned as children's courts magistrates. One hundred and nineteen (119) magistrates have been appointed to serve in the Children's Courts. The Children's Courts are physically separated, child-friendly courts. All Children's Courts are courts of first instance, with the effect that they lay beneath the High Court in the court structure. Other than murder charges, they hear and try all matters concerning children including: custody and maintenance matters; guardianship of children; granting judicial orders for the protection of children; measures for dealing with children who need special care and protection; and treatment of child offenders.

¹⁵⁷Committee on the Rights of the Child. 44th Session. *Second Periodic Kenya Country Report on Implementation of the United Nations Convention on the Rights of the Child. 1998-2004.* p 3

¹⁵⁸ Republic of Kenya. *National Report for the Special Session of the UN General Assembly on Follow up to the World Summit for Children.* (Nairobi: 2000) p 4

The private sector (nongovernmental organizations) runs foster care and reception centers and programs that cater for children without family care. These must be registered with the Children's Department. In its second report to the Committee on Child Rights Kenya reported that the children's department through the Governance, Justice, Law and Order Sector (GJLOS) was promoting the rights of juvenile delinquents in rehabilitation schools and also strengthening law enforcement and rehabilitation programs. Holding facilities for children were to be constructed in selected police stations so that child offenders are held separately from adults.¹⁵⁹

Under the Children Act, a large number of categories of children in need of special protection are eligible for Government assistance, including: all orphans including HIV/AIDS orphans and those infected by the disease, street children, child workers, destitute children, battered children, child mothers, handicapped children, juvenile delinquents, children whose parents are imprisoned, sexually abused children, neglected or abandoned children and children of parents with mental disability. To this end, the Government has created institutions for the rehabilitation and care of children and provides rules and regulations on how to treat children who need special care and protection.¹⁶⁰ The Act also provides remedies in cases of violation of rights recognized by the Convention including severe penalties such as imprisonment, fines or both. There are also severe penalties for persons who obstruct a children's officer or any other authorized officer in the execution of their duties in protecting the rights of the child. A uniform code of conduct for children's officers and volunteer children's officers is now in place allowing standardized reporting procedures to be introduced. There are specific efforts by the

¹⁵⁹ Committee on the Rights of the Child. 44th Session. *Second Periodic Kenya Country Report on Implementation of the United Nations Convention on the Rights of the Child. 1998-2004.* p 2

¹⁶⁰ Ibid p 2

Government to ensure that police stations have a desk to receive and investigate complaints of violation of children rights in a child friendly manner.¹⁶¹

Apart from the Children Act 2001, which is the main legislation on child rights in Kenya, other Acts with positive implications for the status of children have been passed. These are the Sexual Offences Act (2006); the Prohibition of Female Genital Mutilation Act (2011); the Persons with Disabilities Act (2003); the Counter Trafficking in Persons Act (2010); the HIV/AIDS Prevention and Control Act (2006); the Industrial Properties Act and the Criminal Law Amendment Act. The new Kenya Constitution (2010), has reinforced the status of children as subjects of human rights. It addresses issues affecting children and guarantees their rights in various sections.¹⁶²

After ratification Kenya made efforts to make the Convention known to both children and adults according to article 42 of the Convention.¹⁶³ In particular, the weekly Child Survival radio programme was developed and aired radio programmes on the rights of the child. Although these were mainly been in English, a few were aired in Kiswahili and in local languages. There was a Kiswahili programme called Maisha ya Mtoto. In the daily newspapers, feature articles on thematic issues of child rights were published. The two main dailies, the Daily Nation and the East African Standard, had a weekly pullout section for children. Activities such as the Day of the African Child and Universal Children's Day marked in June and November respectively are used to create public awareness using drama, song and poems by children, and speeches by child specialists. They are coordinated by various ministries in

¹⁶¹ Ibid p 2

¹⁶² Mbugua, Jane Waithira. *Promoting Child Rights: Reflections on Key Processes of Children Sector in Kenya from 1989 onwards as Recorded by some National Civil Society Actors*. Save the Children, 2012. pp 35-43

¹⁶³ Republic of Kenya. *National Report for the Special Session of the UN General Assembly on Follow up to the World Summit for Children*. (Nairobi: 2000) p 4

collaboration with NGOs and UNICEF. Supplementary articles are published in the main dailies. Radio programmes are also broadcast countrywide to coincide with these days. Child rights clubs were started in primary, secondary and non-formal schools by NGOs. The same NGO's publish and distribute child rights publications. A National Ambassador for Children in Kenya was appointed in 1998 with a mandate to advocate for children and women rights.¹⁶⁴

In 2006, the NGO Child Rights Committee organized several forums to discuss the shortcomings in the Act. The recommended amendments were submitted to the Kenya Law Reform Commission, which forwarded them to the Attorney-General. The AG drafted the Children Law (Amendment) Bill of 2007. The Bill was not finalized because further amendments kept being received from stakeholders. There was need for extra time to allow for adequate stakeholder input. Amendments were also prepared in accordance with the Kenya Constitution 2010. A new Bill, the Children Law (Amendment) Bill, 2010 was prepared, but has not yet been passed by parliament.¹⁶⁵

3.4. Domestication of International Treaties in Sweden

Sweden is a dualist state. International treaties ratified by Sweden do not automatically become part of Swedish law. Under the Swedish Constitution, the Government is empowered to conclude international agreements.¹⁶⁶ However, agreements which require amendments in existing legislation or new legislation must be approved by parliament. The government may instruct an administrative authority to conclude an international agreement in a matter which the participation of the parliament or the Advisory Council of Foreign Affairs is not required.¹⁶⁷

¹⁶⁴ Ibid p 4

¹⁶⁵ Mbugua, Jane Waithira. *Promoting Child Rights: Reflections on Key Processes of Children Sector in Kenya from 1989 onwards as Recorded by some National Civil Society Actors*. Save the Children, 2012. p 20

¹⁶⁶ Sweden. The Instrument of Government. Chapter 10 article 1. p 106 <http://www.scandinavianlaw.se/pdf/52-26.pdf>. Cited on 5th September 2013

¹⁶⁷ Ibid p 108

There are rare cases where a special act of law stating that a particular treaty shall apply in Sweden as Swedish law results in the direct application of an international instrument as Swedish law. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force as Swedish law in 1995. In general, for treaties to become part of Swedish law, they must be transformed or formally incorporated into the Swedish statutes, by the enactment of equivalent provisions in an existing or a new Swedish statute.¹⁶⁸ The process of transforming international instruments to domestic law involves careful review of Swedish law to ensure conformity with the instrument in question. Where there is no existing domestic legislation concerning a particular instrument, new legislation or amendments to existing law are proposed through a bill forwarded to parliament.

3.5 The Process of Enacting Implementing Legislation in Sweden

It is the responsibility of the government to draw up a legislative proposal. The matter to be legislated on must be analysed and evaluated by officials in the relevant ministry. The government may also appoint a special expert or group to do the analysis and evaluation.¹⁶⁹ When it is done by the Ministry, the minister concerned appoints the members of the committee who may include experts in different fields, public officials and politicians. They do analysis based on the terms of reference laid down by the government which identify the issue to be investigated and define the problems to be addressed. Any other interest groups are allowed to follow the process of inquiry.¹⁷⁰ After completing its work, the committee presents its inquiry report to the government, which is then published together with the terms of reference and made available to the public. These two are also circulated to other relevant consultation bodies such

¹⁶⁸United Nations. *International Human Rights Instruments. Core Document Forming Part of the Reports of State Parties: Sweden*. Revised 2002 . p 13

¹⁶⁹ Ministry of Justice. Fact Sheet. *The Swedish Law Making Process*. Jun 07.06.e. June 2007. p 1

¹⁷⁰ Ibid p 1

as central government agencies, local government authorities or bodies and NGO's. These submit their comments which the relevant ministry takes up and together with the inquiry report, come up with a draft Bill which is presented to parliament. The government must agree on the Bill before it is presented in parliament. It may consult the Council on Legislation on some major issues on the Bill which confirms that the Bill is in conformity with the legal system and the constitutional law.¹⁷¹

When the Bill is completed, it is submitted to parliament where it is handled by one of the standing committees. A counter-proposal on the Bill may be introduced by any member of parliament, or the government may propose amendments at this stage. If parliament adopts the counter-proposal the government must implement its provisions. The concerned committee completes its deliberation and comes up with a report which it submits to parliament for debate and approval. If the Bill is adopted the government formally issues it as law and publishes it in the Code of Statute.¹⁷²

When it comes to a Bill to adopt an international agreement, the Bill goes through the same process of preparation and then it is forwarded to parliament together with a Swedish translation of the full text of the agreement. When the Government approves the new legislation or amendments, the law is enacted and with the consent of parliament, the international instrument can then be ratified. After ratification other bills may be presented to parliament to propose legislation in relation to the provisions of the international instrument.

Any new legislation must conform to the international obligations contained in international instruments. There are procedures to ascertain that no new legislation clashes with

¹⁷¹ The Council on Legislation is a body consisting of judges drawn from the Supreme Court and the Supreme Administrative Court.

¹⁷² Ministry of Justice. Fact Sheet. *The Swedish Law Making Process*. Jun 07.06.e. June 2007. p 2

the human rights treaties that Sweden is party to. The relevant ministry drafts a bill. The draft bill is forwarded to the Ministry of Foreign Affairs, where a review is made in comparison with the relevant human rights instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights. If amendments are needed, the responsible ministry makes them until the legislation conforms to these instruments. The Law Council, (Lagrådet), which consists of the Supreme Court and the Supreme Administrative Court may also give opinions on draft bills. These opinions are open to the public. However, the government is under no obligation to act on the Council's recommendations.¹⁷³

The provisions contained in international instruments that have been incorporated into Sweden as internal law or administrative regulations are enforceable in Swedish courts of law. They are occasionally evoked before Swedish courts, tribunals and administrative authorities. The provisions that are not incorporated can be evoked but cannot be used to make final decisions by courts. They are useful in interpreting domestic legislation by both the Supreme Court and the Supreme Administrative Court.

The Swedish System of Ombudsman plays an important role in ensuring implementation of provisions under international instruments, especially human rights provisions. There are six official ombudsmen: Office of the Parliamentary Ombudsman (JO), Consumer Ombudsman (KO), Office of the Equal Opportunities Ombudsman (JämO), Ombudsman against Ethnic Discrimination (DO), Children's Ombudsman (BO), Office of the Disability Ombudsman, and Ombudsman against Discrimination because of Sexual Orientation (HomO).¹⁷⁴

The Office of the Parliamentary Ombudsman (JO) supervises the observance of laws and ordinances by state and municipal agencies and bodies and their personnel such as judges, civil

¹⁷³United Nations. *International Human Rights Instruments. Core Document Forming Part of the Reports of State Parties: Sweden*. Revised 2002 . p 4.

¹⁷⁴ Ibid p 6

servants and military officers. The Office of the Consumer Ombudsman (KO) is the State Agency in charge of consumer affairs such as consumer information and education, product safety and quality, etc. The Office of the Equal Opportunities Ombudsman (JämO) established in 1980 ensures observance of the provisions of the Equal Opportunities Act which promotes equal rights for men and women in work related matters. The Office of the Ombudsman against Ethnic Discrimination (DO) established in 1986 deals with matters of ethnic discrimination on the labour market. The Children's Ombudsman is made up of Swedish children and young people up to the age of 18.¹⁷⁵

The Children's Ombudsman (BO) was set up in 1993 with the main task of safeguarding the rights and interests of children and young people as laid down in the Convention on the Rights of the Child. It works on a strategic basis to achieve closer harmony between the Convention and national law by devoting special attention to the compatibility of laws and other statutory instruments and their implementation with Sweden's commitment under the Convention. It reports to the government concerning fields in which it finds that children's and young persons' rights are not being provided for according to the Convention. It also has the responsibility of supplying information about the Convention and acts as a consultative body in the process of drawing up legislation covering children and young people.¹⁷⁶ The Office of the Disability Ombudsman (*Handikappombudsmannen*) established in 1994 is responsible for monitoring issues relating to the rights and interests of persons with disabilities according to the general objectives of disability policy. The Ombudsman against Discrimination because of Sexual Orientation (HomO) 1999, is a Government authority commissioned to combat

¹⁷⁵ Ibid pp 7-8

¹⁷⁶ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997*. Addendum. Sweden. pp 11, 13.

discrimination based on sexual orientation (homosexuality, bisexuality or heterosexuality) in all areas of Swedish society.

To promote awareness of human rights contained in international instruments, texts in Swedish translation are disseminated, providing the public and authorities with information in those instruments. There is also exchange of views on human rights issues with non-governmental organizations. The translations are published in the *Swedish Treaty Series* (*Sveriges internationella överenskommelser*, SÖ). A biennial index to the *Swedish Treaty Series* is published by the Ministry for Foreign Affairs. The Ministry also publishes official statements and speeches on human rights issues on a yearly basis in the publication *Utrikesfrågor*, which also is published in English (*Documents on Swedish Foreign Policy*). Other documents by the same ministry are *UD informerar* (*Information from the Ministry for Foreign Affairs*), *Human Rights in Swedish Foreign Policy* and *Democracy and Human Rights in Sweden's Development Cooperation*, which cover a variety of issues including contents of human rights instruments. Swedish legislation adopted in connection with the conclusion of international agreements is published in the *Swedish Legal Series* (*Svensk författningssamling*). Government bills are published in the parliamentary publications, which are widely available to the public. All these publications are available to the public free of charge.¹⁷⁷

3.6. Domestication of the UNCRC in Sweden

Sweden was one of the first States to become party to the Convention on the Rights of the Child (CRC). Following a decision by the Riksdag (Swedish Parliament) on 21 June 1990, Sweden ratified the CRC on 29 June 1990. The Government Bill (Prop. 1989/90/107) for approval of the CRC included a review of its articles in relation to the Swedish condition. The

¹⁷⁷United Nations. *International Human Rights Instruments. Core Document Forming Part of the Reports of State Parties: Sweden*. Revised 2002 . pp 15-16

Convention came into force on 2 September 1990.¹⁷⁸ Ever since the Convention was ratified, discussions have been conducted concerning its assimilation by incorporation, i.e. by giving it the status of Swedish law. This question was raised by the Riksdag in 1995. The proposal of incorporation was rejected, but the Standing Committee on Social Affairs referred to the necessity of an ongoing control and adjustment of Swedish law and practice. Implementation of the Convention in Sweden should be an ongoing process and promoting support for the incorporation of the Convention in law and practice should be a long term undertaking. The Committee emphasized that the provisions and intentions of the Convention at all levels in society must be taken into account when dealing with questions relating to children and the rights of the child, and it took the view that the Government should resolve on a wide ranging review of the compatibility of Swedish law and practice with the provisions of the Convention.¹⁷⁹

The Convention and its two Optional Protocols have been incorporated into Swedish legislation through transformation, i.e. by adapting the Swedish rules on various specific areas to the requirements of the CRC. Transformation has involved gradual and continuous adaptation of national law and application, putting into consideration changing social conditions and development. On 1 February 1996, the Government appointed a parliamentary commission (the Children's Committee) to carry out a wide ranging review of Swedish legislation and practice in relation to the provisions of the Convention. The Committee's task was to establish greater

¹⁷⁸ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Initial Reports of States Parties due in 1992.* Addendum. Sweden. p 4

¹⁷⁹ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997.* Addendum. Sweden. p 16

clarity and a wider consensus regarding the implications of “the best interests of the child” in the Convention and Swedish law and in particular analysing conflicts of aims in this connection.¹⁸⁰

The task of measuring up to the provisions and principles of the Convention has special priority and it is the Swedish Government's aim to advance the position of children and young persons. In March 1999, the Swedish Riksdag (parliament) unanimously approved the first national strategy for the implementation of the United Nations Convention on the Rights of the Child in Sweden, entitled “A Strategy for Implementation of the CRC in Sweden.” According to the strategy, the UNCRC will be introduced and implemented at all levels of society, both in the Government offices and national authorities at local and regional levels.¹⁸¹ The strategy is an important instrument for safeguarding the rights and interest of children and young people and must inform all decision-making affecting children in the Government Offices. All legislation concerning children will be formulated in accordance with the CRC. Reference should be made to the Convention in training programmes for professional groups working with children and in-service training for government employees whose work impacts on children and young people, including municipal and county council staff. Municipal and county councils should establish follow-up systems for implementation of local and regional government activities aimed at safeguarding the best interests of the child. Children and young people's participation should be encouraged in community and traffic planning and child impact assessments are important in measuring the impact of all government decisions affecting children. The Office of the Children's Ombudsman must be strengthened in its role in the implementation of the Convention

¹⁸⁰ Ibid pp 16-17

¹⁸¹ Sylwander, Luoise. *Child Impact Assessment: Swedish Experience of Child Impact Analyses as a Tool for Implementing the United Nations Convention on the Rights of the Child*. (Sweden: 2001) p 9

in Sweden.¹⁸² The strategy's implementation is overseen by a coordinating body set up in the Government Offices, at the Ministry of Social Affairs. The body's functions are: to support and promote the development of convention-related activities in the Government Offices; to take part in the preparation of joint government business and ensure that government decisions including bills, instructions, committee terms of reference and other documents coming out of Government Offices reflect the spirit of the Convention; to coordinate and initiate developments in the child and youth policy field; to represent Sweden abroad in matters relating to children and to generate regular reports on children with regard to the Convention.¹⁸³

Sweden practices local self government, where local political bodies decide their own affairs independently. One of the fundamental principles of the Swedish society is that decisions affecting children must be made by persons as near as possible to the child. In most of the areas affecting children and young persons, the State indicates goals and directions through general legislation or national goal documents, while the municipalities decide the concrete design of activities. The ultimate responsibility for the quality of activities rests with the municipalities. The State is responsible for national follow up and evaluation of that quality.¹⁸⁴

National policies for children and young persons are handled by various government departments (ministries) and national authorities which are guided by the rules and principles of the Convention. The Ministry of Health and Social Affairs is assigned to initiate, promote and co-ordinate processes with the objective that the spirit and the intentions of the CRC shall permeate all aspects of government policy and all public activities relating to children and young

¹⁸²United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Third Periodic Reports of States Parties due in 2002. Sweden.* p 11

¹⁸³ Ibid p 12

¹⁸⁴United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997. Addendum. Sweden.* pp 5-6

people. It is responsible for financial support to families with children, child care, health and medical care, social welfare and questions relating to alcohol and drug abuse, and care of the disabled. The Ministry of Public Administration has a coordinating role where youth affairs are concerned. The Ministry of Justice is responsible for legislative matters not coming under any other ministry. The Ministry of Education is responsible for the education system, while the Ministry of Culture is responsible for cultural, immigrant and refugee affairs.¹⁸⁵

Measures relating to children and young persons have been coordinated at local level in Sweden in order to have effective coordination of matters concerning children and young persons. Authorities at the local, regional and national level use the UNCRC to guide their strategies on meeting the needs of children and young persons. Many municipalities now have special child and youth committees which are responsible for both child-care services, schools and leisure amenities. The Child and Youth Advisory Committee is the Government's advisory body on matters relating to children and young persons. It encourages debate on child and youth affairs and contributes financially to the State Inheritance Fund which is used to support children and young persons. The National Child Environment Council is mainly concerned with children's safety and their access to good play environments. It observes research and development and helps to codify, process and disseminate knowledge within its field of responsibility.¹⁸⁶

The National Agency for Education is required to follow up, evaluate, support and stimulate activities within the school system, as well as supervising schools. The National Board for Intercountry Adoptions is responsible for information, supervision and control in matters relating to international adoptions. The National Board of Health and Welfare, is the supervisory

¹⁸⁵ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Initial Reports of States Parties due in 1992. Addendum. Sweden.* p 8

¹⁸⁶ Ibid p 9

authority for social services. It ensures that municipalities work to ensure that children and young persons will grow up in secure, well-ordered conditions. It coordinates State measures for children and young persons in social services and in health and medical care. The Institute of Public Health is required, at national level, to conduct health promotion and disease prevention activities of an intersectoral nature. Children's and young persons' health is a priority field for the Institute's activities. The police undertake various measures for the prevention of juvenile crime. The National Council for Crime Prevention has a special child and youth group which concentrates on questions concerning crime prevention measures among children and young persons. The National Labour Market Board facilitates young persons' entry into the employment sector and counteracts unemployment, partly by means of upskilling. The National Board of Housing, Building and Physical Planning, the National Board for Consumer Policies and the National Immigration Board organize special measures for children and young persons.¹⁸⁷

Allmänna Barnhuset is a State foundation dealing with questions affecting children, above all in the social sector. Among other things it supports socially-oriented child and youth research. Most of the projects for which grants are awarded are concerned with children in vulnerable situations especially children in foster homes. The National Institute for Questions Concerning the Disabled in Schools supports municipalities in order to facilitate the schooling of pupils with functional impairment. It develops, produces and distributes teaching materials for the functionally impaired. The National Board of Youth Affairs has the task of promoting good formative conditions for young persons and the participation of young persons in social development. It coordinates activities at national authority level and assists municipalities in work relating to youth affairs. It is also responsible for distributing state grants to child and

¹⁸⁷ Ibid pp 9-10

youth organizations. The National Council for Cultural Affairs is responsible at the national and international level for observing and developing child and juvenile culture. The Council for Fictionalized Violence coordinates and supports measures by national authorities and other associations to combat harmful fictionalized violence. The National Board of Institutional Care is responsible for the planning and management of special approved homes. The Inheritance Fund Delegation is an authority within the Cabinet Office with the responsibility of awarding financial support from the State Inheritance Fund to support children and young persons with functional impairment.¹⁸⁸

3.7. Domestication under the General Principles in Kenya and Sweden

3.7.1. Kenya

In Kenya provisions under the general principles of the UNCRC have been domesticated in the Kenya Constitution 2010 and the Children Act 2001. In the Constitution the above principles have been covered in a number of articles.¹⁸⁹ Section 27 (4) is about non-discrimination. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Under Section 27 (5) a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

The principle of the best interests of the child is in Section 53 (2) which states that a child's best interests are of paramount importance in every matter concerning the child. The principle on the right to life, survival and development is covered under Section 26 (1) which

¹⁸⁸United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997.* Addendum. Sweden. pp 18-19

¹⁸⁹ National Council for Law Reporting. *Laws of Kenya. The Constitution of Kenya 2010.* Nairobi.

states that every person has the right to life. Section 43 contains economic and social rights; every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, to reasonable standards of sanitation; to be free from hunger and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security and to education. A person shall not be denied emergency medical treatment. The State shall provide appropriate social security to people who are unable to support themselves and their dependants.

Section 53 has specific rights for children.¹⁹⁰ Every child has the right to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age.

The Children Act also has provisions on the principles¹⁹¹. Section 5 provides that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. Section 4 (2) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

¹⁹⁰ Ibid pp 36-37

¹⁹¹ National Council for Law Reporting. *Laws of Kenya. The Children Act 2001. No. 8 of 2001*. Nairobi.

Under Section 4 (3), all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child; conserve and promote the welfare of the child; secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

The right to life, survival and development is covered under Section 4 (1).¹⁹² Every child shall have an inherent right to life and it shall be the responsibility of the government and the family to ensure the survival and development of the child. In Section 7 (1) every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents. Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child. In Section 9, every child shall have a right to health and medical care the provision of which shall be the responsibility of the parents and the government. In Section 10 (1) every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Under Section 12, a disabled child shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible. Section 13 (1) states that a child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person. Under Section 14, no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare,

¹⁹² Ibid p12

dignity or physical or psychological development. In Section 15, a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials. Section 16 states that every child shall be entitled to protection from the use of hallucinogens, narcotics, alcohol, tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health and from being involved in their production, trafficking or distribution. In Section 17, a child shall be entitled to leisure, play and participation in cultural and artistic activities and in Section 18 (1) no child shall be subjected to torture, of cruel treatment or punishment, unlawful arrest, deprivation of liberty, capital punishment or life imprisonment.

Respect for the Views of the Child is covered in Section 4 (4). In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity. Section 83(1(d)) states that in determining whether or not a custody order should be made in favour of the applicant, the court shall have the regard to the wishes of the child.¹⁹³

3.7.2. Sweden

Information on how Sweden domesticated the general principles of the CRC is obtained from the country reports to the United Nations Committee on the Rights of the Child. Sweden has been timely in submitting reports and so far it has submitted five periodical reports. The basic rights and liberties are guaranteed in the Swedish Constitution which lays down that public power shall be executed with respect for the universal human equality and of the liberty of

¹⁹³ Ibid p 16

dignity of the individual.¹⁹⁴ Courts of law, administrative authorities and other agencies performing public administration duties are required to respect universal equality under the law and to observe objectivity and impartiality. There are specific provisions aimed at preventing discrimination on the grounds of race, colour or ethnic origin or sex. The Penal Code has provisions on unlawful discrimination and incitement to racial hatred, which are also reflected in the Freedom of Press Ordinance and the Freedom of Expression Constitution Act.¹⁹⁵

Equality between boys and girls is emphasized in all school curricula. The national pre-school curriculum states that schools must actively seek to counter the development of traditional gender roles and behavior patterns. Boys and girls should be encouraged to develop abilities and interests traditionally associated with one another or the other gender.¹⁹⁶ The Act Prohibiting Discrimination and Other Forms of Degrading Treatment of Children and School Students entered into force on 1 April 2006.¹⁹⁷ The purpose of this Act is to promote the equal rights of children and pupils and counteract discrimination because of sex, ethnic membership, religion or other religious belief, sexual orientation or disability. The Act also has the aim of counteracting harassment and other types of degrading treatment such as bullying. This legislation also provides new conditions to combat discrimination and harassment relating for example to sexual orientation. The Child and School Student Representative (BEO) at the National Agency for Education, the Equal Opportunities Ombudsman, the Ombudsman Against Ethnic Discrimination, the Ombudsman Against Discrimination Because of Sexual Orientation and the Disability Ombudsman are responsible, within their respective areas of responsibility, for

¹⁹⁴ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997. Addendum. Sweden.* p 37

¹⁹⁵ Ibid p 38

¹⁹⁶ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Third Periodic Reports of States Parties due in 2002. Sweden.* p 37

¹⁹⁷ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Fourth Periodic Reports of States Parties due in 2007. Sweden.* p 17

monitoring compliance with the Act.¹⁹⁸ The Child and School Student Representative (BEO) ensures compliance with the provisions of the Act on degrading treatment. The roles of the representative are; to investigate details of degrading treatment, to represent individual children and students in court, to dispense information on legislation in this area and to provide advice and information about efforts to combat degrading treatment.¹⁹⁹

The Discrimination Act (2008:567) which came into force on 1 January 2009 is intended to combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief system, disability, sexual orientation or age. The Discrimination Ombudsman was established to oversee compliance with the Act. The Education Act (2010:800) states that every person working in education shall promote human rights and actively combat all forms of degrading treatment.²⁰⁰ The Libraries Act (1996:1596) states that public and school libraries are to devote special attention to people with disabilities and to immigrants and other minorities, e.g. by offering literature in other languages than Swedish and in forms specially adapted to the needs of these groups.²⁰¹

Though not explicitly indicated in the wording of the law, the principle of the best interests of the child has been fundamentally important in the framing of rules and regulations directly affecting or relating to children and young persons.²⁰² The principle prevails in all county planning – curricula, child care plans, urban planning, traffic planning, etc. The Constitution has provisions that lay down that the fundamental aim of public activities must be

¹⁹⁸ Ibid p 17

¹⁹⁹ Ministry of Health and Social Affairs. *Swedish Fifth Periodic Report to the United Nations Committee on the Rights of the Child, on the Implementation of the Convention on the Rights of the Child: 2007-2012*. p 28

²⁰⁰ Ibid p 28

²⁰¹ Ibid p 91

²⁰² United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Third Periodic Reports of States Parties due in 2002. Sweden*. p 42

the welfare of the individual in various respects. It is the task of government and the county to deliberately pursue social care and security and a good living environment. The rules of the Code of Parenthood and Guardianship, concerning custody and access requires decisions to be made according to what is best for the child, ensuring that the child's fundamental rights are catered for. The Young Offender (Special provisions) Act sanctions the remand in custody of persons under 18 only if such a measure is necessary. There are special rules for the protection of children as complainants and children questioned in prejudicial criminal investigations.²⁰³ There are national guidelines on inter-agency co-operation on crime-risk children intended to ensure efficient and legally secure co-operation in investigations relating to children in a manner that has the best interests of the child in mind.

On 1 January 1998, the Social Services Act was amended to include a provision stating that the best interests of the child must be given full consideration when adopting any measures affecting the child's life or status. This applies to all measures in social services concerning children.²⁰⁴ The Education Act also states that the basis of all education and other activities shall be the best interests of the child. Education must be designed to give the child the best possible conditions for his or her personal development.²⁰⁵ The Act on Imprisonment (2010:610) and the Act on Detention (2010:611) have provisions relating to the best interests of the child principle. A prisoner under eighteen years of age must not be placed with prisoners over eighteen years, unless this can be considered to be in his or her best interests. There are particular requirements to be met by the Prison and Probation Service, concerning young people who are serving a term

²⁰³ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997.* Addendum. Sweden. pp 39-41

²⁰⁴ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Third Periodic Reports of States Parties due in 2002.* Sweden. p 44

²⁰⁵ Ministry of Health and Social Affairs. *Swedish Fifth Periodic Report to the United Nations Committee on the Rights of the Child, on the Implementation of the Convention on the Rights of the Child: 2007-2012.* p 30

of imprisonment. The Aliens Act (2005:716) states that in cases involving a child, particular attention should be paid to consideration of what the health and development and the child's best interests otherwise require.²⁰⁶

Sweden's health and medical services and social services measure up to the provisions under the principle of right to life, survival and development. The aim of health and medical care in Sweden is to provide good health and care on equal terms for the entire population. There are preventive and supportive measures within mother health care, child health care and school health care, which are free of charge. School health is a statutory right of all pupils attending compulsory school, upper secondary school, school for the intellectually handicapped, special school and Sami schools. It comprises health checks and elementary nursing.²⁰⁷ The Health and Medical Act expressly requires health and medical services to work for the prevention of disease. Individualized health care can take the form of health checks, vaccinations and health education. Under the Act, county councils are required to offer health and medical care to persons residing within the county. The Dental Care Act requires county councils to provide free dental care for children and young adults living within the county boundaries.²⁰⁸

The basic rights of the child are set out in the Code of Parenthood and Guardianship. Children are entitled to care, security and a good upbringing. Children shall be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other offensive treatment.²⁰⁹ The right to education is enshrined in the Education Act, which

²⁰⁶Ibid pp 32-33

²⁰⁷United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997. Addendum. Sweden.* p 80

²⁰⁸Ibid p 86

²⁰⁹United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Initial Reports of States Parties due in 1992. Addendum. Sweden.* p 16

lays down that all children and young persons living in Sweden – regardless of sex, residential locality and social economic circumstances must have equal access to education in the public sector school system for children and young persons. Education is free and compulsory, and pupils are freely supplied with books, writing materials and other articles necessary for their education. The Act provides that the education must make allowance to pupils with special needs.²¹⁰ The issues of abuse, neglect and children are dealt with in the Health and Medical Care Act, the Compulsory Psychiatric Care Act, the Social Services Act and the Care of Young Persons (Special Provisions) Act which guarantee the child entitlement to care. The provisions of the Penal Code on sexual offence contain provisions especially intended for the protection of children and young persons.²¹¹

The Constitution Act assures all citizens, children included, of the right to form their own opinions and to express them freely.²¹² The importance of the child's views is defined in other relevant legislation. The Code of Parenthood and Guardianship states the following concerning the exercise of custody: It is the right and duty of the custodian to decide questions relating to the child's personal affairs. In doing so, the custodian shall take progressively greater account of the child's view points and wishes, parallel to the child's increasing age and development" (Chapter . 6, section 11).²¹³ The Social Services Act was amended on 1 January 1998 by the introduction of a provision whereby a child has the right to express his or her opinion in matters concerning the child personally. The child's views on any matter affecting the child can be determined without requiring the child to make a choice. There is no minimum age for considering a child's views; a child's wishes are to be taken into account with due regard to his or her age and

²¹⁰ Ibid p 56

²¹¹ Ibid p 39

²¹² United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Second Periodic Reports of States Parties due in 1997. Addendum. Sweden.* p 41

²¹³ Ibid p 42

maturity. In residence cases and rulings by services Committee on parental agreements, custody and access, courts and authorities must consider the child's wishes depending on the child's age and degree of maturity.²¹⁴ Under the Aliens Act, Chapter 11, Section 1a, children have the right to express their views on decisions made on cases affecting them.²¹⁵ The Care of Young Persons (Special Provisions) Act also contains provisions requiring that the opinions of the young person should be clarified as far as possible and given due consideration according to the age and maturity of the child. The Planning and Building Act contains provisions on opportunities for children and young persons to participate in and influence physical planning.²¹⁶

3.8. Conclusion

Kenya and Sweden being dualist countries did not incorporate the CRC directly into their laws. For Kenya, the Children Act 2002 gave effect to the CRC. For Sweden, there is no major document concerning child rights. The rights of children are contained in several documents already in existence before the CRC. Sweden ratified the CRC after scrutinizing its own laws to ensure that the provisions of the CRC were not inconsistent with the country's existing laws. The CRC is considered important in both countries and this made it necessary to establish government authorities that are responsible for the implementation and monitoring child rights issues that are contained in the CRC.

Kenya and Sweden have done their part in domesticating the UNCRC. It is a positive thing to have clear laws, policies and programmes on human rights issues because they act as guidelines for all actors in a state in the particular field of human rights. However even with the laws, policies and programs in place, not all children are living according to what is best

²¹⁴ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Third Periodic Reports of States Parties due in 2002. Sweden.* pp 51, 53

²¹⁵ Ibid p 55

²¹⁶ United Nations. Convention on the Rights of the Child. *Consideration of Reports Submitted by State Parties under Article 44 of the Convention. Fourth Periodic Reports of States Parties due in 2007. Sweden.* pp 23-24

according to the UNCRC and local laws on children. Domestication alone is not enough for the realization of child rights or any other rights. Political will, availability of resources, economic performance of a state, cultural issues all play an important role in realization of rights.

CHAPTER FOUR

ANALYSIS AND PRESENTATION OF RESEARCH FINDINGS

4.0. Introduction

This chapter analyses the research findings. It shows how research findings have provided answers to the research questions and objectives. It will look at how the hypotheses have been tested by the research findings and how the theoretical framework has been reflected in the findings. Analysis is done by comparing the research findings on Kenya and Sweden.

4.1. International Conventions

The study shows that international conventions have been playing an important role in creating rules of conduct on issues of global concern. Human rights is one of the major concerns in the international political system. The UNCRC is one of the major human rights treaties that have been concluded under the United Nations. To understand why the provisions of this treaty and other human rights treaties have to be provided for at the local level, it would be important to understand the importance of international human rights law.

States have come together under the United Nations and other regional bodies such as the African Union to adopt a series of human right treaties and other human rights instruments at the international and regional level. These human rights laws have conferred legal form on inherent human rights.²¹⁷ By ratifying international and regional human rights treaties states show their commitment to international efforts in this field and assume obligations and duties to respect, to protect and fulfill human rights. To respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. To protect requires states to protect groups and individuals against human rights abuses. To fulfill means that states must take positive action to

²¹⁷ <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>. Cited on 6th September 2013

facilitate the enjoyment of basic human rights.²¹⁸ These obligations to respect, protect and fulfill human rights can only be possible if mechanisms to achieve these obligations are put in place at the domestic level. Reservations on human rights treaties and other treaties should be done before ratification because once ratification is done then a state is legally bound to conduct itself in accordance to treaty obligations.

Ratification of treaties doesn't always have to be followed by domestication. Before ratifying the UNCRC Kenya had ratified many other treaties. But it is noted that the enactment of the Children Act 2001 was a landmark in Kenya as it was the first law that domesticated an international convention.²¹⁹ It was also the first to provide social, economic and cultural rights together with civil rights. All these imply that the way the Act is implemented will have a major impact on human rights legislation efforts in Kenya.²²⁰ If Kenya had ratified other treaties before but not domesticated them, it means that those treaties were not applicable at the state level.

International conventions are agreements between states, not governments. When ratifying treaties, governments do it on behalf of their states, considering the public interests of the state and its citizens. Both Kenya and Sweden ratified the Convention in the 1990s, and since then different governments have ruled the states but the ideals of the Convention are still upheld to date. This is the case for very many international treaties signed by many states over the years. They continue to be valued even with change of government. It is only a state that can choose to withdraw from its commitment to an international treaty, not a government. This somehow gives security to rights especially human rights adopted at the international level

²¹⁸ Ibid

²¹⁹ Mbugua, Jane Waithira. *Promoting Child Rights: Reflections on Key Processes of Children Sector in Kenya from 1989 onwards as Recorded by some National Civil Society Actors*. Save the Children, 2012. p 13

²²⁰ The Children Act Implementation Working Group. *Report on The National Stakeholders Consultative Conference on Implementation of the Children Act, No. 8 of 2001. Held at Amref Training Center, Nairobi on 26th June 2002*. (Nairobi: 2002) p 7

because different governments are then under obligation to respect these rights and cannot disregard them at will.

Interpretation is important in international conventions. It helps in understanding the purpose of an international convention. In domesticating, both states used the four general principles of the UNCRC, which are basic to all rights contained in the Convention and act as interpretation and implementation guide to states. These are the principles of non-discrimination, the best interests of the child, the right to life, survival and development and the respect for the views of the child. Both Kenya and Sweden have laws or policies addressing all the four principles. This is what is required by the United Nations Committee on the Rights of the Child. The principles guide all other states parties in writing their reports and more importantly on legislation and implementation. Interpretation is one of the important things that states should consider when domesticating international conventions and using the same principles to make domestic provisions for the UNCRC means that both states have most likely met the objective of the Convention. It is also easy to compare the performance of states on international law when interpretation is uniform.

4.2. States' Treaty Practice

States treaty practice is clearly defined in some written down document. This was clear when looking at states' treaty practice. This document can be the Constitution where treaty practice is mentioned under different articles. It can also be some report showing how a certain treaty was ratified or a specific document where treaty practice is recorded in a detailed way. This shows that treaty practice is an important function for every state and even though what is written down might not always be followed in actual practice, it gives a general guideline on

how the state should handle the process. This helps in classifying a state either as monist or dualist though in practice, it seems like elements of both approaches are used in most states.

It is important for states to have written down treaty practice. During interviews with legal state officers, it looked like Kenya's treaty practice has not been on any written document. On trying to find out some of the issues considered in ratifying a treaty, one officer responded that those are administrative issues. Now Kenya has the Treaty Making and Ratification Act which clearly explains Kenya's treaty practice. Ghana realized its need for writing down its treaty practice in 2008 when a former Attorney General expressed concern over lack of information on Ghana's treaty practice. Now Ghana has a Treaty Manual and a comprehensive list of all treaties ratified by Ghana. These can be used as a reference guide for ministers, departments and agencies and other stakeholders, including the public on the procedure for the domestic ratification of treaties and other international documents and also sensitize members of the public to the international treaty obligations of Ghana.²²¹

Most states practice dualism. States find it better to incorporate provisions of international instruments into national law than to adopt the instruments as they are. Kenya and Sweden are dualist states. However, states may not be strictly dualist or monist. As much as Sweden does not apply international treaties as law domestically, the research points out that in some cases there can be a specific act of law stating that a particular treaty shall apply in Sweden as Swedish law, for example in the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms. A state may be monist and one point and dualist at another point. Before the new constitution, Kenya was dualist. With the new constitution, it is monist but not strictly monist because Article 21 (4) of the Constitution provides that "the state

²²¹ Republic of Ghana. *Treaty Manual*. p 2

shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.”

There is a difference in the way the Executive, the Legislature and the Judiciary are involved in ratification in dualism and monism. In monism, almost all levels of government are involved. It is the Executive’s responsibility to ratify treaties but before they do this, parliament must approve the ratification. Both parliament and Judiciary are involved in discussions prior to ratification to make sure that ratification will only be done for a treaty that is suitable for a country. Then once they have given their approval, the Executive can ratify the treaty. In dualism, the Executive consults with the Judiciary which advises on whether to go ahead with ratification or not based on whether the content of the treaty is beneficial to the country and they do not conflict with existing laws. In some dualist states, the parliament has to give approval for ratification. Usually the parliament is involved in enacting local legislation to give effect to an already ratified treaty.

It is upon each country to choose how they will conduct the process before ratification. Kenya and Sweden are both dualist but they handled the process differently for the CRC. Sweden involved its parliament even before ratification. In Kenya, as was the practice then, parliament was not involved at the ratification stage. They were only involved during domestication to enact the Children Act 2001. During legislation both countries involved all other interest groups and even the public. This means that for successful treaty ratification and even domestication, all levels of government must work together well, because the process could be delayed or all together stopped at one stage. This is also important because it ensures measures to check that states are bound only by treaties that are beneficial to them. All the levels of government must be able to work independently so that none has influence over the other.

This way there is probability of the public interest of treaties being considered in a better way. The Executive seems to have greater say in the processes because even after parliament or the judiciary have done their part, it is up to the Executive to finally ratify a treaty or to give consent to an enacted legislation. Public involvement also means that the views of the citizens are taken into consideration. This is only possible in democratic states.

4.3. The Process of Domestication

Whereas states show their commitment to international law at the international plane by ratifying international conventions, at the domestic level, commitment to these conventions is shown by domesticating them so that they can have effect at the domestic level. Both Kenya and Sweden ratified the UNCRC willingly before embarking on its domestication. Both countries are dualist but they handled the process of domestication differently. Sweden first looked at the existing legislation to make sure it did not conflict with the provisions of the UNCRC, before ratifying it. No specific statute was created to take care of all the provisions of the UNCRC. The provisions were provided for under different statutes in Sweden and even in the years that have followed new legislation made that touches on issues of children is not to incorporate the UNCRC in particular. In Kenya a National Programme of Action for Children in the 1990s was developed capturing the provisions of the UNCRC and it was used to inform other documents with regard to children issues. The Children Bill 1995 was drafted with the main aim of domesticating the UNCRC and the ACRWC. As much as the Children Act 2001 captured child rights catered for in other existing statutes, the main motivation for the Act was the domestication of the UNCRC and the ACRWC.

Domestication ensures that the importance of international conventions is considered the same at both the international and domestic level. This is the reason why incorporating

international conventions at the domestic level has to go through the normal process of law-making within a country. Through the participation of the government, the legislature, the judiciary, the civil society, NGO's and the public at large, it is assumed that the local laws that are enacted to give effect to an international convention are for public interest of the state and its citizens.

States may ratify as many international instruments as possible and domesticate them without coming up with new legislation. New laws may be enacted later to further domesticate the treaties. From the findings of the domestication processes of the UNCRC in Sweden, it may be appropriate to say that, Sweden doesn't make a specific law (as in the case of Kenya Children Act) to domesticate international treaties. Before ratifying the CRC, Sweden analysed all the articles to check if they were in line with the existing law, especially the Constitution. On finding that the provisions were catered for in one way or another in the existing legislation, a decision was made to ratify the CRC and its optional protocols. This means that domestication of international instruments can be done through existing legislation or the enactment of new laws. New legislation may be made to capture the provisions of the international instrument plus other relevant issues, not just the international instrument. This is the case with the Kenya Children Act 2001. It was not only for the domestication of the UNCRC. It also domesticated the African Charter on the Rights and Welfare of the Child and combined provisions from other existing statutes. The old Constitution was silent on specific children rights. But the new Constitution has specific provisions on children. The Constitution, as the supreme law of the land, is able to cover many laws provided for in many international conventions.

Before enacting new legislation to give effect to an international instrument, it would be good to first analyze all the existing laws nationally. Lawyers and other law experts would play

a very important role here. There would be no need to come up with new legislation if issues are already covered in existing legislation. This would avoid the confusion of having too many statutes to refer to when a case arises. However, if new legislation brings together all the existing legislation plus new issues that are not covered anywhere then it would be an advantage, because the new legislation would compile all the laws scattered in other statutes making the new legislation a quick direct reference. This is the case with the Children Act 2001. It brought together the provisions of other existing statutes on child rights and at the same time capturing the provisions of the CRC and the UNCRC. If a country realizes that there is weakness in implementing already existing laws in a certain area, especially because of scattered legislation, that result in different interpretations, then it would be beneficial to come up with a single statute covering all the existing laws.

Collaboration between state and non-state actors during review and enactment of laws to domesticate an international convention may result in better laws locally. The first draft Bill on child rights in Kenya was rejected by NGO's and parliament because of major shortcomings. Had the they not intervened, it would have been passed with the anomalies. NGO's are now advocating for the amendments to the current Act to make it better for children. The Swedish government involves the public and interest groups in discussions about child rights policies and other issues.

Domestication is an on-going time consuming process. There have to be discussions to finally agree on the ratification of the international treaty and also to agree on enacting new legislation or amendments to existing laws. Sweden is still putting in place measures to domesticate more provisions in the UNCRC. In every periodic report, they have new legislation to cater for certain provisions in the UNCRC. Kenya took seven years to debate on the

Children's Bill which was enacted into the Children's Act 2001, which is now under amendment. There are also other Acts which capture the provisions of the UNCRC. This means that domestication of a single international treaty can be captured in so many other laws in a single state.

Domestication especially where a state is coming up with a single document like the Children Act should take an average period of time. Not too much time so that by the time it is applied the economic, political and cultural environment have already changed and not too short so as to lock out the contributions of so many resourceful people. States should come up with a set period of time for domesticating treaties so that those who are to be involved know that they have only that time to make their contributions. Because of the on-going nature of making legislation, the state should ensure good dissemination of information so that as many people as possible are aware of what is happening about a particular treaty.

4.4. Applicability of International Conventions Nationally

Human rights treaties are automatically binding on states whether they ratify them or not. And this means that even if a country ratifies and does not domesticate them it is still bound by its obligations and whether there are domestic mechanisms in place to protect human rights or not, states are responsible for their protection. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented and enforced at the local level.²²² This is not always the case. It may take some time before the international community intervenes in the case of human rights abuse within a sovereign state. In the case of human rights it would be well to say that

²²² The Children Act Implementation Working Group. *Report on The National Stakeholders Consultative Conference on Implementation of the Children Act, No. 8 of 2001. Held at Amref Training Center, Nairobi on 26th June 2002.* (Nairobi: 2002) p 7

domestication of conventions does not affect applicability of international conventions at the state level and lack of domestication does not mean that international conventions cannot apply at the state level.

Human rights are important in modern day society and they are safeguarded in a number of important statutes within a country. Countries consider their Constitutions as the supreme law of the land. In many of these Constitutions human rights have been safeguarded. In Kenya, it was not enough to have child rights under the Children Act. They were also included in the new Kenya Constitution 2010. Other statutes are also important in ensuring protection of human rights because they are considered enforceable laws in a state.

In Kenya, some of the provisions of the major human rights conventions are captured in the new Constitution of 2010. Chapter IV of the new constitution incorporates most of the civil and political rights found in the International Covenant on Civil and Political Rights. It therefore guarantees: fundamental rights and freedoms of the individual (article 19), the right to life (article 26), the right to freedom and security of the person (article 29), protection from slavery and forced labour (article 30), protection from inhuman treatment (article 25), the right to property (article 40), the right to privacy (article 31), freedom of conscience (article 32), freedom of expression (article 33), freedom of assembly and association (articles 36 and 37), freedom of movement and residence (article 39) and equality and freedom from discrimination (article 27). The constitution also protects social and economic rights, such as the rights to health, housing, food, water, social security and education (article 43). Further, it prohibits all forms of discrimination, including discrimination in matters of personal law such as adoption, marriage, divorce, burial and succession (article 27).²²³

²²³ National Council for Law Reporting. *Laws of Kenya. The Constitution of Kenya 2010*. Nairobi.

International treaties are a product of diplomatic negotiations and political compromise and are not drafted with the same degree of precision as local legislation.²²⁴ The document at the international level may be vague as far as application of rights are concerned but when domesticated through local legislation, it becomes more clear on how such provisions are going to be met practically. Domestication gives a state the opportunity to apply international treaties in a way that best suits it economically, politically and culturally. This is because states have to be sure that what they domesticate is applicable at the national level. State reports on the implementation of these rights also reflect the different status of countries economically, politically and culturally. Enacting laws to give effect to international instruments makes it possible to interpret the provisions of the instrument in a language that is locally understood. The laws may capture all existing issues on ground. Domestication makes it possible to respect, protect and promote human rights because they are no longer considered just as international issues. Local laws make them become recognized as important at the local level.

Domestication makes it almost impossible for a state to withdraw from its commitments at the international level because it would then mean that the enacted laws domestically would have to be nullified. However, this does not mean that domestication ensures laws are followed to the letter. There are many instances where the state disregards even its own laws. This means that domestication may not always affect the way a state applies international conventions domestically. A state may simply ignore laws protecting human rights both at the international and domestic level.

Domestication of international conventions affects applicability of treaty provisions at the state level. The laws on domestication in Kenya and Sweden are clear that provisions in

²²⁴ Tully, Stephen. *International Conventions*. New South Wales Young Lawyers International Law Committee. *The Practitioner's Guide to International Law*. (South Wales: 2010) p 23

international conventions shall not directly become part of law at the domestic level. They have to be incorporated or transformed into domestic law through enacting new legislation or through already existing legislation. This means that if domestication does not take place international conventions, even though ratified by the two states, may not have effect at the domestic level. Applicability also depends on the process of domestication. In Kenya it took 11 years for the Children Act 2001 to be enacted and to come into force, meaning that it took eleven years for the provisions of the UNCRC to have legal force in Kenya. In Sweden, before ratification of the UNCRC was done, the government had confirmed that its provisions were in line with other existing legislation so it would be right to say that the provisions were somehow domesticated through the other laws and it did not take time for them to apply in Sweden.

According to monism and dualism domestication is about laws. However in looking at how international instruments apply at the domestic level, one realizes that there is more than the laws involved. There is setting up of institutions like the National Council for Children Services in Kenya and the Ombudsman for Children in Sweden. It may also involve policy actions that directly bring to effect some provisions of the international instrument. Measures for domestication are needed at both national and regional levels. For example in Kenya, the NCCS operates at the national level and is represented at the district level through Area Advisory Councils. In Sweden, there are efforts at the national level as well at the municipal and county levels to promote child rights.

Because of the changing global environment, it would be necessary to keep making amendments. Amendments were recommended to the Children Act 2001. Sweden has been amending its policies. But this should be done very carefully so that there are no so many existing legislation that will create confusion when it comes to their application.

Domestication and implementation are dependent on each other. Domestication can only bear fruit where there is effective implementation. Good laws may exist but if they are poorly implemented or not implemented at all, then they are useless. Implementation may become challenging if there are no guidelines in terms of laws, policies or programmes.

Domestication of international conventions gives citizens more rights that may be used to protect them in court cases. In states where international law is higher than domestic law, provisions of treaties may be used to protect citizen rights that may not be well provided for in domestic laws.

4.5. Conclusion

State involvement from negotiation of treaties to domestication is important. If a state was not involved in negotiations, then it might not ratify a treaty because of lack of understanding of what the treaty is all about. Again if a state stopped at ratification, the benefits of international treaties would not affect domestic lives. Apart from just ratifying and domesticating, there is need for continuous documentation of gains and challenges in the domestication of international treaties especially human rights instruments. Sweden has done well in submitting its periodic reports to the UNCRC Committee and looking at the reports it is possible to know progress made, challenges and how to address them, because they have been receiving comments from the CRC Committee. This is not so for Kenya. Kenya has always submitted reports late and in some cases not presented reports at all. While Sweden has presented five reports so far, Kenya has submitted two only. It plans to submit a combined third, fourth and fifth report. This makes it difficult to monitor and evaluate Kenya's performance in child rights.

CHAPTER FIVE

SUMMARY OF RESEARCH FINDINGS

5.0. Introduction

This chapter presents the summary of findings, draws conclusions from the findings and gives recommendations.

5.1. Summary of Findings

International conventions go through a long process from negotiations, conclusion to ratification, and their full effect or benefit can only be felt when they are applied at the domestic level. Every activity under the process is important. Negotiation and conclusion are important because states get to agree on what is to be included in the treaties. Ratification is important because this is the point at which the state becomes legally bound to the provisions of the international convention. Domestication, though taking place at the national level, is important because this is what determines whether the provisions under the international conventions will have effect at the domestic level. Treaties ratified by states are binding to all governments and the work of domestication started by one government should be continued if a different government takes over. This should be the same with implementation of laws and policies to meet provisions under international conventions.

It is important to have a written down treaty practice that can always be referred to especially by people who would want to know how a certain country conducts itself in this field. It would also guide new government officers in this field. By looking at a state's treaty practice it is possible to tell whether a state is monist or dualist. However, both monist and dualist states have to go through the process of analyzing international conventions carefully before ratifying them so that they can see if the provisions will be applicable at the domestic level. This analysis

is even more crucial for states that are monist because once they become a party to a treaty, then that treaty becomes part of their law. Domestication in strict monist states is just that act of ratifying an international treaty because once ratified it becomes applicable domestically. Dualist states find it better to incorporate provisions of international instruments into national law than to adopt the instruments as they are. No state is strictly dualist or monist. Most apply elements of both in domesticating international agreements. After a long time of using one approach, a state may shift to using the other approach. That is from dualism to monism or monism to dualism. States are free to use whichever approach they choose to domesticate international conventions provided the provisions of these conventions benefit people at the local level. Sometimes a state may ratify a treaty that conforms very well to many of its national laws and so may not need to enact new laws to meet the provisions of the ratified document.

Whereas states show their commitment to international law at the international plane by ratifying international conventions, at the domestic level, commitment to these conventions is shown by domesticating them so that they can have effect at the domestic level. Domestication ensures that the importance of the international conventions is considered the same at both the international and domestic level. International laws are interpreted in a language that is locally understood, capturing all relevant issues at state level. Domestication gives a state the opportunity to apply international treaties in a way that best suits it economically, politically and culturally. Human rights treaty provisions are assumed to be automatically binding to states. This means that whether a state domesticates them or not they will still apply at the national level. Even states that do not ratify such treaties are expected to conduct themselves in ways that do not disrespect human rights. To safeguard human rights laws and other important laws they

should be domesticated in constitutions as well as in other statutes in a state. This is because it is not easy to nullify these laws.

Domestication is a time consuming process. States take time to go through the domestic processes before ratifying international agreements and after ratifying them they take time to go through the law-making process to make them applicable at the national level. It is not obvious that once a treaty is ratified it is domesticated. It may take some years before legislation is made to enact it at the local level. Some provisions in an international treaty may already be domesticated through already existing legislation in a state while some provisions may need new laws to enact them. A single document for example the constitution may be used to domesticate many provisions spread across many international conventions. Amendments may be made to already existing laws, even those made specifically to enact an international treaty, to capture changes in a certain field as situations keep changing. A state may choose to have reservations on some provisions and this means they don't have to domesticate them.

Domestication is not just about laws. Laws are important but institutions to facilitate the implementation of the laws enacted are also important. Administrative measures and policy actions are also important. Domestication cannot be separated from implementation. Domestic laws and policies give guidelines on implementation. Collaboration between state and non-state actors is important during domestication and implementation. Each of them may contribute differently depending on their strengths and resources and this may benefit both domestication and implementation. There is also need to keep records on domestication and implementation.

5.2. Conclusions

Monism and dualism are important approaches that explain how states translate international law into domestic law. However, whether monist or dualist, what is important is for a state to make international conventions applicable at the domestic level. It would be a waste of time, resources and effort if states come together and negotiate issues and come up with documents after a long time and then after that the content of the documents is ignored. Domestication is what successfully completes the whole process of coming up with international agreements. Even though there may be mechanisms at the international level to ensure compliance with international agreements, only willing application of these agreements by sovereign states will make a difference in people's lives domestically and eventually to the world as a whole, because states make up the world.

There should be no conflict between international law and municipal law. This is because in both, states are involved. Where a state feels it is not comfortable with certain provisions of a treaty, even after putting forward its concerns during negotiations, it should have reservations before ratification and then go ahead and domesticate the rest of the provisions considering its economic, political, social and cultural status. Whether a state uses the monist approach or the dualist approach, at the end of the day what matters is whether a state has ratified a treaty. After ratification then domestication can happen using either approach. Monism may look like a quick way to domesticate treaties because negotiations are only done before ratification then after that a treaty is applicable domestically. But it should be considered that a state may take time to ratify a treaty or may choose not to ratify it at all. This may also happen for countries using dualism. If there is no ratification in the first place, then there is no domestication.

5.3. Recommendations

There is need to do more research on the two approaches of applying international conventions at the domestic level. This should bring out clarifications on the differences between dualism and monism, especially when it comes to the state level and the application of international provisions at the state level. From the research findings there is no clear reason why a state chooses to follow one approach and not the other, apart from that it is a country's tradition to follow monism or dualism. May be further research on issues like benefits and challenges of both approaches would enable states make an informed choice on which approach to use.

Monism seems like a better approach in domesticating international conventions. It may be less time consuming. It is the same states that are involved at the international level to ratify and at the domestic level to domesticate. The state can organize itself in a way that at the same time negotiations are taking place at the international level, the parliament, interest groups and the public at large are having their own discussions and debates at the local level based on the situation domestically and also on the information they get from the international negotiations. Those negotiating at the international level can also use the contributions of those at the national level to negotiate. If at the end of the negotiations a state feels they are not comfortable with a certain provision or provisions in an international document, they may choose to ratify the document with reservations. Once they ratify the document, because there is already awareness at the local level of what is happening at the international level, then the ratified document should become directly applicable at the domestic level. This would help save time and resources of having local negotiations and debates before ratification and again before legislating the provisions of the international agreement locally. What would be left is for the state

especially the judiciary to interpret the international agreement according to domestic conditions when need arises.

In both cases of dualism and monism, it is very important for states to be actively involved in negotiations at the international level and to be well informed so that they understand international treaties very well and also make their contributions. Public awareness of these treaties should be emphasized and experts on issues should be very much involved. This is to make sure that by the time a state is ratifying an international treaty, it knows what it is committing itself to. States should not just ratify treaties for the sake of showing unity with the international community. A state should commit itself to treaties that it knows will not just remain on paper but will be domesticated and implemented to benefit citizens' lives.

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