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***Department of Social Work***

*International Master of Science in Social Work and Human Rights*

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**Sweden's Reluctance to Incorporate the UN Convention on the Rights of the Child into Swedish Legislation: Implications for the full Implementation of Children's Rights. Exploring the Perspective of Child Rights Actors**

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## Abstract

This study titled *Sweden's Reluctance to Incorporate the UN Convention on the Rights of the Child into Swedish Legislation: Implications for the full Implementation of Children's Rights. Exploring the Perspective of Child Rights Actors* had a primary aim of understanding the implications of such reluctance as far as implementation of children's rights are concerned. It also aimed to underscore the difference that possible incorporation would yield, from the perspective of child rights actors—in the public service realm, NGO sector, and the Academia. This study found out a set of implication such as failure by human rights lawyers to invoke the CRC which was considered detrimental to especially children denied asylum. One other finding related to the disempowering effect of the current transformation process in the face of child rights actors, then the focus on children's needs more than their rights, among other implications. Noteworthy, most of these implications were from NGO actors and participants from the academia. The government official was reluctant to consider that the country's reluctance to incorporate the CRC was having any practical implications. And in turn, he held the view that incorporation would make no practical difference in the children's welfare. As a conclusion informed by the implications observed, this study contends that there is something the country can gain from incorporation which by implication means that the country is missing out as of current.

**Key Concepts:** *CRC, Reluctance, Incorporate, full implementation, Child Rights Actors.*

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**Dedication**

With all thanks and Joy, I dedicate this book to my parents—Mr. James Luwangula and Mrs. Elizabeth Kisoma Luwangula; my sisters—Tezira, Damalie, Rebecca, Mary and Viola; my brothers—Joseph, Zephania, Isaac and Ivan. For I have missed you throughout the time I have been away from you and I know it has neither been easy copying without me nor has it been easy for me without you. But the gracious Lord has made everything possible. It will be a good feeling to rejoin you after a while.

# 1. Introduction

## 1.1 Background

In the world over today, children and children's rights have gained prominence and they score invaluable high on the political, economic, social, and cultural agenda of many nations of the world. Children are viewed as the future of tomorrow's world, thus concern towards them paradoxically implies concern towards the future. For this reason, countries that share this common value/norm have equally appreciated the need to protect and foster children's rights not only to ensure that they enjoy a safe growth and development environment but also to prepare them as responsible citizens, capable of furthering respective countries' national and international development and diplomatic goals/agendas. To this effect, different countries attempt to ensure such children's rights through a framework of national laws and international human rights.

Sweden cannot be treated or viewed as exceptional of this positive reality. Smith (2007) in *The Independent Newspaper* (14 February 2007) hails Sweden's success in the UNICEF study in which the country topped in terms of children's material wellbeing, health and safety and behaviour and risk. This may be seen as a reflection of years of Sweden's commitment to the rights and welfare of the child. Today, one may be right to argue that Sweden is one among the recognised, respected and considered role-model countries with regard to children's welfare and rights. Children enjoy a wide range of rights including civil and political, socio-cultural, economic, among others. Of more significance, a great deal (though not all) of the rights enjoyed by children are indiscriminate of whether a child is Swedish by birth/origin or of an immigrant status. For instance the new Act on healthcare for asylum-seekers (2008, p.344) provides asylum-seekers and former asylum-seekers or "children in hiding" with a right to health care and medical services under the same conditions as children legally residing in the country (UN committee on the Rights of the Child, 2009, p.10, 14; Hunt, 2007, p.19, para 69). This is a fundamental position albeit there being a counter claim that this right is not absolute for undocumented children since these only have a right to urgent medical care, with no subsidies (Ibid 2009, p.14; CRIN 2009, p.2). This rather comparatively admirable state of affairs could in part be attributed to the long-time social democratic welfare model that the country has operated.

Indeed, one can today with a reasonable degree of certainty contend that Sweden to a greater extent has a positive though not absolute answer to the concern raised in 2002 by the then UNICEF Executive Director, Carol Bellamy for the need to accelerate progress for children. Bellamy's concern was echoed during United Nations Special Session on Children, 8<sup>th</sup>– 10<sup>th</sup> May 2002<sup>1</sup>. During this Special Session, Carol Bellamy implored national leaders to seriously examine their records on children and posed a number of questions to that effect: "Are you getting all your children into the classroom? Are you protecting all your children against disease? Are they safe from abuse, exploitation and violence? In her view, answering these questions rightly would be logically investing in young people and thus overcoming poverty and the instability it breeds which to her was not an optional matter in the face of concerned States. Sweden indeed can be said to be scoring well, although this is not to suggest that there are no gaps.

Sweden's progress in the sphere of children's rights can be said to have followed the country's international commitment notably when the country signed the UN CRC on 26<sup>th</sup> January 1990 and ratified the same on 29<sup>th</sup> June 1990<sup>2</sup> without registering any reservations at all<sup>3</sup> just a year after the

convention came into being. This moreover happened before the convention's entry into force on 2<sup>nd</sup> September 1990<sup>2</sup>. This in a way symbolizes how pertinent, concerned, crucial and sensitive Sweden treats the matters concerning children's rights.

More pledge by Sweden towards the international community as far as protection and promotion of children's rights is concerned is reflected in Sweden's signing and ratifying of the 2000 Optional protocol to the CRC on the involvement of children in armed conflict on 8<sup>th</sup> June 2000 and 20<sup>th</sup> February 2003 respectively<sup>4,5</sup>. This step was commended and appreciated by the UN Committee on the Rights of the Child (2005, p.10) during its 38<sup>th</sup> session on 30<sup>th</sup> March 2005. On addition, Sweden signed the 2000 Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography on 8<sup>th</sup> September 2000 though ratification took a longer time to be effected on 19<sup>th</sup> January 2007<sup>6</sup>. The country was again applauded for such more ratification by the UN Committee on the Rights of the Child during its 51<sup>st</sup> session on 12<sup>th</sup> June 2009.

Sweden is also noted to have been one of the countries which took the initiative for the World Summit for Children in 1990, where important goals were set in order to improve children's living conditions (Ministry of Foreign Affairs Sweden, UD Info No. 11, 1998). Further, Sweden is one of the largest donors of UNICEF, something that further denotes not only the country's commitment towards international cooperation but also promoting the rights of the child (Ibid).

In the same spirit, the Swedish government in its submission to the Riksdag of the Government Communication 2001/02:186 on 23rd May 2002 (2002, p. 12), noted that "since the CRC was adopted by the General Assembly, Sweden has assumed major responsibility for spreading knowledge about it. Sweden has also emphasized the follow-up of its application, and for this purpose provided financial support for the UN Committee on the Rights of the Child. By 2002, Sweden had had two representatives on the committee".

The country took a step further in implementing the CRC and optional protocols by domesticating the international children's rights instruments through policies, laws/Acts of parliament, strategies and action plans such as; the Government's strategy for implementing the UN CRC in Sweden in 1999<sup>3,7,8,9</sup>, the Child Rights Policy<sup>3,10,11</sup> (CRIN, 2009, p. 2), The National Plan of Action to protect children against sexual abuse and ill-treatment (UN Committee on the Rights of the Child, 38<sup>th</sup> session, 30<sup>th</sup> March 2005, p. 9); the establishment in June 2005 of a Child Rights Forum as a platform for structured dialogue between the Government and NGOs working with and for children (UN Committee on the Rights of the Child, 2009) among other developments.

From the above developments, it can be contended that the country is invaluablely committed to not only safeguarding but also promoting/fostering the children's rights within the country's jurisdiction.

However, the above notwithstanding, the question of whether or not the children's rights as articulated in the CRC are implemented to their fullest detail remains a contentious issue particularly that the country has exhibited reluctance to transpose the CRC into a national law (UN Committee on the Rights of the Child, 2009, p.2). In its written replies (2009) to the issues raised by the Committee on the Rights of the Child (during its 51<sup>st</sup> session while considering Sweden's 4<sup>th</sup> periodic report), the Swedish government explicitly noted that whereas such actors as "UNICEF Sweden and Save the Children Sweden have recently commented on the need to make the CRC a national law, the Government does not see any need at present to transpose the Convention into Swedish law". The Swedish government argued that "The Swedish legal and constitutional tradition is such that international agreements are incorporated into Swedish law by means of transformation, that is, by adapting the national legislation to match the requirements of the conventions" (Ibid).



Noteworthy, it is assumed that failure to incorporate specifically the CRC into national legislation may imply that most likely, the national law will be given precedence over the international law in case of conflict between the two. Yet ideally, the “Convention should always prevail whenever domestic law provisions are in conflict with the law enshrined in the Convention” (UN Committee on the Rights of the Child, 2009, p. 3; CRIN, 2010). The same may also imply that government can always find excuses to overlook and thus postpone or even ignore the implementation of some articulated rights in the international instrument especially the second generation rights—the economic, social and cultural rights (Sen, 2004, pp. 318-19) as long as it is not yet a national law. On addition, once the CRC is incorporated into national legislation, it could imply that such possible clashes between the national laws and the CRC can be no more. This state of affairs less surprising led the UN Committee on the Rights of the Child during the 51<sup>st</sup> session on 12<sup>th</sup> June 2009 to raise a concern that “the continuous lack of formal recognition of the Convention as Swedish law can have an impact on the rights contained therein and on the application of such rights”.

Whereas this is not to dismiss Sweden’s indispensable efforts and commitment towards implementing children’s rights, it is rather a matter of concern that such reluctance to incorporate the CRC into a Swedish legislation could be potentially or actually having implications for the full implementation of children’s rights. And they are those implications that this study exactly sets out to establish.

## **1.2 Problem statement**

Sweden in general can be said to be a profound pro-child rights country. Children are generally granted a secure environment which guarantees them a wide range of rights ranging from civil and political, socio-cultural, economic, etcetera both in the private and in the public spheres of the children’s lives. The country has relatively made reasonable commitment to uphold and foster children’s rights as signified internationally by ratifying the UN CRC and its two accompanying optional protocols<sup>4,6</sup> followed by domestication of the same through the country’s child rights policy, legislations, national strategy to implement the CRC and the National Plan of Action to protect children against sexual abuse and ill-treatment among other ways.

However, despite the country’s positive spirit and commitment reflected through both the local and international measures and steps set forth to implement the CRC, Sweden has been reluctant to incorporate the CRC into Swedish legislation, something which arguably would depict the utmost degree of commitment to implement the CRC to its fullest. Yet whereas on one hand there isn’t assurance that the current domestication of UN CRC perfectly takes care of all principles and provisions of the CRC, on the other hand, the question as to whether or not the current scores on children’s welfare and rights for children is attributable to the effectiveness of the transformation process as opposed to incorporation remains a matter of contention.

Previous studies have pointed to differentials in rights implementation when two scenarios are compared i.e. where the country has only domesticated the international human rights instrument and where the instrument has been incorporated into a national law. Hale (2006, pp.350-351) observes that despite the binding nature of the CRC in international law, as long as it is not made part of the domestic law, “many of its obligations tend to be drawn in such a broad and aspirational way that rather makes its implementation and realization difficult, thus in turn such a scenario merely represents the theory of children’s rights”. Heard (1997) argues that whereas “domestic human rights legislation represents the local implementation of internationally-recognized rights that are universal and

inalienable, unfortunately, human rights are far more complicated phenomena than that". Turner (1993) arguing from a sociological perspective, observes that "rights are social claims for institutionalized protection and... it is however just because of collective sympathy for the plight of others that moral communities are created which support the institution of such rights." In the same way, Sen (2004, p.319) contends that "human rights can be seen as primarily ethical demands. They are not principally 'legal', 'proto-legal' or 'ideal-legal' commands". These positions when analysed and contextualized to the CRC, they point to the view that once the CRC is not made a domestic law, implementation remains rather on a mere moral ground which for many actors may not consider binding.

Overall, although these previous studies shed light to the fact that there are implications for full implementation of rights once the international human rights instrument is not incorporated into a national legislation, none specifically underscores these implications more so with particular regard to children's rights and to Sweden as a case point. It is upon such a background that this particular study sets forth to explore and document these.

### **1.3 Study objectives**

#### **1.3.1 General objective**

The general objective of this study is to document the implications of Sweden's reluctance to transpose the UN CRC as a national law for the full implementation of children's rights.

#### **1.3.2 Specific objectives**

1. To find out the potential and/or actual implications of Sweden's reluctance to embrace the UN CRC as a national law for the full implementation of children's rights
2. To establish the extent to which Sweden's current policies, strategies and Action plans mirror and therefore take care of the UN CRC
3. To find out whether or not by embracing the UN CRC as a Swedish law through incorporation would make a difference and therefore an issue worth talking about

### **1.4 Research questions**

1. What accounts for Sweden's reluctance to incorporate the CRC into a national law?
2. To what extent do Sweden's current policies, strategies and Action plans, legislations, etcetera mirror and therefore take care of the UN CRC?
3. What does it really mean/imply for a country like Sweden to only ratify the CRC without incorporating it into national/Swedish legislation?
4. What difference if at all would it make by Sweden incorporating the CRC into a national legislation?
5. What are the missed benefits associated with such reluctance?
6. What risks as far as implementation of children's rights to their fullest does Sweden run by being reluctant to incorporate the CRC into Swedish law?
7. In practice, between the national legislations and the international law—the CRC, what takes precedence over the other?

## 1.5 Scope of the study

The geographical scope of the study was primarily Gothenburg city/municipality. However, for two NGOs—Save the Children and UNICEF whose representatives were not possible to obtain from Gothenburg, representatives from respective national offices in Stockholm were considered. And for national level key informants, they were based in Stockholm. In terms of content, focus was given to the potential and/or actual implications for the full implementation of children's rights following the state's reluctance to incorporate the CRC into Swedish legislation. This study took a period of utmost 4 months—mid January to mid May 2011 (including data collection phase, data analysis, and report writing).

## 1.6 Significance of the study

This study portrays the differences between mere domestication of the UN CRC and incorporation of the same convention into national legislation as far as implementation of children's rights to their fullest is concerned. It also highlights the difficulties faced by some 'specially' vulnerable groups of children such as those seeking asylum and children in hiding when it comes to attainment of rights guaranteed by the CRC but not necessarily in the domestic laws. This study might as well be an important stimulant for evidence-based debate on the need to consider incorporating the convention into a law or to maintain the status quo i.e. depending on how actors and authorities perceive the difference that incorporation would breed as pointed out in this study. Besides, since social research is cumulative, the findings of this study build on the existing body of knowledge and it may be a basis for stimulating future research.

## 1.7 Operational definitions of key concepts

**Incorporation:** This is a method or practice by which an international human rights instrument is accorded a status of a national law (made part of the national legislation) by an Act of parliament. It is basically done by dualist states.

**Convention on the Rights of the Child (CRC):** This is a backbone international (United Nations) human rights treaty that enshrines all children's entitlements. It ideally regulates actors—state and non-state (within a state party) in their work with children.

**Reluctance:** An act of unreadiness or hesitance

**Implications:** Consequences of an action or decision

**Child-Rights Actors:** Agencies within the public and private service realm focusing on children's needs and rights as their mandate and/or goal

**Full implementation:** Ensuring that all children's rights as articulated in the CRC are all made a reality in practice

## **2. Methodology**

This section spells out how the study was conducted. It defines the research design, study area, study population, sample size and selection procedure, data collection methods and tools, data analysis, and ethical considerations.

### **2.1 Study design**

The study was exclusively qualitative in nature, exploratory—with an aim obtain an insight into the undocumented potential and/or actual implications for Sweden's reluctance to transpose the CRC into a national law on the full implementation of children's rights. The study was cross-sectional (conducted at one point in time) since it bore no interest in analyzing trends. Besides, a cross-sectional design was very commensurate with the defined time allowed for the study.

### **2.2 Area of study**

This study was largely conducted in Gothenburg city. For NGOs—Save the Children and UNICEF whose representatives were not possible getting in Gothenburg, those at the respective national offices in Stockholm were interviewed. On addition, since the subject studied is of a national nature, obtaining a national perspective was deemed necessary. Thus, some interviews with national officials from the Ministry of Health and Social Affairs, and from the office of the Children's Ombudsman were conducted. Gothenburg in particular was considered because; it houses both state and non-state actors working with children's rights as well as people in the academia. These were in Stockholm. These categories primarily formed the study population aimed for by this study as potential sources of information. Besides, studying this area could give a picture that could serve as a replica of other cities in the country with which it shares similar administrative structures, operating NGOs, and academic units/institutions. Thus, the study was envisaged to attempt reflecting a picture beyond Gothenburg. Once again, given the resource constraints (finances, time and human resources), it was not feasible studying the whole country.

### **2.3 Study population**

The population from which the sample was drawn included primarily three broad categories i.e. first, staff of municipality—social workers from Gothenburg social services department, secondly, staff of Child-Rights NGOs and thirdly, people in the academia focusing on children's rights. These three categories were considered not only because they directly work with children's rights and therefore the most suited for this study but also because they were envisaged to potentially contribute to the subject from different perspectives. Studying these three categories raises optimism about obtaining mixed views/opinions which was envisioned to be beneficial. Other than these, the study also considered two (2) special units, these are, the office of the children's ombudsman given its central role in fostering and monitoring the implementation of children's rights in conformity with the CRC<sup>11</sup> (CRIN, 2009, p.1; CRIN 2010) as well as the National Ministry of Health and Social Affairs. This ministry is considered because of its key mandate as a coordinating body for the implementation of the Swedish Government Strategy for the implementation of the CRC (UN committee on the Rights of the child—38th session, 2005, pp.1-2). Besides, it is directly mandated with the coordination role of the CRC.

These two latter categories were studied as key informants and they contributed a national perspective about the subject under investigation.

## **2.4 Description of the study Sample**

Considering that there were three primary respondent categories, varying numbers of respondents were drawn from each of these. All the respondents were selected using non-probability purposive sampling. From among the public servants in the social services departments of Gothenburg municipality, two participants were interviewed. Each of these was drawn from different districts. They both held the title of 'Chief of Family and Children's Unit'. This unit is directly in charge of all matters concerning children ie their protection, participation, and welfare in general. They are concerned about the safety of children and any risk that children could be exposed to. The initial plan was to study/interview 4 chiefs but this was not possible because of the timing of the study. The study was conducted at a time Gothenburg was undergoing restructuring to centralize from 21 (twenty one) districts to 10 (ten). At that time it was extremely difficult to get hold of the chiefs because all the time they were in meetings together with their deputies. Thanks to the two who were able to participate in the study.

Among NGOs, BRIS Gothenburg, Save the Children (Stockholm) and UNICEF (Stockholm) took part in the study. These were considered because of their direct focus on children's rights. Besides, they form part of the NGO group that has on a number of occasions called upon government to incorporate the CRC into Swedish legislation. They were thus considered better positioned to inform about the implications of Sweden's reluctance to incorporate the CRC. For each of Save the Children and UNICEF, one respondent was interviewed while for BRIS, two officials joined together for a discussion.

For NGOs, they were again considered for this study because they share a value of ensuring, safeguarding and promoting the rights and welfare of the children in society. Besides that, "they support the work of developing alternative (shadow) reports to the UN Committee on the Rights of the Child of which such parallel reports are a valuable supplement to the official reports..." (Swedish Government Communication 2001/02:186<sup>8</sup>, 2002, p.11). The same observation has been made by Smith (2007, p.144), applauding the NGOs potential of "frequently consulting more widely across the community in question without State 'bureaucratic' constraints". Generally, NGOs have a key role in the protection of human rights as highlighted by the concluding Declaration (para. 38) of The World Conference on Human Rights in Vienna 1993 (cited in Smith, 2007, p.144).

Four (4) study participants from the academia took part in this study. Two of whom were drawn from Social Work department of Gothenburg University while the other two are human rights experts at Global School still at the University of Gothenburg. These two categories were purposively selected because of they not only focus on children's rights and welfare but were also considered informed about the subject under investigation. The Academics formed an important resource to substantiate on the subject from a rather scholarly yet legal and/or practical perspective.

From the national Ministry of Health and Social Affairs, one official from the coordination unit of the CRC was interviewed whereas from the Office of the Children's Ombudsman, one of the legal officers participated in the study. These both informed and clarified on a number of issues.

## **2.5 Data collection methods and tools**

Data was collected using unstructured in-depth interviews complemented with documentary review.

### **2.5.1 Unstructured interviews**

These were used to obtain detailed information from primary respondents and key informants. This is a preferred method of qualitative social inquiry and as Fielding and Thomas (2003, p.124 citing Lofland and Lofland, 1994) observe, “Non-standardized interviews best fulfill the case that the essence of research interview is the ‘guided conversation’”. The method aimed to enhance flexibility and elicit rich, detailed material and insights usable in qualitative analysis (Ibid, 2003). Besides, to allow for a higher response rate and taking into account the discursive nature demanded by the subject under investigation, unstructured interviews became the most appropriate. An interview guide and a key informant guide were the applied tools to gather the information from primary respondents and key informants respectively.

### **2.5.2 Documentary review**

This method encompassed a review of official reports, policies, legislations, articles/publications with the intent to obtain information to answer the research questions. Such public/official documents like Macdonald (2003, p.196) argues aid the understanding of the investigated social world. Besides, this method “remains an invaluable part of most schemes of triangulation” (Ibid 2003 citing Denzin, 1970). To take into account concerns of authenticity and credibility of documents, attention was paid to issues of when report/document was written, interest of the author, thus questions of “who produced the document, why, when, for whom and in which context” were borne at the back of the researcher’s mind as these helped to account for quality (Ibid 2003, pp.204-05). Reviewing documents helped to gather relevant views to the study that otherwise would not be possible obtaining by mere interaction with study sample. On addition, it also aided to contextualize the study findings.

## **2.6 Data processing and analysis**

Data was transcribed and then post-coded into themes emerging from the data themselves, guided by the study objectives. Like Kvale and Brinkmann (2009, p.180) underscores, transcribing interviews helped to “structure interview conversations in a form amenable to closer analysis and transcription itself formed an initial analytic process”. Since this investigation did not aim at “emphasizing the mode of communication and linguistic style” nor did it aim for “extensive narrative analysis” (Kvale and Brinkmann, 2009, p.180) but rather aimed at “reporting the subjects’ accounts in a readable manner” (Ibid, 2009, p.181) and producing a more coherent output (Ibid, 2009, p.184, 186), the verbatim method of transcribing was not used throughout. Rather, only selective verbatim transcription was deployed. I did the transcribing myself and this helped me: “learn much about my own interviewing style, reflect on the emotional aspects entailed in the interviews, and it helped me make timely analysis of what was said” (Kvale and Brinkmann, 2009, p. 180).

Themes generated from data collected based on objectives are supported with cases obtained during the study. Contextual differences were taken into account while making comparisons among findings from different representatives of units of analysis. This helped to make interpretations and drawing sense from the data. Being a qualitative study, analysis started right in the field by making a follow up of emerging issues in the interviews and discussion. Precisely, the road towards final

analysis entailed analysis focused on meaning i.e. meaning coding, meaning condensation and meaning interpretation (Kvale and Brinkmann, 2009, pp.197, 201-207).

## **2.7 Study procedure**

The researcher obtained an introduction letter from the Department of Social Work, University of Gotheburg where he is a student before heading for data collection. Making contacts with intended study participants preceded actual interviews. Before the interview, respondents were emailed to a copy of the guide questions to avoid getting them by surprise or asking them surprising questions. But most important, this helped to ensure a higher response rate. Interviews were audio recorded on permission of the respondent to capture every other detail and later transcribed. Data was then be managed, coded and analyzed thematically to produce a research report.

## **2.8 Ethical considerations**

The researcher; introduced himself to the study respondents, informed them about the purpose of the study, the benefits and risks associated with participation in the study. Participants were assured of confidentiality and anonymity of both the interview and data. The information provided by respondents was to be and has been limited to the study purpose. The importance of their participation was communicated to them and they were informed of the voluntariness of their participation i.e. they reserved the liberty to pull out of the interview/discussion at any point. After thorough explanation of all these, an informed consent form was handed to the respective respondents who neither out of pressure nor persuasion but out of understanding the study details and the implications of their participation all consented and signed it. Before conducting the study, the researcher obtained an official clearance from the Department of Social Work (that houses the Programme) at the Faculty of Social Sciences, Gothenburg University. I do contend with certainty that the consent form entailed all the standard features as underlined by different authorities in the field of research as detailed for instance by Kvale and Brinkmann (2009, p.70-76); Sections 16 and 17 of The Act concerning the Ethical Review of Research Involving Humans (2003, p.460) by The Swedish Ministry of Education and Cultural Affairs, among others.

### 3. Theoretical framework

This study identifies two theories deemed relevant in not only providing a framework for understanding better the phenomenon under investigation but also for analyzing the findings of the study. The theories include: the Monism and Dualism theories of international law, and the empowerment and advocacy theory. The postulations of the respective theories are underscored below.

#### 3.1 Dualist-Monist theories of International law

Monism and Dualism are theories that have been developed to explain the relationship of international law and national law (Dixon, 2007, p.88; Tapiwa, 2002, p.1).

##### 3.1.1 Monism

The monist theory supposes that international law and national law are simply two components of a single body of knowledge called ‘law’<sup>12</sup> (Dixon, 2007, p.88; Tapiwa, 2002, p.1; Wallace, 1997, p.36). According to this theory, both sets of rules operate in the same sphere of influence and are concerned with the same subject matter, and for this reason, there may be conflict between the two systems. If this happens in a concrete case, international law is said to prevail<sup>12</sup> (Dixon, 2007, p. 88; Wallace, 1997, p.36).

“Monists assume that the internal and international legal systems form a unity”<sup>13</sup>. “Both national legal rules and international rules that a state has accepted, for example by way of a treaty, determine whether actions are legal or illegal” (Ibid, citing Pieter Kooijmans, 1994, p. 82). In monist States, International law does not need to be translated into national law. The act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority<sup>13</sup>. Similarly, the Juristic website contends that the basic monist theory upholds that international law and national law are part of the same hierarchical legal order<sup>12</sup>. Stemming from the fact that all monists suppose the superiority of international law in cases of conflict (Dixon, 2007, p.88), several commentators have justified the supremacy of international law over national law thereby advancing different explanations. Some of these commentators include; Hans Kelsen, and Hersch Lauterpacht (Dixon, 2007, p.88; Juristic website<sup>12</sup>).

According to Dixon (2007, p. 88), Hans Kelsen, a noted legal theorist, sees the superiority of international law as a direct consequence of his ‘basic norm’ of all law. This basic norm—or fundamental principle from which all law gains its validity – is that ‘states should behave as they customarily have behaved’. Dixon further notes that “Kelsen is ‘monist-positivist’ in that international law derives from the practice of states and national law derives from the state as established in international law. International law is therefore a ‘higher’ legal order”.

In contrast, Hersch Lauterpacht, once a judge of the ICJ (International Court of Justice), “sees international law as superior because it offers the best guarantee for human rights of individuals. Indeed, the ‘state’ itself is seen as a collection of individuals rather than a legal entity in its own right. International law is said to control or override national law because the latter cannot be trusted to protect individuals and, more often than not, because it is used to persecute them” (Dixon, 2007, p.88).



“International law prevails because it is the guarantor of individual liberty, and clearly this echoes the current thinking of many international human rights lawyers” (Ibid).

Dixon (2007, p.89) further highlights that common about these diverse opinions is “the basic monist tenet that international law and national law are part of the same hierarchical legal order. Consequently, norms of international and national law must be ranked in order of priority should a conflict occur in a concrete case. In this sense, international law is superior. In practice, this means that legal institutions of a state, such as its courts and legislature, should ensure that national rights and obligations conform to international law. More importantly, if they do not, the national court should give effect to international law and not its domestic law”.

In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is the constitution<sup>13</sup>. Reasoning from a human rights point of view, once a country has accepted a human rights treaty, a citizen of that country who is being prosecuted by his/her state for violating a national law, can invoke the human rights treaty in a national courtroom and can ask the judge to apply this treaty and to decide that the national law is invalid. He or she does not have to wait for national law that translates international law. His or her government can, after all, be negligent or even unwilling to translate this particular treaty into a national law<sup>13</sup>.

### **3.1.2 Dualism**

Dualists emphasize the difference between national and international law (Tapiwa, 2002, p.1; Wallace, 1997, p.36). “Dualism denies that international law and national law operate in the same sphere, although it does accept that they deal with the same subject matter”<sup>12</sup> (Dixon, 2007, p. 89). In their reference to dualists such as Triepel, Dixon (2007, p.89) and the Jurist website<sup>12</sup> all observe that international law regulates the relations between states whereas national law regulates the rights and obligations of individuals within states and International law deals with the subject matter on the international plane whereas national law deals with the subject matter internally. Consequently, if an individual is denied a right in a national court which is guaranteed under international law, the national court will apply the national law. Likewise, action by a state that might be unlawful under international law may nevertheless attract validity and protection in national law (Ibid). The Jurist website<sup>12</sup> citing Malenovský observes that “the international and national laws are two different and separate systems, which are based not only upon different jurisdictions and sanction bodies, but also upon the different sources and the different subject of matter”.

Dualism requires the translation of international law into the national law. “Without this translation, international law does not exist as law”<sup>13</sup>. This theory further postulates that before incorporation of such international law, citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law<sup>13</sup>. “International law as such can confer no rights cognizable in the municipal courts. It is only insofar as the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations”<sup>13</sup> (citing James Atkin, Baron Atkin, in M. Akehurst).

“Again, from a human rights point of view, if a human rights treaty is accepted for purely political reasons, and states do not intend to fully translate it into national law or to take a monist view on international law, then the implementation of the treaty is very uncertain”<sup>13</sup> (citing Antonio Cassese, 1992, p.15).

A treaty "has no effect in municipal law until an Act of Parliament is passed to give effect to it"<sup>13</sup>. Since under dualist theory international law is not automatically applicable in municipal law, the former requires internal statutory action to make it applicable in the latter (Tapiwa, 2002, p.1; Wallace, 1997, p.37).

However, regarding the matter of whether or not the international law and national law are capable of getting into conflict, scholars that have written about dualism at some point offer competing views. According to the Jurist website<sup>12</sup>, Anzilotti—one of the exponents of this theory argues that "the systems are so different, that no conflict between them is possible, however, most of the dualists would assume that municipal law would be applied". To the contrary, Dixon (2007, p.90) notes that "Dualism does accept that the systems can come into conflict – because they deal with the same subject matter – but recognizes that each system applies its own law unless the rules of that system say otherwise. International courts apply international law and national courts apply national law".

Besides, "International law does not determine which point of view is to be preferred, monism or dualism. Every state decides for itself, according to its legal traditions. International law only requires that its rules are respected, and states are free to decide on the manner in which they want to respect these rules and make them binding on its citizens and agencies"<sup>13</sup>. "[T]he transformation of international norms into domestic law is not necessary from the point of view of international law...the necessity of transformation is a question of national, not of international law"<sup>13</sup> (citing Antonio Cassese, 1992, pp.21-22). The theory also holds that "Both a monist state and a dualist state can comply with international law. All one can say is that a monist state is less at risk of violating international rules, because its judges can apply international law directly"<sup>13</sup> (citing Pieter Kooijmans, 1994, p.83). "Negligence or unwillingness to translate international law, or delays of translation, or misinterpretation of international law in national law can only pose a problem in dualist states. States are free to choose the way in which they want to respect international law, but they are always accountable if they fail to adapt their national legal system in a way that they can respect international law..."(Ibid).

The choice of this theory was grounded on its envisaged relevance in analyzing and thereby obtaining an understanding of the implications for the implementation of children's rights well aware that Sweden is a dualistic state<sup>14</sup>. Yet at the same time, the country's legislative body—the Riksdag has not accorded the CRC a national law status, something that would be possible through an Act of parliament. The theory's relevancy gets strengthened in a bid to understand the relationship between the Swedish laws and the CRC and which one in practice takes precedence over the other and the subsequent implications for this.

### **3.2 Empowerment and advocacy theory**

According to Payne (2005, p.295), "Empowerment seeks to help clients gain power of decision and action over their own lives by reducing the effect of social or personal blocks to exercising existing power, increasing capacity and self-confidence to use power and transferring power from the groups and individuals". Payne notes that "Advocacy seeks to represent the interests of the powerless clients to powerful individuals and social structures. Advocacy originates in legal skills and is a role for many caring professions. It represents people in two different ways: speaking for them, and interpreting and presenting them to those with power" (2005, p. 295).

Payne (2005, p. 297) citing Rojek (1986) considers empowerment and advocacy to be rationalist in nature, thus assuming that changing the environment in client's favour may be possible. These two therefore work towards this direction.

Payne (2005, p.297) brings up an important dimension of advocacy in his observation that “From the 1970s onwards, advocacy has been incorporated into general social work practice, particularly in rights work aimed at achieving the maximum welfare and other benefits for users”. And most important that advocacy seeks a change in legislation or policy on behalf of user groups.

“Advocates ‘represent’ in the sense of acting and arguing for the interests of their clients” (Payne, 2005, p.298). Payne citing Philp (1979) notes that advocacy is used to “imply the aspect of social work that ‘represents’ in the sense of interpreting or displaying the value of clients to powerful groups in society”. Thus, advocacy is taken to mean any or all of these: a service that argues clients’ views and needs, a set of skills or techniques for doing so, and the interpretation of powerless people to powerful groups (Ibid). Further Payne considers as an important part of social work the need for advocacy to ensure that people receive all their entitlements to other services (2005, p.299 citing Payne, 2001; 2002a).

Payne (2005, p.302) considers that “...individualized work has been seen as empowering, although many original uses of the word in social work were applied to oppressed groups rather than individuals. While challenging “Jack’s (1995) criticism that giving power from a powerful position is impossible”, Payne (2005, p. 302) contends that “increasing the total amount of power in use is possible, since not all capacity for power is taken up”. Consequently, “clients often have power which they are unable to use or do not believe they have” (Ibid).

On the other hand, advocacy, a considered aspect of empowerment “can be used to argue for resources...or change the interpretation which powerful groups make of clients” (Payne, 2005, p.303). He further regards advocacy to be an aspect of “welfare rights work, and an integral aspect of workers’ activities on behalf of clients within their own agencies or arguing on their behalf with other agencies” (Ibid).

In consideration of the government (the Executive, Judiciary and in most important the Legislature) as forming the ‘powerful group’ and the children forming the powerless and vulnerable group, the empowerment and advocacy theory is thought to be relevant in serving as a pointer to the empowerment and advocacy effect on the work of Child rights actors in the face of the country’s reluctance to transpose the CRC into a national law.

## 4. Literature Review

### 4.1 Justifying the need to transpose the CRC into national law: Could it make a difference?

Hale (2006, p.350-51) observes that despite the binding nature of the CRC in international law, as long as it is not made part of the domestic law, “many of its obligations tend to be drawn in such a broad and aspirational way that rather makes its implementation and realization difficult, thus in turn such a scenario merely represents the theory of children’s rights”. To this effect, Sweden can be applauded since it may be said to be scoring greatly in as far as harmonizing the CRC into the country’s domestic law is concerned. However, this applaud faces a challenge from the UN Committee on the Rights of the Child which during the Children’s Rights Universal Periodic Review of Sweden reiterated its concern that “there was no apparent modality to give effect to the standards of the Covenant in domestic law” (CRIN, 2010). Perhaps this is another way by the committee of reaffirming its call to the Swedish government to consider incorporation of the convention into national law. It shall be remembered that earlier on, this committee together with some children’s rights actors such as UNICEF and Save the Children Sweden contented that it would rather be more ideal for Sweden to take a greater step further to transform this convention into Swedish (UN Committee on the Rights of the Child, 2009, p.2). Yet the implications of not incorporating the convention into national law on the full implementation of children’s rights remains undocumented, and thus forming the focus of this study.

Save the Children-Sweden (SC-Sweden) as one of the key stakeholders during the Children’s Rights Universal Periodic Review of Sweden made a practical observation regarding the high level of autonomy enjoyed by municipalities and regional councils as this may be consequential, “leading to variations in how such entities make decisions on issues concerning children” (CRIN, 2010). A further analysis of this may reveal that such autonomous entities within the same State are bound in their practical work to react and thus implement differently the CRC as long as it is not yet made a law. the impact may be grave especially when it comes to the second generation rights (Economic, social and cultural rights) (Sen, 2004, p.318-19) where States/entities can excuse themselves based on availability of resources.

It is argued that if the child perspective is to permeate all issues that affect children and young people it is crucial to change attitudes, approaches and practices in a range of activities at various levels of society<sup>3</sup>. However, it may be contended that as long as the CRC is not yet a Swedish law, the attitude, approach and practices are more likely to be loose. Put another way, actors are likely to act on a rather moral ground than a legal ground yet the weight of the two could be varying since the former unlike the latter ground may not necessarily sound obligatory and binding.

A further observation is also made while some rights are absolute and must be implemented by all states immediately irrespective of the state’s level of development (civil and political rights), other rights are more like goals and are dependent on the resources of the individual state (the economic, social and cultural rights)<sup>3</sup>. In my view, well aware that the rights granted to children in the CRC like in the UDHR are accorded different status, this in one way or another signals some potential or actual implications for full implementation of all rights in a situation where a state has not considered incorporating the CRC into a national law. It is probable that a state may stem on such a ground to assert that some rights can only be implemented only with availability of resources to excuse itself, thereby skipping to fully implement children’s rights. This scenario trickles down to the State’s autonomous municipalities and regional councils.

The Ministry of Health and Social Affairs<sup>3</sup> further notes that the CRC is a binding agreement between the states that have joined it and states are obliged to take suitable action to implement the Convention (an indication of State sovereignty). Each state decides how it lives up to its commitments, as long as implementation is in line with the principles of the Convention. In my view, according to the way/spirit in which the UN operates, i.e. encouraging states to voluntarily implement the rights spelt out in the UN human rights instruments, even when the CRC is considered to be binding, it is possible that without incorporating it into a national legislation, its binding effect remains limited. Besides, it is clearly put that each state decides how it lives up to its commitments (State sovereignty). Sweden has chosen not to make the CRC a Swedish law but rather to rely on national laws that aim to uphold the rights of the child. Such a situation cannot be treated or seen as implication free in as far as the full implementation of children's rights is concerned.

In the Government Communication 2001/02:186<sup>8</sup> (2002, p. 17), it is observed that Ratification obliges every nation to ensure that national legislation conforms to the content of the CRC. Moreover, the State Parties to the convention are obliged to take other measures to ensure that the CRC's spirit and intentions permeate all child-related measures. Whereas Sweden can be said to have gone a long way towards achieving this, the concern is to what extent is it adequate to merely have national legislation conforms to the content of the CRC and the ensuring that the CRC's spirit and intentions permeate all child-related measures? From a systems perspective/theory, "the whole is better than the sum of its parts" (Payne, 2005, p.145) yet according to Sweden's practice, it is opting for the sum of its parts rather than the whole (CRC).

Former UN Secretary-General Kofi Annan<sup>15</sup> addressed the children of the world saying to them that "We, the grown-ups, have failed you deplorably..." (UNICEF website<sup>16</sup>). The concern here is that by Sweden turning adamant towards incorporating the CRC into Swedish law couldn't it be risking succumbing to Kofi Annan's concern?

Heard (1997) argues that denial or abuse of people's rights forms a center stage in many nations political debate yet this human rights abuse or denial characterizes not only the non-democratic countries but also the prosperous and democratic ones. In my opinion therefore, those that argue for incorporation of the CRC into Swedish legislation perhaps could argue from this view point that once the convention becomes a law, it may probably help to better deal with such children's rights denial and abuse. Actually Heard further argues that whereas "domestic human rights legislation represents the local implementation of internationally-recognized rights that are universal and inalienable, unfortunately, human rights are far more complicated phenomena than that". One may thus stem from this viewpoint to consider that mere domesticating the human/children's rights articulated in the CRC is inadequate and thus could bear different implications for their full implementation compared to if a nation State fully embraced the CRC as a national law.

On the other hand however, as Sen (2004, p.318) argues, there is need to "examine whether legislation is the pre-eminent, or even a necessary, route through which human rights—in this case children's rights can be pursued". Perhaps the Swedish government in view of this has considered that it would make no difference by incorporating the CRC into Swedish legislation. But the above notwithstanding, an exploration of the implications of the country's reluctance ought to be made and documented.

Sen (2004, p.319) further contends that "human rights can be seen as primarily ethical demands. They are not principally "legal", " proto-legal" or "ideal-legal" commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights". This position about human rights and in this case children's rights attains more support from Turner (1993) in his observation that "From a sociological perspective, rights are social claims

for institutionalized protection and that it is however just because of collective sympathy for the plight of others that moral communities are created which support the institution of such rights.” This position when analyzed points to the view that once the CRC is not made part of the domestic law, implementation remains rather on a mere moral ground. To a community (people) that share a common view as Sen and Turner, they would concur that perhaps it makes a difference when a country incorporates the CRC into national legislation so as to accord the same a greater status and to ensure its implementation as rather a legal than ethical/moral demand/obligation.

## 4.2 Sweden’s children’s rights related policy developments

Underscoring the country’s developments in the area of policies, strategies and action plans related to children’s rights is deemed essential for providing a yardstick against which to measure the extent to which such developments take stock of the rights articulated in the CRC. Thus it is not for its own sake. Below is a spell out of some of the key developments.

The Swedish Government Communication 2001/02:186<sup>8</sup> (2002, p. 14) highlights that the Swedish Government appointed a Parliamentary Committee in 1996 to carry out a broad overview of how Swedish legislation and practice tally with the provisions and intentions of the CRC. This Committee found, in its report *The Best Interests of the Child a Primary Consideration (SOU 1997:116)*, that Swedish legislation broadly tallied with commitments in the CRC.

Other indicators of Sweden’s progress towards the implementation of Children’s rights relate to; the country’s introduction of the position of ombudsman for children (appointed by the Swedish Government for a term of six years) as a monitoring agency with a duty to promote the rights and interests of children and young people as set forth in the CRC<sup>17</sup> (The Children’s Ombudsman Speech on Health Care, April 2006, p.1; CRIN, 2009, p.1).

Another development is the Riksdag’s (Parliament) unanimously approval of the Government’s strategy for implementing the UN Convention on the Rights of the Child in Sweden in 1999<sup>3,7,9</sup> (Swedish Government Communication 2001/02:186<sup>8</sup>, 2002, p. 14). Accordingly, “the strategy formed the starting-point for the child policy, later renamed the Child Rights policy aimed at reflecting the spirit and intentions of the UN Convention on the Rights of the Child in all decisions and activities relating to girls and boys up to the age of 18”. Yet the child policy aimed at “a strategic level to initiate, drive forward and coordinate processes with the purpose of ensuring that the rights expressed in the UN CRC shall permeate all aspects of government policy as well as having an impact at all levels of society and in all activities where children and young people are affected” (Ibid) Besides, “The Parliament has in December 2010 agreed on a new Strategy to strengthen child rights in Sweden consisting of nine principles that express basic conditions to strengthen children’s rights”<sup>10</sup>.

The Child Rights Policy (CRIN, 2009, p. 2)—a cross-sectoral policy is mainly concerned with action to implement the CRC in Sweden and with an objective that “children and young people are to be respected and to have opportunities for development and security and also for participation and influence”<sup>3</sup>. And its role is “to initiate, press forward and coordinate processes aimed at ensuring that the intentions and spirit of the CRC permeate all aspects of Government policy and all public actions that affect to children and young people”<sup>3,10,11</sup>.

Other marked developments include Sweden’s establishment in March 2007 of the Swedish Academy for the Rights of the Child at Örebro University (UN Committee on the Rights of the Child—51st session, 2009), its adoption of a National Plan of Action to protect children against sexual abuse and ill-treatment (UN Committee on the Rights of the Child—38th session, 2005, p. 9) as well as in the area of juvenile justice, Sweden in 2002 enacted of a law on mediation in connection with

criminal offences in order to reduce the injurious effects of the crimes as well as in 1999 introducing of custodial care and of community youth service as sanctions for young offenders (Ibid, 2005). Not forgetting, the establishment in June 2005 of a Child Rights Forum as a platform for structured dialogue between the Government and NGOs working with and for children (UN Committee on the Rights of the Child, 2009).

According to the UN Special Rapporteur's report, "The World Conference on Human Rights (1993) recommended that States draw up national human rights action plans with a view to identifying how to better promote and protect human rights which if properly resourced, such plans could serve many useful purposes such as promoting the integration of human rights, including the right to health, in all relevant policymaking processes" (Hunt, 2007, p.10, para 27). Accordingly, "In 2002, Sweden adopted its first national human rights action plan (2002-2004) (Skr. 2001/02:83) with the purposes of among other things promoting coordination on, and raising awareness about, human rights". This however turned out to be regrettable given that, "it included neither a focus on the right to health, nor other economic, social and cultural rights" (Ibid, 2007, p.10, para 28). However despite such shortfalls of the first action plan, the new (second) national human rights action plan (2006-2009) presented to the Riksdag (2005/06:95) in March 2006 was a better one (Hunt, 2007, p. 10, para 29). This second plan was hailed for "representing a very considerable improvement on its predecessor as it included a chapter on economic, social and cultural rights, as well as a section on the right to the highest attainable standard of health. The right to health section had a welcome focus on discrimination, inequalities and health and the plan proposes governmental measures, in the health context, to combat discrimination based on gender, ethnicity, religion or other belief, sexual orientation, and disability (Ibid, para 29 citing Åtgärd 55, p. 67).

Whereas these national measures clearly articulate intentions to take care of the CRC, it cannot be taken for granted that they actually do. Put simply, whether or not these measures actually fulfil the provisions and principles of the CRC in a situation where the CRC is not part of the Swedish law is a core concern of this study. In a way, understanding this will at the same time serve as a pointer to the implications of the country's reluctance to incorporate the CRC into its national legislation.

## 5. Presentation of Findings

The findings are presented following a set of themes that emerged from the data collected. The themes are aligned to the research objectives and questions. Put simply, they attempt to answer the research questions of the study. They include; the perceived reasons for Sweden's reluctance to transpose the CRC into Swedish legislation, the extent to which national measures to implement the CRC mirror and/or take care of the CRC, the perceived difference transposition would make, the implications of non-transposition, the risks Sweden runs by not transposing the CRC, among others.

### 5.1 Perceived reasons for Sweden's reluctance to transpose the CRC into Swedish legislation

Though not part of the objectives set forth for this study, one of the unintended findings surrounded the reasons the study participants perceived to be making Sweden maintain the reluctance. And this was found to be having a bearing on the implications for the full implementation of children's rights.

One study respondent, an academic attributed the reluctance to the 'great confidence in the welfare State'. She expressed *...I think we have a strong welfare state and we have confidence in it. It is good although it has deteriorated over the past years with this current government but it is good. It works well for the majority of the population though, not for everyone. So I think this is one of the reasons politicians say we do not need to transpose the CRC into Swedish law since we have good circumstances working for children...* This belief in Sweden's strong welfare system was equally identified in a different interview with another academic when she noted that *...I think we have this system/ideology of working in a positive way given our strong welfare system and we think the situation will be better for the children even without the CRC as a law.* The strong welfare system for Sweden was more or less inferred to in all interviews although to some respondent particularly from NGOs and the academia did not consider it as a sufficient justification for the country's reluctance.

The other perceived factor/reasons underlies the contention that already the CRC is being implemented through the existing measures such as the child rights policy, national legislations, human rights action plan, national strategies, etcetera and that Swedish laws legislating work with children are in harmony with the CRC. One chief of the Family and Children Unit in one of Gothenburg districts noted that the fact that the four fundamental principles are reflected in the national laws that guide their work is enough, thus no much need to necessarily incorporate the CRC into Swedish law. One academic observed that, *...the CRC is implemented in the Swedish laws. For example the principle of the best interest of the child is written in several laws concerning the child ...and also the child's right to growth, development and good health. Also the child's right to have contact with both parents is certainly implemented in the family law. So even though we may say that the convention has not been incorporated, it is being implemented within the national laws because the convention's aspirations are expressed in the wordings of the national law.* This was the exact standpoint of the official from the Child Rights Coordination office in the Ministry of Health and Social Affairs. He argued that with such measures and the results they have yielded as far as children's welfare is concerned, it is hard to imagine the need for the transposition of the CRC. In his reference to Article 4 of the CRC, he defended his and the state position that *...you are right the UN committee on the Rights of the Child has urged us to incorporate the CRC into our legal system but there is not any article in the convention that says we must. Article 4 of the CRC suggest a number of measures that a country can adopt/choose from to see that the implementation of the CRC take effect such as*



*administrative, legislative, and other measures but does not necessarily say we incorporate it into our national legal system. The transformation process we use is actually part of the legislative measures recommended by Article 4 of the CRC.* He thus argued that there is therefore no need to make the CRC a national law.

Whereas the view that the CRC is being implemented through a set of national measures was supported by some other study participants such as social workers in the social services department, a counter argument was raised by some participants notably child-rights NGO officials and this concerned implementation. The NGO officials interacted with in separate interviews contended that truly the country's national laws are in harmony with the CRC but contested the claim that the CRC was already adequately being implemented through measures that government has set forth. In their view, such implementation finds a challenge of the autonomous nature of the regional and municipal councils and when it comes to the CRC that is not a law, the situation characterized by discrepancies gets exacerbated. Participants that held this view could not justify Sweden's reluctance to incorporate the CRC into national law on mere ground that the CRC is in harmony with and is being implemented through such measures set forth by government.

Besides, some respondents that challenged the plain view that the CRC is already being implemented, in particular NGOs representatives and the academics argued that though the Swedish legislation follows the CRC, the CRC has articles which are not automatically translated/ incorporated in the national law, mainly articles about economic, socio and cultural rights. Most commonly cited were the health and education rights of children in hiding. On addition, despite the general and cross-cutting contention that Swedish legislation is in harmony with the CRC, some respondents from child-rights NGOs and some academics felt that it would be too simplistic to base on this and claim that there is then no need to transpose the CRC into Swedish legislation. According to these respondents, the claim of harmony as a justification for non-incorporation loses ground when one considers that the person interpreting the CRC may do so in his/her own way and judges are often looking at the national laws and not the CRC to provide guiding principles in their rulings.

In another interview, one academic argued out Sweden's reluctance in terms of state sovereignty. While expressing his dissatisfaction with Sweden's reluctance regarding the question of incorporating the conventions, he argued that state sovereignty could be the responsible factor for Sweden's practice regarding the question at hand. In a related matter, a Legal officer of one of the Child-rights NGOs studied noted that Sweden's reluctance can be seen in terms of what he called the 'Swedish system'. He expounded that *...it is Sweden's traditional political system. The State chose to take the transformation process, choosing to make changes/adjustments to its national laws to include sections of the CRC because then it makes it easy for their courts to work with the national laws and to follow the changes in the Swedish law following the transformation process rather than working with the whole CRC as a complete law.* This same view was noted by one academic in his observation that *...I think it is a tradition for Sweden not to incorporate the conventions into the national legislation. The only convention that Sweden has incorporated is the European convention.* The argument by the Ministry official was found to rhyme with the preceding observation when he emphasized that *...so this is the Swedish traditional legal/constitutional system.*

A more or less cross-cutting finding among all respondent categories was that the convention is so general, lacks precise provisions and thus, hard to use as law in its current form. In view of this it was argued that it is better to make more precise writings within the law as government is doing. But this claim was seen to be pointing towards and defending the transformation process that Sweden utilizes as opposed to incorporation. However, those participants in favour of incorporation such as child-rights NGO representatives and some academics argued that the CRC having general claims is

not a convincing argument for disregarding incorporation. An interviewee from UNICEF for instance, noted that this considered problem can be solved by authorities and courts of law taking it upon themselves to make praxis to such provisions of the CRC and helping to explain how to interpret the articles of the CRC in relation to the general guidelines offered by the UN Committee on the Rights of the Child. An academic in his argument for incorporation as opposed to transformation noted that as long as efforts are not made to make the CRC a law, it cannot be followed to its latest. However, all such arguments for incorporation were quashed by the Ministry official in his consideration that making the CRC a law in its general nature would breed problems. He insisted that, *practically, the legislation should help the authority to define concrete actions they should do but with general provisions in the law, it means that you are giving authorities/actor hundreds of excuses when actual implementation comes.*

## **5.2 Extent to which national measures to implement the CRC mirror and/or take care of the CRC**

As already noted in the preceding sections, Sweden has been undertaking a number of measures to implement the CRC such as the 1999 National Strategy for the implementation of the CRC, the 2010 National Strategy for the implementation of the CRC, the Child Rights policy, National Human Rights Action plans and National legislations regulating work with children, among other measures.

One unanimous revelation among study participants was that Sweden has done a great job in attempting the implementation of the CRC through such measures and thus, the country is commended for that. Regarding the national legislation, irrespective of the differences among respondent category, all the participants/respondents concurred that the national laws legislating work with children very much so are in harmony with the CRC. Sweden, it was argued has made good use of the texts in the convention in its national laws. The most cited text regarded Article 3 of the CRC that guarantees the primacy of the best interest of the child in all actions concerning children. The child rights policy and the national strategies for the implementation of the CRC were contended to be important steps towards making the children's rights more tangible despite not having the CRC as an explicit law.

However, when asked about the adequacy of these measures in upholding the provisions and spirit of the CRC, varying and in some cases competing opinions arose. One official from the Children's rights coordination office in the Ministry of Health and Social Affairs argued that it is these measures without necessarily the CRC as a law that have seen children enjoy great rights as seen today in the Swedish society. The official pointed to world indices of children's rights which rank Sweden really high as one of the bases for his argument. In his view, the fact that children today in Sweden enjoy a very high level of welfare, rights and freedom is a pointer to the effectiveness and perhaps adequacy of such current measures. The official actually believed that in any case, the action plans, strategy, legislations, etcetera are going much deeper than the CRC. And to this effect, this official saw no need to have the CRC incorporated into Swedish legislation. This position however, found opposition from other categories of respondents, notably the academics and representatives of the Child-rights NGOs. These were of the view that though government has taken such commendable measures and thus worth appreciating, such measures cannot be said to be taking full care of the CRC.

One Human rights academic held a view that ideally, the CRC should be part of the Swedish legislative system. In his words, he had this to say, *...sometimes it is not adequate to have just action plans, what happens if the action plans are not implemented in the right way, how do you claim your rights without the convention as a law? The whole idea about human rights is that you should not go to court in order to get your rights but in case the system fails then the court has to provide redress.*

In one of the interviews with one child-rights NGO representatives, she echoed that, *the measures are inadequate. The CRC details more rights than the current national measures.* In another interview with another NGO official, the participant noted that, *very much so, the national laws are following the convention, they are in harmony but not necessarily fully taking care of the CRC.* Her further comment on the 1999 National strategy to implement the CRC, this she argued is not very realistic and that it reflects limited commitment on the part of the state because the strategy in her view does not have measurable goals, no budget, no concrete action plan regarding within what time range to achieve what, and no human resources committed to it, etcetera. Arguably, if the CRC was part of the national law, all these gaps would find quick closure. More concern surrounded whether or not child rights actors especially at the municipal and local levels have concrete knowledge about the two strategies especially that it is aimed to implement a CRC which is not a law itself and yet the different actors lack adequate knowledge about it. This participant further reiterated that there is no effective mechanism in place to disseminate this strategy to municipalities.

In an interaction with one UNICEF Sweden official, she expressed that, UNICEF appreciates the government for these significant steps towards implementing the CRC but *we argue that there is need for a stronger implementation of these plans and strategies. For instance there is need for a separate action plan to address the situation of children victims of trafficking. These children's situation is unique, they are quite isolated since they have contact with only the traffickers yet the problem is growing as children are looked at as sources of labour unaccounted for. So perhaps the CRC as a law would be a step towards these concrete actions.*

Notably, the legal officer in the office of the children's ombudsman like the NGO representatives and the academics held a view competing with that of the ministry official. The legal officer admitted and appreciated the measures by government to implement the CRC but expressed more optimism that...*there could be a lot more to do and to earn if the CRC was incorporated.* Yet he took a more objective stand that mere incorporation of the CRC into Swedish legislation would not be an end in itself. Rather, follow up with continuous measures of implementation would be needed.

### **5.3 The envisaged differences that incorporation of the CRC into Swedish legislation would make**

This study among other things aimed to investigate the views of the child-rights actors regarding what differences it would make by incorporating the CRC into Swedish legislation. Quite a number of views came to the fore. While some of the respondents exhibited optimism, arguing that great differences would be realized, others could not imagine any differences in the practical sense. The respondents that held the latter view contended that such differences would rather be more academic and theoretical than practical as far as changing the current welfare situation of children is concerned. Below is a reflection of opinions of the different respondents.

A common view was held by mainly child-rights NGO representatives and the academics that the incorporation of the CRC would accord child-rights actors—social workers both in public and private-not-for-profit a stronger tool for claiming the rights of their clients. This followed a contention that in the current state, these actors are in a weaker position to make such claims given that the 'ideal and would-be number one point of reference' as far as children's rights are concerned—the CRC is still accorded a lower status. Respondents that reasoned from this perspective noted that then they would gain not only a moral but also a legal ground to engage authorities and to have them provide for the children's needs and rights. It was argued that currently it is hard to effectively represent the voices

of the voiceless while standing on a 'loose' ground. But with the CRC as a law, social workers often working with vulnerable and powerless individuals and groups would gain a stronger bargaining position in their advocacy role. The CRC as a law would arguably strengthen NGOs working with children's rights. They would use it as a political tool to influence politicians, influence opinions by telling them that look, what you are doing is not right according to the CRC. One respondent informed that *...but also when dealing with the authorities, it would be easy to point at them and say look, what you are doing is not commensurate with the CRC which is part of the law. So we can demand that authorities should follow the CRC once it is a law.* This is not to mean that NGOs and some social workers in the public service realm are not using the CRC but rather, they are using it in quite a weaker position as long as it is not yet a law.

Another key envisaged difference that came up as a shared view among the academics, NGO staff, and legal officer in the office of the children's ombudsman regarded the possibility of invoking the CRC in national courts of law once made part of the Swedish legislation. It was a common and strong observation that for Sweden that is dualistic, as long as the CRC is not incorporated into the Swedish legislation, it remains foreign and not recognized in the national law. The implication of this being that human rights lawyers acting on behalf of children cannot invoke it and similarly, judges cannot rely on it in making their court decisions. To this effect, one academic pointed to the shortfall of the transformation process that Sweden has chosen. He had this to say: *...from a human rights perspective you end up failing to see where the strengths of the transformation system lie because you end up failing to use the convention in courts.* Another study participant noted that the with the CRC in its current state, if a lawyer attempted invoking it before court, the 'shut up' question he/she would be faced with is: *where in the Swedish law is that stated?* In an interview with one legal officer from an NGO noted that: *...it would ease our work as lawyers when defending our clients in courts of law. Because all the time we have to explain our positions whenever we try to refer to the CRC but if it was a law, we would easily invoke it and that would not be questioned.* Once again a legal officer in the office of the children's ombudsman shared the same concern in his remark that *...you would be able to come to court and refer to articles in the CRC when arguing out a case. You could compel the court to rule according to the articles in the CRC since it would be part of the Swedish law.*

In relation to the above, different study participants concurred that incorporating the CRC into Swedish legislation would inevitably accord it a higher and practical status. One legal officer from one of the studied NGOs just like the Family and Children's unit chief in one of the districts of Gothenburg independently agreed that it is true that when a civil servant did not follow the law in pursuing his/her duties, he/she commits an offence and can thus be charged but may not be charged for not following the CRC. The legal officer consequently argued that *so theoretically, one may say that the international law is superior to the national law but in practice, the national law is given a greater status than the international law.* Generally, it can be agreed that when the different study participants observe that incorporating the CRC into Swedish legislation would make it possible for articles in the CRC to be invoked in courts of law and that judges would be obliged to consider such invocations, this is a reflection of the greater status that the CRC would attain.

Besides lawyers and judges being able to invoke the CRC in courts of law, study participants argued that these would also be able to use it in interpreting the national laws, something that would assure greater conformity of the national law with the international law.

The concern about inability by lawyers and judges invoking the CRC in courts law identified above received a competing objection from the ministry official. This study participant stemmed from the general nature of the CRC. He noted that, *the principles of law are that the specific law is stronger than the general law. If we have two laws regulating the same case but one is general and another*

*specific, the latter will be stronger and will be preferred to the former. That is why judges are always referring to the Swedish law because even if they start with the CRC, its general nature will send them back to the specific Swedish law regulating that particular case.* However, this objection did not go unchecked. A UNICEF officer argued that if Sweden was really committed to making the CRC part of the Swedish legal system, the authorities and courts would make praxis to the CRC. In the same spirit, a Save the Children official was of the view that authorities with guidance from the general comments issued by the UN Committee on the Rights of the Child would go ahead to make interpretations of the CRC and hand these to the regional and municipal implementation levels.

Once again it was revealed that the CRC as a law would aid in closing the existing gaps in the national laws currently regulating work with children. Some of the areas commonly recited where gaps were identified in the national laws included children in hiding, children victims of trafficking and children in poor/segregated communes. With regard to children in hiding in particular, the CRC guarantees them the full right to health and education among other socio-cultural rights yet the national legislations have limits to this. It was revealed for instance that children in hiding are afraid of seeking medical attention from regular health centers or hospitals for fear of being identified and potentially being reported to authorities. This reportedly applies to education too. One participant noted that *...although there is no law that obliges service providers to provide information about illegal residents to authorities, there is equally no law prohibiting them from the same.* A review of documents reveals that for health practitioners, it is the Confidentiality Act that requires them to keep secret information about their clients. However, the extent to which these powerless clients could be aware of this form of protection remains a pending question. In view of the above, if the CRC was transposed into Swedish legislation, it is envisaged to have aided in closing such gaps.

Another gap was differently identified in the family law by two academics from different departments as well as BRIS and Save the Children staff interacted with. Notably this law among other things regulates the child's custody. These respondents in different interviews contended that the law of custody aims for joint custody of the child by both parents and that in case of separation or divorce of parents leading the child to reside with one of the parents, it is in the best interest of the child to maintain contact with both parents. According to these respondents, this law is rather pro-parent than pro-child yet it is regulating work with children. For instance, it was observed that according to this law, once a child is residing with only the mother who separated with the father, if the father needs/wants to see his child, he has all the rights to see the child even if the child lacks the will (interest) in seeing him. Unfortunately, if the child needs to see the father, as long as this father is not willing to meet this child, he may not be forced to do. In view of these study participants, where does the 'best interest of the child' principle lie? Thus, they argued that if the CRC was a law, it perhaps would help to close such gaps thereby setting a platform for a pro child-rights legislation rightly aimed to address the concerns of the child.

In a related matter, it came to the fore that when parents are contemplating separation/divorce and thus having disagreement about whom of the two should take custody of the child, the two seek redress in court. And the two parents get legal representation but not the child. This was noted as a big gap since the subject matter here is the child and it is the child that is not represented. This raises questions of who represents the interests of the child in such situations where each parent is pursuing his or her own goals just to win the custody of the child. In relation to this, a Save the Children official expressing dissatisfaction with this matter notes that: *...the best interest of the child is having contact with both parents which is true in most but not all cases ...there are also cases when it is not in the best interest of the child to meet or have contact with both parents. Unfortunately, it is very rare to find that the child's case/view/position is heard in custody cases.*

Yet again as another gap in the current measures to implement the CRC, it was unraveled that some of these measures fall short in addressing all the circumstances faced by children against which they need protection. A UNICEF Sweden official in an interview earmarked trafficking as one of the areas. She observed that there isn't and thus there is need for a separate action plan to address the situation of children victims of trafficking. Empathetically, she expressed that *these children's situation is unique; they are quite isolated since they have contact with only the traffickers yet the problem is growing as children are looked at as sources of labour unaccounted for*. From an optimist view point, the CRC as a law would be a step towards realizing these concrete actions, she argued. This way, the incorporation of the CRC would make a difference.

Furthermore, some study participants held the view that with the CRC in its current state, the institution of the Children's Ombudsman has a weak ground to lean against in its bid to engage government in ensuring children's rights to their fullest. In view of this, they thus argue that the incorporation of the CRC into Swedish legislation would assure the institution a more concrete ground against which to engage authorities from a legal perspective as well as to make stronger cases against violations of children's rights. However, an interaction with one legal officer from the office of the Children's Ombudsman revealed that this may not be an automatic case. He noted that making this possible is much more than mere incorporating the CRC into Swedish legislation. To him, it would rather lie in expanding the currently small and limiting mandate of the Ombudsman by parliament. The above notwithstanding however, he noted that possibly and perhaps more likely, if the CRC became part of Swedish legislation, then the national legislators (parliament) would easily think otherwise, thereby expanding the Ombudsman's mandate.

One other finding regarding the difference that the incorporation of the CRC into Swedish legislation would make focused on possible increase in knowledge about the CRC. This was a common finding across different respondent categories. Different respondents had a common agreement that there is a general lack of knowledge about the CRC among different stakeholders including not only children but also parents and different professionals working with and for children, not excluding social workers, judges and lawyers. In his comment on this subject, the legal officer in the office of the children's ombudsman noted that this has for long been a concern of the children ombudsman's office. And that the lack of knowledge is in part attributed to the CRC not being part of Swedish law since then it is not accorded due focus compared to if it were a law. One academic in an interview observed that *...there is lack of knowledge among a group of Swedish lawyers about the CRC. They are not trained in such a way to use the CRC as a national law. So if the CRC was part of the Swedish law, then lawyers and judges would ensure being knowledgeable about it and they would use it in their defenses and decisions*.

In another interview with BRIS official, she in an optimistic mood noted that *...training government actors working with children would also be a priority issue if the CRC was made a national law and when these government actors work more closely with the CRC on addition to other national laws, you inevitably can see a difference. It means every other detail regarding the child will be taken into account in all their decisions and actions regarding children. When you do not use the convention you never see the rights and you never learn*. A critical look at this observation reveals not only the lack of knowledge about the CRC among government officials working with children but also points to the fact that providing knowledge to this category of actors would not be just for its own sake but for a purpose. One Save the Children official on the same note submitted that *...the knowledge about the CRC would increase and in Universities, different professionals would be considered for training in the CRC...and lawyers and judges would be able to use it in interpreting the law as is the case in Norway*.

Similarly, it was revealed that when a convention is incorporated into the country's national legislation, it gets closer to the people or more particularly closer to the individuals protected by the respective convention as observed by a human rights academic. This similar opinion was shared by BRIS official who in her words commented that...*for the children who call us, it would be a great thing to have them told and learn that the CRC is a law and it tantamount to a crime if a particular right is not fulfilled or is violated. So that would strengthen the children's position as it would grant them a tool to demand/claim their rights.*

The other envisaged difference expected to result from the incorporation of the CRC into Swedish legislation is what one study participant referred to as 'symbolic difference'. This finding was observed among a wider cross-section of respondents irrespective of the categories. It was contended that transposition of the CRC would earn Sweden respect from other states, some of which would look up to Sweden which considerably is already a role-model to many. To this effect, one NGO official noted that ...*other countries would trust us better. More countries can look up to us.* Another—an academic remarked, *Sweden would show the rest of the world that look, we accord due status to the CRC to the extent that we have it as part of our national law.*

All the above notwithstanding, the ministry official's opinion came counter to the views of other study participants reflected above. To him, the envisaged differences and/or effects that could follow incorporation are a mere speculation which implicitly, he could not be a party to. In his view, the most important thing is ensuring that children's welfare is ensured in positive faith and not the incorporation of the CRC. This study participant underscored that *when you look at the welfare of children in Sweden, it is at the same level as in Norway and Finland that have incorporated the CRC into their national legal system. So when you think about the children, it should be that their living conditions, welfare and dignity are as good as possible. And for Sweden, we score generally well.*

However, it may be contended that when talking about children's rights, their welfare is merely a part. The former happens to be much greater than the latter though it aims among other things to promote the latter. To this effect, a closer look of the observations by the ministry official reveals some inconsistency at some points. For instance, in his reference to Norway, the official appreciated that incorporation of the CRC made it stronger and received a greater status yet this has been the concern of study participants from the academia and NGOs. The official also observed that *though it is not a national law, CRC is an international law that we ratified and so it is binding.* This fact is not denied but considering that Sweden is a dualistic state, its binding effect swings in a balance. And the fact that it cannot be invoked in courts of law comes as a practical confirmation that it has minimal binding effect. Once again, this has formed a center stage for the arguments of NGO staff and the academics.

#### **5.4 Implications of Sweden's reluctance to transpose the CRC into Swedish law**

One of the central objectives of this study was to find out the implications for the implementation of children's rights as a result of Sweden's reluctance to incorporate the CRC into Swedish law. So far, the preceding section on the envisaged difference that incorporation would yield in some cases implicitly highlights already some of the implications of the reluctance to incorporate the CRC. This section therefore can be seen to be interlinked with the preceding one.

A variety of implications were discerned from the State's reluctance to incorporate the CRC. One of the implications identified is that this current stand point by government makes it hard if not impossible for an individual or his/her advocates to claim his/her rights when the matter is subjected before the courts of law. This follows the fact that in a Sweden's dualistic system, the CRC is not part

of national legislation, something that makes it impossible for lawyers and judges to invoke it. Besides, if it is referred to in court, the judge is under no obligation to rule according to it. If the CRC is to be given any attention, then it is rather from a moral than a legal ground. Unfortunately, the former ground is quite weaker than the latter. One NGO official in an interview remarked that: *...but also if you are in a legal position and you have to go before court, it is very difficult to invoke the CRC. It is difficult to say according to this article of the CRC, you should rule this way. Then they put you to task to explain where in the Swedish law it is stipulated.* In another interview with an academic, he had this to say: *...it means that Sweden's transformation process is ineffective...and the discrepancy between the transformation process/effect and the actual document—the CRC becomes clear when an individual becomes unable to claim his/her rights in the courts of law based on the convention. So the law does not give you the protection that you are supposed to have as guaranteed in the convention. That is why we keep getting criticisms from the UN committee on the rights of the child.* A UNICEF official in this respect in agreement said *...the transformation approach that Sweden uses is not enough to guarantee full implementation of the CRC; it is not a holistic approach that we would like to see.*

In a related case, it was contended that as an implication, Sweden will continue succeeding in undermining the rights that the UN guarantees to children in the asylum-seeking process as well as the undocumented. As a case point, during one of the interviews with a human rights academic it was revealed that children seeking asylum often fall in a 'trap of violation' of their rights when the Swedish migration board gives a negative decision to their application. Impliedly, such children have to go back to their countries of origin. Unfortunately, as one respondent noted *...this at times if not often is done without ascertaining whether or not there is someone to take care of those children when they are sent back and whether or not the environment where those children are being sent is safe. In this case the Sweden's violation of the children's rights may thus be indirect.* Notably, this has time and again attracted the attention of the UN Committee on the Rights of the Child. The same study respondent further informed that *but the migration Board authorities keep arguing that they are following the law and yes they are...* Incidentally, *for human rights lawyers taking up such children's cases, when they go to courts of law, it becomes difficult to challenge the decision of migration board since they cannot invoke articles in the CRC given that it is not part of the Swedish legislation, and thus not recognized. The case would be different if the CRC had been incorporated into Swedish law.* He added. This view was shared among a set of NGO staff and the academics interacted with. The Save the Children official expressed that: *Sweden being a dualist State, it is a problem for lawyers (especially human rights Lawyers) to defend their positions on the basis of the CRC.*

While commenting on the same issue, one other respondent exclaimed that *...the main idea behind human rights is that the individuals that the rights in a particular convention aim to protect should be able to access and claim these rights directly. Unfortunately for Sweden, the access to children's rights is indirect through the national law which as observed does not offer full protection.* This is seen to be in turn consequential as another participant discerned that *...in case their rights are violated and the law offers no adequate defense to them, they have nowhere to run to.* This can be viewed as further disempowering the already vulnerable and powerless category—the children.

Furthermore, one finding common to all the academics, NGO officials interviewed and some public social service actors was that the fact that the CRC is not a law, the different actors most especially those within the public realm tend to look at it, interpret and follow it differently. On the contrary, if it were a law, it would rather attract systematic and more or less uniform interpretation and implementation by the different actors. Not being a law means that it gives a greater room for differences in interpretation. The implication of this open room for interpretation as some respondents



noted is that access to rights and the magnitude of rights accessed end up depending on where the child lives (the commune), how much resources the commune has, and which social worker the client—child meets, among other factors. In this case, then the aspect of universality and indivisibility of children's rights more over within the same state fades into the background. Being a law could not allow such negative flexibility. This finding relates to the effect of autonomy by the regional and municipal councils on the implementation of the CRC. This however, is handled in one of the subsequent subsections ahead.

The other implication identified surrounded knowledge about the CRC. In an interview with one official from Save the Children, it was noted with dismay that *since the CRC is not a part of Swedish law, there is not very much focus given to it and the knowledge about it not only among children and parents but also among decision makers is very much lacking*. In her opinion, if it had been a law, it would have been more recognized and that in training institutions like Universities, professionals—medics, lawyers, teachers, social workers etcetera would be given due orientation about it...*these do not discuss the convention much to its detail*. During an interaction with one NGO official who without necessarily citing any particular single case, pointed out that...*and some Swedish judicial cases reveal that there is lack of child rights approach (among the judiciary) especially when it comes to the needs and rights of children*.

One other respondent noted that...*and also in the municipalities, decision makers are often focusing on what the law says and not the CRC, partly because the CRC is not a law but also because they have limited knowledge about it*. This opinion was confirmed in separate interviews by the chiefs of the family and children's units in two of the districts of Gothenburg municipality. Whereas both confessed to have taken a long time since they ever read the CRC, one of these testified in an interview that the trainings and refresher trainings about laws they work with hardly explicitly tackle the CRC. Rather, according to her, trainings are focused on national legislations. Considering that there is a close and an indispensable link between knowledge/theory and practice, it is hard to imagine such actors to work closely with the CRC. Actually, these held the belief that the CRC is taken care of by the national laws regulating work with children, hence had limited if at all any consideration for making it a direct working tool in their work with children.

In her verbal reference to researches done by the European Union and the Children's Ombudsman, a Save the Children official with dissatisfaction informed that...*it is shaming to find that quite few children are aware of the CRC. Many might have heard of it but they do not know what it means or what its content is*. She further argued that although as part of the new curriculum all children are supposed to be taught about human rights which to her is a commendable step, the contention that the teachers that are supposed to serve as resource persons in this respect may most likely be not knowing much about the CRC raises her concern. However, such a concern may find an answer in the observation by one respondent—a human-rights academic that...*in the University teacher education, a modality has been made that all training teachers have to be trained in human rights as part of their training*. Nonetheless, whereas this is capable of providing long term solutions, what about in the short-run and medium-run?

Actually, the incorporation of child rights in the training programmes of the different professionals working with and for children so as to address the knowledge gap formed one of the focus areas of the 1999 national strategy for the implementation of the CRC. But when one considers the time difference between then and currently when a law has been made to facilitate teachers with children's rights knowledge, he/she may rightly agree that the law took longer to come than would have been expected. Besides, this is addressing basically teachers, what about other professionals? The extent to which it is being done for other professionals turns to be a matter of contestation. On a

similar note, the Child rights academy established at Orebro university shared a common agenda—addressing the knowledge gap that existed among individuals and groups (including occupational groups) working for and with children. But like one study participant hailing from an NGO wondered...*the capacity of this academy to meet the needs of all actors in the whole country is not certain.*

Once again particularly the NGO staff and the academics identified that the Swedish laws regulating work with children unlike the CRC are focused on children's needs and they utilize a needs language whereas the CRC is focused on rights and it uses a rights language. The study participants who succumbed to this position therefore argued that by implication, the needs-based Swedish laws bias the actors working with these laws to focus more on the needs of the children and less on the rights. These also contended that there exist differences between the needs-based and rights-based approaches to working with children. The views and implications discerned by the different study participants are reflected in the immediate subsequent section.

#### **5.4.1 Children's need vs. Children's rights: Language and wording of the Swedish law vs. that of the CRC**

This difference was noted to be having profound implications for the implementation of children's rights. One of the academics commented that...*the Swedish law is more focused on children's needs yet the CRC is more on children's rights. Needs and rights are two different things though connected. The two form different perspectives.* Similarly, one BRIS official explicitly noted in agreement that...*it is true that the wording and language of the national laws focuses on needs while that of the CRC focuses on rights. Taking on the CRC as a law would be a new development for Sweden since for a long time the texts of the Swedish laws talk mainly about needs.* In her opinion, this shift would yield a rights-based thinking which is thought to be good in that the person working from a rights-based perspective is more active than one working from a needs-based perspective. And a further implication is that it also strengthens the children's position that it is not only their needs but their rights that matter. So it gives them more power to act and claim. These same views were strongly contended to by another academic in his contribution that...*from a rights perspective, needs and rights are not the same thing, despite their relationship. For needs it means there is someone identifying for you while for a right you identify it yourself as an entitlement.* This academic further expounded that the Swedish welfare system is based on the working class solidarity movement approach to society which means that everyone should be included. Incidentally, *it takes a top-bottom approach and this is even institutionalized in the way laws, authorities and social services generally work. And so the needs approach has been quite strong in Sweden for a long time and it is a kind of traditional discourse that keeps being reproduced when we re-write the law.* The legal officer from the office of the children's ombudsman in agreement with the above was of the view that consequently, Swedish laws about children and young people need to be written in a much more rights based perspective.

A critical analysis of these observations offers an implicit impression that more likely, those actors notably public servants that are working primarily with the law rather than the CRC as their primary guiding and reference tools in their work with children expose their clients—the children to miss out on the benefits that would accrue from the rights-based approach. This approach is considered by many to be more yielding compared to the needs-based approach for several reasons. For instance a human rights academic in an interview observed that ...*the needs-based and rights-based perspectives, each shapes the way the authority perceives and responds to the person seeking the service. For example, if an authority in the social services perceives and defines a client benefiting*

*from social assistance from a needs perspective, he or she will have some negative connotation towards the person and will see the person as weak and just being helped. Whereas from a rights-based perspective, the authorities will endeavor to offer the service in time as a client's entitlement and the client him/herself will have the power to demand/claim the service.* He pointed to more implications that the rights discourse changes the power relations between the service provider and the service user since the latter will be viewed by the former as seeking the service not because he/she is weak but rather because it is an entitlement. More praise to the rights-based approach yielded that the approach also changes the service providers' attitude and approach towards the service user. The latter seizes to be seen as weak, incapable, worthless, etc. and he is seen to be basically entitled to the service as his/her reason for seeking such a service.

More discussion revealed that again the needs based approach based on solidarity has a problem in that if those that form the solidarity do not feel the solidarity for you, they may not define you as having a need and thus you may not be considered for a service. So the right approach makes authorities change their thinking about someone as a rights holder rather than someone being cared for and a mere recipient of services defined and provided by the authorities. As one academic agitated...*this is the shift that needs to take place.* The Save the Children officer in agreement with and support for the need for this shift argued that *The CRC unlike the Swedish laws uses a soft language that is child-based basically because the CRC is rights-based and for this reason, I really feel that it would be good to have a law based on the CRC i.e. that is child-based.* In support of her argument, she reiterated that...*in Sweden, there are many laws that impact on children's lives but they are not from the children's point of view, they are not children's rights-based for example the family law.*

However, some actors were reluctant to judge any of the approaches against the other. Rather they considered that both approaches are equally essential for the children's welfare and the most appropriate action should aim to strike a balance between the two since children's needs and rights are 'two sides of the same coin'. Such a view found much emphasis by a UNICEF official who equally contended that *there is a greater focus on the needs perspective in Sweden compared to rights perspective and thus with the CRC as a law, this would strengthen the rights perspective.* In the same way, a human rights academic in a counter argument noted that...*but again this is not to say that the rights approach should replace the solidarity approach. The solidarity approach has worked quite well for Sweden just that it has its shortfalls. Thus the rights-based approach ought to be looked at as a potential approach to address the shortfalls of the solidarity approach. Precisely, the two approaches ought to complement each other.* To this effect, the solidarity approach found some praise in his argument that...*so the solidarity approach is very much needed because then you are sure that there will be people ready to support others that they consider to be in need.* In his support for a balance between the two approaches, he emphatically noted that...*and eliminating the solidarity needs-based approach and therefore going exclusively for the rights-based approach might be problematic because rights are too technical and legalistic, thus may not favour all and may destabilize society.*

Despite all that has been said, it is imperative to acknowledge that it is not aimed to paint an image that there are no traces of the rights based approach in the current legislations. Like the UNICEF official noted...*but also the rights perspective is evident e.g. in many Swedish legislations, the basic principle of the best interest of the child is included. So transformation in a way is on the right course but it is taking a longer time. That is why we think that having parallel incorporation of the whole CRC would be more rewarding.*

#### 5.4.2 The autonomous nature of regional and municipal councils: its effects on implementation of the CRC

As earlier on observed, among the implications of Sweden's reluctance to incorporate the CRC was that the scenario led to unsystematic, non-uniform and differential implementation of the CRC among different municipalities and regions. This was attributed to nothing more or less than the autonomous nature of regional and municipal councils. Different study participants held such a common view.

One academic, a social worker observed that *autonomous communes imply that they may implement or even interpret the CRC differently*. A BRIS official with discontent noted that...*and one other problem with the Swedish system is that we have the government on top and the regional governments, then the municipalities at the lower local levels but all these speak different languages. You find that different regional governments or municipalities implement the policies and strategies differently given their autonomous positions. And when it comes to the CRC which is not a law, it implies these administrative/government entities have the discretion to implement it their own way*. In a further remark, she pointed out that *combining the autonomy enjoyed by the municipalities and communes together with the fact that the CRC is not part of Swedish legislation make it quite harder for government to induce the lower-level self-governments to interpret and implement the CRC in a more uniform way*. Likewise, a human rights academic also observed that...*when it comes to human rights, it has always been hard for instance for the Justice Ministry to oblige municipalities to do something without making it a law. The government lacks that mandate. Therefore by not making the CRC a law, it means that government has its hands tied since it cannot tell the municipalities what to do when it comes to implementing the CRC. So this is a potential problem that may make some municipalities totally reluctant to do anything about implementation of the CRC*.

These disparities made the Save the Children official and one academic in the respective interviews to consider that the differences between/among local authorities/communes/municipalities have been criticized for a long time in Sweden and that these differences mean that the kind of welfare that children get and how their rights are fulfilled depend upon where the child lives or the social worker he/she meets. This scenario becomes rather disturbing as one wonders where the universality principle of human rights rests moreover, for children within the same national boundaries.

This self-governance/autonomy enjoyed by municipalities and their respective communes was seen to be even more consequential. In an interview with an academic, she expressed unease with the freedom that these administrative entities enjoy. According to her...*besides the autonomy yielding non-uniformity in implementation of children's rights and the CRC in general, it grants actors a lot of room for freedom and excuses*. The following is her case point: *You see situations where the different communities are asked by the government department of migration to sign-up and take on a certain number of refugee children who are coming alone (unaccompanied) but there are some communities that just refuse, excusing themselves saying that we do not have knowledge to handle these; it will be expensive to organize schooling for them because we need people that know their home languages, etcetera. So there you have a case where you can see that the communities are acting autonomously to the detriment of children's rights*. In view of this, since it is envisaged that the CRC as a law would minimize the freedom arising from the autonomy regarding how to implement the CRC and which aspects of the CRC to implement and what not to, it would help to minimize such disparities in implementation of the CRC. Communities would be rather more obliged to implement it like any other law. Such a view was in line with that held by a BRIS official that...*the powers these municipalities and communes have associated with their autonomy give them the liberty to decide what to do, how*

*and when to do it especially when it comes to non-legal issues. So leaving the CRC outside the Swedish legal system leaves a lot of freedom which is subject to abuse by those autonomous entities.*

Despite her open expression that she is not an expert on the subject matter under consideration, the UNICEF official interviewed concurred that such autonomy enjoyed by regional bodies, municipalities, and communes have implications to the extent that different municipalities prioritize different aspects of the CRC. For instance, some may prioritize the school system, others health, some prioritize other things. An analysis of this may point to the differences in status accorded to different rights embedded in the CRC by the different autonomous entities.

The different study participants therefore considered that the CRC if incorporated into the Swedish legal system would offer a standardized measure for implementing the CRC. Further, such study participants from NGOs and the academia agreed among other things that when the CRC is a law, the government can afford to exert authority and influence on the lower-level governments to interpret and implement it in more uniform way, something that was envisaged to have the potential of yielding some kind of harmony across different municipalities. The Save the Children official in addition was of the view that...*government would make it a point to hand down to the municipalities the general comments on the interpretation of the CRC by the UN Committee on the Rights of the Child. This official expressing optimism noted Well, all this would not take away all the discrepancies but at least it would awaken those municipalities not doing anything or not doing enough and for those that are aware of the CRC and already doing something/implementing it would be strengthened...it would be a message to all municipalities that the CRC is a standard like any other Swedish law. She argued further that this would minimize government excuses for not implementing some aspects of the CRC. Such an argument was premised on the observation that currently when some aspects are not implemented, government hides behind the autonomy of the municipalities and says that is a responsibility of the municipality, it is within the municipality's mandate and we cannot do anything. Of course they (government) can do something but they use it as an excuse. She emphasized her position noting that: So if it was a law, its full implementation would not be a matter of option by the municipalities. And government would be more obliged to see that it is implemented. The municipalities would be more open to take directives from the government as they are doing with the current laws.*

In the same spirit, the legal officer from the children ombudsman's office admitted to the above position that...*yes, I believe so that it would make a difference because once it is a law, then it would be no doubt that all regional and municipal councils and other government agencies would follow it more systematically and uniformly as a law.*

In her reaction to the disparities among municipalities and communes, a social work academic in an interview brought to the attention the 'Integrated Children System' borrowed from Britain and introduced in Sweden with an aim to try to standardize or to make uniform the assessment and care given to children. This according to her was introduced in a bid to respond to such differences among actors across communes and municipalities. This system she stated is a standardized and formalized tool to follow when assessing children to be taken into care, with seven areas to follow. However, she reiterated that there are critics to this system both from Sweden and Britain that these needs/standards against which children are assessed are constructed from an adult perspective rather than the child's perspective. This submission not only reaffirms the discrepancies among municipalities but also cements the arguments for a rather more child rights based approach which to many can best be guaranteed by having the CRC as a law.

Although all the above observations pointed to the shortfalls of the autonomy granted to the self-governments, one human rights academic did not fail to identify a possible positive about this

autonomy granted to municipalities and communes. Here he goes: *...on the other hand, by having relative freedom to determine what they should do, it means that some municipalities may even go much farther than would the law define/determine. Such municipalities as self-governed entities within the state may feel responsible and shouldering the responsibility to be good municipalities with a good human rights reputation, thus, being ready to do it to their best. So when the municipality decides that the CRC should be part of what we do, they just develop policies to that effect.* However and unfortunately like he regretted, those cases may be hard to come by.

## 5.5 Risks Sweden runs by not incorporating the CRC into national legislation

These were found to be part of the implication of the reluctance to incorporate the CRC into Swedish legislation. Put simply, some of the implications of the country's reluctance were perceived by some study participants as a risk.

An academic pointed out that *...one of the worst problems for Sweden is that if we continue like this without incorporating the CRC into the country's legislative system and in court we continue with such rulings where the CRC cannot be invoked and consequently continue getting criticisms from the UN, it may undermine Sweden's international and diplomatic position.* The academic further highlighted that *...because if you argue that human rights and international law are really important yet in practice you cherish the national law more than the international law, this raises question marks from the UN, hence criticisms.* It is worth remembering that Sweden is one of the countries that the UN has always trusted in participating in the drafting international treaties—conventions. The Save the Children official argued in accurate uniformity with this academic. On addition to getting continued criticism from the UN Committee on the Rights of the Child and damaging the country's image, she believed that the CRC will continue lacking full recognition; the legislators and courts will continue having minimal recognition for the CRC and the convention's spirit will not be followed in decision making not only in courts but also in municipalities by decision makers.

Sweden therefore was seen to be risking her integrity and reputation. As one respondent observed *...Sweden's international position is based on Sweden being a good a country, that it follows the international treaties, and argues that human rights are important and urges other countries to ratify and follow the UN Conventions. So if you are to maintain this position and minimize criticisms from the UN, you have to provide evidence that you are 'practicing what you preach'.* Accordingly, this can best be guaranteed by incorporating the CRC into national legislation especially for a dualistic country like Sweden. The concern for the country's integrity and reputation formed a center stage in the findings obtained from basically the NGO staff and the academics.

However, one of the academics made a counter argument that although there is truly a risk emanating from the non-incorporation of the CRC, this ought not to be seen as too great and perhaps even blown out of proportion. *...we have implemented the most important things from the convention, for example the best interest principle is very much implemented in the national law,* she noted.

All the above said, ministry official's position on this subject was quite unique, dismissing any possibility for any risk of any kind or magnitude. Boldly, he underlined that *...the risk could have surfaced already over these past 20 years when we have had the CRC not being a law. Instead over these over 20years, we have Sweden among the leading/top countries when it comes to children's rights and welfare. All our scores in the field of children's rights and welfare have come when we have not had the CRC as a law.*

However, whereas the issue of rights and welfare that children in Sweden have gained over the past years as the ministry official says does hold, the matter of total absence of risk associated with

Sweden's reluctance to incorporate the CRC into Swedish law may be a subject of contention. Like many study participants made a hint on the time and again critics and urge from the UN committee on the rights of the child towards Sweden for being reluctant on this note, the country's credibility and power influence in the eyes of other countries may get to swing in a balance. One may perhaps say it is just a matter of time. This could be true when consideration is made to the image potentially or actually painted that 'Sweden does not practice what she preaches'.

## 6. Analysis and Discussion of findings

Following a set of findings revealed by this study as presented in the preceding chapter, this particular chapter makes an attempt to interpret and make meaning out of those findings and concurrently discussing them. In the analysis and discussion of the findings, use is made of the theoretical perspective as well as earlier research.

### 6.1 Reasons for the reluctance

As observed, as a point of departure the child rights actors (respondents) threw light to what they perceived to be reasons for Sweden's reluctance to incorporate the CRC. And such factors as great confidence in the welfare system, current implementation of the CRC through a set of national measures, Sweden's tradition (constitutional system) of using transformation as opposed to incorporation, and the general nature of the provisions of the CRC were all identified.

Considering that one of the factors perceived to be responsible for Sweden's reluctance to incorporate the CRC is that it has been and still is Sweden's tradition to work with transformation rather than incorporation of international treaties, this factor is found to rhyme with the observation by Padhy (2008)<sup>18</sup> that "Taking a historical approach to the evolution of children's rights in different legal contexts, this scholarship situates law in practice and presents how the particularities of the legal traditions and the political context mediate in the implementation of children's human rights...legal reforms relating to children's rights in domestic settings are stirred by international norms and yet the process of internalization is locally ordained, defined by the political, social and cultural context".

It also came as a finding that incorporating the CRC into Swedish legal system would confuse courts of laws as the situation would breed competition between national and international laws. Save the Children in a way hints on this factor in its observation that a further argument against incorporation as identified by the 1996 parliamentary Committee for Children's Affairs national inquiry<sup>19</sup> "was that as responsibility for interpretation of the CRC would be placed with the courts; this would imply a risk that the rights could be given too narrow an interpretation" (Save the Children, 2011, pp.18-19).

Likewise, the CRC was cited by study participants as having general provisions as a reason for Sweden's reluctance to incorporate it into its national legislation. This same factor was raised in the national inquiry conducted by the 1996 parliamentary Committee for Children's Affairs (Save the Children, 2011, pp.18-19 citing Barnkommittén, 1997). In relation to this, Tapiwa (2002, p.2) in agreement (present an argument for transformation) argues for the necessity of regulation of international law by the countries in which it is to be applied, contending that "international treaties, including human rights treaties, are often formulated in very general terms and their effective implementation in domestic legal systems requires specific legislative action by national legislatures". However, according to Save the Children, whereas such grounds (general nature of provisions of the CRC) held in the past as justifications against incorporation, currently, the extent to which they can be depended upon as arguments against incorporation is questioned. This follows Sweden's joining of the EU and the subsequent incorporation of the European Convention on Human Rights (ECHR) into Swedish law. Save the Children (2011, p.9, citing Åhman, 2009) observes that European Union law has since had influence on Swedish law today. "Through their work with EU law, Swedish lawyers have learnt to deal with documents of similar kinds to the CRC; at the same time, Swedish courts have also become more dynamic and more accustomed to questions relating to the interpretation of rights".



Besides, whereas the CRC is blamed for lacking specificity, even some of the national measures to implement it notably have a shared problem. According to Save the Children (2011, p.5-7), amidst having a desirable objective and good measures as well as functioning as a shared frame of reference for the different actors in the field of children's rights, the 1999 national strategy for the implementation of the CRC lacked concrete and operationalized objectives (citing 2004 investigations by the National Audit Office) and targets. This accordingly made government to come up with an improved 2010 strategy to reinforce and close the gaps of the previous one (Ibid, 2011, p. 6). Nonetheless, this current new strategy is also challenged on ground that "it needs to be accompanied by a concrete plan of action that lays down time frames for implementation and evaluation" (Save the Children, 2011, p. 6).

According to the report of the UN Special Rapporteur on Health, "The World Conference on Human Rights (1993) recommended that States draw up national human rights action plans with a view to identifying how to better promote and protect human rights and if properly resourced, such plans could serve many useful purposes such as promoting the integration of human rights...in all relevant policymaking processes" (Hunt, 2007, p.10, para 27). Consequently, in 2002, Sweden adopted its first national human rights action plan (2002-2004) (Skr. 2001/02:83) which unfortunately "regrettably included neither a focus on the right to health, nor other economic, social and cultural rights" (Ibid, 2007, p. 10, para 28). However, "In March 2006 a new (second) national human rights action plan (2006-2009) was presented to the Riksdag (2005/06:95) representing a very considerable improvement on its predecessor as it included a chapter on economic, social and cultural rights, as well as a section on the right to the highest attainable standard of health. The right to health section had a welcome focus on discrimination, inequalities and health and the plan proposed governmental measures, in the health context, to combat discrimination based on gender, ethnicity, religion or other belief, sexual orientation, and disability (Hunt, 2007, p.10, para 29. citing Åtgärd 55, p.67). An analysis of the dichotomy between the first vague plan and the second explicit plan in my view points to the possible fact that the first plan could have offered a learning experience and lessons for improvement that came into reflection in the second plan. In relation to this, considering the arguments of the child rights actors in favour of incorporation of the CRC into the Swedish legislation, they may be having a point that the vagueness of the provisions of the CRC ought not to be capitalized upon as a ground for dismissing the suggestion for its incorporation by the authorities. Probably, with time, more precise rights-based laws can be realized if the CRC finds incorporation into the Swedish legal system.

The great confidence in Sweden's welfare system is something that was unanimously identified and agreed to by a vast majority. This welfare system is seen to be so assuring as far as extending welfare benefits to children is concerned. It is not surprising therefore that Sweden is favourably ranked in terms of children's welfare and rights. A look at the children's rights indices attests to this (Gran, 2004, p. 9). Consequently, this made study participants such as the Ministry official from the CRC coordination office to argue that maintaining the status quo regarding the non-incorporation of the CRC remains an ideal. However, this view found no support from the academics and the NGO officials. To them, despite the contention that the great welfare system is a factor for reluctance to incorporate the CRC into Swedish legislation, it ought not to be used as a justification for the same. Arguably, the fact that some categories of children such as poor immigrant children, children seeking asylum, children victims of trafficking, children in hiding remain losers amidst such a welfare system tailored more towards a needs-based perspective, there warrants a paradigm shift towards a rights-based approach which is considered more possibly assured by the incorporation of the CRC into Swedish legislation.

Another factor raised for the reluctance to transpose the CRC into Swedish law was that the CRC is already being implemented through a set of national measures. Article 4 of the CRC articulates that *States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...* For Sweden, such measures as the national legislations, child rights policy, National strategy for the implementation of the CRC, National Human Rights Action Plans are some of measures to this effect. In view of this, like the Ministry official, one may argue that the Swedish government is operating within the required and acceptable limits which I equally agree with. However, having such measures in place together with them being in harmony is one thing and their implementation in such a way that fully takes care of spirit, provisions and principles of the CRC is another. The findings of this study revealed that such a dichotomy is not exceptional for Sweden. Such differences are detailed in the subsequent section of this chapter. They are these discrepancies that made the NGO staff and some academics to argue that it is imperative for Sweden to make a step further to incorporate the CRC as a benchmark for addressing such practical differences, something that found contestation from ministry official.

Transformation as opposed to incorporation was cited as part of Sweden's legal tradition and thus accounting for the reluctance to incorporate the CRC into Swedish legislation. With respect to this, I contend that Sweden like any other country has a right to decide which practice—between transformation and incorporation to adopt. Accordingly, “International law does not determine which point of view is to be preferred, monism or dualism”<sup>13</sup>. Every state decides for itself, according to its legal traditions. International law only requires that its rules are respected, and states are free to decide on the manner in which they want to respect these rules and make them binding on its citizens and agencies (Dixon, 2007, p. 95). Nonetheless, UNICEF Sweden (2011, p. 2) in its comments on Sweden's initial report on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography challenges the adequacy of the transformation method. UNICEF Sweden is quoted saying, “The present method of transformation is not enough”. Thus, the organization reiterates that “neither the CRC nor the two optional protocols have become part of the Swedish judicial system”. UNICEF Sweden appreciates that some provisions in the CRC and the Optional Protocol have been transformed into the Swedish law by various legislative measures but raises concern that “the principles and provisions in the CRC and its two optional protocols would be considered more seriously in the judicial system if they were incorporated as such into the Swedish legislation and therefore became Swedish law”. Upon such a belief, UNICEF Sweden in its Questions and suggestions for recommendations to the Committee on the Rights of the Child to the Swedish Government asks the question: *Why is the Swedish Government still reluctant to fully incorporate the CRC and its optional protocols into the Swedish legislation?* The above notwithstanding, UNICEF argues that a transformation of different laws alongside incorporation would still needed to ensure that all relevant domestic legislation is brought into compliance with the CRC. Thus transformation is not downplayed as worthless but rather inadequate.

The preceding arguments already indicate that there are concerns regarding the extent to which the international rules (the CRC in particular) are respected in the context of dualistic Sweden. This is discussed in the subsequent section. Later on, part of the debate analyses the national and international law: what takes precedence over the other in practice? Once again, by dualistic Sweden according the European Convention a national law status and not the CRC despite the repeated calls by the UN Committee on the Rights of the Child together with some Swedish NGOs raises such concerns as: whether Sweden accords different conventions different status and if so, for what reasons? Moreover, the incorporation of the European convention into Swedish legislation came quite faster (after Sweden joined the EU) and perhaps with limited difficulties and blockades.

## 6.2 Implementation of the CRC through National measures: Extent to which National measures take care of the CRC

It is in the interest of the UN Committee on the Rights of the Child in its examination of initial and periodic reports to “emphasize that a central aspect of implementation is to ensure that all legislation in the country in question is in complete accord with the provisions and principles enshrined in the CRC”. Yet “General Comment No. 5 also emphasizes the importance of examining all national legislation and related administrative guidelines, in order to ensure full compatibility with the CRC” (Save the Children, 2011, p. 18).

Recalling that one of the findings revealed by this study was that the national laws are in harmony with the CRC; this finding finds support in the work of Lundberg (2011, p. 49, 60) where Lundberg observes that “[T]here is a clear ambition to implement the principle of the best interests of the child in the Swedish asylum process and the Swedish Aliens Act and policy documents call for authorities and courts to give due weight to the best interests principle, mainly by taking children’s own experiences into account and by analyzing the potential impacts of the Board’s decisions in individual cases”. On a further note, Lundberg (2011, p. 50) informs that “The ambition to have the principle of the best interests of the child pervade asylum law and its implementation is visible foremost through the all-embracing paragraph in chapter 1, section 10 of the Aliens Act” (citing Aliens Act, 2005:716). Similarly, the 1996 Parliamentary Committee in its report *The Best Interests of the Child a Primary Consideration* (SOU 1997:116) found that Swedish legislation broadly tallied with commitments in the CRC (The Swedish Government Communication 2001/02:186<sup>8</sup> (2002, p. 14)).

Noteworthy, children seeking asylum and children in hiding came out loud as some of the most vulnerable and powerless groups and whose rights often time though not always swing in a balance in the face of authorities’ priorities and decisions.

The harmony between national laws and the CRC is what made some respondents notably the ministry official to consider that there may be no need to incorporate the CRC, something that was contested by study participants from NGOs and the academia despite their agreement with the existing harmony. The latter two categories of respondents in the first place contended that harmony between national laws and the CRC is one thing while implementation of such laws and other measures in such a way that ensures fulfillment of the spirit, provisions and principles of the CRC is another. They further argued that there was a difference between legal words and actual deeds and that there was a lot more in the CRC that is not embraced in the national laws. Once again, the law was regarded to be quite restrictive and more or less limiting the promotion of children’s rights. Lundberg’s (2011, p. 60) observation that in Sweden there has been intensive discussion regarding the restrictive nature of the country’s refugee policy when it comes to children and the situation of asylum-seekers and children in hiding comes in support of the views of those study participants who contended that mere harmony between Swedish laws and the CRC is inadequate. Thus, arguing for the CRC’s incorporation as a potential basis for a more lenient and rights-based law.

The difference between words and deeds with regard to the Swedish laws is underscored by Lundberg (2011, p. 49) in her study of *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children’s Rights*. Lundberg cites cases of discrepancies in her remark that; “...several discrepancies between words and deeds were identified. Firstly, children were not heard to the extent expected in light of the Swedish legislation, and the children’s individual grounds for asylum were seldom addressed in interviews with them. Secondly, children’s responses were not taken seriously in the assessment of asylum claims. And finally, the ‘best interests’ paragraph in the

legislation was mainly used to legitimate rejected asylum applications” (2011, pp. 49, 60-63). Moreover, such deeds of the Migration Board unfold amidst the contention by Thomas Hammarberg—once the Council of Europe Commissioner for Human Rights that “the most fundamental idea of children’s rights is expressed in Article 3(1) (Hammarberg, 1990, p. 99 cited in Lundberg, 2011, p. 53) of the CRC concerning the primacy of the best interest of the child in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Lundberg’s account is seen as depicting discrepancies between Sweden’s practice and the CRC’s provisions in Article 12(1 and 2). Yet again, Freeman (2007, p. 60) cited in Lundberg (2011, p. 54) points to the mandatory duty to take children’s rights and interests into account, both in individual cases and with regard to children as a group. “The very difficult situation of undocumented people, children inclusive living in Sweden (gömda) has been brought to the attention of the Special Rapporteur and they represent one of the most vulnerable groups in society, consisting predominantly of rejected asylum-seekers...” (Hunt, 2007, p. 19, para 70).

Like the asylum laws and policies, the family law has its own shortfall with regard to the implementation of the ‘best interest’ principle. This ‘pro-parent’ rather than ‘pro-child’ law yet being used to regulate the actors’/authorities’ work with children puts the children’s best interest at stake. It is appreciated that the law is in harmony with the CRC’s Article 9(1) to the extent that the best interest of the child in matters of custody is considered supreme but this is more in words than in practice. In practice, the fact that while before court to determine who to take custody of the child in the event of separation only the two parents get legal representation and not the child raises concern about the extent to which children participate in the proceedings and make their views heard as required by Article 9(2) of the CRC. Besides, as the child becomes a mere object whose best interest is hardly reflected upon as parents fight to win custody of the child, this contravenes Article 9(1) of the same convention. In addition, considering that the family law grants the parent the power/right to meet or be met by his/her child (not in the parent’s custody) and that the child cannot refuse even if he/she does not have the will to meet the parent (simply put, even if it is not in the best interest of the child), to this extent, this law runs counter to the Article 9(3) of the CRC.

Lundberg (2011:54) in agreement with Freeman (2007, p. 60 cited in Lundberg, 2011, p. 54) sounded loud that the mandatory duty to take into account the children’s rights and interests is not negotiable. In her words, “The best interests of the child must be taken into account, no matter whether the question concerns distributive justice or whether an individual child is concerned”. The family law can hardly be said to be living to these standards unfortunately. Besides, although “The content of the best interests of the child is undoubtedly vague and difficult to implement” (Lundberg, 2011, p. 50), the case of the family law considering the disproportional power it accords to the parents in relation to that accorded children thus, putting the children in a weaker, powerless and vulnerable situation can be said to be superseding this frame of lenience/excuse of vagueness.

Therefore, whereas Freeman (2007, p. 59) cited in Lundberg (2011, p. 54) calls upon the need to strike a balance between several constitutional tensions in the process of using the ‘best interest principle’, the case of the implementation of the family law and that of processing of children’s asylum applications both illustrate shortfalls when one considers such tensions as “long-term (future-oriented) versus short-term best interests of the child; children’s own experiences and perceptions versus parents’ ideas around what constitutes the best interests of the child; different professional groups’ perceptions of the best interests of the child; and the social context and cultural values” (Ibid).

Padhy (2008)<sup>18</sup> acknowledges the variations in acceptance of children's rights standards in diverse legal traditions. Padhy notes that these authors illustrate that "the child's 'best interest' concept, ingrained in common law and foundational to the CRC is interpreted diversely in different cultures". And that "despite its almost universal presence, the best interest principle has been used to legitimize discriminatory practices by the state". This scenario typically comes in agreement with Lundberg's (2011, p. 49) observation that "the 'best interests' paragraph in the legislation was mainly used to legitimate rejected asylum applications". Both of these illustrations confirm that mere harmony between national laws and the CRC is inadequate to deduce that the latter is being implemented and it may be contended that such harmony can be seen as a loose ground upon which to judge that there is no need to incorporate the CRC into a country's legislation.

There are yet again other national laws that depict harmony with the CRC but with vivid discrepancies when it comes to practice. According to Hunt in the UN Special Rapporteur's report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health following his mission to Sweden in 2007, underscored that Sweden's "Health and Medical Services Act establishes that the goals of health and medical services are to assure the entire population good health on equal terms, and that care should be prioritized according to need" (Hunt, 2007, p.8 para 20 citing Health and Medical Services Act, 1982:763, sect. 2.). On the same note, The Special rapporteur observed that "The main goal of Sweden's public health policy is to achieve good social conditions with a view to ensuring good health on equal terms for the entire population" (2007, p. 9, para 22). However, although this Act and the policy both regulate on health in this way, the extent to which the wording and/or goal of this Act rhymes with practice when it comes to especially children in hiding remains a matter of concern. While children seeking asylum have access to the same health care on the same basis as children domiciled in Sweden (Ibid, 2007, p.19, para 69), their counterpart children in hiding in practice seemingly have no concrete place in the healthcare system. Although Hunt (2007, p. 19, para 71) reports that "Undocumented children receive health care on the same basis as resident children", in my view, the practical courage to seek this care fades away when one considers such factors as: fear to be identified and reported by service providers/authorities and consequent deportation on one hand and on the other hand the absence of a national law that prohibits disclosure of information about these children by service providers.

Besides, although it is appreciated that "Under Swedish law, no health institution can turn away a person in need of immediate care, regardless of his or her legal status, financial situation, etcetera. (Hunt, 2007, p. 19, para 71), the absence of such a law prohibiting disclosure of information about illegal residents can be seen as not only prohibiting but also a possible depiction of double standards. In such a fragile environment marred with fear and tension, it remains an issue of contention as to whether or not undocumented parents risk taking/sending their children for healthcare especially when it is not an emergency. This fear has been underlined by the Special Rapporteur in his remark that "...A further problem is that undocumented people fear being reported to authorities by medical staff and thus they often refrain from seeking medical assistance even in the most serious cases" (Hunt, 2007, p. 19, para 71). Hunt however counter argues that "...under the Secrecy Act (1980:100), general care staff are, as a general rule, prohibited from divulging information of individuals". However, an analysis of this yields a number of questions. For instance, to what extent are undocumented children aware of this Secrecy Act and to the extent does it motivate them to seek the service? Similarly, the extent to which the requirements of the Act are upheld by the medical staff is not known although this is not meant to question their professional practice. In relation to education service, whereas there is such a Secrecy Act governing the practice of health practitioners, what about the educationists—the teachers? There is not unfortunately. Therefore there may be reason to concur

with those that hold the view that a separate law prohibiting such professionals from disclosing information of undocumented children and one that is made known to the public and children would perhaps serve a better purpose. Moreover, the CRC as a law can be seen as a potential ground for such a law.

In my opinion therefore, I argue that whereas Sweden's public health policy aims to ensure good health on equal terms for the entire population, this goal is far from being reached considering that in practice, the child's residential status tantamount to a ground for discrimination in terms of accessing healthcare. Moreover, Article 24 (1 and 2) of the CRC clearly articulates this right to health without any ground for discrimination. The 'disguised' and inequitable access to healthcare by undocumented children in my view can thus be seen as fitting into the UN Special Rapporteur's description of "incompatibility with fundamental right to health principles, including equality and non-discrimination as well as inconsistency with the guiding objective of the Swedish Health and Medical Services Act to guarantee the entire population good health on equal terms" (Hunt, 2007, p. 12-13, para 40). Yet the UN Special Rapporteur declares that "A fundamental human right, the right to the highest attainable standard of health is to be enjoyed by all without discrimination. It is especially important for vulnerable individuals and groups. Asylum-seekers and undocumented people are among the most vulnerable in Sweden. They are precisely the sort of disadvantaged group that international human rights law is designed to protect" (Hunt 2007, p. 20, para 73.). Besides, the Special Rapporteur highlights that "the right to the highest attainable standard of health is recognized in the Constitution of the World Health Organization (WHO) and in its eleventh General Programme of Work (2006-2015), WHO recognizes that health-related human rights are a core value and principle guiding its work" (Ibid, 2007, p. 26, para 103). Moreover, "Sweden is a member of the World Health Assembly, the Organization's supreme decision-making body" (Ibid, 2007, p. 26, para 104.).

The inconsistency between the Swedish law and actual practice regarding the healthcare accessible to asylum-seekers and undocumented foreign nationals including children in relation to international human rights law formed a central concern of the UN Special Rapporteur (Hunt, 2007, p. 20 para 72). In particular, Hunt underlined that "In 2000, the Committee on Economic, Social and Cultural Rights, which monitors and interprets ICESCR, advised: "States are under an obligation to respect the right to health by refraining from denying or limiting equal access for all persons, including ... asylum-seekers and illegal immigrants, to preventive, curative and palliative health services (citing the Committee on Economic, Social and Cultural Rights, op. cit., para. 34)". He further noted "In 2004, another United Nations committee of independent human rights experts took the same position (citing the Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2005), para. 36)". The Special Rapporteur thus saw no reason for an obliged State Sweden to take a different view. Accordingly, the Special Rapporteur noted that "under international human rights law, some rights, notably the right to participate in elections, to vote and to stand for election, may be confined to citizens. However, human rights are in principle, to be enjoyed by all persons" (Ibid). In view of this, I do contend that Sweden falls prey of the above critique due to its reluctance to incorporate the international human rights instruments, the CRC in particular into its legislative system.

It is in this spirit that Hunt exclaimed that "With a view to improving protection of the right to health in Sweden, the Government is urged to incorporate international and regional treaties protecting the right to health into domestic law" (2007, p. 8, para 18). In particular, the Special Rapporteur recognizes the CRC as one of the international Human rights treaties that Sweden has ratified that recognize the right to health and other health-related rights (2007, p. 7, para 15).

In the same way, Hunt observes that “Many other laws in Sweden have relevance to the realization of the right to health for instance, the Prohibition of Discrimination Act (SFS 2003:307) which states that discrimination due to ethnic origin, religion or other beliefs is forbidden in connection with health and medical care” (2007, p. 9, para 21). The new Discrimination Act (2008:567) which entered into force on 1<sup>st</sup> January 2009 (UN Committee on the Rights of the Child, 2009, p. 11) reemphasized the same. In my own view, I do concur that to this effect, this national law is in harmony with the CRC. However, grounds for discrimination highlighted in this Act are limited in scope. One very practical among other important grounds is overlooked i.e. the child’s residence status. This in turn emerges as a ground for discrimination in practice when one considers not only access to healthcare but also other services like education. According to UNICEF, Sweden has continued to be criticized by the UN Child Rights Committee which among other things believes that the hidden refugee children are discriminated against when they do not go to school (UNICEF website<sup>20</sup>).

UNICEF website<sup>20</sup> quoting a UNICEF Child Rights Lawyer of Sweden Christina Heilborn notes, “It is remarkable that Sweden still is criticized for its hidden refugee children are not entitled to schooling. It is unacceptable that this discrimination against children continues 20 years after the CRC was approved by Sweden. It is time that the government takes the criticism from the UN Child Rights Committee in earnest”. The unfolding of such realities further depict that Articles 2 and 28(1) of the CRC are not taken good care of in the national legislation. It is probable that this is something that the CRC would potentially address if incorporated into Swedish law. Indeed, UNICEF is of the view that some of the criticisms from the Committee relate to the Convention not being part of the Swedish law and thus UNICEF Sweden considers that it would make a difference in the handling of asylum cases, custody disputes and other social concerns if the Convention was recognized as law.

Such a preceding picture can be said to be validating the submission that “...harmonization of international with national human rights law should go beyond merely ensuring that the latter is compatible with the former. It should also result in the increased effectiveness of international human rights law” (Tapiwa, 2002, p. 4 citing Fried Van Hoof, p. 52)

In a similar spirit, Save the Children (2011, p. 19, citing Barnombudsmannen, 18 November 2009) informs that “In connection with the twentieth anniversary of the adoption of the CRC, Sweden’s Children’s Ombudsman called on the government to set up an inquiry into the legal status of the CRC in Sweden, and to consider whether the time is not now ripe for the Convention to be accorded the legal status of an Act of law”. “The Children’s Ombudsman pointed to differences between Swedish law and the CRC – such as with regard to children’s entitlement to participate in decision-making processes that affect them – and reminded the government that the UN Committee on the Rights of the Child recommends incorporation” (Ibid).

To this effect, the consideration that if the CRC was a made a law would help address some of these gaps perhaps holds. This is premised on the view that it could ignite such actors/authorities to focus more on ensuring children’s rights in the spirit of the CRC than the postulations of the legislation. And perhaps this would help to address the situation where “at the Migration Board, children’s rights are treated as secondary to the national interest of keeping overall migration numbers down” (Lundberg, 2011, p. 49). And probably, Lundberg’s suggested solution to this problem would find blessing i.e., “...to more clearly assess children’s asylum claims in light of the Convention on the Rights of the Child (CRC)”. Moreover, in her opinion, the officials at the migration board would remain acting within their discretion while using such a rights-based approach to the best interests of the child (Ibid, 2011, p. 49). Above all, Lundberg (2011, p. 54) explicitly underscores that “one way to get a better understanding of the best interests of the child is through an understanding of the CRC as a

whole”, yet to Freeman “we cannot escape the conclusion that children’s best interests must be defined with reference to the rights of the child according to the CRC (2007, p. 9 cited in Lundberg, 2011, p. 54). However, in view of the above, concern and worry arise when one considers that public servants reportedly have limited knowledge and understanding of the CRC, partly if not largely because it is not a law.

On a further note, whereas the UN Committee on the Rights of the Child recommends to Sweden that: all children in Sweden must be protected against discrimination, hidden children and undocumented children receive the right to education, undocumented children are entitled to healthcare in practice, Ombudsman for Children be given the mandate to investigate individual complaints from children (UNICEF Website<sup>20</sup>) among other things, the extent to which these recommendations can be translated into practice to realize tangible outcomes remains a contentious issue as long as the CRC remains foreign to the Swedish legislation. Perhaps, it is upon such a conception that the committee has sustained its call for incorporation of the CRC into Swedish legislation.

### **6.3 Implications of the reluctance and the difference that would accrue from incorporation**

First of all, in this section two issues (objectives) are addressed concurrently because of their likeness i.e. the implications of the reluctance and the difference that incorporation would yield.

As this study primarily aimed to uncover the implications of Sweden’s reluctance to transpose the CRC into Swedish law, one of the overarching findings regarded the inability by mainly human rights lawyers and judges to invoke the CRC in courts of law. And even if it was referred to by the lawyers in defense of their case arguments, the judge would be under no obligation to follow it in his/her ruling. Christina Heilborn, UNICEF’s child rights lawyer of Sweden underscores that as “authorities and courts do dismiss the Convention because it does not have the status of Swedish law, this has been seen to be having implications for decisions relating to children” (UNICEF website<sup>20</sup>). In its comments on Sweden’s initial report on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UNICEF Sweden (2011, p. 2) expressed that “if the CRC and its two optional protocols would be incorporated as a whole into the Swedish legislation, their principles and provisions could be directly invoked before the courts and applied by national authorities. This would also promote a holistic approach of children and child protection engaging different actors involved in protecting children’s rights”. The failure to realize this because the CRC is not yet a law can be argued to be one of the implications that Christina Heilborn implied.

There is need to point out that Sweden adheres to a dualistic system<sup>14</sup> (Save the Children, 2011, p. 18 citing Åhman, K., 2009). Thus the country succumbs to the transformation doctrine which stipulates that “rules of international law do not become part of national law until they have been expressly adopted by the state. International law is not ipso facto part of national law” (Dixon, 2007, p. 95).

However, despite this dichotomy made between monism and dualism, Padhy (2008)<sup>18</sup> observes that this distinction is not strictly followed in practice; “in civil law countries that practice monism, international law is not accepted directly in courts, and in dualist countries international norms play an important persuasive role in interpreting treaties in municipal law in common law traditions”. This in practice might be real for Sweden. For instance, it might be misleading to say that



international law and municipal law are mutually exclusive, and that the former has no effect on the latter until it is incorporated through domestic legislation.

Although the CRC is not yet part of the Swedish law since it has not been given effect by an Act of parliament (Tapiwa, 2002, p. 1; Wallace, 1997, p. 37; Dixon, 2007, p. 95) the fact that it has been accepted as a treaty followed by national attempts to adapt the country's national laws to conform to the CRC, Sweden in principle may not be said to be violating international law (Ibid).

The above notwithstanding however, considering that in practice there exist discrepancies between the CRC and national laws such as those regulating the health and education right for children in hiding, the family law regulating custody of a child separated from one or both parents, as well as the Asylum Act when it comes to children's 'best interest principle', a lot can be deduced when Sweden's dualistic system is analyzed. Observing that, "International law as such can confer no rights cognizable in the municipal courts and that it is only insofar as the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations"<sup>13</sup> (citing James Atkin, Baron Atkin, in M. Akehurst), this implies a lot for children's rights. First, it implies that unless the national laws fully take care of the rules of the international law (the CRC in this case) and that those laws are implemented in the right spirit of the CRC, some of children's rights remain rather an aspiration. And in the event of violation of some of the children's rights enshrined in the CRC but not in the national laws such as the right to education and health for all children regardless of the child's legal status in a state party to the CRC, efforts of their legal representatives in the appeal process is only destined to hit a dead end, a concern that came out loud in many of the interviews.

It is thus little wonder that Antonio Cassese (1992, p. 15) reasons from a human rights point of view that, "if a human rights treaty is accepted for purely political reasons, and states do not intend to fully translate it into national law or to take a monist view on international law, then the implementation of the treaty is very uncertain"<sup>13</sup>. Whereas the first part of this observation may not be the case for Sweden, the second one is hard to rule out.

In this submission, the intention is neither to judge Sweden for adhering to the dualistic system nor is to make a defense or persuasion for a monistic system but rather to highlight the implications of the country's legal system in relation to international law as far as implementation of children's rights is concerned. In any case, even "International law does not determine which point of view is to be preferred, monism or dualism"<sup>13</sup>. Every state decides for itself, according to its legal traditions. International law only requires that its rules are respected, and states are free to decide on the manner in which they want to respect these rules and make them binding on its citizens and agencies (Dixon, 2007, p. 95). Wallace (1997, p. 36) observes that "the way in which a state makes international law part of its domestic legislation is a matter of municipal law rather than international law". As Pieter Kooijmans (1994, p. 83) pointed out, "Both a monist state and a dualist state can comply with international law. All one can say is that a monist state is less at risk of violating international rules, because its judges can apply international law directly"<sup>13</sup>. "Negligence or unwillingness to translate international law, or delays of translation, or misinterpretation of international law in national law can only pose a problem in dualist states..."<sup>13</sup>.

Borrowing from Tapiwa (2002, p. 2) in the review of the work of Tshosa Onkemetse (2002) focusing on *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe*, it becomes apparent that in a situation where the human rights instrument is not part of the country's national law, these three countries' experience may hardly be escaped. Tapiwa acknowledges that the article author's observation that "...although substantive provisions of the Bill of Rights contained in the national constitutions of Botswana, Namibia and Zimbabwe are essentially

in consonance with international human rights standards, internal human rights practice has not always been consistent with the requirements of international human rights treaties”. Nonetheless, due respect ought to be given to differences in contexts such as differences in levels of democracy and welfare regimes operated by the different countries i.e. whether social democratic, conservative or capitalist regimes (Esping 1990, pp. 26-29). But again the differences in contexts notwithstanding, Hale’s (2006, pp. 350-51) observation may not be bound by context. He observed that despite the binding nature of the CRC in international law, as long as it is not made part of the domestic law, “many of its obligations tend to be drawn in such a broad and aspirational way that rather makes its implementation and realization difficult, thus in turn such a scenario merely represents the theory of children’s rights”.

As I have observed in this very section, in principle Sweden may not be seen as violating international law given the fact that it has accepted the CRC as a treaty followed by national attempts to adapt the country’s national laws to conform to the CRC. However, an analysis of the views of some study participants mainly the academics and NGO staff reveals that it would be too simplistic to conclude that there is no human rights violation and consequent violation of international law considering Sweden’s practices. The bases for this for instance lay in: the gaps exhibited in the way the ‘best interest principle’ is implemented, the non-universality of the right to health and education for all children irrespective of their legal status in the country, denial of residence permits (refugee status) to some children and consequently sending them back to home countries where they risk torture, abuse and other sorts of human rights violation (contrary to Article 37(a) of the CRC), etc.

With particular regard to health and education, one respondent—an academic expressed dissatisfaction with a scenario characterized by the absence of a law that prohibits service workers/providers disclosing information of such children in hiding and in turn their parents, although he noted that there is equally no law that obliges them to disclose information about the same. Not surprising, UNICEF’s Christina Heilborn has expressed dismay that hidden refugee children are not entitled to schooling—something that she considered not only an act of discrimination but also unacceptable (UNICEF website<sup>20</sup>). In view of this, Dixon (2007, p. 91) makes it explicit that “a state cannot plead the provisions of its national law as a valid reason for violating international law. Further, a state has not to rely on absence of domestic legislation as a reason for non-fulfillment of its international obligation”. Likewise, Dixon (2007, p. 91) concurs with Wallace (1997, p. 38) that “a state ‘may not invoke its internal law as justification for its failure to perform a treaty’ (citing Art. 27 of the Vienna Convention on the Law of Treaties 1969), nor may it rely on non-compliance with national law in order to deny that it has consented to be bound by a treaty (citing Art. 46 of the Vienna Convention and Maritime Delimitation and territorial Questions case (Qatar v Bahrain) 1994 ICJ Rep 112)”. “If a change in national law is required in order that a state may fulfill its international obligation, then the state is under international duty to make that change or otherwise mitigate its international responsibility” (Ibid, 2007, p. 92).

In the same way, Wallace (1997, p. 36, 38) noted that “In the Alabama Claims Arbitration (citing Moore, 1 Int. Arb. 495 (1872)), the arbitration tribunal concluded that neither municipal legislative provisions, nor the absence of them, could be pleaded as defense for non-compliance with international obligations, whilst the Permanent Court of International Justice in an advisory opinion held that: *...a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken*” (citing Exchange of Greek and Turkish Populations Case, P.C.I.J. Rep., ser. B., No. 10,p.6 at p. 20 (1925)). In addition, Wallace (1997, p. 38 citing the international Law Commission—Y.B.I.L.C., 1949 at pp. 286, 288.) observes that Article 13 of the draft Declaration on Rights and Duties of States 1949 provides that: *Each State has the duty to carry out in good faith its obligations*

*arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.* Noteworthy however, some scholars have challenged the binding power of a Declaration (Smith, 2007, p. 36; Freeman, 2002, p. 43) yet others argue that since Declarations like the Universal Declaration of Human Rights (UDHR) is the foundation for all UN human rights instruments, it automatically gains a moral binding force and it becomes universally applying.

Once again, this study found reports that the current status of the CRC puts not only children but also child rights actors—both in state and non-state (NGO) agencies in a weaker position to claim for children’s rights and to effectively perform their advocacy role. Put simply, without the CRC as a national law, these actors are disempowered. The discussion that follows is categorized under a summary theme/subheading called empowerment effect of the CRC if incorporated into Swedish legislation. This is seen as one of the differences it would make yet at the same time, the fact that this empowerment is not currently reflects an implication of the current status of the CRC.

### **6.3.1 The empowerment and advocacy effect of the CRC if incorporated into Swedish legislation**

Considering that “Empowerment seeks to help clients gain power of decision and action over their own lives by reducing the effect of social or personal blocks to exercising existing power, increasing capacity and self-confidence to use power and transferring power from the groups and individuals” and that “Advocacy seeks to represent the interests of the powerless clients to powerful individuals and social structures” (Payne, 2005, p. 295), the incorporation of the CRC into Swedish law would be empowering in nature. Considering that the incorporation of the CRC would arguably strengthen its status (UNICEF, 2011, p. 2), in turn child rights actors would have a stronger tool to work with, moreover one that is based on children’s rights and not needs. The empowerment effect of the incorporated CRC would go as far as enabling the human rights lawyers to invoke the CRC in courts of law and in their reference to it, judges would have an obligation to consider such references in their rulings. Children would have a strongest ground to step on in claiming their rights except and unfortunate that majority of children according to reports from the Children’s ombudsman are not aware of the content of the CRC. But perhaps, even training of children in their rights based on the CRC would be more prioritized and strengthened. This is not to dismiss the current efforts to ensure children obtain an understanding of their rights such as the New School Education Act passed by parliament in June 2010 as well as the new national curriculum with new subject syllabuses, containing clearer references to human rights (Save the Children, 2011, p.12). Rather, the point is that children’s rights would gain more emphasis and children would be empowered more to make such claims for their rights.

In a further analysis, with the current state of the CRC, the call made towards NGOs during an international conference in Geneva 2009, November to use the Convention on the Rights of the Child as a legal instrument, can be seen as ‘planting seeds on a rocky ground’. To put the picture into context, “on the 12th and 13th of November, Save the Children, in partnership with the Office of the High Commissioner for Human Rights (OHCHR), UNICEF, the NGO Group for the Convention on the Rights of the Child and Child Rights Information Network (CRIN) held an international conference in Geneva with the objective of inspiring child rights NGOs to use the Convention on the Rights of the Child as a legal instrument” (Conference Report, 2009, p. 9). Supposedly, this task can only go well if the convention is made part of the Swedish law considering that Sweden is sovereign and adheres to the dualistic system. Otherwise, the concerned NGOs are to remain disempowered to

achieve this goal. It is partly less wonder that child-rights NGOs are at the forefront of engaging government to incorporate the CRC into Swedish legislation and the good news to these NGOs is that four out of the seven political parties in parliament are in support of their cause. But nonetheless they (NGOs) believe they have a long way to go since the biggest parties (the Social Democratic and Moderate parties) are still reluctant to buy the idea.

In relation to this matter, Save the Children (2011, p. 19) observes that “UNICEF also notes that the debate has started bubbling. More and more voices have been calling for the Convention to be incorporated into Swedish law, with the issue being debated in parliament and in the media. The liberal “Folkpartiet” party and the Christian Democratic Party recently decided that they would join those calling for incorporation, following the example of the Swedish Green Party and the Left Party”. ‘*Aluta continua*—The struggle continues’.

The office of the children’s ombudsman would be another agency to benefit from the empowerment effect of the CRC as a law. However, in agreement with the observation of the legal officer in the office of the children’s ombudsman, Rees (2010, p. 417) concurs that it all depends on the composition and mandate of the ombudsman as these vary considerably from country to country. Rees notes that “some children ombudsman institutions are restricted to lobbying government to take children’s rights into account, much in the same way as non-governmental organisations while others may also have the power to provide assistance and advocacy to individual children, or to investigate complaints submitted by or on their behalf, a function that has been termed ‘dealing with individual cases’” (Ibid). Unfortunately for Sweden, the institution lacks the latter mandate which ideally would be more paying. Nonetheless, with hope, the legal officer exhibited optimism that if the CRC ever gets incorporated, this may make the parliament to rethink their standpoint and thus, consider expanding the mandate of the Children’s ombudsman. The matter of greater independence being accorded to the children’s ombudsman vis-à-vis the government, and empowering the institution through having its mandate expanded to deal with individual complaints has been of concern to the UN Committee on the Rights of the Child and Swedish NGOs (Save the Children, 2011, p. 8). Incidentally, government has been adamant to respond to the repeated calls (Ibid, 2011, p. 8).

Considering that Children ombudsman’s mandate has a great influence on the implementation and outcomes of the CRC, I argue that the limited mandate not investigate individual cases undoubtedly leaves this institution powerless to a reasonable degree. The importance and perhaps urgency of according the children’s ombudsman a greater mandate to investigate individual cases can better be appreciated when one reflects on the following case illustration in which Rees (2010, pp. 417-418) refers to the differences between the four Children’s Commissioners in the United Kingdom thereby helps to signal the relevance of according National Human Rights Institutions (NHRIs) for children such as the children ombudsman the mandate to investigate individual cases, a mandate beyond restriction to lobbying government to take children’s rights into account. Below is an account;

“The Children’s Commissioner for Wales and the Northern Ireland Commissioner for Children and Young People have the function of advising and advocating on behalf of individual children, whereas the Children’s Commissioner for England and Scotland’s Commissioner for Children and Young People do not, with the effect that their role is limited to proactively lobbying government, although they may carry out investigations in limited circumstances”. To make clear the practical consequence of the two dichotomous mandates borne by the two categories of Children’s commissioners, Rees underscores the case illustration put forwards by Jane Williams. That is the case illustration of “a disabled child awaiting nursing support before being able to return from hospital to home and to school, who has encountered repeated delays in provision of the support” (Williams, 2005, p. 48 cited in Rees, 2010, p. 418). According to Rees, “although each of the Commissioners

could, depending on the circumstances, carry out an investigation into the failings which occurred, a commissioner empowered to deal with individual cases, such as the Northern Ireland and Wales Commissioners, could advise the child, and, if necessary, make representations to relevant agencies on his or her behalf, with a view to negotiating an outcome taking the rights of the child into account". And "a commissioner with this power is, prima facie at least, more of an effective "champion" on the issues that the children themselves feel they need to raise individually" (Williams, 2005, p. 50 cited in Rees, 2010, p. 418). Although it is not obvious and automatic as the legal officer in the office of the children's ombudsman emphasized, it is believed that if the CRC is made part of the Swedish law, perhaps then the parliament can rethink their standpoint on the limited mandate of this institution.

That aside, following the revelation that many public officials whose work has a bearing on children such as the judges, doctors, nurses, teachers, police and even some social workers (more so in the public service realm), among other professionals, have inadequate and some perhaps complete lack of knowledge, understanding and competence of the CRC partly if not largely because the CRC is not a law and thus it is less focused on, its incorporation would have an empowerment effect on these professional groups. In the first place, the CRC would gain an equal status as any other national laws that form a prime reference point for these public servants. The implication of this becomes that each actor has to obtain an understanding and competence in working with it like the case is for other laws. In turn, they would be empowered towards that line. In particular the inadequate knowledge and competence on the CRC among judiciary formed a matter of concern at the international conference in Geneva organized by Save the Children, in partnership with the Office of the High Commissioner for Human Rights (OHCHR), and other child rights on the 12th and 13th of November, 2009 (Conference Report, 2009, p.18). Likewise, UNICEF Sweden (2011, p. 6) in its consideration of the need for training for judges has argued that "Crimes against children and the question of children's exposure to abuse and exploitation imply a need for stronger competency for decision makers. Several individual cases reveal a lack of understanding for children's rights and needs". In this regard, "UNICEF Sweden would like to see a stronger child rights approach within the Swedish judiciary...we therefore advocate more training programmes based on a child rights approach".

In the same way, the Committee on Economic, Social and Cultural Rights in 2001 also encouraged Sweden "to raise awareness about human rights, in particular economic, social and cultural rights, among State officials and the judiciary" (Hunt, 2007, p. 11, para 30). Yet among parents, according to Save the Children (2011, p. 9) the fact that no studies focusing on their knowledge and competence in the CRC have been done, it is rather hard to gauge how much they know about the CRC.

In its reference to the a survey carried out by the Children's Ombudsman in 2009 to ascertain how much the CRC features in the education and training given to teachers, police officers, nurses and social workers, Save the Children (2011, p. 9) noted with dismay that the survey "found that nearly all the degree courses and training programmes investigated looked at the subject of children's rights. However, shortage of time and insufficient competence among teachers/lecturers meant that the students did not always acquire enough knowledge to be able to use the CRC as a practical tool in their chosen professions". Such an observation comes in support of a finding from one of the chiefs of the Family and Children's unit in one of the districts of Gothenburg. This chief testified that in their trainings about guiding laws for their practice, the CRC is not often allocated time/attention. In addition, she explicitly informed that in practice, she could not see which difference the CRC would have in her work. In my opinion therefore, it is probable that the CRC would make a difference in terms of more reflection made to it and the different professionals being empowered to better work with this tool.

With respect to children's knowledge about the CRC, Save the Children (2011, p. 9) highlights that "surveys conducted by the Children's Ombudsman, and also the interviews carried out for this study (titled *Governance fit for Children*), have shown that in general, children and young people have no more than sketchy knowledge of the CRC". Moreover, this comes after a period of over 2 (two) decades down the road since Sweden's ratification of the CRC on 29th June 1990<sup>21</sup>. And it turns out to be a reality despite "all kinds of initiatives the Swedish government has carried out to spread awareness and understanding of the contents of the CRC" (Save the Children, 2011, p. 9). Impliedly, the spirit is that if the CRC found incorporation into Swedish laws, all these would be matters of concern and perhaps priority in the face of the concerned authorities.

### **6.3.2 The urge for a Rights-based approach**

As a common contention among different respondents across different respondent categories in their submission on: the implications of Sweden's reluctance to embrace the CRC as a law; as well as the difference it would make by transposing the CRC, a shift from a needs-based approach to a rights-based approach was underlined. As an implication, it was pointed out that reluctance to embrace the CRC as a national law meant that particularly actors in the public service realm are more focused on the needs than the rights of children. This was largely premised on the observation that a wide scope of Swedish laws regulating the actors' work with children utilize a needs language in their texts. Thus, the study participants stemmed from such an observation to consider that if the CRC was made a law, it would assure a paradigm shift encompassing a rights-based approach reinforcing the traditional needs-based approach.

The absence of a rights focus in Sweden's domestic policies came not only as a surprise to the UN Special Rapporteur for Health but also formed a strong concern to him during his mission to Sweden in 2007. With particular attention to health, Hunt (2007, p. 9, para 23) reports that "during this mission, it became apparent to the Special Rapporteur that at the domestic level, there is a weak understanding of the right to the highest attainable standard of health. Indeed, even the existence of the right to health appeared to be unknown in some quarters where the Special Rapporteur might reasonably have expected otherwise. For the most part, explicit reference to the right to health remains absent from Sweden's domestic health policies". Consequently, the Special Rapporteur expressed dismay about the domestic unfamiliarity with this right in question (Ibid). Most puzzling to the Special Rapporteur was that unfamiliarity with the right to health at the national level existed amidst Sweden having a commendable policy of actively mainstreaming human rights, including the right to health, into its international policies (Ibid, 2007, p. 9, para 24).

It is rather worthwhile to consider that the urge for this paradigm shift cannot be said to be essential for its own sake. UNICEF (2007, p. 21) underlines four core principles of a rights-based approach which in their own right can be seen as pointing to the benefits of this approach. They include; (a) accountability of all duty bearers for obligations to children and women, (b) universality of rights, (c) indivisibility and interdependence of rights, (holistic vision, but can prioritise actions—emphasis on priorities and strategies to secure rights in context of available resources) and (d) participation of all stakeholders as a right (ownership and sustainability). Likewise, the Royal Tropical Institute (n.d) underscores the same core principles. According to UNICEF, these core principles cannot be seen as an end, rather if upheld, they can assure such positive outcomes as; "promoting holistic legislative reforms, stimulating discussion of barriers to reform, addressing gender inequality and the discrimination against women and girls, promoting broad participation (of children) in political life, promoting broad dissemination of international human rights instruments and increased

legal literacy, promoting effective implementation, in conformity with human rights principles, ensuring special protection for vulnerable and marginalized children, undermining social practices negatively affecting children and women and promoting positive change, promoting an effective, reliable and predictable judicial system that is accessible to all, promoting adoption of redress mechanisms, and ensuring that the law contributes to the full extent possible to children's and women's well-being", among other things (2007, p.21). One may thus argue that as an implication of the reluctance to incorporate the CRC, Sweden is missing on such benefits.

A reflection on these potential benefits of a Rights-based approach in relation to the findings of this study in my opinion cements the need for this approach which is envisaged to become attainable if the CRC is made part of the national legislation. The rights-based approach if upheld can with some degree of certainty help to address some of the existing gaps in as far as ensuring children's rights is concerned. The findings for instance revealed among other things such gaps as; the limited knowledge and competence on the CRC among groups of professionals working with children and children themselves, limited protection of children in hiding and children that are victim of trafficking, the non-holistic and non-uniform implementation of children's rights across the autonomous communes and municipalities, the non-universality of some economic and social rights (e.g. education and health for children in hiding), the discrepancies between words of Swedish laws and actual deeds (such as asylum laws) despite their harmony with CRC, then the scenario of children's lack of legal representation child before court in custody cases as parents scramble over who to take custody of the child in the event of separation/divorce. UNICEF Sweden (2011, p. 6) makes a submission that a rights-based approach can be a ground for advocacy for child rights training programmes which according to UNICEF are capable of changing attitudes and behaviours of concerned actors to better enable the fulfillment of children's rights. This is premised on the belief that such training would target the customs and practices that shape the currently poor attitudes and behavior. Imperative to note is that incorporation of the CRC and consequent training of stakeholders—children, parents/guardians, child rights actors, judiciary, etc. would serve to fulfill a State party obligation under Article 42 of the CRC.

In relation to the above, this rights-based approach considered to be "gaining currency in development policy and practice because conventional approaches have produced disappointing results, particularly with respect to reducing poverty and producing greater equity" (Royal Tropical Institute (n.d.)) is argued to bear an empowering aim for "people to exercise their 'voice' and influence decisions that affect their lives; help state and non-state actors realize their responsibilities to respect, protect, promote and fulfill citizens' rights; ...and help translate human rights principles into reality (Royal Tropical Institute citing Overseas Development Institute, 2003).

Like Hunt observes, "The integration of the rights approach into Swedish service policies would not signal a radical new policy departure. On the contrary, it would reinforce and strengthen much that is already being done" (2007, p. 10, para 25). A further argument is raised that "although, no method of analysis - whether based on equity, economics, utilitarianism, human rights or anything else - provides neat solutions to complex policy dilemmas, a right approach has a constructive contribution to make to health and other service policymaking" (Ibid). The Special Rapporteur makes his voice even louder that "A policy that is animated by the right to health is likely to be equitable, inclusive, non-discriminatory, participatory, evidence-based, sustainable and robust. Thus, a failure to integrate, explicitly and consistently, the right to health, and other human rights, into Swedish health policymaking, represents a missed opportunity of significant dimensions, as well as being inconsistent with Sweden's international obligations" (Ibid, 2007, p. 10, para 26). This is quite a strong message to not only to the Swedish authorities and the legislature in particular that reserves the power to

incorporate the CRC but also to the child-rights focused civil society to strengthen their advocacy. These remarks further serve to augment the argument that the incorporation of the CRC in Swedish law would serve to make a difference in this regard.

### 6.3.3 The autonomy of regional and municipal councils

The autonomy of regional and municipal councils that is part of Sweden's devolution which accords them responsibility for the kind of service-provision that primarily concerns children—education, health, social services (Save the Children, 2011, p. 5, 12) was earmarked among the findings to be having a bearing on the outcomes for the implementation of the CRC in its current state. Since the convention is not a law, the autonomous entities take their discretion to interpret and implement it in their own way. This autonomy was reported to be accounting for the non-uniformity in implementation of children's rights, differences in prioritization of children's rights across regional, municipal councils and communes. Consequently it means that the rights and welfare attained by children depend upon which locality the child lives in and the service providers therein. By implication, the core principles of universality, indivisibility and interdependence of rights underlined by the rights-based approach (UNICEF 2007, p. 21; 2011, p. 3) in such a case remain rather aspirations than a reality. It is thus less wonder that the Committee on the Rights of the Child during its examination of Sweden's fourth period report in May 2009 “explained that the disparities existing between different municipalities and regions in terms of how well the CRC is implemented are a ground for concern and these disparities cause differences in levels of child poverty, in the resources available to the social services, and in academic results at school” (Save the Children, 2011, p. 11).

On addition, with such devolution amidst the current state of the CRC, the significance and urgency with which such autonomous entities embrace government interventions concerning children's rights varies, thus marking discrepancies in guaranteeing and attainment of children's rights within the same State party to the CRC. For instance, Save the Children in its study titled *Governance fit for Children*, noted that the new national strategy for the implementation of children's rights is not well known in the municipalities: “of the four municipal authorities included in this study (Malmö, Arvika, Partille, and Uppvidinge), only one—Partille had drawn up a municipal child-rights strategy while Malmö authority was by the time of the study working on a strategy and plan of action to promote democratic participation for young people” (Save the Children, 2011, p. 6). In turn, the phenomena of devolution and consequent autonomy have assured shortcomings in co-ordination between the national, regional and municipal levels, a scenario which according to Save the Children has called the attention of UN Committee on the Rights of the Child, and Swedish NGOs (2011, p. 6, 10). These gaps are believed to would have been minimal if the CRC was a law.

In view of the above, it can be argued that perhaps the UN Committee on the Rights of the Child had a grounded point when it expressed concern at the “continuing lack of formal recognition of the Convention as Swedish law, which can have an impact on the rights contained therein and on the application of such rights” during its examination of Sweden's fourth periodic report in May 2009 (Save the Children, 2011, p. 11).

Considering that under the Swedish system (characterized by greater decentralization and thus autonomy of regional and municipal councils), “the holders of national political office steer the country via laws...” among other things (Save the Children, 2011, p. 13), in my opinion, this has quite far reaching implications for the implementation of the CRC in its current state—i.e. which is not a law. By implication, as the national political officers attempt to influence the authorities in the decentralized units through laws, what becomes the fate of the CRC which is not a law? It means the



national authorities will have limited if at all any mandate, legal or moral authority to hold the local authorities responsible and accountable in the way they interpret and implement the CRC. I thus argue that the reverse would perhaps be true if the CRC was made part of the Swedish law.

It would thus be possible to deduce that promoting coordination on human rights, something that has been Sweden's aim since the first national human rights action plan (2002-2004) (Skr. 2001/02:83) (Hunt, 2007, p.10, para 28) could only remain an aspiration in the midst of Sweden's devolution.

#### **6.4 Sweden: 'Not practicing what she preaches'**

As a matter of reminder, different respondents except the ministry official unanimously contended that the risk that Sweden runs by being reluctant to transpose the CRC is that the country is positioning itself to be considered 'not practicing what she preaches'. This same view has been inferred to by Save the Children (2011, p. 13). This organization acknowledges that "Human rights have traditionally been a central feature of Sweden's international profile...with every interest in there being fixed, agreed rules of conduct in the international arena. Yet at national level human rights have not always been as central". Sweden's characteristic of giving human rights at international rather than national level a central focus according to Save the Children "is reflected in a positive attitude towards participation in international co-operation and collaboration of various kinds, including the framing of new conventions such as the CRC (citing Ek, S., 2009) and a concomitantly positive attitude towards contributing to the financing of such measures". To Save the Children, the current welfare and rights enjoyed by children is explained more by Sweden's well-developed welfare state that has guaranteed the likelihood of children growing up under conditions where their rights are respected, the vast majority of children in Sweden grow up under good material conditions, and have parents who provide them with care, well-being and protection. And it is less surprising therefore that "In an international comparison Sweden is a leading country in the area of child welfare" (Ibid, 2011, p. 13).

The UN Special Rapporteur did not keep silent about this subject under consideration during his 2007 mission to Sweden. The Special Rapporteur acknowledged that "To its credit, Sweden also encourages developing countries to integrate human rights into their national policies. Yet its explicit integration of the right to health into its own national policies appears to be at a rudimentary level". He thus declared that "Some might be driven to the conclusion that, at the domestic level, Sweden does not practice what it preaches".

Of greater concern, the risk of Sweden being viewed as not practicing what she preaches ought not to be seen as an end in itself. What about the countries that look up to Sweden as a role model? Besides, will this prestigious claim by government continue holding? The claim that: "Because of the good conditions of life enjoyed by children in Sweden, and the way we view childhood and treat our children – especially our respect for children's integrity – Sweden is seen as a nation that leads the way and can provide an example for other countries to follow in terms of guaranteeing children's rights" (Save the Children, 2011, p. 11, citing Skrivelse 2007/2008:111). It is possible that the country's international and diplomatic image may come to scrutiny. And similarly, the country's moral authority to encourage other states to follow human rights may steadily fade into the background.

#### **6.5 In practice: Supremacy of the national law over the international law**

One of the outstanding findings of this study was that in practice the national laws appear to be supreme over the international law—the CRC. Dualistic Sweden has not by an Act of parliament made

the CRC part of Swedish legislation. The implications of this were made explicit by the different child rights actors interacted with. One of the study participants from BRIS made this remark, "...yes, I think that is one of the problems. Ideally, we should have the CRC as part of the international law to take precedence in case of conflict with the national law but the country can defend itself by saying that we follow a dualist system and the CRC is not yet part of the national law, thus we have to follow the national law". The Save the Children official deduced that given the difficulty or impossibility of invoking articles of the CRC in court by lawyers and the subsequent questioning in case of reference to the CRC that "where in the Swedish law is that stipulated", all give an impression that in the practical sense, the national law takes precedence over the international law/standards though the UN urges the reverse.

The following confession by one of the chiefs of the family and children unit in a Gothenburg district accords rather a more practical picture. She expressed that, "...well, you have to consider the law first. E.g. in a case of child abuse, if I do not follow the stipulation of the law as a public servant, then I can go to prison and can be charged and then I do not have a job. So when working, in case I need to compare the CRC and the law, then the law is considered first. But I may not be charged for not following or referring to the CRC". As long as it is agreed that not all the rights guaranteed by the CRC are entailed in Swedish laws, it becomes unquestionable about children missing out on some of their rights as a consequence. Moreover, all this unfolds yet the "Convention should always prevail whenever domestic law provisions are in conflict with the law enshrined in the Convention" (UN Committee on the Rights of the Child, 2009, p. 3; CRIN, 2010). Similarly, Wallace (1997, p. 36) contends that "On the international scene, international law is unequivocally supreme, as is borne out by both arbitral and judicial decisions and international conventions which reflect accepted international law".

All the above said, it can be contended that since Sweden ratified the convention on the 29th June 1990, many developments have unfolded and a lot has been achieved in the sphere of children's welfare and rights to the extent that today, Sweden ranks among the top countries when talking about children's rights and welfare. For instance according to the 2004 Children's Rights Index—an indicator for over 190 countries of four different types of children's rights: civil, political, social, and economic, Sweden scored 29 out of a maximum of 32 (Gran, 2010, p. 8). This was right above the average/mean of 23.25 and median of 22.50 for Europe and Central Asia—the category where Sweden fell. On one hand, basing on this picture, like the ministry official contends, one may perhaps deduce that since Sweden has attained such a rights and welfare status for children without necessarily incorporating the CRC, the country's decision of being reluctant to incorporate the CRC is perhaps rational. However, before such a conclusion is reached, answers to the following questions need to be sought: First, Has Sweden attained this current rights and welfare status for children because the transformation ideology has worked well or because of the country's traditionally sound welfare system? Secondly, could it be as a result of transnational networking (including a country's diplomatic image) and social activism besides legal processes of interaction which according to Menski (2006 cited in Padhy, 2008), also transform the human rights behavior of states through moral pressure? And thirdly, wouldn't incorporation make any addition, thus assuring a greater comparative edge? It may not be within the scope of this study however, to answer these questions but at least they are appreciated as essential in thinking deeper about the implications of the country's reluctance to incorporate the convention as well as the possible differences that incorporation would bring about.

## **6.6 Validity, reliability and generalization of findings**

Validity as Kvale and Brinkmann highlights is concerned with objectivity and truth and it permeates all stages from thematization to final reporting (2009, p. 241). It focuses on “whether a method investigates what it purports to investigate” (Ibid, 2009, p.246). Reliability on the other hand concerns itself with “the consistence and trustworthiness of research findings...often treated in terms of whether a finding is reproducible at other times and by other researchers” (Ibid, 2009, p. 245).

### **6.6.1 Validity and reliability**

In order to cater for reliability, I desisted as much as possible from asking leading questions during interviews apart from when they were a part of the interviewing technique (Ibid, 2009, p. 245). Besides, as a deliberate move, I transcribed the interviews myself. Considering the findings obtained (the implications of the reluctance, envisaged difference due from incorporation of the CRC, the risks of failure to incorporate the CRC, etc.) obtained through interviews and document reviews all attest to the validity of the methods employed by this study—they measured what the study intended intended to. In order to validate the findings and to ensure valid scientific knowledge, a set of tactics as suggested by Miles and Huberman (1994, p. 263, cited in Kvale and Brinkmann, 2009, p. 250) were made of use. Specifically, I utilized triangulation, made follow up on surprises, sought views of informants, among other things. Besides, I ensured that questions of “content and purpose of the study precede questions of method” (Kvale and Brinkmann, 2009, p. 251). Kvale notes that “the complexities of validating qualitative research need not be due to an inherent weakness in qualitative methods but may on the contrary rest on the extraordinary power to picture and question the complexity of the social reality investigated” (2009, p. 253). To guard against that, an attempt was made to check, question and theorize the study findings as recommended (Ibid).

### **6.6.2 Generalization**

As Kvale and Brinkmann (2009, p. 261) observe, “if we are interested in generalizing, however, we may ask not whether interview findings can be generalized globally, but whether the knowledge produced in a specific interview situation may be transferred to other relevant situations”. Out of the three forms of generalization that Kvale and Brinkmann suggest, analytical generalization is deemed applicable to this particular case (2009, p. 262). Analytical generalization “involves a reasoned judgment about the extent to which the findings of one study can be used as a guide to what might occur in another situation (Ibid). Accordingly, the findings of this study specifically the implications of the country’s reluctance to incorporate the CRC and the difference that incorporation would make can be generalized to Sweden as a whole. Different child rights NGOs throughout Sweden are likely to be affected alike, undocumented children regardless of which municipality they live in are bound to be affected the same way and the different professionals that work with children most like will be affected the same way. This is premised on the fact that the whole of Sweden is governed by the same legislative system.

Besides, considering that like Sweden, many other countries adhere to the dualist system yet they have by intention or default equally not by an Act of parliament accorded the CRC a legal status, such findings of this study may hardly be ruled out. The difference may possibly lie in differences in welfare systems, level of democracy and development across these different countries.

Although I do appreciate “a common objection to interview research that there are too few subjects for findings to be generalized” (Kvale and Brinkmann, 2009, p. 261), it is equally imperative to acknowledge that as far as this study is concerned, the issue of number was not that much a subject matter but rather the issues/concerns raised by a right sample.

## 7. Summary and Conclusion

### 7.1 Summary of findings

Sweden's reluctance to incorporate the CRC into Swedish legislation was found to be having a set of implications. This state of affairs was noted to be affecting different stakeholders in different ways. Notably the affected categories are the children themselves and the child rights actors. An effect on the country's image was noted as a potential implication. The flow of summary follows the themes generated under the findings chapter.

In the first place, several factors were put to light to explain Sweden's reluctance to incorporate the CRC into the country's legislative system. These included among others; the strong belief in the country's welfare system which according to the study participants leaves the politicians/legislators convinced that there is no need for incorporation of the CRC. Besides, the current high welfare level and rights for children is noted to have been achieved without having the CRC incorporated but rather transformed. However, whereas all study participants agreed on Sweden's strong welfare system, NGO staff and the Academics unlike the ministry official considered that this is not justifying enough. Sweden's constitutional tradition of transformation as opposed to incorporation came up loud as a factor for the reluctance to incorporate the CRC. This was backed by the fact that each country has the discretion to choose between monism (more synonymous with incorporation) and dualism (more synonymous with transformation) as long as the country upholds the rules of international law. Sweden opted for the latter.

The convention was also argued to be already being implemented through a number of national measures and that there is greater harmony between the CRC and Swedish legislations. This was unanimously agreed to by all participants. But whereas it seemed convincing according to the Ministry official and some social workers in the public realm (social services department), the case was different from the eyes of NGO staff and academics. According to these, despite the harmony between the CRC and Swedish legislations, there are some rights articulated in the CRC which are guaranteed in Swedish legislation. A case in point was the health and education rights of children in hiding. Besides, the NGO staff and academics also considered that there are differences between words and deeds within the Swedish legislation.

The general nature of the provisions of the CRC was a common perceived factor for Sweden's reluctance to incorporate the CRC. This however was seen as not enough justification from the perspective of the academics and NGO staff unlike the ministry official and other public staff. Some of the academics and the NGO staff, they considered that if Sweden was interested in making the CRC part of the Swedish legislation, judges and other concerned authorities would make praxis so as to counter such a challenge. Others contended that Sweden would borrow a leaf from Norway so as to see how it works.

Other study participants were of the view that incorporation of the CRC into Swedish legislation would bring confusion in court and that judges are not familiar with using the convention as a law. However, this argument was neutralized by a counter argument that the fact that the European convention has been made part of Swedish law and judges have learnt how to work with it, yet it has not bred any confusion can serve as a promise that even the CRC can receive easy adaptation to as a law.

Another research question focused on the extent to which national measures in place to implement the CRC take care of the CRC. Precisely, in the first place these measures including the policies, legislations, action plans and strategies are agreed to be in harmony with the CRC. On

addition, they go a great deal to see that the principles underscored by the CRC are addressed. For instance, the 'Best interest principle' is noted to be central in all legislations and other measures. And notably it permeates all decisions and actions concerning the child. The other principles of secure growth and development of the child, non-discrimination, and having the child's views heard are as well noted to be given attention. As well, there is considered harmony between the CRC and these measures. However, divided opinions were elicited when it came to consideration of practice. Whereas the ministry official came out in defense of these measures as quite adequate and effective, the NGO staff and some academics went ahead to delineate the gaps they entail. Accordingly, the CRC was considered to be articulating more rights than do Swedish legislations guarantee. For instance, the CRC guarantees children the right to health and education irrespective of the child's legal status in the country. The Swedish system that demands for the personal number as more or less a pin number to access services falls short of guaranteeing such rights to children in hiding. Besides, differences were noted between words and deeds when consideration was made for such laws as those regulating processing of asylum applications for children. To this effect, these measures were considered not adequately taking care of the CRC.

Another focus of this study was what difference the incorporation of the CRC would yield. Once again whereas the ministry official maintained his ground that already the situation for children is well with the current measures and that therefore incorporation would not yield any difference, this standpoint ran contrary to that held by the academics and the NGO staff. One of the envisaged differences that these two categories held was that it would make it possible for human rights lawyers to invoke the CRC in courts of law and judges would have an obligation to make consideration for such submissions. As a consequence, this would not only make the work of these lawyers easier but also it would raise vulnerable children to a better position. Similarly, the Child rights NGOs and others child rights actors reportedly would get a stronger tool to work with—one from which they would stem and challenge the authorities act in accordance with the children's rights at all times. For children, the CRC as a law arguably would offer a firm ground for them to claim their rights. Unfortunately, many children are said to be knowing not more than a sketch of the content of the CRC. Equipping professionals that work with children with knowledge through training was envisioned to be a priority if the CRC became part of the Swedish legislation. With optimism, the incorporation of the CRC into the Swedish legislation would perhaps help to influence the legislators to change their position about the limited mandate of the children's ombudsman. Overall, the incorporation was envisaged to not only gain a higher status but also to have an empowering effect on the not only child rights actors but also children.

The implications of Sweden's reluctance formed the core of this study. One among the implications is that as long as the CRC is not a law, the different actors most especially those within the public realm tend to look at it, interpret and follow it differently. And given that the national authority influences the local authorities through laws, it is then likely that there may be limited success in influencing the local authorities to implement the CRC when it is not a law. This situation is exacerbated by the strong devolution that characterizes the Swedish society. By implication, the rights and welfare attained by children depend upon where the child lives and the social workers he/she meets as well as the resource base of that community. This in turn bears implications for the universality and indivisibility principles of rights-based approach.

Another implication emphasized was that since the CRC is not a law, there is limited focus on it compared to the focus accorded to Swedish legislations. To this effect, different professional groups—medics, lawyers, teachers, social workers, police working directly with children lack adequate knowledge and competence necessary to work with the CRC. On a similar note, with the

CRC in its current status, children and professionals alike are destined to continue having merely sketchy knowledge about the CRC despite the government efforts to make it known.

Once again since Swedish laws are considered to be focused more on children's needs as opposed to the CRC which focuses on children's rights, the reluctance to incorporate the CRC into Swedish legislation is more likely to maintain a status quo characterized by actors mainly in the public realm addressing children's concern from a needs-based as opposed to a rights-based approach. Yet although each of these approaches has its own strengths and weaknesses, the rights-based approach is contended to have a greater comparative edge compared to the needs-based approach. The two meanwhile need to reinforce each other. This actually was one of the envisioned differences that would accrue from the incorporation of the CRC.

The most outstanding risk highlighted that Sweden potentially runs by being reluctant to incorporate the CRC is that the country risk being labeled 'not practicing what she preaches'. This according was noted to bear the potential to impact negatively on the country's diplomatic image and thus, Sweden's role model position will possibly fade slowly. At the local level, the risk is that the current state of affair will probably remain, those losing out from the non-incorporation will continue that way. However, to the ministry official, this claim did not hold in his view. To him, if there was to be any risk associated with the non-incorporation of the CRC into Swedish legislation, this would have already manifested within the past over 20 years when the country has not had the CRC incorporated.

## 7.2 Conclusion

In conclusion, it would not only be biasing but also misleading not to appreciate and/or congratulate Sweden for the so far attained success in the sphere of child rights attainment. More profoundly, the government has put up a set of measures to implement the CRC many of which are in harmony with the CRC. This way, Sweden's practice can be agreed to be in compliance with Article 4 of the CRC which articulates that: *States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...* Today, Sweden enjoys a better position if not one of the best on the scale of Child Rights Index. And vividly, the kind of welfare enjoyed by Sweden's children is undoubtedly great and worth appreciating to the extent that the country boasts of being a role model on the international scene as exemplified by the following remark: "Because of the good conditions of life enjoyed by children in Sweden, and the way we view childhood and treat our children – especially our respect for children's integrity – Sweden is seen as a nation that leads the way and can provide an example for other countries to follow in terms of guaranteeing children's rights" (Save the Children, 2011, p. 11, citing Skrivelse 2007/2008:111).

However, the above notwithstanding, Sweden cannot be said to be exceptional of the metaphor 'no man is perfect'. The country's reluctance to incorporate the CRC into its national legislation whether by intention or default has made Sweden to be faulted in many areas where it has been said to have scored less than it is expected and/or where it has not scored at all. In particular, the country's reluctance to incorporate the CRC into Swedish legislation is summarized to have implied a tradeoff between fully implementing all children's rights and government upholding its national laws and policies. This has led some actors to strongly point out that although all children in general remain a vulnerable group, some particular categories have been left more vulnerable among the vulnerable such as children victims of trafficking (UNICEF, 2011, p. 1), undocumented children, children seeking asylum (Lundberg, 2011, pp. 49, 60-63), children victim of parents separation/divorce, children in poor autonomous communes/municipalities, etc. Most saddening, the voicelessness of a number of these becomes exacerbated by the fact that they cannot attain effective legal representation as long as

their rights cases are based on rights enshrined in the CRC but not in Sweden's domestic law. Reason being, the human rights lawyers cannot invoke the CRC which is currently foreign to Swedish legislation.

To windup, in my opinion, as long as the CRC is not incorporated into the Swedish legislation, it is less probable that there will be timely registration of change in the current status quo. Besides, the incorporation of the CRC into Swedish legislation would not signal a radical or strange legislative/policy departure given the experience of the European convention. Rather, it would offer constructive and reinforcing contribution to the legislative and rights framework for children and their actors. Moreover, evidence has shown that benefits from the transformation method have been too gradual yet to some, there is a contention as to whether the achievements in the sphere of children's rights are attributable to the effectiveness of transformation or attributable to Sweden's strong welfare system. This can be one area for further research.

Overall, Sweden being a sovereign state, the power and decision to consider incorporation remains a reserve of the government through its arms mainly the legislature. Yet the civil society remains with a duty to sustain and strengthen their advocacy.



## Endnotes

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## Appendices

### Data collection Instrument

Topic: *Sweden's Reluctance to Incorporate the UN Convention on the Rights of the Child into a National Law: Implications for full Implementation of Children's Rights. Exploring the Perspective of Child Rights Actors*

### Interview guide

1. Sweden has been reluctant to transpose the CRC into a national/Swedish law, what does this imply as far as full implementation of children's rights is concerned?
2. What risks does Sweden run by not transposing the CRC into Swedish law?
3. What are the missed opportunities and/or benefits?
4. In particular what implications has this reluctance had or can have for the full implementation of children's rights in Sweden? (Legal or practical?)
5. In your opinion, do Sweden's current policies, strategies and Action plans for children fully take care of all the provisions of the CRC?
6. Are there theoretical and/or practical differences between Sweden's current policies, strategies and Action plans for children and the provisions of the CRC?
7. Could such differences in any way have implications for the full implementation of children's rights? Specify.
8. Given the relative autonomous nature of Sweden's municipalities, do you think this in anyway may or actually does account for differentials in implementation of the CRC?
9. In your opinion, could any differentials in implementation of the CRC within different municipalities arising from their relative autonomy be associated with the fact that the CRC is not yet a Swedish law?
10. Do you envisage any difference it would make if Sweden transposed the CRC into a Swedish law? (specify the difference)
11. If no difference is envisaged, why?
12. Do you have anything more you would like to add to the implications of Sweden's reluctance to transpose the CRC on the full implementation of children's rights?

## Letter of introduction

My name is Ronald Luwangula, a Second year student at the University of Gothenburg pursuing a Masters programme in International Social Work and Human Rights.

As a requirement for the fulfillment and attainment of the award of this Degree, like any other student, I am obliged to undertake a research project. Thus, I am conducting a study titled, ***“Sweden’s Reluctance to Incorporate the UN Convention on the Rights of the Child into National Legislation: Implications for full Implementation of Children’s Rights. Exploring the Perspective of Child Rights Actors”***. Specifically, the study aims to study/interact with public service Child rights actors, NGO Child Rights Actors, and Actors in the Academia focusing on children’s rights.

You have therefore been chosen as a potential participant to take part in this study.

The following is a presentation of how the data collected in the interview will be used.

In order to insure that this project meets the ethical requirements for good research I promise to adhere to the following principles:

- You will be given information about the purpose of the project.
- You have the right to decide whether or not to participate in the project, even after the interview has been concluded.
- The collected data will be handled confidentially and will be kept in such a way that no unauthorized person can view or access it.

The interview will be recorded as this makes it easier to document what is said during the interview and also helps in the continuing work with the project. In my analysis, some data may be changed so that you may not be recognized. After finishing the project the data will be destroyed. The data collected will only be used in this project.

You have the right to decline answering any questions, or terminate the interview without giving an explanation.

You are welcome to contact me or my supervisor in case you have any questions (e-mail addresses below).

Student’s name & e-mail

Supervisor’s name & e-mail

Ronald Luwangula  
[rluwangula@gmail.com](mailto:rluwangula@gmail.com)

Gustav Svenson, LLD  
[gustav.svensson@socwork.gu.se](mailto:gustav.svensson@socwork.gu.se)

Coordinator of the MSWHR: [Ing-Marie.Johansson@socwork.gu.se](mailto:Ing-Marie.Johansson@socwork.gu.se)

Tel+ 46 31 786 1889

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## Informed consent form

**Study topic: Sweden's Reluctance to Incorporate the UN Convention on the Rights of the Child into National Legislation: Implications for full Implementation of Children's Rights. Exploring the Perspective of Child Rights Actors**

This research project is conducted as a partial fulfillment for the award of a Masters Degree in International Social Work and Human Rights at the University of Gothenburg, Sweden. The overall objective of this study is to document the implications of Sweden's reluctance to incorporate the UN CRC into a Swedish legislation for the full implementation of children's rights.

In order to ensure that this project meets the ethical requirements for good research I promise to adhere to the following principles:

- You will be given information about the purpose of the project (objective already stated above).
- You have the right to decide whether he or she will participate in the project, even after the interview has been concluded.
- The collected data will be handled confidentially and will be kept in such a way that no unauthorized person can view or access it.

The interview will be recorded as this makes it easier to document what is said during the interview and also helps in the continuing work with the project. In the analysis some data may be changed so that you will not be recognized. After finishing the project the data will be destroyed. The data collected will only be used in this project.

You have the right to decline answering any questions, or terminate the interview without giving an explanation.

### Declaration

I hereby do consent to take part in this research

.....  
Signature of Respondent

Student's Name  
Ronald Luwangula

Supervisor's name  
Gustav Svenson

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