

**The Impact of Chinese Foreign Investment on Human Rights: A Case Study of Kenya**

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## **DEDICATION**

I dedicate this thesis to my family. Thank you for being my support system.

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### **List of Treaties and Conventions**

1. *Charter of the United Nations*, 24 October 1945; 1 UNTS XVI.
2. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979; 1249 UNTS 13.
3. *International Covenant on Civil and Political Rights*, 16 December 1966; 999 UNTS 171.
4. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965; 660 UNTS 19.
5. International Labour Organization (ILO), *Forced Labour Convention*, C29, 28 June 1930, C29.
6. International Labour Organization (ILO), *Right to Organise and Collective Bargaining Convention*, C98, 1 July 1949, C98.
7. International Labour Organization (ILO), *Equal Remuneration Convention*, C100, 29 June 1951, C100.
8. International Labour Organization (ILO), *Abolition of Forced Labour Convention*, C105, 25 June 1957, C105.
9. International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention*, C111, 25 June 1958, C111.
10. Resolution 1913 (LVII) of the United Nations Economic and Social Council (ECOSOC).
11. Universal Declaration of Human Rights (Adopted 10 December 1948); UNGA Res 217 A (III) (UDHR).

### **List of Statutes**

1. The Constitution of Kenya, 2010.
2. Employment Act, No.1of 2007, Laws of Kenya.
3. Employment and Labour Relations Court Act, No. 20 of 2011, Laws of Kenya.
4. Foreign Investments Protection Act, Chapter 518, Laws of Kenya.
5. Investment Promotion Act, No. 6 of 2004, Laws of Kenya.
6. Labour Relations Act, No. 14of 2007, Laws of Kenya.
7. Labour Institutions Act, No. 12 of 2007, Laws of Kenya.
8. Occupational Safety and Health Act, No. 15 of 2007, Laws of Kenya.

## Case Law

1. *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2002) Communication 245/2002, Annex III, 21<sup>st</sup> Annual Activity Report, 54.
2. *Veolia v. Egypt Veolia Propreté v. Arab Republic of Egypt* (ICSID Case No. ARB/12/15).

## Official U.N. Documents

1. Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Adopted 26<sup>th</sup> June 2014); UN Doc. A/HRC/RES/26/9 (2014).
2. Human Rights and Transnational Corporations and Other Business Enterprises (Adopted 6<sup>th</sup> July 2011); UN Doc. A/HRC/RES/17/4 (2011).
3. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
4. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights; UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)
5. Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument; UN Doc. A/HRC/31/50 (2016).
6. Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999); UN Doc. SG/SM/6448 (1999).

## **List of Abbreviations and Acronyms**

|         |  |
|---------|--|
| CRBC    | China Road and Bridge Corporation                        |
| FDI     | Foreign Direct Investment                                |
| FPI     | Foreign Portfolio Investment                             |
| GDP     | Gross Domestic Product                                   |
| IMF     | International Monetary Fund                              |
| KHRC    | Kenya Human Rights Commission                            |
| KNCHR   | Kenya National Commission on Human Rights                |
| LDC     | Less-Developed Country                                   |
| MNC     | Multinational Corporation                                |
| MNE     | Multinational Enterprise                                 |
| NACOSTI | National Commission for Science, Technology & Innovation |
| NAP     | National Action Plan (on business and human rights)      |
| NSA     | Non-State Actor  |
| OECD    | Organisation for Economic Cooperation and Development    |
| SGR     | Standard Gauge Railway                                   |
| SOE     | State-owned Enterprise                                   |
| SOMNC   | State-owned Multinational Corporation                    |

|        |  |
|--------|--|
| TNC    | Transnational Corporation                          |
| TNE    | Transnational Enterprise                           |
| UN     | United Nations                                     |
| UNCTAD | United Nations Conference on Trade and Development |
| UPR    | Universal Periodic Review                          |
| WTO    | World Trade Organisation                           |

## **ABSTRACT**

For many developing countries, foreign investment is considered one of the most significant drivers of economic development. In a bid to attract foreign investment, many African countries have provided several incentives for foreign investors. A recent trend is the Sino-African relationship that not only includes foreign direct investment (FDI) but also commercial loans from China to several African countries. Through its Belt and Road Initiative, China has heavily invested in the infrastructure sector of European, Asian and African countries to increase regional and global connectivity. Kenya is at the forefront of this emerging trend and while the government is attracted to the economic benefits that may come with Chinese foreign investment, these arrangements leave a lot to be desired. This study argues that Chinese foreign investment is beneficial to Kenya's economy, but it also has negative effects. By analysing the Standard Gauge Railway (SGR) project, and the activities of the China Road and Bridge Corporation (CRBC) as a case study, this study explores the adequacy of the existing international and national frameworks in protecting Kenyans against human rights abuses by multinational corporations, whether private or state-owned.

# CHAPTER 1

## INTRODUCTION

### 1.1. Background

Due to globalisation, international trade and investment has intensified, with multinational corporations (MNCs) being some of the key drivers of world economy.<sup>1</sup> Another result of globalisation is the role played by States, as well as international institutions, in promoting foreign investment, especially in developing and less-developed States.<sup>2</sup> Also of great importance is the role played by multinational corporations in the conduct of business across borders.

Generally, multinational corporations, whether private or state-owned, are a powerful force in the community, nation and the entire world.<sup>3</sup> Depending on the nature of activities of a multinational corporation, it may have a very big impact on the countries in which it operates.<sup>4</sup> MNCs have become widely recognised as important actors on the international plane, exerting great economic, as well as political influence.<sup>5</sup> Of particular interest to political leaders, scholars and the civil society is the ever-growing role of MNCs and foreign investment in developing

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<sup>1</sup>OECD, 'The Social Impact of Foreign Direct Investment' (OECD Publishing, Paris, July 2008), 1. Also available at: <https://www.oecd.org/els/emp/The-Social-Impact-of-foreign-direct-investment.pdf> (accessed on 23 June 2017).

<sup>2</sup>Maciej Zenkiewicz, 'Human Rights Violations by Multinational Corporations and UN Initiatives,' (2016) 12 *Review of International Law & Politics* 1, 123.

<sup>3</sup>David Weissbrodt, 'Corporate Human Rights Responsibilities' (2005) 6 *Zeitschrift für Wirtschafts- und Unternehmensethik* (Journal of Business, Economics & Ethics), 279-297. Also available at [http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1246&context=faculty\\_articles](http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1246&context=faculty_articles) (accessed on 19 November 2017).

<sup>4</sup> *ibid.*

<sup>5</sup>Conway W. Henderson, 'Multinational Corporations and Human Rights in Developing States' (1979) 142 *World Affairs* 1, 17.



countries.<sup>6</sup> Another development in this area is the growing influence and participation of state-owned multinational corporations in international trade.

While some look at MNCs as ‘engines for development,’ some are skeptical about their role.<sup>7</sup> For the former, foreign investment and the activities of MNCs come with numerous benefits for developing countries, including the creation of jobs, technology and skills transfer, and the introduction and use of sophisticated production and management practices.<sup>8</sup> For the latter, MNCs are seen as engines for exploiting natural resources and cheap labour in poor countries.<sup>9</sup> While the activities of MNCs have been brought into question on different platforms and for diverse reasons, this study conducts an analysis of the interplay between Chinese-related foreign investment in Kenya’s infrastructure sector and human rights.

By virtue of the increase in foreign investment and the influence of MNCs across the globe, the international regulation of these entities in respect of human rights has been a topical issue for decades.<sup>10</sup> One of the on-going debates, globally, is on the inadequacy of the current international legal framework to hold MNCs liable for human rights abuses resulting from their activities in host countries.<sup>11</sup> Some of the existing frameworks for the regulation of activities of MNCs include the UN-led initiatives, such as the Global Compact, which was endorsed by Kofi Annan

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<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> OECD, ‘The Social Impact of Foreign Direct Investment’ (OECD Publishing, Paris, July 2008), 1-3. Also available at: <https://www.oecd.org/els/emp/The-Social-Impact-of-foreign-direct-investment.pdf> (accessed on 23 June 2017).

<sup>9</sup> Conway W. Henderson, ‘Multinational Corporations and Human Rights in Developing States’ (1979) 142 *World Affairs* 1, 17.

<sup>10</sup> Maciej Zenkiewicz, ‘Human Rights Violations by Multinational Corporations and UN Initiatives,’ (2016) 12 *Review of International Law & Politics* 1, 123.

<sup>11</sup> Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights,’ 1 *Business and Human Rights Journal* 1, 46.

in 1999,<sup>12</sup> and the UN Guiding Principles, which were endorsed in 2011.<sup>13</sup> A few years later, the Human Rights Council adopted a resolution which culminated in the creation of a working group that was tasked with developing a treaty geared towards regulating MNC and other businesses' activities.<sup>14</sup> The negotiation phase for this instrument opened in July 2015, and has been met with mixed reactions.<sup>15</sup> Apart from the United Nations, other organisations that have attempted to create a regulatory framework to govern corporate human rights responsibility include the OECD, which included provisions on human rights as a chapter in its 2011 Guidelines.<sup>16</sup> At the national level, States are also grappling with ways to regulate business activities of MNCs when it comes to human rights. The balance between development needs and effective protection of human rights has been a difficult one to strike as developing States continue in the rush to attract foreign investment.

The failed attempts at regulating the activities of MNCs can be attributed to the fact that these entities are non-state actors and, consequently, not international law subjects.<sup>17</sup> This reality has sparked a global debate on the legal personality of MNCs. Some have argued that there exist strong normative ties between MNCs and international law, ties which show themselves in areas including human rights, trade and investment and criminal law.<sup>18</sup> Additionally, it is international

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<sup>12</sup>Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), UN Doc. SG/SM/6448 (1999).

<sup>13</sup> The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

<sup>14</sup> Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC Res. 26/9 (26 June 2014), para. 9.

<sup>15</sup> Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, UN Doc. A/HRC/31/50.

<sup>16</sup>OECD, 'OECD Guidelines for Multinational Enterprises' (OECD Publishing, Paris, 2011). Also available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed on 23 June 2018).

<sup>17</sup>Antonio Cassese, *International Law in a Divided World*, (Clarendon Press, Oxford, 1986), p. 103.

<sup>18</sup> Davor Muhvić, 'Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations' (2017) 1 *Pécs Journal of International and European Law*, 10.

law, through treaty law, that governs the contemporary regime of foreign investment.<sup>19</sup> Based on this argument, the extent of rights accorded to MNCs as foreign investors under international law is sufficient to categorise them as international law subjects.<sup>20</sup> The conundrum for the international community is trying to attribute human rights responsibility to MNCs amidst the lack of consensus between the traditional and contemporary approaches to legal personality. Consequently, the existing regulatory framework relies heavily on States to enforce international human rights obligations.<sup>21</sup> The main challenge with this framework is that, in the wake of globalisation, MNCs wield so much power that some of them cannot be controlled by the States in which they operate.<sup>22</sup> As a result, it is the citizens that bear the brunt of the adverse impacts resulting from the activities of MNCs.

Closely linked to corporate human rights responsibility is state responsibility, discourse which is relevant to this study because of the nature of the entity being analysed—the CRBC. As a state-owned corporation, such an entity could be classified as an organ of the State, and therefore, capable of directly imputing responsibility for its wrongful acts overseas to its home State. The ILC Draft Articles provide guidance in this context.<sup>23</sup>

This study explores the nature of foreign investment in Kenya, with particular interest in Chinese investment in Kenya's infrastructure sector. It will analyse the role of MNCs in foreign investment in Kenya, and the impact on human rights. The study will also discuss the extent to

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<sup>19</sup>ibid.

<sup>20</sup> ibid.,10.

<sup>21</sup>Antonio Cassese, *International Law in a Divided World*, (Clarendon Press, Oxford, 1986), p. 103.

<sup>22</sup>Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford and Portland, Oregon, 2009), 105-144.

<sup>23</sup>International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

which Kenya has gone to protect and enforce human rights in respect of business activities of MNCs.

## 1.2. Statement of the Problem

This study is informed by the current debates on corporate human rights responsibility, especially at the international and regional levels. It is also informed by the growing concern regarding the nature of Sino-African relations and their implications on developing States like Kenya. Recent media coverage of human rights violations by the CRBC against its workers in Kenya has also necessitated this study.

China, through the CRBC, has been instrumental in Kenya's realisation of its infrastructure goals. However, various complaints have been raised regarding the activities of the company, among them, the violation of workers' rights,<sup>24</sup> claims of racial discrimination,<sup>25</sup> environmental degradation and related concerns,<sup>26</sup> risk of biodiversity loss,<sup>27</sup> health concerns, violation of the right to education,<sup>28</sup> loss of livelihood as a result of displacement,<sup>29</sup> as well as an increase in

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<sup>24</sup>Bonface Otieno, 'Chinese Firm Stops Workers from Sharing Information' *Business Daily* (Nairobi, 14 May 2018). Also available at: <https://www.businessdailyafrica.com/news/Chinese-firm-stops-workers-from-sharing-information/539546-4559798-155qh0g/index.html> (accessed 15 July 2018).

<sup>25</sup>Charles Wasonga, 'Workers Union Boss Wades into SGR Mistreatment Claims' *Daily Nation* (Nairobi, 10 July 2018).

Also available at: <https://www.nation.co.ke/news/Workers-union-wades-into-SGR-mistreatment-claims/1056-4655442-ned326/index.html> (accessed 15 July, 2018).

<sup>26</sup>Alloys Musyoka, 'Tribunal Bans Harvesting Ocean Sand for SGR' *The Star* (Nairobi, 19 February 2016).

Also available at: [https://www.the-star.co.ke/news/2016/02/19/tribunal-bans-harvesting-ocean-sand-for-sgr\\_c1295855](https://www.the-star.co.ke/news/2016/02/19/tribunal-bans-harvesting-ocean-sand-for-sgr_c1295855) (accessed on 20 July 2018).

<sup>27</sup>Jacob Kushner, 'Controversial Railway Splits Kenya's Parks, Threatens Wildlife' (*National Geographic*, 18 April 2016).

Also available at: <https://news.nationalgeographic.com/2016/04/160412-railway-kenya-parks-wildlife/> (accessed on 21 July 2018).

<sup>28</sup>Mary Mwendwa, 'School Suffering from Post SGR Effects' (Talk Africa, 10 April 2017).

Also available at: <http://www.talkafrica.co.ke/17726-2/> (accessed on 20 July 2018).

<sup>29</sup>'Environmental Justice Atlas' (Environmental Justice, ICTA-UAB, 2017).

Also available at: <https://ejatlas.org/conflict/standard-gauge-railway-project-from-mombasa-to-nairobi-kenya> (accessed on 20 July 2018).

unemployment, as a result of foreigners dominating the job market.<sup>30</sup> Some have also questioned whether the SGR project makes any economic sense, in light of the huge debt incurred by the Kenyan government.<sup>31</sup> In the period between 2013 and 2017 alone, in the bilateral stock category, stock of debt from China rose by 52.8% from Kshs. 63.1 billion to Kshs. 478.6 billion.<sup>32</sup> This debt accounts for at least 12% of the total national government debt.<sup>33</sup>

Of particular interest to this study is the interplay between Chinese foreign investment in Kenya and human rights. While foreign investment is generally viewed as a tool for development for many developing countries, this study analyses this in light of Chinese investment activities in Kenya's infrastructure sector. The study also explores the possibility of maintaining foreign investment sources while ensuring that developing States discharge their primary duty of ensuring that human rights are respected by third parties at the domestic level.

### **1.3. Justification of the Study**

This study is necessitated by the growing concern over the strong influence of private and state-owned MNCs on States the world over. Even in the presence of available international and national legal and institutional frameworks for protecting human rights, there seems to be a laxity in applying these to activities of MNCs in developing States such as Kenya. While there are various studies which have analysed foreign investment, MNCs and their impact on human

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<sup>30</sup>George Sayagie, '14 Chinese Rail Workers Nursing Injuries After Attack' *Daily Nation* (Nairobi, 2 August 2016). Also available at : <https://www.nation.co.ke/news/Angry-youth-attack-Chinese-rail-workers/1056-3327302-h7p9ljz/index.html> (accessed on 19 July 2018).

<sup>31</sup>David Ndi, 'How Business Rivalry Between US and China is Undermining Our Constitution, Democracy and Suitable Development' *Daily Nation* (Nairobi, 23 September 2017). Also available at : <https://www.nation.co.ke/oped/opinion/-business-rivalry-between-US--China-is-undermining-democracy-/440808-4108086-wftqip/index.html> (accessed on 20 July 2018).

<sup>32</sup>Kenya National Bureau of Statistics, *Economic Survey 2018* (Kenya National Bureau of Statistics, Nairobi, 2018), 82.

Also available at : <https://www.knbs.or.ke/download/economic-survey-2018/> (accessed on 19 July 2018).

<sup>33</sup>ibid.

rights in developing countries, some even focusing on Kenya, there are no recent studies examining the growing influence of Chinese foreign investment in the country. Additionally, most of the available research focuses on sectors other than infrastructure. In the recent past, Kenya has embarked on massive infrastructure projects, an area which this study focuses on. This study is also geared towards providing updated literature and contributing to the discourse on foreign investment and human rights in Kenya.

The results of this study are intended to provide insight into the impact of Sino-African relations, foreign investment and their effects on human rights. By highlighting the role of the government, corporations and individuals, it is hoped that all relevant stakeholders can ensure the adherence to human rights standards by MNCs operating in Kenya.

#### **1.4. Statement of Objectives**

The primary aim of this study is to analyse the interplay between Chinese foreign investment in Kenya's infrastructure sector and its impact on human rights. Drawing from this overall objective, this study has the following specific objectives:

1. To analyse the place of MNCs in the international legal order and in the global economy;
2. To undertake a case study of the existing framework for the regulation of corporate human rights responsibility in Kenya; and
3. To make recommendations for the better regulation of activities of MNCs in respect of human rights.

## **1.5. Research Questions**

The following questions will be answered by this study:

1. How does Chinese foreign investment in the infrastructure sector impact on the human rights of Kenyans?
2. Do MNCs bear human rights responsibility under international and domestic law?
3. Is the current legal and institutional framework in Kenya adequate for protecting Kenyans against human rights violations by MNCs?

## **1.6. Theoretical Framework**

This study is guided by three main theories, that is, the dependency theory, the theory of rights and the international relations theory. They are relevant to the study in that they shape the discourse on foreign investment and the role and impact of MNCs in a globalised world.

### **1.6.1. Dependency Theory**

The dependency theory, though not a legal theory, is important to this study as it helps appreciate the interaction between developing and developed States. The theory is also important in understanding the relationship between foreign investment and MNC activities in developing countries. Dependency denotes the reliance by a country on external actors for its national development. These actors may be other countries or corporations.<sup>34</sup>According to Sunkel, the end result of dependency is influence on the dependent country's economic, political and even cultural development.<sup>35</sup>Theotonio Dos Santos' definition of dependency, on the other hand,

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<sup>34</sup>Oswaldo Sunkel, 'National Development Policy and External Dependence in Latin America,' (October, 1969) 6 *The Journal of Development Studies* 1, 23-48.

<sup>35</sup>*ibid.*

places emphasis on the historical underpinnings of the phenomenon, and why some countries, due to their positioning in the world economy, are more favoured to the detriment of others.’<sup>36</sup>

The dependency theory was initially advanced in Latin America in the 1950s by Raul Presbich.<sup>37</sup> Other proponents of the theory include Andre Gunder Frank, Cardoso, Faletto and Peter Evans.<sup>38</sup> While these theorists advanced different strands of the dependency theory, the point of convergence in their arguments is the acceptance that in dependency, external influence exists in the dependent State, and this is crucial to its economic development (or underdevelopment).<sup>39</sup> External influence is characterised by the presence of MNCs, whether private or state-owned, foreign assistance or other means by which a dominant State would assert its dominance in a dependent State.<sup>40</sup> The political elite perpetuate dependency through the formulation of policy to attract foreign investment.<sup>41</sup> This study looks at how the Government of Kenya has promoted dependency on China through foreign investment from the latter.

### **1.6.2. Rights Theory**

The rights theory guides this study by providing parameters for the scrutiny of human rights abuses involving MNCs and their activities in developing countries like Kenya, and by recommending action to enforce corporate human rights responsibility. Human rights denote the

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<sup>36</sup>Theotonio Dos Santos, ‘The Structure of Dependence,’ in K.T. Fann and Donald C. Hodges, (eds) *Readings in U.S. Imperialism*, ( Boston: Porter Sargent, 1971), 226.

<sup>37</sup>Vincent Ferraro, ‘Dependency Theory: An Introduction,’ in Giorgio Secondi (ed), *The Development Economics Reader* (Routledge, London, 2008), 58-64.

Also available at: <https://www.mtholyoke.edu/acad/intrel/depend.htm> (accessed on 10 May 2018).

<sup>38</sup> Andre Gunder Frank, ‘The Development of Underdevelopment,’ in James D. Cockcroft, Andre Gunder Frank, & Dale Johnson (eds), *Dependence and Underdevelopment* (Anchor Books, Garden City, New York, 1972), 3.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup>Ushewedu Kufakurinani et al., ‘Dialogues on Development ‘ (2017) 1 Institute for New Economic Thinking, viii. Also available at: <http://eprints.kingston.ac.uk/38253/6/McKenzie-R-38253-VoR.pdf> accessed 18 June 2018 (accessed on 11 May 2018).



basic moral guarantees accruing to an individual because he or she is a human being.<sup>42</sup> An individual may invoke these rights, which are not only universal but also exist independent of whether they are recognised or implemented by a country's legal system or officials.<sup>43</sup> Furthermore, human rights are to be enjoyed by every human being regardless of their sex, age, or race, among others.<sup>44</sup> The human rights discourse is central to today's legal thinking, especially in an era of globalisation.<sup>45</sup> With globalisation emerged the need for an international regime to protect persons from human rights abuses as a consequence of business conduct across borders.<sup>46</sup> This study discusses these international and domestic regimes for human rights protection with specific attention to the possible violations brought about by the activities of MNCs. The rights theory is also relevant in apportioning responsibility to the State to safeguard the rights of its nationals from violation by third parties, in this case, private MNCs, as well as MNCs which are creatures of the State. This theory is also relevant in explaining the role of the UN and the rationale for its involvement in attempting a regulation of corporate human rights responsibility.

### **1.6.3. International Relations Theory**

The theory of international relations provides a framework within which the status of actors in the international sphere can be analysed. Three schools of thought are important in analysing corporate human rights responsibility: realism on one side, liberalism on the other, and constructivism, which represents a new form of idealism.<sup>47</sup> These three schools of thought display positivist and post-positivist approaches to international relations. Realism, for instance,

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<sup>42</sup>James Nickel, *Making Sense of Human Rights*, (2<sup>nd</sup>edn, Blackwell Publishing, USA, 2007).

<sup>43</sup>*ibid.*

<sup>44</sup>M.D.A Freeman, FBA, *Lloyd's Introduction to Jurisprudence*, (9<sup>th</sup>edn, Sweet & Maxwell, UK, 2014), 1287.

<sup>45</sup>*Ibid.*, 1308.

<sup>46</sup>*Ibid.*, 1396.

<sup>47</sup>Jack Snyder, 'One World, Rival Theories,' (2004) *Foreign Policy* 145, 53.

views States as the central actors in international law,<sup>48</sup> while liberalism adopts a more liberal approach, recognising the role of non-state actors (especially MNCs) in the conduct of international affairs.<sup>49</sup> Constructivism, on the other hand, highlights the changing norms of sovereignty, international justice and human rights in international relations.<sup>50</sup> The application of these theories has been problematic in practice and this explains why regulating MNCs has been met with many challenges.

## **1.7. Literature Review**

Much has been written about the global and domestic frameworks for regulating the activities of MNCs and human rights. This section will categorise this literature under various sub-headings:

### ***1.7.1. The Nature, Role and Impact of MNCs in a Globalised World***

In the present world, a large fraction of commerce, both local and international, is controlled by corporations operating in one or more countries. Joseph Stiglitz notes that many of the advantages attributed to globalisation are to a large extent attributed to the activities of MNCs.<sup>51</sup> Additionally, the use of investment agreements between States has increased, with the intention of encouraging trade and investment across borders.<sup>52</sup> However, Stiglitz expresses doubt as to whether this has led to economic growth and development in countries where MNCs have their

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<sup>48</sup>Jack Donnelly, 'Realism' in Scott Burchill et al (eds), *Theories of International Relations* (3<sup>rd</sup>edn, Palgrave MacMillan, United Kingdom, 2005), 29-52.

<sup>49</sup>Scott Burchill, 'Liberalism,' in Scott Burchill et al (eds), *Theories of International Relations* (3<sup>rd</sup>edn, Palgrave MacMillan, United Kingdom, 2005),51-83.

<sup>50</sup>*ibid.*, 54.

<sup>51</sup>Joseph E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities,' (2007) 23 *American University International Law Review* 3, 453.

Also available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1025&context=auilr> (accessed on 15 June 2018).

<sup>52</sup>*ibid.*

operations.<sup>53</sup> In fact, he argues that the very nature of these arrangements is to focus more on the property rights of multinational corporations at the expense of human rights.<sup>54</sup> He also discusses the role of foreign investment and its impact on countries, such as Malaysia, Singapore and China.<sup>55</sup> Some of the downsides which the author discusses include the destruction of local competition by foreign corporations.<sup>56</sup> He also notes that foreign corporations do little to alleviate the working conditions of their employees in host countries (usually developing ones), even though better working conditions may enhance production and lower costs.<sup>57</sup> Even in light of the benefits of foreign investment, Stiglitz notes that, oftentimes, commercial interests and values have been advanced at the expense of social justice, the environment and human rights.<sup>58</sup> While Stiglitz's focus is on select countries in Asia and Africa, this study looks at China-Kenya relations in respect of infrastructure projects.

Zenkiewicz, on the other hand, expresses concern over the attitude of developing States in being so eager to attract foreign investment at the expense of human rights.<sup>59</sup> He blames this on the power imbalance between States and MNCs, the scales always tilting in favor of MNCs.<sup>60</sup> The nature of State-MNC interaction is that developing States rely, to a large extent, on foreign investment for their development, while MNCs have the power to choose a different State for their operations, based on cheap labor, availability of resources and fewer regulatory burdens.<sup>61</sup> As a result, developing States engage in a competition to offer the lowest standards possible so

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<sup>53</sup>ibid.

<sup>54</sup>ibid.

<sup>55</sup>Joseph E. Stiglitz, *Globalization and its Discontents* (W.W. and Norton Company, New York, 2002), 67.

<sup>56</sup>ibid., 68.

<sup>57</sup>ibid., 69.

<sup>58</sup>ibid., 20.

<sup>59</sup>Maciej Zenkiewicz, 'Human Rights Violations by Multinational Corporations and UN Initiatives,' (2016) 12 *Review of International Law & Politics* 1, 125.

<sup>60</sup>ibid.

<sup>61</sup>ibid.

as to attract investment.<sup>62</sup> In most cases, such States end up contributing to human rights violations of their people.<sup>63</sup> The author uses South Africa and Sierra Leone as examples of how governments of developing countries can act hand in hand with MNCs to abuse human rights of their peoples.<sup>64</sup> This analysis by Zenkiewicz is important to this study because it helps interrogate the effectiveness of States in carrying out their international law obligations regarding corporate human rights responsibility of MNCs, in light of the power dynamics between the two entities.

### ***1.7.2. Human Rights and Foreign Investment***

Černič's work is concerned with corporate human rights responsibility within the OECD framework.<sup>65</sup> He discusses the extent of human rights abuses involving MNCs as well as their officers.<sup>66</sup> He notes that some of the frequent allegations levelled against MNCs in developing countries in Africa include racial discrimination, forced and child labor, slavery, torture, crimes against humanity, genocide and environmental degradation.<sup>67</sup> The author's study is largely based on statistics provided by various UN organs, and he reaches the conclusion that the extractive sector accounts for most of the human rights violations involving MNCs.<sup>68</sup> Other sectors which have noted immense human rights violations include the food and beverage industries, followed by the clothing industry, and the ICT sector.<sup>69</sup> This study goes further to determine the extent of human rights abuses in Kenya's infrastructure sector.

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<sup>62</sup>ibid.

Also known as a "race to the bottom."

<sup>63</sup>ibid.

<sup>64</sup>ibid.

<sup>65</sup>Jernej Letnar Černič, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 1, 71-100.

<sup>66</sup>ibid., 74.

<sup>67</sup>ibid., 76.

<sup>68</sup>ibid.

<sup>69</sup>ibid.

Closer home, various literature documents the nature of human rights violations by MNCs operating in Kenya. For instance, in 1985, Wambalaba conducted a study to analyse the effect of MNCs and policy-making in LDCs.<sup>70</sup> He used Kenya as a case study, and he discussed the negative and positive impacts of MNCs on various sectors of the Kenyan economy at the time.<sup>71</sup> Kenya is no longer categorised as an LDC, and its economy now is not comparable to how it was in the 1980s, hence necessitating more research. Recent studies carrying the same theme have been conducted over the years. In 2002, the Kenya Human Rights Commission (KHRC) released a report which detailed the exploitation of Kenyan workers at Del Monte Kenya.<sup>72</sup> In 2012, KHRC released another report revealing the plight of Kenyan women workers in the cut-flower sector.<sup>73</sup> Another author, Mwanza, examines the issue of FDI from China and human rights in Kenya.<sup>74</sup> She notes that Chinese FDI poses serious challenges to the human rights regime in Kenya, and suggests ways of dealing with the issue.<sup>75</sup> She, however, does not delve into much detail about the various categories of human rights violations. Her analysis focuses on Chinese FDI in general.<sup>76</sup>

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<sup>70</sup>Wamukota Francis W. Wambalaba, 'The impact of the multinational corporations on leading issues and policy making in less developed countries: (a case study on Kenya)' (1985) Portland State University. Also available at: [https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=4570&context=open\\_access\\_etds](https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=4570&context=open_access_etds) (accessed on 20 July 2018).

<sup>71</sup>ibid.

<sup>72</sup>Willy Mutunga et al., 'Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers' Rights at Del Monte Kenya' (Kenya Human Rights Commission, 2002).

Also available at: <https://www.khrc.or.ke/publications/45-exposing-the-soft-belly-of-the-multinational-beast-the-struggle-for-workers-rights-at-del-monte/file.html> (accessed on 18 July 2018).

<sup>73</sup>Kenya Human Rights Commission, 'Wilting in Bloom: The Irony of Women Labour Rights in the Cut-Flower Sector in Kenya,' (Nairobi, 2012).

Also available at: <https://www.khrc.or.ke/publications/63-wilting-in-bloom-the-irony-of-women-s-labour-rights-in-the-cut-flower-sector-in-kenya/file.html> (accessed on 21 June 2018).

<sup>74</sup>Rosemary Mwanza, 'Chinese Foreign Direct Investment and Human Rights in Kenya: A Mutually Affirming Relationship?' (2016) 2 Strathmore Law Journal 1, 133-154.

Also available at: [http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/2SLJ1/2SLJ1\\_7Chinese-FDIs-and-human-rights-in-Ke-RMwanza.pdf](http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/2SLJ1/2SLJ1_7Chinese-FDIs-and-human-rights-in-Ke-RMwanza.pdf) (accessed on 20 July 2018).

<sup>75</sup>ibid., 154.

<sup>76</sup>ibid.

While the above literature canvasses the nature of human rights violations in Kenya, none has focused on those perpetuated by the CRBC. This study will focus on the infrastructure sector, unlike the various studies which have analysed human rights abuses by MNCs with operations in Kenya's agricultural, manufacturing and textile sectors. This study also discusses the new and emerging claims of human rights violations by Kenyans against the CRBC.

### ***1.7.3. International Law Obligations of Non-State Actors***

Also of great importance to this study is the discourse regarding non-state actors and their obligations(if any) in international law. Ssenyonjo discusses this in respect of socio-economic and cultural rights.<sup>77</sup> He differentiates between obligations of States and their non-state counterparts, contending that States are primarily charged with ensuring the enforcement of human rights and related laws within their borders, but non-state actors, including corporations, also bear direct human rights responsibility.<sup>78</sup> This view, according to him, is backed by the reality of current times, whereby MNCs are arguably the most visible manifestations of globalisation.<sup>79</sup> In his view, unlike other bilateral and multilateral treaties, human rights treaties are unique because they are not concluded simply to reciprocate mutual benefits by contracting States. Rather, these rights are universal, and they are to be enjoyed by individuals irrespective of nationality.<sup>80</sup>

Deva, on the other hand, pokes holes in the existing framework governing corporate human rights responsibility.<sup>81</sup> One of the reasons why the framework is inadequate is because

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<sup>77</sup>Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford and Portland, Oregon, 2009), 105-144.

<sup>78</sup>ibid.

<sup>79</sup>ibid.,105.

<sup>80</sup>ibid.

<sup>81</sup>Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 Connecticut Journal of International Law, 1-57.

international law does not envision MNCs as subjects of international law, and instead, relies heavily on States to enforce international human rights obligations.<sup>82</sup> Not only does the author question the effectiveness of the indirect approach which the current framework favors, but also proposes an alternative model to achieve a more effective framework.<sup>83</sup> While Ssenyonjo proposes a body of global rules that will be binding on non-state actors, seeing that most of these actors are more economically powerful than the States that regulate them,<sup>84</sup> Deva also proposes a departure from the traditional approach, and recommends the designation of MNCs as “secondary limited subjects of international law” at least insofar as human rights are concerned.<sup>85</sup>

The discourse relating to corporate human rights responsibility is not one without divergent opinions. For some public international law experts, like Alvarez,<sup>86</sup> making corporations subjects of international law is too ambitious an effort. Alvarez’s main argument is that corporations are not equivalents of States (or even natural persons), and drawing out comparable obligations is a flawed move.<sup>87</sup> According to him, States are vested with the greatest power to legitimately enforce both municipal and international law.<sup>88</sup> However flawed governments are, and however weakened they have become in a globalised world, States, by virtue of their status in international law, still wield the power to protect their people against the excesses of globalisation.<sup>89</sup> Alvarez points out that these traits are lacking in MNCs because neither are they the intended beneficiaries of human rights nor do they possess an ability to suffer the

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Also available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=637665](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=637665) (accessed on 13 June 2018).

<sup>82</sup>ibid.

<sup>83</sup>ibid.

<sup>84</sup>Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, (Hart Publishing, Oxford and Portland, Oregon, 2009), 105-144.

<sup>85</sup>Ibid.

<sup>86</sup>José E. Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 Santa Clara Journal of International Law 1.

Also available at: [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_069097.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_069097.pdf) (accessed on 13 June 2018).

<sup>87</sup>ibid.,34.

<sup>88</sup>ibid.

<sup>89</sup>ibid.

consequences emanating from the deprivation of human rights.<sup>90</sup> The analysis by Alvarez raises valid questions which this study appreciates. One is the complexity of according corporations a status equal to that of States under international law. Instead of focusing on the subject/object debate, Alvarez instead calls for different approaches, notably, the Ruggie approach, to finding corporate responsibility.<sup>91</sup> The approach appeals to Alvarez because it is based on the reality on the ground, and not on assertions of personhood.<sup>92</sup>

#### *1.7.4. State-Owned MNCs and State Responsibility*

The discourse on corporate human rights responsibility presents another layer of issues if analysed from the point of view of state-owned MNCs. Increasingly, state-owned enterprises are engaging in commercial activity across borders. Willemyns, in analysing state-owned enterprises (SOEs), notes that the first difficulty which such entities represent is that they lack a universal definition.<sup>93</sup> Secondly, and closely related to the issue of definition, there lacks a coherent international framework for governing these entities.<sup>94</sup> Existing international rules, where existent (for example the UN Guiding Principles), may be ineffective or toothless.<sup>95</sup> The author also attempts a characterisation of SOEs, and the differences between these entities and privately-owned enterprises.<sup>96</sup> Even though this analysis does not delve into corporate human rights responsibility, it is important in understanding the nature of SOEs and their rights and obligations under multilateral and bilateral instruments.

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<sup>90</sup>ibid.

<sup>91</sup>ibid.

The Ruggie approach denotes the UN 'Protect, Respect and Remedy' framework of the UN Guiding Principles on Business and Human Rights.

<sup>92</sup>ibid.

<sup>93</sup>Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 Journal of International Economic Law 3, 657–680.

<sup>94</sup>ibid.

<sup>95</sup>ibid.

<sup>96</sup>ibid.



Zhang, on the other hand, analyses SOEs from a Chinese perspective, recognising that Chinese SOEs (CSOEs) have become very influential and largely representative of SOEs around the world.<sup>97</sup> Just like Willemyns, he highlights the problems which CSOEs present in international investment law. He points out that the international framework has not addressed these problems.<sup>98</sup> It is noteworthy that Zhang's discussion is centered on dispute settlement and does not really look at human rights implications of activities of CSOEs.

Perhaps a more helpful analysis of corporate human rights responsibility of SOEs is that by Backer, who distinguishes the obligations of SOEs and private enterprises using political and legal theory.<sup>99</sup> Accordingly, while States have obligations under law, the responsibility of private entities is to be found in their governance.<sup>100</sup> The difficulty in finding a coherent framework for human rights responsibility within this framework is that SOEs operate in a state of convergence of enterprise responsibility and State duty.<sup>101</sup> He notes that it is difficult to achieve compliance with rights-related norms (including the UN Guiding Principles) in instances where States project their influence and authority in the form of commercial entities.<sup>102</sup> The authors work also analyses China's growing influence through its SOEs particularly in relation to the Belt and Road Initiative.

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<sup>97</sup>Anran Zhang, 'The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases,' (2018) 17 Chinese Journal of International Law 2.

<sup>98</sup>*ibid.*

<sup>99</sup>Larry Catá Backer, 'The Human Rights Obligations of State Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy' (2017) 51 Vanderbilt Journal of Transnational Law, 1-42. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2980533](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980533) (accessed on 11 November 2018).

<sup>100</sup>*ibid.*

<sup>101</sup>*ibid.*

<sup>102</sup>*ibid.*

McCorquodale and Simons address issues of state responsibility for actions of corporate nationals.<sup>103</sup> Accordingly, there are instances where the home State can incur liability for the actions of an MNC (or their subsidiary) in a host State.<sup>104</sup> The authors also show that state complicity in the face of human rights abuses could potentially result in state responsibility.<sup>105</sup> This study borrows from this thinking and argues that States can also incur liability under international law for actions of their SOEs abroad.

Wee, on the other hand, opines that because States are closely related to SOEs than their purely private counterparts, the State's duty to protect in the case of the former is heightened.<sup>106</sup> Accordingly, the SOE's act or omission will be more readily and directly attributed to State responsibility.<sup>107</sup> The author also notes that even where the undesirable acts of an SOE cannot be directly blamed on the State under state responsibility it is still possible to establish its responsibility where it has blatantly failed to discharge its general duty to protect its nationals against human rights violations by SOEs.<sup>108</sup> This study supports the arguments by Wee to the extent that States are primary actors in the global sphere, and their involvement in the commercial space (through SOEs) warrants an equally higher standard in respect of obligations to respect human rights and protect against their violations by third parties.

This study appreciates the literature discussed above and seeks to fill in the gaps identified under each section. From this analysis, the study also reaches the conclusion that, ultimately, it is for the primary actor in international law, that is, the State, to safeguard the human rights of its

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<sup>103</sup>Robert McCorquodale and Penelope C. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 4, 598-625.

<sup>104</sup>*ibid.*

<sup>105</sup>*ibid.*, 606.

<sup>106</sup>Camilla Wee, 'Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility', (2008) *International Commission of Jurists*, 1-38.

<sup>107</sup>*ibid.*

<sup>108</sup>*ibid.*, 35.

people against violations by MNCs, including SOEs operating beyond the home State. How well the State does this is a question which will be examined in the subsequent chapters of this study. Additionally, this study hopes to contribute to and to update the existing literature on the discourse on Chinese foreign investment in Kenya and its implications on human rights.

### **1.8. Research Methodology**

This study not only relied on primary data but also secondary data. Primary data was collected from key interviews with experts on human rights, public international law, trade and investment. This study also relied on interviews with key informants working with the OHCHR in Geneva, the Kenya Railways Corporation (KRC), the KNCHR, the Attorney General's Office in Kenya, and the Central Organisation of Trade Unions (COTU-K). Apart from key interviews, this study also benefitted from information collected through a focus group discussion comprising 10 residents of Kibera, 2 of the focus group members being former workers at the SGR, and the rest weighing in on the general impact of Chinese investment in Kenya from a local citizen's perspective.

Most of the correspondents for this study requested to be anonymised. Others scheduled interviews but failed to turn up, while others refused to participate in the study based on what they termed as 'sensitive' and 'bad timing' of the study. Below is a summary of the successful interviews:

|  |           |
|--|-----------|
| Professor of Public International Law                                    | 1         |
| Tax Law, Public Finance and Public Procurement lecturers                 | 2         |
| Public Investment Law lecturer   | 1         |
| Trade Law (WTO and GATT) lecturer  | 1         |
| Focus Group Discussion (Kibera residents) (2 former SGR workers present) | 10        |
| Human Rights Officer – KNCHR   | 1         |
| OHCHR, Geneva  | 2         |
| COTU-K   | 1         |
| Office of the Attorney General Kenya                                     | 1         |
| Kenya Railways Corporation   | 1         |
| <b>TOTAL</b>   | <b>22</b> |

This study also relied, to a large extent, on library and internet-based research. The study benefitted from literature in authoritative textbooks, book chapters, case law, parliamentary proceedings, reports, and relevant scholarly and peer-reviewed journal articles. Official documents of the United Nations (including treaties, conventions and resolutions) and the OECD, multilateral and bilateral agreements between States, government reports, statutes, and government policies were also analysed.

Where there was insufficient data in the above-mentioned sources, other sources of secondary data included authoritative newspapers, magazines and official websites of various institutions. Both international and local media proved necessary for this study, especially investigative news pieces that highlight the State of workers’ rights. Due to the difficulty involved in scheduling interviews with officials at the Kenya Railways Corporation and the CRBC’s human resource

personnel, management and staff, the study heavily depended on the investigative expose by Paul Wafula, a journalist working for the Standard Media Group. This was supplemented by information collected from the two former SGR workers who formed part of the focus group.

The research permit issued by the NACOSTI for purposes of conducting this study is attached as Appendix 1. The interview questions presented to the various correspondents have also been attached as Appendix 2.

### **1.9. Limitations**

The main limitation of this study is that it is limited to the analysis of the interplay between foreign investment in Kenya's infrastructure sector and human rights. The study is also limited to an analysis of Chinese foreign investment. In conducting the study, some key information could not be accessed, for example, the contracts signed by the Kenyan and Chinese governments in respect of the SGR project. The unwillingness by officials of the CRBC and the Kenya Railways Corporation to participate in the study was also a challenge. Additionally, this study is also limited in time and space. Accordingly, the findings of this study should be interpreted against this backdrop.

### **1.10. Hypotheses**

This study aims to put the following hypotheses to the test:

1. It is difficult to regulate the activities of MNCs in respect of human rights since they are not the primary actors in international law.
2. The current legal and institutional frameworks in Kenya are adequate for protecting Kenyans against human rights violations by MNCs.

## **1.11. Chapter Breakdown**

### **Chapter One: Introduction**

This Chapter lays the foundation for the study by providing a background, problem statement and objectives of the study. It also suggests various hypotheses to test, with a view to answering the fundamental research questions put forth. The Chapter also provides the theoretical framework and research methodology which guide this study. The literature review undertaken in this Chapter lays the basis for analysing the research questions and objectives of the study.

### **Chapter Two: Conceptualising Foreign Investment, Dependency and Rights in a Globalised World**

This Chapter discusses, in detail, the place of MNCs, both private and state-owned, in the international legal order and the global economy. In doing so, it distinguishes between private MNCs and SOMNCs, highlighting the problems presented by the latter category. The chapter will also deal with the conceptual and theoretical issues of globalisation, foreign investment, dependency, human rights.

### **Chapter Three: Corporate Human Rights Responsibility: A Case Study of the Standard Gauge Railway Project**

The focus of this Chapter is to determine the extent of human rights violations by MNCs, using Kenya's SGR Project as a case study. It will analyse the extent of human rights violations by the CRBC vis-à-vis the existing international and national legal frameworks in place for protecting against human rights abuses by multinational corporations.

## **Chapter Four: Recommendations**

This Chapter suggests possible solutions to the issues identified as emanating from the case study undertaken in the previous chapter.

## **Chapter Five: Conclusion**

This Chapter concludes and summarises the findings of this study.

## CHAPTER TWO

### CONCEPTUALISING FOREIGN INVESTMENT, DEPENDENCY AND HUMAN RIGHTS IN A GLOBALISED WORLD

#### 2.1. Introduction

Chapter 1 laid the basis for discussing foreign investment in the context of globalisation, and the place of MNCs in the international legal order. This chapter expounds on this discussion. A discussion on the impact of Chinese foreign investment on Kenya, in respect of human rights, would not be meaningful without understanding the concept of foreign investment and the interplay between it and the activities of MNCs. This chapter will be divided into two. Firstly, it will discuss foreign investment and the place of MNCs in a globalised world, and in international law. Secondly, it will discuss the conceptual and theoretical framework underpinning this study.

#### 2.2. Foreign Investment in a Globalised World

According to Freeman, globalisation denotes the flow of people, information, investment and even ideas, across national borders.<sup>109</sup> Stiglitz's definition looks at globalisation as the integration of people and countries, a phenomenon that was brought about by reduced transport and communication costs, as well as the dismantling of barriers to trade, services, knowledge, and people.<sup>110</sup> Globalisation has many varied definitions, but the common link between these

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<sup>109</sup>M.D.A Freeman, FBA, *Lloyd's Introduction to Jurisprudence*, (9<sup>th</sup>edn, Sweet & Maxwell, UK, 2014), 1394.

<sup>110</sup>Joseph E. Stiglitz, *Globalization and its Discontents*, (W.W. Norton, New York and London, 2002), p.9-10.



definitions is the acknowledgment that it is a representation of a world order that is ever-changing, and which is influenced by financial, political and economic factors.<sup>111</sup>

Globalisation has resulted in the interdependence of States in various aspects, including international trade, foreign investment, as well as knowledge, skills and technology transfer. At the center of all this, is the MNC. MNCs, whether state-owned or private, have taken a central place in the development of international business, trade and investment. They have also been some of the key beneficiaries of globalisation.<sup>112</sup> Another reality is that with globalisation, some MNCs are as powerful, or even more powerful, than some nation States.<sup>113</sup> It is also true that MNCs influence the performance of national economies, especially in developing and less-developed States.<sup>114</sup>

### **2.2.1. Understanding the Multinational Corporation**

An MNC is defined as a business entity which has operations in other countries other than its home country, operations which allow the entity to transfer products and capital across borders based on demand and price conditions.<sup>115</sup> The term “multinational corporation” is usually used interchangeably with “transnational corporation.”<sup>116</sup> The MNC is also defined as the organisational form that defines foreign direct investment (FDI).<sup>117</sup> Such a corporation may be

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<sup>111</sup>ibid., p.64.

<sup>112</sup>Jennifer Westaway, ‘Globalization, Transnational Corporations and Human Rights – A New Paradigm’ (2012) 1 International Law Research 1, p.63.

<sup>113</sup>Indira Carr and Peter Stone, *International Trade Law*, (4<sup>th</sup>edn, Routledge-Cavendish, London and New York, 2010), 683.

<sup>114</sup>Stephen D. Cohen, ‘Why Companies Invest Overseas,’ in *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, (Oxford University Press, New York, 2007), 252.

<sup>115</sup> Bryan A.Garner, *Black’s Law Dictionary* (10<sup>th</sup> ed., Thomson Reuters, USA, 2014), 417.

<sup>116</sup>ibid.

<sup>117</sup>Lazarus A A, ‘Multinational Corporations’, (2001) International Encyclopedia of the Social & Behavioral Sciences, 12, 10197.

Also available at <[https://www0.gsb.columbia.edu/faculty/bkogut/files/Chapter\\_in\\_smelser-Baltes\\_2001.pdf](https://www0.gsb.columbia.edu/faculty/bkogut/files/Chapter_in_smelser-Baltes_2001.pdf)> (accessed on 19 November 2017).

incorporated in country A, and have subsidiaries, branches, and production and retail activities in countries B and C or more.

### **2.2.1.1. State-owned Enterprises**

Apart from private MNCs, there is also the growing influence of state-owned enterprises which invest beyond the State's borders. It is noteworthy that there is no agreed universal definition of SOEs or SOMNCs. SOEs can be defined as corporate entities recognised as such under national law, and in which the State is either the owner, or controller.<sup>118</sup> Accordingly, an entity is an SOE if the State is its ultimate beneficiary in terms of majority voting shares, or where the State exercises an equivalent degree of control.<sup>119</sup> These enterprises may be partly or wholly-owned by the government of the State in which they are incorporated and, where they carry out commercial activities outside their home country, are commonly referred to as State-owned multinational companies (SOMNCs).<sup>120</sup> Put differently, an SOMNC is a legally independent entity which is directly owned by the State, but which has operations of a value-adding nature outside its own country.<sup>121</sup> The CRBC falls under this latter category.

Just like private MNCs, SOMNCs may invest abroad for profitability and market-seeking motives. However, SOMNCs may also invest abroad simply for political or security reasons and serving other important public purposes.<sup>122</sup> Chinese SOMNCs such as the CRBC, for instance, have been known to invest in the infrastructure and mining sectors of African countries so as to

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<sup>118</sup>OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing, Paris, 2015), 1.

<sup>119</sup>*ibid.*

<sup>120</sup>Alvaro Cuervo-Cazurra and others, 'Governments as Owners: State-Owned Multinational Companies' [2014] *Journal of International Business Studies* <[https://www.hbs.edu/faculty/Publication Files/SOMNCs\\_Intro\\_140709\\_FINAL\\_886542e4-3ff8-478e-9804-3a003ddd10d6.pdf](https://www.hbs.edu/faculty/Publication%20Files/SOMNCs_Intro_140709_FINAL_886542e4-3ff8-478e-9804-3a003ddd10d6.pdf)> accessed 11 September 2018.

<sup>121</sup>*ibid.*

<sup>122</sup>*ibid.*,10.

increase the influence of the Chinese government as well as develop relations between these countries and the Chinese government.<sup>123</sup>

For the purposes of this study, both private and state-owned enterprises shall be collectively referred to as MNCs.

### **2.2.2. Understanding Foreign Investment**

It is noteworthy that there exists no agreed definition of the term ‘foreign investment.’<sup>124</sup> A possible explanation for this is that the term ‘investment’ varies based on the purpose or objective of a particular investment instrument.<sup>125</sup> However, the bottom line is that foreign investment occurs where there is an international flow of capital from one country to another.<sup>126</sup> Investment of this nature can also be manifested through the uptake of management roles by foreigners in their investment in the host country.<sup>127</sup> Section 2 of Kenya’s Investment Promotion Act defines the terms ‘foreign investor’ and ‘investment’ separately.<sup>128</sup> Accordingly, a foreign investor may be a corporate entity which is incorporated in a country other than Kenya.<sup>129</sup> Investment, on the other hand, denotes the contribution of capital, regardless of whether it is from a foreign or local investor, and could also involve creating or acquiring of business asset by a business entity.<sup>130</sup> Neither this Act nor the Foreign Investment Promotion Act defines ‘foreign investment’ but from these separately defined terms, one gets a sense of what it entails.<sup>131</sup> It is

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<sup>123</sup>ibid., 11.

<sup>124</sup>Shirley Ayangbah and Liu Sun, ‘Comparative Study of Foreign Investment Laws: The Case of China and Ghana’ (2017) 3 Cogent Social Sciences 1355631 <<https://doi.org/10.1080/23311886.2017.1355631>> accessed 12 September 2018.

<sup>125</sup>ibid.

<sup>126</sup>Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) <<http://ebooks.cambridge.org/ref/id/CBO9780511841439>> accessed 12 September 2018.

<sup>127</sup>Ayangbah and Sun (n 14).

<sup>128</sup>Investment Promotion Act 2004 (Laws of Kenya).

<sup>129</sup>ibid.

<sup>130</sup>ibid.

<sup>131</sup>Foreign Investment Promotion Act 1964 (Laws of Kenya).

also noteworthy that the Acts do not differentiate between private and state-owned corporations. Foreign investment can be classified under four main categories: FDI, FPI (financial portfolio investment), commercial loans and official flows.

FDI is a financial phenomenon which occurs when a company owns voting stock of more than 10% in a commercial entity incorporated abroad.<sup>132</sup> Many corporations and individuals have chosen to invest abroad for various reasons. For one, foreign investment has been necessitated by less experience, or lack thereof, by host countries in areas such as technology and trade.<sup>133</sup> For some, exploring newer markets abroad is as a consequence of a saturated market back home.<sup>134</sup> While some of these reasons may be so informed, some MNCs invest abroad so as to maintain their market share at home and to stay ahead of their competitors who may have already moved their operations abroad to take advantage of cheap labor.<sup>135</sup> Some MNCs have also been known for exploring, and exploiting foreign markets, so as to benefit from lower tariffs on production in the foreign country.<sup>136</sup>

FDI manifests itself in various forms, and is to be distinguished from FPI, otherwise known as indirect investment.<sup>137</sup> While indirect investment may be in the form of share purchase in an already existing company in a foreign country, direct investment involves “the creation of new businesses, and the capital transfers to underwrite them.”<sup>138</sup> It also means the ownership and

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<sup>132</sup>Stephen D. Cohen, ‘Heterogeneity: The Many Kinds of Foreign Investment and Multinational Corporations and their Disparate Effects,’ in *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, (Oxford University Press, New York, 2007), 65.

<sup>133</sup>Ralph H. Folsom, Michael W. Gordon, John A. Spanogl, Jr., *Principles of International Business Transactions, Trade and Economic Relations*, (Concise Hornbook Series, Thomson West, 2005), 554.

<sup>134</sup>*ibid.*

<sup>135</sup>Stephen D. Cohen, ‘Why Companies Invest Overseas,’ in *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity*, (Oxford University Press, New York, 2007)

<sup>136</sup>*ibid.*

<sup>137</sup>*ibid.*

<sup>138</sup>*ibid.*

control of an enterprise abroad, in the form of a branch or subsidiary.<sup>139</sup>Enterprises which undertake FDI are known by various names, including MNCs, MNEs, TNCs, or TNEs. For purposes of international law, scrutinising the nature of an enterprise is important so as to deduce ownership and nature of control, because these determine the business structure of the entity, as well as the country which asserts authority over it.<sup>140</sup> The home nation is oftentimes the place or country of incorporation, while the host nation is usually the place where the enterprise conducts its productive operations.

The other two forms of foreign investment are commercial loans, which entail loan facilities issued by domestic banks to the government of a foreign country; and official flows, which entail developmental assistance given by a country to another, the latter usually being a developing country.<sup>141</sup>

#### **2.2.2.1. The Standard Gauge Railway Project: Foreign Investment or Not?**

While conducting this study, one of the identified challenges was how to classify the SGR project. According to some of the academic experts interviewed for this study, the nature of the SGR project would warrant its classification under FDI. For others, the project would fall under foreign financial assistance. In trying to classify the project, the definitions of foreign investment and its various forms provided some insight.

Based on the general definition of foreign investment provided earlier on in this chapter, it is apparent that the mode of financing of the SGR project qualifies as a foreign investment in the form of a commercial loan. The project is part of Kenya's development goals under its Vision

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<sup>139</sup>ibid.

<sup>140</sup>ibid.

<sup>141</sup>Investopedia, 'Foreign Investment' <<https://www.investopedia.com/terms/f/foreign-investment.asp>> accessed 12 September 2018.

2030.<sup>142</sup> The project was primarily financed through a concessional loan and a commercial loan from the EXIM (Export-Import) Bank of China, while the Kenyan government financed the remaining 10% deficit.<sup>143</sup> The question of whether China's financial loan to Kenya in respect of the SGR project qualifies as an investment or not is also settled by the very literal definition of an investment. The Black's Law Dictionary's definition of an investment denotes the strategic placing of funds to secure income or attract profit from its use.<sup>144</sup> A loan, whether concessional or commercial, can also be viewed as an investment, considering that the interest accruing as a result of the loan would qualify as a return on investment. The trade law lecturer interviewed for this study was also in support of this classification.

The investment would not only be classified under commercial loans, but also FDI, for the main reason that the CRBC is a company owned by China, is incorporated abroad, and has a subsidiary in Kenya. However, the argument that the financing provided by China falls under financial assistance does not hold considering that it was not a grant but a loan which is to be repaid as per the terms of the contractual agreement between the Kenyan government and the EXIM Bank of China.

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<sup>142</sup>Ministry of Planning and National Development and the National Economic and Social Council, 'Kenya Vision 2030' (2007) <[https://www.researchictafrica.net/countries/kenya/Kenya\\_Vision\\_2030\\_-\\_2007.pdf](https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf)> accessed 12 September 2018.

<sup>143</sup>Kenya National Assembly, 'Report on the Departmental Committee on Transport, Public Works and Housing on the Statement Sought by Hon. Hezron Awiti, MP, on the Tendering and Construction of the Standard Gauge Railway from Mombasa To Malaba' (2<sup>nd</sup> Session of the 11<sup>th</sup> Parliament, Nairobi, 2014). Also available at: <https://africog.org/wp-content/uploads/2017/06/Transport-Committee-FINAL-REPORT-ON-Standard-Gauge-Railway.pdf> (accessed on 23 July 2018).

<sup>144</sup>Henry Campbell Black, *Black's Law Dictionary* (4<sup>th</sup> ed., West Publishing Company, USA, 1968), 960.

### 2.3. MNCs and the Theory of International Relations

The place of MNCs within the sphere of international law has been debated on for years. One of the common misconceptions regarding these entities, firstly, is that they are monolithic.<sup>145</sup> MNCs, by their nature, are networks of companies that operate beyond one State. Secondly, is that they are a creature of international law, when in essence, they are entities organised under domestic law.<sup>146</sup>

As Cassese rightly puts it, MNCs are some of the entities participating in the daily life and activity of the world community.<sup>147</sup> In Kenya, big multinationals such as Coca Cola and Unilever stand out. One of the principal features of MNCs is that they are powerful, both economically, and politically. In fact, some of these entities are more powerful than most States. Another feature of MNCs is that they have activities that are not confined to just one State. Additionally, their business transactions are not limited to their internal structure, but they also involve other private companies, States as well as other international organisations.<sup>148</sup>

From the principal features of MNCs, it is evident that these entities, though not creatures of international law *per se*, conduct activities that may have an impact on the international community, whether directly or indirectly. It is, therefore, interesting that even with these characteristics MNCs are still not considered international law subjects proper.<sup>149</sup> As a result, MNCs have neither rights nor obligations under international law.<sup>150</sup>

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<sup>145</sup>Detlev F. Vagts, William S. Dodge, Harold Hongju Koh, *Transnational Business Problems*, (4<sup>th</sup>edn, Thomson/Foundation Press, USA, 2008), 53.

<sup>146</sup>*ibid.*

<sup>147</sup>Antonio Cassese, *International Law in a Divided World*, (Clarendon Press, Oxford, 1986), p. 103.

<sup>148</sup>*ibid.*

<sup>149</sup>*ibid.*

<sup>150</sup>*ibid.*

MNCs have and will continue challenging the traditional concepts of both corporate law and international law.<sup>151</sup> The reluctance to make MNCs subjects of international law has been explained using different approaches. For developing and less-developed States, MNCs are perceived as powerful entities, and they are viewed through a window of suspicion.<sup>152</sup> While socialist countries are opposed to them from a political standpoint, Western countries would prefer to have these entities under their control as far as possible.<sup>153</sup> Whether this will change in the future is still an on-going debate, but as far as MNCs are concerned, they are only subjects of municipal law and as Cassese points out, also subjects of ‘transnational’ law.<sup>154</sup>

### **2.3.1. International Relations Theory**

The traditional approach to explaining the legal status of MNCs is informed by the realist school of thought while the readiness to accept MNCs as active players in international relations is a view predominantly held by proponents of liberalism and constructivism. Some of the key proponents of realism include Kenneth Waltz and Hans Morgenthau, who posit that the State is a supreme power and is devoid of influences by non-state actors like terrorists, individuals, MNCs and international organisations.<sup>155</sup> The criticisms levelled against this school of thought necessitated the development of a recent branch of realism known as neo-realism. According to proponents of this latter discipline, the influence of non-state actors on States is appreciated.<sup>156</sup>

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<sup>151</sup>Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, Oxford, 1993), p. vii (preface).

<sup>152</sup>Antonio Cassese, *International Law in a Divided World*, (Clarendon Press, Oxford, 1986).

<sup>153</sup>*ibid.*

<sup>154</sup>*ibid.*

Subject to any BIT between states perhaps.

<sup>155</sup>Jack Donnelly, ‘Realism’ in Scott Burchill et al (eds), *Theories of International Relations* (3<sup>rd</sup>edn, Palgrave MacMillan, United Kingdom, 2005), 29-52.

<sup>156</sup>John Baylis, Steve Smith and Patricia Owens, *The Globalization of World Politics: An Introduction to International Relations* (4<sup>th</sup>edn, Oxford University Press, New York, 2008).



The proponents of neo-realism share some ideologies with liberals whose main argument is that non-state actors, just like State, can have substantial influence in international politics, for example, through agenda setting.<sup>157</sup> However, while neo-realists still view States as the primary actors in international law and depicting them as unitary and seeking to maximise power,<sup>158</sup> the liberal approach considers the role of non-state actors in helping States cooperate.<sup>159</sup> Accordingly, under this school of thought advanced by the likes of Immanuel Kant and Adam Smith, both States and non-state entities are important in the conduct of international relations. Some have argued that the discourse on state intervention in economic life and corporate human rights responsibility finds space within this school of thought.<sup>160</sup> According to liberals, democratic society, which is characterised by the protection of civil liberties and the prevalence of market relations, is relevant in international relations and can contribute to peaceful global order.<sup>161</sup>

Closely related to the liberal approach is constructivism. Considered a form of idealism, this approach was propounded by thinkers like Alexander Wendt and John Ruggie, and sought to challenge the realist and liberal approaches to international relations.<sup>162</sup> Unlike the two previous schools of thought, this one appreciates the power which ideas have in shaping contemporary international relations.<sup>163</sup> For proponents of constructivism, thinkers, otherwise known as ‘intellectual thinkers,’ can influence the behaviour of actors on the international plane through

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<sup>157</sup>Erzan Oskan and Hakan Cem Cetin, ‘The Realist and Liberal Positions on the Role of International Organizations in Maintaining World Order’ (2016) 12 *European Scientific Journal* 17, 89.

<sup>158</sup>*ibid.*

<sup>159</sup>*ibid.*

<sup>160</sup>Scott Burchill, ‘Liberalism,’ in Scott Burchill et al (eds), *Theories of International Relations* (3<sup>rd</sup> edn, Palgrave MacMillan, United Kingdom, 2005), 51-83.

<sup>161</sup>*ibid.*, 81.

<sup>162</sup>Christian Reus-Smit, ‘Constructivism,’ in Scott Burchill et al (eds), *Theories of International Relations* (3<sup>rd</sup> edn, Palgrave MacMillan, United Kingdom, 2005), 188-212.

<sup>163</sup>Daniel Philpott, *Revolutions in Sovereignty How Ideas Shaped Modern International Relations* (Princeton University Press, USA, 2001).

their new and evolving ideas.<sup>164</sup> Constructivism also studies the role of activist groups with a transnational character and which are involved in promoting change. John Ruggie's work in respect of the UN Guiding Principles displays elements of constructivism.

These three selected theories are contrasted, bear some similarities, and come with various criticisms. However, the underlying debate is the positioning of non-state actors within the international legal order. It is undisputed that States are the primary players in this framework, and they yield a lot of power in this context. However, this study leans more towards the liberal and constructivist schools of thought as they better conceptualise the interplay between States and non-state actors today.

This brief discussion on the place of MNCs in international law and the selected schools of thought under the theory of international relations is crucial to this study to the extent that the recommendations put forth will be informed by the challenge presented by the position of MNCs in this regard.

## **2.4. Theoretical Framework**

Apart from the international relations theory, this study is guided by two other theories: the dependency and rights theories.

### **2.4.1. Dependency, Foreign Investment and Developing States**

Developing States, like Kenya, have relied on foreign investment as one of the main drivers of development. This relationship can be evaluated and interrogated using the dependency theory. The dependency theory is a sociological theory, which was developed in the 1950s in Latin

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<sup>164</sup>Jack Snyder, 'One World, Rival Theories,' (2004) *Foreign Policy* 145, 60.

America. The theory is attributed to the works of Raul Prebisch.<sup>165</sup> It developed out of the concern that economic growth witnessed by some of the world's industrialised economies could not automatically be equated to growth in poor countries.<sup>166</sup> At the time, the plausible explanation seemed to be that poor countries would export their raw materials to richer countries, and the latter would manufacture the materials and export to poor countries at a higher cost.<sup>167</sup> In order to cure the problem, Prebisch and his colleagues recommended policy changes that would enable domestic markets to sell their raw materials on the world market without having to purchase already manufactured products from rich countries at a higher cost, that is, through import substitution.<sup>168</sup> The difficulty with such a proposition, especially for developing and less-developed countries, was their inability to compete with their industrialised counterparts due to the economies of scale that favoured the latter.

Perhaps one of the most useful definitions of “dependency” is that offered by Sunkel, who looks at dependency as the economic growth of a country as a result of external influences of a political, socio-economic, and cultural nature on the country's development policies.<sup>169</sup> Another useful definition is that by Theotonio Dos Santos', whose Marxist analysis of dependency is prominent. His definition places emphasis on the historical underpinnings of dependency. Accordingly, he contends that dependency arises out of a historical condition that shapes the

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<sup>165</sup>Vincent Ferraro, 'Dependency Theory: An Introduction,' in Giorgio Secondi (ed), *The Development Economics Reader* (Routledge, London, 2008), 58-64.

Also available at: <https://www.mtholyoke.edu/acad/intrel/depend.htm> (accessed on 10 May 2018).

<sup>166</sup>*ibid.*

Prebisch was the former Director of the United Nations Economic Commission for Latin America.

<sup>167</sup>*ibid.*

<sup>168</sup>Philip J. O'Brien, 'A Critique of Latin American Theories of Dependency', in Oxaal, Ivar, Barnett, Tony, and Booth, David (eds), *Beyond the Sociology of Development: Economy and Society in Latin America and Africa*, (Routledge, London, 1975), pp. 7-27.

<sup>169</sup>Oswaldo Sunkel, 'National Development Policy and External Dependence in Latin America,' (October, 1969) 6 *The Journal of Development Studies* 1, 23-48.

global economy, favouring some while limiting the development of other countries, the latter usually being subordinate economies on which the former depend for their own growth.<sup>170</sup>

In his analysis, Dos Santos focused on three types of dependency which poor nations have undergone: colonial dependency, financial-industry dependency and technological-industrial dependency.<sup>171</sup> According to him, the latter form of dependency was characterised by the proliferation of MNCs in the industries of underdeveloped countries.<sup>172</sup>

Two different strands of the dependency theory have emerged over the years, that is, the theory of ‘the development of underdevelopment’ as propounded by Andre Gunder Frank, a Marxist; and the theory of “dependent development” as propounded by the likes of Cardoso, Faletto and Peter Evans.<sup>173</sup> According to the former, the argument is that where there is development in core countries, some countries at the periphery, will experience poverty and underdevelopment.<sup>174</sup> The latter theory, on the other hand, suggests that where there is development in core countries, there is a chance that countries at the periphery may benefit and develop.<sup>175</sup> This study appreciates the propositions by these two strands, to the extent that globalisation, and the injection of foreign investment into developing and less developed countries, is both beneficial and detrimental to their growth. The SGR project, for example, has revamped the country’s infrastructure, but on the flipside, has plunged Kenya into debt. Human rights violations by the

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<sup>170</sup>Theotonio Dos Santos, ‘The Structure of Dependence,’ in K.T. Fann and Donald C. Hodges, (eds) *Readings in U.S. Imperialism*, (Boston: Porter Sargent, 1971), 226.

<sup>171</sup>Theotonio Dos Santos, ‘The Structure of Dependence’ (1970) 60 *The American Economic Review* 231, 232. <[http://web.unair.ac.id/admin/file/f\\_20003\\_Dos\\_Santos\\_Structure-LAMPIRAN\\_3.pdf](http://web.unair.ac.id/admin/file/f_20003_Dos_Santos_Structure-LAMPIRAN_3.pdf)> accessed 12 September 2018.

<sup>172</sup>ibid.

<sup>173</sup>Andre Gunder Frank, ‘The Development of Underdevelopment,’ in James D. Cockcroft, Andre Gunder Frank, & Dale Johnson (eds), *Dependence and Underdevelopment* (Anchor Books, Garden City, New York, 1972), 3.

<sup>174</sup> ibid.

<sup>175</sup>Vincent Ferraro, ‘Dependency Theory: An Introduction,’ in Giorgio Secondi (ed), *The Development Economics Reader* (Routledge, London, 2008), 58-64.

Also available at: <https://www.mtholyoke.edu/acad/intrel/depend.htm> (accessed on 10 May 2018).

contractors managing the project, the CRBC, also illustrate the negative impact of foreign investment.

The dependency theory is also relevant to this study to the extent that it brings into perspective the role of history in positioning different nations within the global economy.<sup>176</sup> Proponents of the theory consider colonisation as one of the factors that led to the marginalisation of countries in the global south.<sup>177</sup> Even after the end of colonialism, profits continue to flow from the global south to the north.<sup>178</sup> Even though the dependency theory was influential in Latin America in the 1960-1970s it is still relevant in today's globalised world. Underdevelopment of countries in the global south can therefore be scrutinised through this lens. This study uses the theory to explain why developed countries exploit developing countries like Kenya, primarily for cheap natural resources and labor. It also explores the possibility of south-south exploitation, using the example of the growing Sino-African relations.

In explaining dependency, the interaction between the local and global spheres cannot be ignored. The relationship between dominant and dependent countries is rooted in the internationalisation of capitalism.<sup>179</sup> A common characteristic of the various strands of dependency theory is the realisation that there are external forces which are important in the economic activities taking place in a dependent State.<sup>180</sup> These include MNCs foreign assistance or other means by which a dominant State would represent its economic interest in a dependent State.<sup>181</sup> Furthermore, the role of the local elite in perpetuating dependency must be

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<sup>176</sup>Ushehwe duKufakurinani et al., 'Dialogues on Development,' (2017) 1 Institute for New Economic Thinking, vi Also available at: <http://eprints.kingston.ac.uk/38253/6/McKenzie-R-38253-VoR.pdf> accessed on 18 June 2018.

<sup>177</sup>ibid.

<sup>178</sup>ibid.

<sup>179</sup>ibid.

<sup>180</sup>ibid.

<sup>181</sup>ibid.

scrutinised.<sup>182</sup> This study looks at how the governments of African States promote dependency on the global north through policies, incentives for foreign direct investment and other mechanisms. For the purposes of this study, Chinese foreign investment in the form of a loan to finance the SGR project will offer an illustrative analysis.

#### **2.4.1.1. Sino-African Relations: Dependency or Interdependence?**

The discourse on dependency has gained traction in a more recent discourse regarding China's growing influence in Africa. While the traditional conception of dependency had the global north and south in mind, the contemporary China-Africa relationship has begged the question whether the theory best describes this phenomenon. Some have even characterised China's engagement with African countries as a form of neocolonialism.<sup>183</sup> Agbebi and Virtanen, for instance, explore this relationship through the lens of dependency but, instead, suggest that the relationship between China and Africa is one of interdependence.<sup>184</sup>

It is this study's standpoint that the China-Africa relationship, even though mimicking the interdependence model suggested by Agbebi and Virtanen, still falls within the framework suggested by the dependency theorists. Even though the relationship is a South-South one, there exists a dominant State and a dependent State in many of these relations. China may not be categorised as a developed country.<sup>185</sup> However, it has been acknowledged that the country is playing both an influential role in the global economy and development.<sup>186</sup> While the relationship between China and African countries might have started as one of interdependence,

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<sup>182</sup>ibid., p.viii.

<sup>183</sup>Motolani Agbebi and Petri Virtanen, 'Dependency Theory-a Conceptual Lens to Understand China's Presence in Africa?' (2017) 44 *Forum for Development Studies* 429 <<https://doi.org/10.1080/08039410.2017.1281161>.> accessed 12 September 2018.

<sup>184</sup>ibid.

<sup>185</sup>World Bank Group, China Overview. Also available at: <http://www.worldbank.org/en/country/china/overview> (accessed 12 September 2018).

<sup>186</sup>ibid.

or trade partnership, the relationship has evolved into one of dependence. According to research by the China-Africa Research Initiative, there has been an increasing imbalance between Africa and China.<sup>187</sup> According to the 2017 report, exports from China to Africa remain stable, even reaching \$106 billion in 2015, while Africa's exports to China declined by 42% between 2014 and 2015.<sup>188</sup> While Kenya remains one of the top 5 recipients of Chinese foreign investment in Africa, ranked second in 2015 by the China-Africa Research Initiative, questions have emerged as to the implications of this relationship. Is Kenya the winner or the loser in this relationship? According to the views of the academics interviewed for this study, Kenya is gaining, but also losing. The increasing debt burden on Kenya is just one of the examples highlighted.

#### **2.4.2. Theory of Rights: Analysing the Impact of Foreign Investment**

The modern conception of rights is informed by various schools of thought. The rights debate is one which is still on-going. According to some, the idea of rights can only be understood if based on a prior theory of political or social morality, for example, using utilitarianism.<sup>189</sup> This view was taken by some, including Jeremy Bentham, who regarded the talk about human rights as nonsense upon stilts.<sup>190</sup> Deriving from the divergent views in the rights debate, rights have been viewed under two major lenses: moral rights and legal rights. This distinction is informed by the claim upon which each of the two is grounded. Moral rights are grounded on a moral theory, while legal rights are legitimised by a legal system through authoritative sources.<sup>191</sup>

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<sup>187</sup>Lucas Atkins and others, 'Challenges of and Opportunities from the Commodity Price Slump' (2017) 1 China-Africa Economic Bulletin 2.  
<<https://static1.squarespace.com/static/5652847de4b033f56d2bdc29/t/59f85883ec212d5a70e9624c/1509447812591/bulletin+v5.pdf>> accessed 12 September 2018.

<sup>188</sup>ibid.

<sup>189</sup>Jeremy Waldron, *Theories of Rights* (Oxford University Press, Oxford, 1984).

<sup>190</sup>Jeremy Bentham, "Anarchical Fallacies" reprinted in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, London, 1987) p.46-69, at.p.53.

<sup>191</sup>Brian Bix, *Jurisprudence: Theory and Context*, (7<sup>th</sup>edn, Sweet & Maxwell, London, 2015), 134.

From the natural law perspective, human rights are seen as those entitlements accorded to human beings because of their humanity.<sup>192</sup> Accordingly, and theoretically, human beings should be able to make certain claims simply because they are human. Apart from their inalienable nature, this natural law conception of rights also presupposes that human rights are universal. The main challenge with the moral rights (also natural rights) thesis is whether rights can exist or be claimed independently of the legal and institutional framework of the society. According to Macdonald, moral rights assume that people have rights as human beings regardless of existing laws, but this is not true considering that no such social compulsion is self-justifying.<sup>193</sup> It is her argument that a natural right, as guaranteed by a natural law, presupposes a natural fact.<sup>194</sup> For example, a Standard Gauge Railway worker in Kenya has an actual right to be free from slavery. This is the ideal situation – what the worker ought to be. However, following McDonald’s argument, unless the law comes in to safeguard the worker’s freedom from slavery, he might not be able to enjoy that right, even though by nature he ought to be free.

The legal rights debate, on the other hand, seems to be more widely accepted as opposed to the concept of moral or natural rights. The concept of legal rights can be seen as one grounded on the positivist legal theory. The school of thought is informed by the assertion that the law is, and should be, separate from moral judgments.<sup>195</sup> Notable proponents of the theory include Jeremy Bentham and John Austin. Within this conception, legal rights are dependent on laws and governments, and that governments enact laws so as to protect rights. In doing so, governments can also create and accord their people additional rights within the scope of law. A good

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<sup>192</sup>Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford Press Scholarship Online, Oxford, 2011), 140.

Also available <http://www.lse.ac.uk/collections/Law/staff%20publications%20full%20text/collins/ch9.pdf>.

<sup>193</sup>Margaret McDonald ‘Natural Rights’ in Jeremy Waldron (ed), *Theories of Rights*, (Oxford University Press, Oxford, 1984), 23.

<sup>194</sup>*ibid.*, 24.

<sup>195</sup>Brian Bix, *Jurisprudence: Theory and Context*, (7<sup>th</sup>edn, Sweet & Maxwell, London, 2015), 33.



illustration of this is the right to vote. In America, for instance, women could not exercise the right to vote until the 1920s.<sup>196</sup> The legal rights talk has, however, faced skepticism from different quarters, including the critical legal studies (CLS) movement that views this conception of rights as detrimental to the interests of the people it is intended to protect.<sup>197</sup> The other claim by the CLS movement was that the law is used to advance the interests of those in power and a tool to legitimise injustice.<sup>198</sup>

The rights talk has not simply been confined to the debate on natural or moral rights and legal rights. In a bid to get rid of the confusion in the rights talk ‘clearer’ Wesley Hohfeld came up with his famous rights analysis, founded on the legal rights discourse.<sup>199</sup> His analysis covered four main legal concepts – rights, liberties, powers and immunities.<sup>200</sup> This study will mainly draw from his conception of rights, that is, claims as correlative to another person’s duty.<sup>201</sup> Accordingly, a person entitled to a “legal” right, or claim, is accorded legal protection against the interference of the said right.

In discussing rights, the interest (beneficiary) theory and the will (choice) theory debate cannot be overlooked. Kramer, Simmonds and Steiner have canvassed the debate in a three-article book.<sup>202</sup> Generally, proponents of the interest theory (the likes of Jeremy Bentham and Neil MacCormick) posit that all rights consist in the protection of individual or corporate interests, and that to ascribe a right to someone would mean that some aspect of that person’s well-being is

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<sup>196</sup> 66<sup>th</sup> Congress of the United States of America, *19<sup>th</sup> Amendment to the U.S. Constitution: Women's Right to Vote* (1920). Available at: <http://www.ourdocuments.gov/doc.php?flash=true&doc=63>

<sup>197</sup> Mark Tushnet, “An Essay of Rights” (1984) 62 *Texas Law Review*, 1363.

<sup>198</sup> Brian Bix, *Jurisprudence: Theory and Context*, (7<sup>th</sup>edn, Sweet & Maxwell, London, 2015), 238.

<sup>199</sup> *ibid.*, 136.

<sup>200</sup> *ibid.*

<sup>201</sup> *ibid.*

<sup>202</sup> Matthew H. Kramer, N.E. Simmonds, Hillel Steiner, *A Debate Over Rights*, (Oxford University Press, Oxford, 1998).

protected against interference through moral or legal means.<sup>203</sup> The will theory, on the other hand, presupposes that rights consist in the enjoyment of opportunities for individuals or corporate persons.<sup>204</sup> This is to mean that the right is vested in a rights holder with some element of control over his situation, and that that person is capable of making a choice about the fulfillment of someone else's duty. The main proponent of the will theory was HLA Hart who viewed a legal right as the equation of someone having exclusive control under the law, making him a 'small-scale' sovereign with the ability to enforce a right against another person who owes him a duty to respect the specific right.<sup>205</sup>

Bringing this discourse closer home, it is crucial to identify and understand the scope of human rights protection in Kenya. In Kenya, just like many other countries, rights accruing to persons as well as the attendant duties of the State are codified. The Kenyan Constitution contains a Bill of Rights and it also recognises other rights in domestic legislation.<sup>206</sup> Human rights as protected under customary law, and regional and international instruments ratified by the State also find protection by the State by virtue of Article 2(5) and 2(6).<sup>207</sup> Kenyans also have mechanisms in place to demand the protection of their rights. Apart from judicial and non-judicial remedies, there are also institutions set up for investigating, monitoring and addressing human rights abuses. One of such institutions is the Kenya National Commission on Human Rights. This study's focus will be on the state-corporation-individual relationship in protecting, respecting and remedying human rights abuses.

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<sup>203</sup>ibid., 2.

<sup>204</sup>ibid.

<sup>205</sup>H.L.A. Hart, 'Are there any Natural Rights?' in Jeremy Waldron (ed), *Theories of Rights*, (Oxford University Press, Oxford, 1984), 79.

<sup>206</sup>The Constitution of Kenya 2010.

<sup>207</sup>ibid.

## **2.5. Conclusion**

This chapter has discussed the conceptual and theoretical framework of this study. After analysing the concept of foreign investment and what it entails, this chapter has reached the conclusion that China's financial loan to Kenya for the purposes of the SGR project qualifies as foreign investment. The analysis has also enabled the categorisation of the CBRC as a state-owned MNC. The discussion has also established that MNCs are not international law subjects. However, such companies must adhere to both domestic and international human rights safeguards in host countries. States, on the contrary, bear direct obligations under international law, owing their citizens a duty to protect their rights from abuse by third parties and SOEs. The next chapter will discuss the framework for regulating the business activities of MNCs in respect of human rights, using the SGR project as a case study.

## CHAPTER 3

### CORPORATE HUMAN RIGHTS RESPONSIBILITY: A CASE STUDY OF THE STANDARD GAUGE RAILWAY PROJECT

#### 3.1. Introduction

Having discussed the conceptual and theoretical underpinnings of this study, this chapter proceeds to discuss the framework for protecting human rights against abuse by commercial activities of MNCs. This chapter will also analyse the findings of the research undertaken through interviews and a focus group discussion. It will also rely on investigative news pieces highlighting human rights abuses by the CRBC in respect of the SGR workers.

#### 3.2. Kenya's Development Goals: The Standard Gauge Railway Project

In Kenya, just like many other developing countries, the economy is driven by foreign investment to a large extent. In its 2016 Report, the Financial Times ranked Kenya fourth among African countries attracting the most FDI – an estimated \$1 billion in 2015 alone.<sup>208</sup> Kenya was also ranked second, after South Africa, as the African country with the most number of FDI projects, with a total of 84.<sup>209</sup> While Kenya's ranking decreased by 55% in 2016,<sup>210</sup> it still maintained a top five ranking among African countries attracting FDI through to 2017.<sup>211</sup> As already noted in the two previous chapters, one of Kenya's main sources of foreign investment is the Far East, primarily China, whose activities in Africa have become more pronounced in the

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<sup>208</sup>Courtney Fingar et al., 'The fDi Report 2017' (Financial Times Ltd, London, 2017), 14.

<sup>209</sup> *ibid.*

<sup>210</sup>Courtney Fingar et al., 'The fDi Report 2017' (Financial Times Ltd, London, 2017), 16.

Also available at: <http://bcckenya.org/assets/documents/The-fDi-Report-2017.pdf> (accessed on 14 July 2018).

<sup>211</sup> Courtney Fingar et al., 'The fDi Report 2018' (Financial Times Ltd, London, 2018), 18.

recent past. In fact, China is ranked as the top largest source of outward capital investment in Asia-Pacific.<sup>212</sup> Large amounts of foreign investment from China have been directed towards developing Kenya's infrastructure. The effects of Chinese investment on the Kenyan economy cannot be ignored. One of the important infrastructure projects that have benefitted from Chinese foreign investment is the SGR project, an outcome of contracts signed by the Kenyan government and CRBC.<sup>213</sup>

Infrastructure forms one of the six foundations of Kenya's socio-economic transformations.<sup>214</sup> In its Vision 2030, Kenya's vision regarding the sector is the provision of cost-effective world-class facilities and services.<sup>215</sup> Not only is the sector seen as a driver of the country's economy, but also as a necessity for the improvement of the livelihoods of Kenyans.<sup>216</sup> In the Integrated National Transport Master Plan, it is envisioned that Kenya would be positioned as a regional transport hub.<sup>217</sup> In a bid to meet the goals stipulated in Vision 2030, the Ministry of Transport and Infrastructure embarked on projects to improve the transport sector. The railway sub-sector, which had been underperforming for many years, was earmarked for drastic improvement.<sup>218</sup>

The Standard Gauge Railway was a project that was intended to contribute to the development of the Northern Transport Corridor as envisioned by Vision 2030.<sup>219</sup> Approval for the SGR project

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<sup>212</sup>ibid., 6.

<sup>213</sup>Kenya National Assembly, 'Report on the Departmental Committee on Transport, Public Works and Housing on the Statement Sought by Hon. Hezron Awiti, MP, on the Tendering and Construction of the Standard Gauge Railway from Mombasa To Malaba' (2<sup>nd</sup> Session of the 11<sup>th</sup> Parliament, Nairobi, 2014).

Also available at: <https://africog.org/wp-content/uploads/2017/06/Transport-Committee-FINAL-REPORT-ON-Standard-Gauge-Railway.pdf> (accessed on 23 July 2018).

<sup>214</sup>Ministry of Planning and National Development and the National Economic and Social Council, 'Vision 2030,' (Government of the Republic of Kenya, Office of the President, 2007), 12.

<sup>215</sup>ibid.

<sup>216</sup>ibid.

<sup>217</sup>ibid., 14.

<sup>218</sup>Kenya National Assembly, 'Report on the Departmental Committee on Transport, Public Works and Housing on the Statement Sought by Hon. Hezron Awiti, MP, on the Tendering and Construction of the Standard Gauge Railway from Mombasa To Malaba' (2<sup>nd</sup> Session of the 11<sup>th</sup> Parliament, Nairobi, 2014), p. 23.

<sup>219</sup>ibid.

was granted by the Cabinet on 3<sup>rd</sup> August, 2012.<sup>220</sup> Prior to that, the Ministry of Transport and Infrastructure had, on 12<sup>th</sup> August, 2009, signed a MoU with the CRBC, authorising the latter to commence a feasibility study before the construction of the SGR.<sup>221</sup> In October, 2012, the National Treasury formally requested for financial assistance from the Government of China so as to implement the SGR project.<sup>222</sup> The loan would be \$3.23 billion from the EXIM Bank of China, part of which was a concessional loan amounting to \$1.6 billion and the remaining \$1.63 billion being a commercial loan, while the Kenyan government would finance the rest.<sup>223</sup> The CRBC is one of the most important Chinese MNCs operating in the Kenyan market for several decades now.<sup>224</sup> The company's Kenyan office was established in the 1980s. The CRBC is ranked amongst the top state-owned companies in China, and a subsidiary of the China Communications Construction Company (CCCC).<sup>225</sup> It is also actively involved in China's Belt and Road Initiative, an important feature of China's foreign policy to connect Asia, Africa and Europe through infrastructure, political and economic cooperation.<sup>226</sup>

### **3.3. The Extent of Human Rights Violations by the China Road and Bridge Corporation**

Ever since the commencement of the first phase of the SGR project in Kenya, there have been serious complaints concerning human rights abuses by the employees of the CRBC against their employers. An analysis of these allegations can be done against the background of international

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<sup>220</sup>ibid.

<sup>221</sup>ibid.,26.

<sup>222</sup>ibid.,47.

<sup>223</sup>ibid.

<sup>224</sup>Xiaotian Sun, 'Chinese FDI: A Study of the Impact of Chinese Infrastructure Investments in Kenya, Africa' (Columbia University 2015) 14 <<https://academiccommons.columbia.edu/doi/10.7916/D8CV4H9T>> accessed 12 September 2018.

<sup>225</sup>China Road and Bridge Corporation, 'Introduction' <<http://www.crbc.com/site/crbcEN/Introduction/index.html>> accessed 12 September 2018.

<sup>226</sup>Alexander Demissie, Moritz Weigel and Tang Xiaoyang, 'China's Belt and Road Initiative & Its Implications for Africa' (2016) <[www.chinaafricaadvisory.com](http://www.chinaafricaadvisory.com)> accessed 13 September 2018.

and domestic legal frameworks for corporate human rights responsibility. It is noteworthy that the potential interviewees from the CRBC seemed unwilling to participate in the study. Various attempts were made to interview the human resource personnel of both the Kenya Railways Corporation and the CRBC.

Before determining the extent of human rights abuses by the CRBC, it is noteworthy that the Kenyan Constitution offers a comprehensive framework upon which protection of human rights can, and should, be hinged. The Constitution not only binds all individual persons but also State organs at the national and county governments.<sup>227</sup> The implication of this provision is that the Bill of Rights, which is a central part of the Constitution, is applicable to all persons, regardless of whether they are Kenyans or foreigners. Article 3 further stipulates that all persons must respect the Constitution.<sup>228</sup> The definition of persons under Article 260 of the Constitution is also crucial to this study, to the extent that it brings within the ambit of the Constitution both natural persons and corporations. The definition includes companies, associations and other incorporated or unincorporated bodies of persons.<sup>229</sup> This provides a basis for demanding the respect of those rights encompassed in the Bill of Rights by corporations operating in the country.

### **3.3.1. The Kenyan Bill of Rights**

The Kenyan Bill of Rights is a central to Kenya's democratic state. It also provides a good framework for socio-economic and cultural policies.<sup>230</sup> One of the rationales behind the Bill of

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<sup>227</sup>National Council for Law Reporting (with the Authority of the Attorney General), *The Constitution of Kenya*, (Revised Edition, Kenya, 2010), Article 2.

<sup>228</sup>*ibid.*

<sup>229</sup>*ibid.*

<sup>230</sup>*ibid.*, Article 19.

Rights is to safeguard the dignity of all people.<sup>231</sup>The Bill of Rights is also applicable to all persons.<sup>232</sup>

The Bill of Rights provides an extensive catalogue of rights which Kenyans and non-Kenyans enjoy equally. The only caveat to the enjoyment of these rights is the limitations envisaged in the Constitution.<sup>233</sup> By dint of article 19(3)(c), it is also clear that the Constitution does not provide a conclusive or exhaustive list of rights, and where these are to be found in other instruments of law, they shall be recognised provided that they are in tandem with the Bill of Rights. It is important to read this provision with article 2(5) and (6) in mind. Article 21, on the other hand, highlights the State's crucial task of observing, respecting and fulfilling the provisions of the Bill of Rights. Furthermore, every person can obtain recourse from courts by virtue of Article 22, should their rights and freedoms be infringed upon.

A discussion of the various rights violated by the CRBC shall be undertaken with these provisions in mind.

### **3.3.1.1. Freedom from Torture and Related Rights**

In a month-long investigation carried out by the Standard Media Group in 2018, it was revealed that Kenyan workers at the CRBC are being subjected to inhuman as well as degrading treatment, among other serious human rights abuses. The exposé, investigated and reported by Paul Wafula and aired by the Kenya Television Network (KTN), revealed that Kenyan employees working at the SGR were victims of corporal punishment in the hands of their

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<sup>231</sup>ibid.

<sup>232</sup>ibid., Article 20(1).

<sup>233</sup>ibid., Article 24.



Chinese superiors, including being asked to do “press ups and to lie down on the ground.”<sup>234</sup> According to one of the two SGR workers interviewed by Hellen Aura of the Nation Media Group in July, 2018, Kenyan workers also bear the brunt of verbal abuse by their Chinese superiors while on the job.<sup>235</sup>

Such mistreatment of Kenyan workers by their Chinese superiors is akin to torture, cruelty and degrading treatment. The Constitution of Kenya is clear on the nature of this freedom – it shall not be limited. This freedom is also unique in nature, in that it has found recognition under international customary law. The implication of this is that it is binding upon Kenya (and all States) regardless of whether it has ratified the 1984 Convention against Torture or not. Even then, both Kenya and China are signatories to the Convention. The nature of this violation also goes against the right to have their human dignity and personal security respected under article 28 and 29 respectively. The scope of article 29 extends to forms of violence by either public or private actors, torture (whether physical or psychological), corporal punishment, among others.<sup>236</sup>

### **3.3.1.2. Equality and Freedom from Discrimination**

The KTN exposé also revealed cases of racial discrimination against Kenyan employees. Kenyan workers, for example, are not allowed to share coaches with their Chinese counterparts. The investigative journalist himself experienced similar treatment while on a trip from Nairobi to Mombasa and back, aboard the train. Additionally, Kenyan workers are not allowed to dine in the same restaurants as their Chinese counterparts. In the focus group discussion conducted in

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<sup>234</sup>Paul Wafula, ‘Exclusive: Behind the SGR Walls’ *The Sunday Standard* (8 July 2018).

<https://www.standardmedia.co.ke/article/2001287119/exclusive-behind-the-sgr-walls> accessed 20 July 2018.

<sup>235</sup> NTV Kenya, ‘Mistreatment of SGR Employees by their Chinese Bosses’ *Nation Media Group* (19 July 2018). [https://www.youtube.com/watch?v=1C9\\_EjHHy0E](https://www.youtube.com/watch?v=1C9_EjHHy0E) accessed 19 July 2018.

<sup>236</sup>*ibid.*

Kibera, two previous workers opened up not only about racial discrimination, but also discrimination in terms of disparities in wages and salaries. Furthermore, the Chinese nationals deny Kenyan workers an opportunity to operate the trains by using Chinese as the programming language. Based on the focus group discussions and the investigative piece by KTN, it is also apparent that it takes a longer time for Kenyan workers to be trained as opposed to their Chinese counterparts who may have lesser qualifications. One member of the focus group explained how the training of Chinese workers could take a few weeks, while that of their Kenyan counterparts would take longer, and some Kenyans would even end up being fired after undergoing and completing training.

The Bill of Rights expressly provides for equality as well as freedom from direct or indirect discrimination based on, among others, race or colour. Both Kenya and China have signed onto the Convention on Racial Discrimination, with China only having one reservation in respect of dispute settlement under Article 22 of the Convention.<sup>237</sup>

### **3.3.1.3. Freedom of Association and Labor Relations**

The Constitution of Kenya safeguards one's freedom of association.<sup>238</sup> This comprises the right of forming, joining or participating in the activities of an association of any kind.<sup>239</sup> For workers, this right is closely related to, and should be read together with, article 41 of the Constitution, which contains provisions on labour relations. Every person should be able to enjoy fair labor practices. Workers not only have the right to fair remuneration but also reasonable working conditions.

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<sup>237</sup>UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, U.N.T.S, vol. 660, p. 195 <http://www.refworld.org/docid/3ae6b3940.html> accessed 12 September 2018.

<sup>238</sup>Article 36.

<sup>239</sup>ibid.

Based on the investigative piece by KTN, it was disclosed that workers at the SGR were not allowed to join trade unions.<sup>240</sup> If these allegations were true, they would be an outright contravention of the Bill of Rights. In an interview by KTN News, the COTU Secretary General, Francis Atwoli admitted that these allegations had neither been brought to their attention, nor to the attention of their affiliate trade union – the Kenya Union of Railway Workers. Two members comprising the focus group for purposes of this study admitted that in their various temporary jobs during the construction phase of the SGR, they knew nothing about joining trade unions and how to use them to highlight the unfair labour practices they were subjected to. They also alluded to the fact that their employer would probably not allow them to join a trade union. Additionally, one of the correspondents for this study admitted that their wages would be paid minus deductions on allegations that the same would be remitted to the Kenya Revenue Authority as tax.

### **3.3.2. Labour Rights within the Human Rights Framework**

The discussion of Article 41 rights brings another angle to the issues addressed in this study. Some prefer to look at labour rights as being distinct from the human rights discourse. However, this study treats labour rights as any other human rights. Just by analysing the Bill of Rights, it is clear that workers' rights find space within the general human rights discourse. Furthermore, as already discussed earlier in this chapter, the Constitution considers as rights those rights in other legislation, provided they do not deviate from the provisions of the Bill of Rights. With this in mind, this discussion moves to the protection of workers' rights in other pieces of legislation apart from the Bill of Rights.

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<sup>240</sup>KTN News Kenya, 'COTU Secretary General Takes on Chinese Bosses Who Allegedly Mistreat Kenyan Workers' *The Standard Group* <https://www.youtube.com/watch?v=Kcgm1ISeXr8> accessed July 10 2018.

### **3.3.2.1. The Labor Relations Act**

The freedom of association, as encapsulated in the Bill of Rights, is reiterated in Part II of the Labor Relations Act.<sup>241</sup> The Act protects the employee's right of forming, joining or leaving a trade union. Additionally, they can participate in any lawful activities of their respective unions.<sup>242</sup> The Act also offers employees protection from discrimination because of their membership to a trade union and the exercise of rights accruing from it.<sup>243</sup> Additionally, no person shall prohibit an employee from being a member of a trade union or require them to give up such membership.<sup>244</sup> Employees should also not be dismissed or prejudiced because of their trade union membership.<sup>245</sup> The Act also makes it illegal to prohibit the exercise of these rights in exchange for an advantage to an employee.

### **3.3.2.2. The Employment Act**

Another piece of important legislation that protects the rights of employees is the Employment Act. This Act came into force in 2007 to provide a scope for the rights of employees as well as provisions on employment conditions, among others.<sup>246</sup> Not only does the Act reinforce the rights already stipulated in the Constitution,<sup>247</sup> but it also defines the employment relationship,<sup>248</sup> rights and duties in employment,<sup>249</sup> as well as provisions on protection of wages, termination and dismissal, protection of children, and dispute settlement procedures.<sup>250</sup>

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<sup>241</sup>Labour Relations Act 2007 (Laws of Kenya ).

<sup>242</sup> *ibid.*

<sup>243</sup>*ibid.*, Section 5.

<sup>244</sup> *ibid.*

<sup>245</sup> *ibid.*

<sup>246</sup>Employment Act 2007 (Laws of Kenya ).

<sup>247</sup> Sections 4, 5, 6, 53.

<sup>248</sup> Part III.

<sup>249</sup> Part V.

<sup>250</sup> Part XII.

In its definition of ‘employee,’ the Employment Act includes persons employed for wages or a salary. This may also include apprentices and indentured learners.<sup>251</sup> A contract of service, on the other hand, is defined as an oral or written agreement, express or implied, to engage a person for employment, apprenticeship or indentured learnership.<sup>252</sup> Section 9 provides that where such a contract is for a period that exceeds 3 months, it shall be in writing.<sup>253</sup> A probationary contract is an employment contract for a period not exceeding 12 months and it should clearly state so.<sup>254</sup> These provisions are crucial in analysing some of the violations of the Employment Act by the CRBC.

One of the difficulties experienced while conducting this study is the determination of who exactly the employer of the SGR staff is. The correspondents interviewed for this study did not seem to know who their employer was. They did not have written contracts, yet they had worked for a period of more than three months. Efforts to schedule interviews with officers at both the CRBC and the Kenya Railways Corporation to clarify on this issue bore no fruit. However, secondary data obtained in this study indicates that the CRBC was retained by the Kenya Railways Corporation to undertake the first phase of the SGR project by virtue of two commercial contracts.<sup>255</sup> The company is the contractor as well as the operator of the SGR project.<sup>256</sup> It is therefore clear that the CRBC is the employer. The Kenya Railways Corporation is simply overseeing the project.

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<sup>251</sup> Section 2.

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*

<sup>255</sup> Kenya Railways, ‘SGR Implementation: Contracts Signed’ <<http://krc.co.ke/sgr-implementation/>> accessed 12 September 2018.

<sup>256</sup> China Road and Bridge Corporation (Kenya), ‘Career Opportunities’ <<http://krc.co.ke/wp-content/uploads/2018/07/ADVERT-July-20-2018.pdf>> accessed 12 September 2018.

The job advertisement describes CRBC as a contractor and operator of the SGR.

Two of the correspondents in this study were also not sure about their employment status. One of them mentioned that he had been a driver for more than a year. He also mentioned that he had a colleague who had been a trainee for over a year before he was laid off. When asked about the frequency of his payment, he said that he would be paid every month. However, sometimes the money would be paid late into the month, and it would be deducted. He also mentioned that he used to receive a payslip, but sometimes the salary figures would differ. Whenever he inquired about the deductions from the payment he received, he would be informed that the money would be remitted to the Kenya Revenue Authority as tax. This piece of information was compared with the investigation done by Paul Wafula of KTN, whose correspondents also made similar allegations.<sup>257</sup> According to one of the employees interviewed by the journalist, she was once given two P9 forms by her employer, which showed different figures, and one even suggested that she earned more than what she was actually being paid.

Various issues arise out of this information if it is true. Firstly, that the CRBC is in contravention of the Employment Act by not providing written contracts for their employees. Section 10 of the Act provides for the contents of such a contract, including that it should stipulate the remuneration paid as well as the intervals within which it is to be paid. Even where the worker is to be placed on probation, they should have a probationary contract, and for a period of not more than a year. Secondly, if the allegations levelled against the CRBC are true, the company would also be in violation of the provisions in respect of wages and salaries. Section 18 provides for when wages and salaries are due, while section 9 offers a guide on what should or should not be deducted by an employer. The Act also places an obligation on the employer to provide a written itemised pay statement on or before the employee is paid their wages or salary provided that they

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<sup>257</sup>Paul Wafula, 'Exclusive: Behind the SGR Walls' *The Sunday Standard* (8 July 2018). <https://www.standardmedia.co.ke/article/2001287119/exclusive-behind-the-sgr-walls> accessed 20 July 2018.

are not casual employees or engaged on peace-rate terms, tax-rate terms or assignments whose duration is less than 6 months.<sup>258</sup> The Act also contains provisions on summary dismissal and termination of contracts, including the requirement of giving notice before termination. If the CRBC terminates its workers contrary to the procedure outlined under part VI of the Act, the company would be in blatant contravention of the Act.

Part V of the Act is also important for the purposes of this study as it contains provisions on rights and duties during employment. Accordingly, the employer has the obligation of providing wholesome water for their employees at the place of employment,<sup>259</sup> proper food (where this is agreed upon in the contract of service),<sup>260</sup> medical attention,<sup>261</sup> annual, maternal and sick leave,<sup>262</sup> as well as housing (where applicable). Based on the allegations against the CRBC, there were no complaints in respect of these provisions. However, the workers cited incidences of racial discrimination, specifically, that the local SGR workers are not permitted to share eating and toilet facilities with their Chinese counterparts.

### **3.3.2.3. The Occupational Safety and Health Act**

This Act also came into force in 2007 and contains provisions which protect the welfare of workers and other persons present at the workplace,<sup>263</sup> as well as the attendant duties of occupiers.<sup>264</sup> The Act not only defines the general duties of employees and occupiers, but also contains provisions on health, machinery safety, chemical safety, welfare, and offences and

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<sup>258</sup> Section 20.

<sup>259</sup> Section 32.

<sup>260</sup> Section 33.

<sup>261</sup> Section 34.

<sup>262</sup> Sections 28, 29 and 30.

<sup>263</sup>The Occupational Safety and Health Act 2007 (Laws of Kenya ).

<sup>264</sup> *ibid.*, Section 6.

penalties.<sup>265</sup>Part VI of the Act provides for workplace standards, including cleanliness, ventilation, lighting, drainage, and sanitary conveniences. Employees are also mandated to provide protective clothing for their workers in instances where they come into contact with injurious substances.<sup>266</sup>

Based on the allegations by various workers at the SGR, some of their safety and welfare entitlements under the Act have been violated. For instance, one correspondent in the focus group discussion complained about the kind of protective gear he (and his colleagues) would be given to wear. Not only were they old and torn but whenever they would ask for new ones it would take a long time for the protective gear to be replaced by their superiors. According to the correspondent, the protective gear is important because of the nature of the job, which involves inspecting the underside of the train vehicles. The former SGR workers also complained about the unsanitary conditions some of them were forced to work in. For example, within the drivers' cabs, there were few or no toilets and some of the Chinese staff would relieve themselves along the train track lines. This information provided by the correspondent during the focus group discussion was also similar to a tip given to the KTN journalist, Paul Wafula, during his investigations.<sup>267</sup>

Such ills would be identified and escalated to the relevant stakeholders if the premises were inspected by labour officers or inspectors. In a press statement by COTU (K), the organisation condemned the action taken by the Chinese contractors at the SGR of denying access to labour

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<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*, various sections.

<sup>267</sup> Paul Wafula, 'Exclusive: Behind the SGR Walls' *The Sunday Standard* (8 July 2018).

<https://www.standardmedia.co.ke/article/2001287119/exclusive-behind-the-sgr-walls> accessed 20 July 2018.



officers and inspectors to inspect their premises.<sup>268</sup> In the press statement issued in July 2018, the Secretary General, Francis Atwoli, demanded that labour officers and inspectors be deployed in all the SGR stations in the country.<sup>269</sup>

#### **3.3.2.4. The Employment and Labour Relations Court Act**

Enacted in 2011, this Act created a court that hears and determines employment and labour relations disputes,<sup>270</sup> with its jurisdiction extending, among others, to disputes between employers and employees.<sup>271</sup> While there are remedies available for employees under the various labour laws, the Court established under this Act can also be accessed for the determination of disputes that may arise between the SGR workers and their employer. As already discussed in chapter 2, the court provides a judicial forum through which workers can enforce their rights against third parties, in this case, their employer.

#### **3.3.2.5. International Labour Law Instruments**

Apart from the rights of workers to be found in domestic legislation, Kenya is party to various International Labor Organisation (ILO) conventions, which accord workers the rights envisioned under these instruments.<sup>272</sup>

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<sup>268</sup>COTU (K), ‘Press Release on the Dehumanizing Working Conditions at the Standard Gauge Railway (SGR)’ (2017) <<https://cotu-kenya.org/presstatement-on-dehumanizin/>> accessed 12 September 2018.

<sup>269</sup> *ibid.*

<sup>270</sup> Employment and Labour Relations Court Act 2011 (Laws of Kenya ).

<sup>271</sup> *ibid.*

<sup>272</sup> By virtue of Article 2(5) and (6) of Kenya’s Constitution.

These include: the Right to Organise and Collective Bargaining Convention, the Abolition of Forced Labour Convention, the Equal Remuneration Convention, the Forced Labour Convention, and the Discrimination (Employment and Occupation) Convention.

### **3.4. Kenya's Engagement with the UN Framework for Regulating Business**

This study is also particularly interested in an analysis of the obligations of the State in protecting its people from the violation of their rights by other actors. This duty accrues to the State as a result of its important status in international law. As primary subjects of international law, States owe certain obligations to their citizens. Accordingly, with respect to activities of both private MNCs and SOMNCs, States should ensure strict adherence to human rights standards safeguarded at the municipal, regional as well as the global level. Internationally, there have been efforts to bring multinational corporations under regulation in relation to their activities and their impact on human rights in host countries. This study will focus on the UN's effort in this area, specifically the UN Guiding Principles. This framework is also relevant because Kenya is among the few countries that have committed to its implementation.

#### **3.4.1. The UN Guiding Principles**

##### **3.4.1.1. Brief History**

The UN's involvement in the activities of MNCs dates back to the 1970s. In 1972, Philippe de Seynes,<sup>273</sup> drafted a resolution that culminated in the creation of a Group of Eminent Persons to examine the impact of MNCs on international relations and matters of economic development.<sup>274</sup> At about the same time, big MNCs, such as Nestle, were facing criticism and scrutiny from countries across the world.<sup>275</sup> The Group held hearings and their report resulted in the establishment of the UN Commission on Transnational Corporations as well as the UN

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<sup>273</sup> The then UN Under-Secretary-General.

<sup>274</sup> Theodore H. Moran, 'The UN and Transnational Corporations: From Code of Conduct to Global Compact' (2009) 18 *Transnational Corporations* 2, 92. Also available at: [http://www.unctad.ch/en/docs/diaeija200910a4\\_en.pdf](http://www.unctad.ch/en/docs/diaeija200910a4_en.pdf) (accessed 10 May 2018).

<sup>275</sup> *ibid.*

Center for Transnational Corporations in New York.<sup>276</sup> The Centre's terms of reference included policy analysis, information-sharing and capacity-building.<sup>277</sup>

The Group spearheaded various initiatives, including the recommendation and compilation of a draft code of conduct that was intended to regulate the activities of MNCs.<sup>278</sup> It was during this time that the UN attempted negotiations towards creating a legally-binding framework to regulate the activities of MNCs. However, these efforts faced opposition from developed market economies, whose insistence on a voluntary code of principles caused a clash between believers in government-directed development and those in favour of the primacy of the market mechanism.<sup>279</sup>

For two decades, there were varied opinions about the viability of a treaty to govern and regulate the activities of MNCs, with active negotiations recently renewed. Prominent intellectuals like Oswaldo Sunkel warned about the influence and power which multinationals wielded,<sup>280</sup> while some expressed reservations about policies which would culminate in loss of foreign investment.<sup>281</sup> Others suggested that the best action for an international organisation like the UN would be to create an agency whose work would simply involve data collection and analysis in

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<sup>276</sup>Resolution 1913 (LVII) of the United Nations Economic and Social Council (ECOSOC).

Also available at: [https://digitallibrary.un.org/record/215243/files/E\\_RES\\_1913%28LVII%29-EN.pdf](https://digitallibrary.un.org/record/215243/files/E_RES_1913%28LVII%29-EN.pdf) (accessed 16 June 2018).

<sup>277</sup> *ibid.*, 3.

<sup>278</sup> Theodore H. Moran, 'The UN and Transnational Corporations: From Code of Conduct to Global Compact' (2009) 18 *Transnational Corporations* 2, 93.

<sup>279</sup> *ibid.*

<sup>280</sup> *ibid.*

<sup>281</sup> *ibid.*

respect of MNC activities.<sup>282</sup>The Center struggled over the code from 1975 to 1992, and finally failed to conclude the process.<sup>283</sup>

While the UN might have failed to conclude a code to regulate MNC activities, the Centre was lauded for accumulating data on foreign investment. This data helped relevant stakeholders to appreciate the impact of MNC activities during a period when foreign investment flows were largely misunderstood.<sup>284</sup>In 1993, the Centre ceased to function, and its activities were integrated into UNCTAD's agenda.<sup>285</sup>UNCTAD involved itself with the already-available research to analyse the impact of FDI and kept abreast with the policies developed by host governments.<sup>286</sup> UNCTAD also spearheaded policy analysis and regular capacity-building initiatives in developing countries throughout 1993 to 2008.<sup>287</sup> The "good" work done by UNCTAD was attributed to the leadership of Karl P. Sauvant, who headed the Investment Division until 2005 when he retired.<sup>288</sup>

The UN's attempts at regulating MNCs took a different approach, and instead of focusing on a binding treaty, moved towards non-binding norms. The Global Compact, an initiative of Kofi Annan, was one of these proposed frameworks of corporate human rights responsibility.<sup>289</sup>Efforts under the Compact have not been successful either. The Guiding Principles were later worked on by John Ruggie and endorsed by the UN in 2011.<sup>290</sup>According to

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<sup>282</sup>Sagafi-nejad T and Dunning, J H, *The UN and Transnational Corporations: From Code of Conduct to Global Compact*, (Bloomington, Indiana University Press, 2008), 74.

<sup>283</sup> Theodore H. Moran, 'The UN and Transnational Corporations: From Code of Conduct to Global Compact' (2009) 18 *Transnational Corporations* 2, 92.

<sup>284</sup>*Ibid.*

<sup>285</sup>*ibid.*, 97.

<sup>286</sup> *ibid.*

<sup>287</sup> *ibid.*

<sup>288</sup> *ibid.*, 98. Sauvant had joined the UN in 1973, prior to the establishment of the UNCTC.

<sup>289</sup> The Compact was first proposed at the World Economic Forum in Davos in 1999.

<sup>290</sup> Human Rights Council (17<sup>th</sup> Session) 'Human Rights and Transnational Corporations and Other Business Enterprises' (16 June 2011) UN Doc. A/HRC/RES/17/4.

Ruggie, the Guiding Principles were formulated with a different regulatory dynamic in mind – one which takes into account the fact that corporate conduct on the international platform is usually shaped by three governance systems, that is domestic, international, and public law.<sup>291</sup> In order to ensure alignment within the three frameworks, the Guiding Principles are hinged on three pillars comprising 31 principles which encompass a myriad of international human rights which are intended for implementation by individual governments.<sup>292</sup> Companies are also expected to align their activities with the Principles, while workers unions and civil society groups are using them for advocacy purposes.<sup>293</sup>

In June 2014, the Council encouraged States to come up with National Action Plans, otherwise referred to as NAPs, with a view to implementing the principles at the national level.<sup>294</sup> The Principles, which are also known as the ‘Ruggie framework,’ are informed by the existing duty on the State’s part to protect the rights of its nationals, as well as their enforcement against third parties, including companies.

#### **3.4.1.2. Understanding the 3-Pronged Approach**

The approach entails three important provisions:

1. The State’s duty to protect;
2. The responsibility of a corporate entity to respect human rights-related laws and standards in countries where it operates; and
3. The victims’ access to appropriate remedies, whether judicial or otherwise.

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<sup>291</sup> John Gerard Ruggie, ‘Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization’ (2015) Regulatory Policy Program Working Paper RPP-2015-04, 3.

Also available at: [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/RPP\\_2015\\_04\\_Ruggie.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/RPP_2015_04_Ruggie.pdf) (accessed 14 June 2018).

<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.*

<sup>294</sup> A/HRC/23/32, p.21.

The first pillar is hinged on the State's existing obligations under international law, of respecting, protecting as well as fulfilling its peoples' rights and freedoms.<sup>295</sup> The first guideline mandates States to take all the necessary steps to prevent and effectively address violations of human rights within their jurisdictions. This can be achieved through formulation of policies, enactment of relevant legislation and regulations as well as adjudication.<sup>296</sup> Guidelines 1 to 10 provide both foundational and operational principles to guide the State in respect of its obligations. These obligations not only extend to private MNCs but also business entities which the State may own, control, or transact businesses with.<sup>297</sup> Accordingly, the CRBC, which is a Chinese state-owned company, in conducting its activities of a commercial nature in Kenya, and with the involvement of the Kenyan government in procuring the company's services in respect of the SGR project, is no exception.

The second pillar requires action by corporate entities themselves to adhere to human rights standards in host countries and within the international human rights framework.<sup>298</sup> MNCs have the duty to avoid any contribution towards negative human rights impacts. Additionally, they are encouraged to prevent and facilitate the mitigation of impacts resulting from their operations, products and services, where they occur indirectly through their business relationships.<sup>299</sup> It is noteworthy that the responsibility accrues to all business entities irrespective of their, size, operational context, sector, structure or even ownership.<sup>300</sup> Guidelines 16 to 24 address the policies and processes which such entities should consider putting in place so as to enable the

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<sup>295</sup>United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) 1.

<[https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 2 July 2018.

<sup>296</sup> *ibid.*, 3.

<sup>297</sup> *ibid.*, Guidelines 4 and 6.

<sup>298</sup> Including those rights which are protected under the ILO Declaration on Fundamental Principles and Rights at Work.

<sup>299</sup> *ibid.*, Guideline 13.

<sup>300</sup> *ibid.*, Guideline 14.

effective discharge of their responsibility. These include drawing up policy commitments, conducting human rights-based impact assessments, due diligence and tracking, as well as remediation.<sup>301</sup>

The last pillar deals with access to remedies by those adversely affected by commercial-related activities of MNCs. The State is under an obligation to ensure that appropriate steps are taken to accord those affected such remedies through judicial, administrative and legislative means.<sup>302</sup> Appropriate grievance mechanisms include judicial ones that are state-based, non-judicial ones that are state-based, and those which are non-state based (such as internal mechanisms of companies).<sup>303</sup> Guideline 31 sets the parameters for gauging the effectiveness of these mechanisms.

According to this study, the Guiding Principles offer a good framework for safeguarding human rights against abuse emanating from commercial activities of MNCs. However, the implementation of these Principles is dependent on the willingness of States and more importantly, corporations, since they are not binding. The uptake of these Principles by States has also not been encouraging. By way of illustration, Kenya is one of the only 6 African countries that are currently developing NAPs.<sup>304</sup> Of the 21 States that have completed the process, none is African.

The following section will look at Kenya's engagement with the Guiding Principles and NAP Process.

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<sup>301</sup> *ibid.*

<sup>302</sup> *ibid.*, Guideline 25.

<sup>303</sup> *ibid.*

<sup>304</sup> OHCHR, 'State National Action Plans on Business and Human Rights' (*United Nations* ).

<<https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>> accessed 12 September 2018.

### 3.4.1.3. The Role of the KNCHR

The KNCHR is a constitutionally created body which is tasked with, among other duties, promoting human rights protection and observance by both public and private institutions. It is also the institution that is constitutionally required to not only monitor but also investigate and report on whether human rights are observed in Kenya.<sup>305</sup> Of particular concern for the purposes of this study is the Commission's work in respect of business activities, a mandate that flows from article 59(2) of the Constitution.

In 2015, during Kenya's Universal Periodic Review (UPR), Norway recommended the development of a NAP to effectively implement the Guiding Principles.<sup>306</sup> It is noteworthy that prior to this recommendation, Kenya had previously launched a policy on human rights in 2014.<sup>307</sup> On close examination of the document, it does not mention anything on business conduct and human rights. However, the importance of Article 59, and specifically the role of the KNCHR, is recognised. Pursuant to the UPR, the KNCHR commenced work on the NAP process in conjunction with the AG's Office and the Department of Justice (OAG & DOJ), and the Kenya Human Rights Commission (KHRC).

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<sup>305</sup> Article 59, Constitution of Kenya, 2010.

<sup>306</sup> Human Rights Council (21<sup>st</sup> Session), 'Draft Report of the Working Group on the Universal Periodic Review, ' (26 January 2015 ) UN Doc. A/HRC/WG.6/21/L.7 , Recommendation 142.27 [https://www.upr-info.org/sites/default/files/document/kenya/session\\_21\\_-\\_january\\_2015/a\\_hrc\\_wg.6\\_21\\_l.7.pdf](https://www.upr-info.org/sites/default/files/document/kenya/session_21_-_january_2015/a_hrc_wg.6_21_l.7.pdf) accessed 2 April 2018.

<sup>307</sup> Republic of Kenya, 'National Policy and Action Plan on Human Rights, Sessional Paper No. 3 of 2014' (2014) <[http://www.knchr.org/Portals/0/Bills/National\\_Human\\_Rights\\_Policy\\_and\\_Action\\_Plan.pdf](http://www.knchr.org/Portals/0/Bills/National_Human_Rights_Policy_and_Action_Plan.pdf)> accessed 12 September 2018.



### **3.4.1.2. Findings in Respect of Kenya’s NAP Process and UN Working Group Country Visit**

For this study, three correspondents were interviewed regarding Kenya’s engagement with the Guiding Principles. One of the correspondents is a human rights officer working at the KNCHR, while the other two are officers working with the OHCHR in Geneva.

The KNCHR officer explained the Commission’s engagement with the National Action Plan and the progress made in respect of its constitutional mandate under Article 59 of the Constitution. However, when asked about the rising number of complaints regarding human rights abuses by the CRBC, the officer confirmed that the KNCHR had neither investigated nor monitored the issue. According to the officer, the Commission would not investigate such allegations unless they received a complaint directly from the workers or their representatives. Such an utterance is curious, considering the Commission has the power to initiate investigations *proprio motu* under Article 59 (2) (f). This also goes to show that the State is lagging behind in its duty to protect Kenyans from the various human rights abuses perpetrated by MNCs. The officer also admitted that due to government’s involvement in the SGR project, bureaucracy and lack of transparency, it is difficult for the Commission to investigate such allegations against the CRBC.

It should be noted that the OAG & DOJ and the KNCHR constituted various technical working groups with a view to developing thematic papers that would support the NAP process. The Background Paper on Labour identified the challenge posed by Kenya’s move to attract foreign direct investment as detrimental to the State’s ability to fulfil its duty and to check the seemingly unfettered discretion of businesses.<sup>308</sup> While the paper’s perspective was in respect of Kenya’s

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<sup>308</sup>Steve Ouma Akoth, ‘Thematic Briefing Paper for the National Action Plan on Business and Human Rights in Kenya: Labour Briefing Paper’ (2017) 5 <<http://nap.knchr.org/Portals/0/Reports/Background Paper on Labor.pdf>> accessed 12 September 2018.

implementation of liberalization programmes by virtue of its membership to the East African Community (EAAC), the World Trade Organisation (WTO), its Bilateral Investment Treaties (BITs) and also as one of the beneficiaries of the African Growth and Opportunity Act (AGOA),<sup>309</sup> a new and developing challenge for Kenya is its growing relations with China, specially through commercial loans.

The interviews conducted with the other two correspondents revealed some of the weaknesses of implementing the Guiding Principles. Firstly, mapping of human rights abuses perpetrated by business entities seems to be selective. One of the correspondents interviewed for this study was part of the Working Group that conducted the Kenya Country Visit in July 2018. On close assessment of the statement released upon completion of the country visit, it came out clearly that the focus of the Working Group was certainly directed to the extractives and agricultural sector, and not on the increasing cases of human rights abuse in the infrastructure sector. Even though the final report will be released later in the year, the summary report gives findings of selected case studies, including the Solai Dam breach, a fairly recent occurrence, while not addressing the allegations against the CRBC, which was extensively covered by the Kenyan media. When asked about the choice of cases to monitor, the officer confirmed that they collaborated with national bodies such as the KNCHR for recommendations on which areas to visit. The KNCHR officer corroborated this information. When asked why the violation of workers' rights by the CRBC was not highlighted and recommended for the Working Group to look into, the KNCHR officer said that they had not directly received complaints in respect of such violations. He also cited the State's unwillingness to support such scrutiny, noting the obstacle posed by state bureaucracy. The member of the Working Group's country visit team

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<sup>309</sup> *ibid.*

declined to comment on whether the team experienced any difficulty in obtaining government assistance and access to records for purposes of establishing the veracity of allegations against the CRBC and other corporate entities.

On the brighter side, the report by the Working Group shows an appreciation of the issues surrounding labour rights in Kenya and some of them have been raised by this study in respect of the CRBC. For instance, in its findings, the Working Group established that the inspection of work premises by labour officers and inspectors has been impeded by lack of resources as well as unwillingness by employers to allow inspection without prior notice.<sup>310</sup> Another concern raised by the Working Group was the restriction by employers, especially in the agribusiness and public sectors, against employees joining trade unions.<sup>311</sup> However, during their visit, the Working Group did not discuss these issues with Kenya's Labour Ministry, but promised to do a follow-up in writing.<sup>312</sup>

Both officers working at the OHCHR in Geneva expressed their satisfaction with Kenya's commitment to the realisation of the Guiding Principles. One of the officers, working with the department directly dealing with the third pillar of the Principles, was of the opinion that the framework, if well implemented, could achieve more than what a potential treaty on corporate human rights responsibility would.<sup>313</sup> If anything, according to the officer, the principles reiterate existing obligations. The Principles, even though not binding, reaffirm the obligations of States to their people.

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<sup>310</sup>Office of the High Commissioner on Human Rights, 'Statement at the End of Visit to Kenya by the United Nations Working Group on Business and Human Rights' (2018).  
<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23356&LangID=E>> accessed 12 September 2018.

<sup>311</sup> *ibid.*

<sup>312</sup> *ibid.*

<sup>313</sup> The Zero Draft of the Treaty was published on 16<sup>th</sup> July 2018. The process is spearheaded by the UN Human Rights Council's Open-Ended Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIWG).

### **3.5. Conclusion**

This chapter has discussed Kenya's infrastructure goals and the place of the SGR project in achieving these goals as envisioned in the infrastructure pillar of the country's Vision 2030. The chapter has also analysed the findings of this study in respect of the existing national and international frameworks in respect of corporate human rights responsibility. In doing so, various gaps in the system have been highlighted. This will inform the recommendation given in the next chapter.

## **CHAPTER 4**

### **RECOMMENDATIONS**

#### **4.1. Introduction**

Throughout its length, this study has provided an analysis of the impact of Chinese foreign investment in Kenya's infrastructure sector on human rights. The study has discussed the concept of foreign investment and human rights abuses by MNCs, in general. To bring out the extent of human rights violations arising out of foreign investment in developing countries, the study looked at the plight of Kenyan workers at the SGR as a case study. It analysed the nature of human rights violations vis-à-vis the existing legal and institutional frameworks for addressing human rights issues. Throughout this study, various loopholes and regulatory inadequacies in the existing framework have been identified. This chapter provides recommendations at the domestic, regional as well as the international level.

#### **4.2. Recommendations for the International Framework**

##### **4.2.1. Negotiation and Adoption of a Treaty**

Based on the findings of this study, it is apparent that States are not fully discharging their obligations in protecting against human rights abuses by MNCs. This can be demonstrated by the kind of human rights abuses in host countries, and the complacency with which such abuses are treated. In light of this, this study recommends that the international community should rethink corporate human rights responsibility. The non-binding nature of codes and norms, for example, the Guiding Principles, may not ensure strict adherence to human rights standards by corporations. Where such voluntary standards, as well as state obligations, fail to safeguard

against human rights violations, a treaty is in the offing. The implication of concluding such a treaty would be to clothe corporations with direct international human rights obligations, a proposition which has been met by divergent views.<sup>314</sup> It is also uncertain how the proposed treaty will, in practice, apply to corporations (non-state actors) considering that States conclude treaties, and as direct bearers of duties under international law, are entrusted with enforcing international law as against natural and legal persons within their jurisdictions.<sup>315</sup> However, this problem may not arise with respect to SOEs, considering that their acts can directly be attributed to their home State, whether there is a treaty in force or not.

#### **4.2.2. International Cooperation in Implementing the Guiding Principles**

Negotiating a treaty for the purposes of regulating the activities of MNCs in respect of human rights is no mean feat. The process could take years, or never yield a treaty in the end. In the meantime, this study recommends that States should cooperate and renew their commitment to the implementation of the Ruggie framework. If anything, as already established in this study, the Principles simply reiterate State obligations already existing in international law.

States should cooperate by, firstly, developing NAPs. Kenya is in the process of finalising its own NAP process. However, these national action plans should not be the end goal. Further action by States is necessary to ensure that businesses operating within and outside their borders are aware of the framework and that they implement their duties as corporations.

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<sup>314</sup>Nicolás Carrillo-Santarelli, 'Corporate Human Rights Obligations: Controversial but Necessary' (*Business & Human Rights Resource Centre*, 2015) <<https://www.business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary>> accessed 12 September 2018.

<sup>315</sup>Julianne Hughes-Jennett and others, 'A Binding Treaty on Business and Human Rights? Still a Way To Go' (*Hogan Lovells*, 2017) <<https://www.hlregulation.com/2017/11/02/a-binding-treaty-on-business-and-human-rights-still-a-way-to-go/>> accessed 12 September 2018.

Another form of cooperation between States would be through benchmarking. Those States which have not developed their national action plans can learn from those which have started or concluded the process. It is also important for governments to cooperate with the UN Working Group during country visits, so as to better monitor, investigate and highlight human rights violations in respect of business activities of multinational corporations.

### **4.3. Recommendations for the Regional Framework**

#### **4.3.1. The AU's Business and Human Rights Policy**

Africa has over the years attracted foreign investment in growing numbers. Ranked the fastest-growing continent globally, Africa is attractive to foreign investors mainly because of its natural resources. This study recommends that African States, which are the most affected by human rights abuses by business activities of MNCs, should support the negotiation of the AU Policy and its subsequent adoption.<sup>316</sup> The Policy is modelled along the UN's Guiding Principles, and is in line with the AU's Agenda 2063. If finalised, the Policy will offer a regional framework for addressing human rights issues in respect of foreign investment in the continent. The challenge with this framework is that, just like the UN Guiding Principles, it will be voluntary. African States will have to cooperate with each other and display political will in implementing it.

### **4.4. Recommendations for the National Framework**

The recommendations under this section will comprise general as well as specific recommendations based on the case study of Kenya. These recommendations shall be

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<sup>316</sup>African Union, 'Validation Workshop of the African Union Policy on Business and Human Rights' (2017) <[https://au.int/sites/default/files/pressreleases/32248-pr-joint\\_au-eu\\_press\\_release\\_on\\_stakeholders\\_validation\\_workshop\\_au-hrb\\_march\\_21-22.pdf](https://au.int/sites/default/files/pressreleases/32248-pr-joint_au-eu_press_release_on_stakeholders_validation_workshop_au-hrb_march_21-22.pdf)> accessed 12 September 2018.

categorised under various sub-headings: state obligations, corporate responsibility, individual action, and the role of trade unions, the media and civil society.

#### **4.4.1. State Obligations**

Pursuant to the findings of this study, it is apparent that labour rights are being undermined at the expense of foreign investment in Kenya. In light of the analysis of human rights violations of workers at the SGR, this study makes the following recommendations:

Firstly, the Ministry of Labour and Social Protection should intervene in investigating the labour rights violations at the SGR. The Labour Department of the Ministry is tasked with the responsibility of implementing Kenya's labour laws. Through its tripartite mechanism of handling labour issues, the department should initiate consultations involving not only the CRBC as an employer, but also workers and relevant government representatives.

Secondly, labour officers and inspectors should be dispatched at the SGR premises and terminuses to ascertain the working conditions of workers. This is a legal requirement under Kenyan labour laws. The challenge with this is that the Ministry is understaffed as well as under-resourced.<sup>317</sup> The Ministry's budget should be increased to enable the employment of more staff for the effective discharge of its duty to enforce labour rights. Furthermore, the Ministry should train its officers so as to build their capacity to handle the demands of the labor market.

Thirdly, legal action should be taken against the CRBC for denying workers the right to join trade unions. This is a blatant contravention of Article 41 of the Constitution.

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<sup>317</sup>Kenya Human Rights Commission, "'Wilting in the Bloom: The Irony of Women Labour Rights in the Cut-Flower Sector in Kenya' (2012) x <[www.khrc.or.ke](http://www.khrc.or.ke)> accessed 12 September 2018.



Fourthly, and of crucial importance, is the role of the KNCHR and its mandate in respect of business and human rights. As a constitutionally-created body and a State organ, the Commission is charged with ensuring Kenya's adherence to treaty obligations as well as the tasks specifically bestowed upon it by dint of article 59 of the Constitution. The Commission seems to be making big strides in monitoring, investigating and addressing human rights violations in various sectors, but seems to be taking some steps backward by not taking action in respect of violations in certain sectors. The Commission should exercise its power of initiating investigating human rights abuses on its own motion more, instead of simply relying on complaints by victims. In light of the human rights abuses by the CRBC, it is clear that due to fear, victims may not be willing to lodge complaints with the Commission. This should not disadvantage such victims, while the Commission has power and resources to investigate such violations on its own motion.

Lastly, this study recommends that, after the finalisation of the NAP process, existing laws should be amended accordingly to create more solid commitments and obligations on the part of the State as well as multinational corporations conducting business in Kenya.

#### **4.4.2. Corporate Human Rights Responsibility**

This study recommends that corporations should be made aware of their obligation to respect human rights. These obligations not only exist in Kenyan laws, but also in the laws of the foreign investors' countries, as well as numerous international law instruments. Corporations should also commit to voluntary codes of corporate responsibility, including the Guiding Principles. In line with the principles in these codes, corporations should cooperate with host governments in upholding that human rights standards in the conduct of business.

It is noteworthy that the KNCHR human rights officer who was interviewed for this study lauded local companies and private MNCs such as Unilever and Tullow Oil for being receptive of voluntary codes such as the Guiding Principles. According to him, corporations are becoming more informed about human rights, and are willing to put mechanisms in place to ensure compliance with these standards. KNCHR supports them through consultations and engagement with private sector representative bodies such as the Kenya Association of Manufacturers. It would be beneficial if domestic SOEs and Kenyan-based SOMNCs became actively involved in such matters.

This study also recommends that the CRBC should consider coming up with human rights policies, which should require the development and circulation of periodic human rights progress reports. This has been successfully done by multinational corporations such as Unilever. It could be replicated in other developing countries within which CRBC operates. However, this can only work if the company joins forces with public human rights institutions such as, KNCHR, as well as civil society organisations, such as KHRC, to foster accountability.

The CRBC should also establish internal communication mechanisms that encourage dialogue between them and their employees. These mechanisms could address workers' rights issues and promote effective dialogue before they escalate.

#### **4.4.3. Individual Action**

This study recommends that Kenyan workers should be empowered to comprehend and appreciate the nature and scope of their rights. Based on the findings of this study, it is apparent that not all workers may be aware of their constitutional rights, for example, that they can join trade unions. Additionally, in keeping with the third limb of the Ruggie framework, the affected

workers should be accorded effective access to either judicial or non-judicial forums to enforce their rights. Kenya's Constitution also gives every Kenyan the right to institute court proceedings to claim their rights should they be interfered with.<sup>318</sup> The SGR workers should also exercise their rights by joining existing trade unions or forming their own within the parameters set out in the Kenyan labour laws and the Constitution.

#### **4.4.4. The Role of Trade Unions, the Media and the Civil Society**

When corporations abuse human rights, it is workers who suffer the most. The role of trade unions is therefore crucial in ensuring that rights of workers are safeguarded by demanding the adoption of good labour practices by corporations. Trade unions in Kenya should endeavor to educate workers on their constitutional right to join trade unions and participate in their lawful activities. Action by COTU-K to demand the deployment of labour officers and inspectors at the SGR is commendable and should be replicated by other trade unions.

The role of the media in highlighting human rights abuses by both public and private actors is also crucial. In a democratic society, the media is envisioned to be free and independent. The media should strive to investigate human rights abuses in an independent and transparent manner. As a source of reliable information, government institutions such as the KNCHR can rely on such information as valid and initiate investigations to deal with human rights abuses perpetrated by corporations. As whistleblowers, journalists who undertake such investigative work, as well as their correspondents, should be accorded extra protection under Kenyan law.

Last but not least, the civil society has a major role to play to ensure that governments and corporations are kept in check. The Kenya Human Rights Commission (KHRC), for instance,

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<sup>318</sup>Article 22, Constitution of Kenya, 2010.

has been active in highlighting human rights abuses by MNCs, such as those operating in the manufacturing and cut-flower sectors.<sup>319</sup> Civil society organisations in Kenya should join forces and lobby government and corporations to improve workers' rights.

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<sup>319</sup>Kenya Human Rights Commission, ““Wilting in the Bloom:” The Irony of Women Labour Rights in the Cut-Flower Sector in Kenya’ (2012) x <[www.khrc.or.ke](http://www.khrc.or.ke)> accessed 12 September 2018.

## CHAPTER 5

### CONCLUSION

#### 5.1. Overall Conclusion

Throughout its length, this study was guided by three research questions as follows:

1. How does foreign investment in the infrastructure sector impact on the human rights of people in Kenya?
2. Do MNCs bear human rights responsibility under international and domestic law?
3. Is the current legal and institutional framework in Kenya adequate for protecting Kenyans against human rights violations by MNCs?

In respect of the first question, this study has established that while foreign investment has positive impacts on the economic development of developing States, it could also have negative impacts. One of the negative impacts highlighted by this study is the abuse of human rights by MNCs. The mistreatment of SGR workers by the CRBC illustrated this point.

Regarding the second question, this study established that multinational corporations, though not the primary subjects of international law, have an obligation to respect laws of host countries, including adherence to the latter's human rights standards. Accordingly, the CRBC has a duty obligation to respect as well as uphold the rights of workers in Kenya, rights which are safeguarded in both domestic and international human rights instruments. This study also established that States retain the overall power to enforce human rights of their people against abuse by third parties. It also came out clearly that where SOMNCs are involved; the home

State's responsibility is heightened by the fact that the former's acts could be ascribed to the State under state responsibility.

The last question was addressed by reviewing the Bill of Rights, various labour laws in Kenya and international legal instruments which both China and Kenya have ratified. The study established that there exists a framework which protects human rights, in general, and that this framework can be used to protect these rights against abuse by MNCs. The study also looked at one of the United Nations framework for regulating business activities and the role of the KNHCR was analysed in this respect. The study concluded that while there is a solid framework in place, the law is not adequately implemented, and government institutions charged with ensuring that the law is implemented do not seem to effectively discharge this function.

The study had proceeded with two hypotheses, that is, firstly, that there is a difficulty in regulating the activities of MNCs in respect of human rights since they are not the primary actors on the international platform, and secondly, that the current legal and institutional frameworks in Kenya are adequate for protecting Kenyans against human rights abuses by MNCs. The findings of this study proved both hypotheses.

## **5.2. Chapter Conclusion**

### **5.2.1. Chapter 1: Introduction**

This chapter laid the foundation for the entire study. It discussed foreign investment within the context of globalisation. It also discussed the role of private and state-owned multinational corporations in the economic development of host States, as well as the effects of their commercial activities on human rights. The chapter outlined the problem which this study would address, that is, the impact of Chinese foreign investment on human rights in Kenya, specifically

in respect of the SGR Project. This chapter also provided a justification for the study, and outlined its main objectives. In order to carry out this study, three research questions would be answered, guided by two hypotheses. The study also adopted a theoretical framework comprising the dependency theory, the rights theory and the international relations theory. These were used in analysing the Chinese-Kenyan investment relations and their consequences of such relations on human rights in Kenya. The literature review undertaken identified gaps which study intended to fill in. The chapter also outlined the research methodology adopted for the study, as well as the limitations encountered while carrying out the research. Finally, the chapter provided a chapter breakdown for the entire study.

### **5.2.2. Chapter 2: Conceptualising Foreign Investment, Dependency and Human Rights in a Globalised World**

This chapter discussed the basic concepts that would guide the study, the nature of the SGR project and the activities of the CRBC. It also discussed the place of MNCs in the international legal order, and in a globalised world. In doing so, emphasis was placed on the fact that multinational corporations, whether private or state-owned, are not international law subjects. They are creatures of domestic law, yet their operations are of an international nature. The discussion, however, concluded that even though MNCs are not direct subjects of international law, they have certain human rights obligations to fulfil in the countries in which they operate. These rights are to be found in domestic and international instruments. The chapter also discussed the dependency, rights and international relations theories, linking them to foreign investment and human rights. The discussion also considered whether the Sino-African relationship is one of dependence or interdependence. The view taken is that what began as a relation of cooperation and interdependence grew into one of dependency.

### **5.2.3. Chapter 3: Analysing Kenya’s Business and Human Rights Framework: A Case Study of the Standard Gauge Railway Project**

This chapter discussed the SGR project within Kenya’s Vision 2030, highlighting the infrastructure goals of the country. The chapter proceeded with an analysis of the human rights abuses perpetuated by the CRBC against its workers. This analysis was done vis-à-vis with the Kenyan Bill of Rights, labour laws and some key international instruments which Kenya has ratified. The study further looked at the Guiding Principles, focusing on Kenya’s engagement with the NAP process. The role of the KNHCR was also analysed in this respect. This chapter established that there exists a framework effectively dealing with corporate human rights issues in Kenya, but it is not adequately implemented. This came out clearly in the case study. The institutions charged with safeguarding against workers’ rights abuses, and human rights abuses in general, do not seem to perform their functions adequately. The gaps identified in the case study were useful in recommending action points for various actors, globally, regionally and locally.

### **5.2.4. Chapter 4: Recommendations**

This chapter provided general as well as specific recommendations for the better regulation of activities of MNCs in respect of human rights. These recommendations highlighted the role to be played by both host and home States as primary international law subjects, individuals affected by human rights abuses by corporations, corporations themselves, trade unions, the media, and the civil society. The various actors were identified as key stakeholders whose separate roles, but joint effort, would promote better corporate human rights responsibility even where there exists no binding treaty to this effect.



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## **Appendix 1: NACOSTI Permit**

## **Appendix 2: Questions for Key Interviews and Focus Group Discussion**

### **A. Office of the Commissioner on Human Rights (OHCHR) Geneva**

1. For how long have you worked at the OHCHR?
2. What is your position at OHCHR?
3. What are your views on the existing international frameworks for corporate human rights responsibility?
4. In your view, are developing States well-equipped to enforce human rights of their people against corporate abuse?
5. In your opinion are the UN Guiding Principles on Business and Human Rights sufficient as a framework for fostering corporate human rights responsibility?
6. Please comment on the uptake of the Guiding Principles by States and corporations, both globally and regionally.
7. Please comment on your recent Kenya County Visit in relation to the NAP process.
8. What are your views on the viability of an international legally-binding treaty on multinational corporations and human rights?

### **B. Lecturers (Public International Law, Tax Law, Investment Law, Procurement Law, Trade Law)**

1. How would you categorise the Chinese financial input in respect of the SGR project?
2. How would you define foreign investment?
3. How would you define a multinational corporation (both private and state-owned)?
4. Would you categorise the Sino-African relationship as one of dependence or interdependence?

### **C. Human Rights Officer- KNCHR**

1. Describe your role at the KNCHR?
2. Please explain the KNCHR's mandate with respect to business. In practice, how does the KNCHR exercise its constitutional mandate?
3. Please describe Kenya's engagement with the UN Guiding Principles on Business and Human Rights and the NAP process.
4. What are your thoughts on the recent UN Working Group on Business and Human Rights' country visit and their statement at the end of the visit?
5. How has the KNCHR addressed the allegations of human rights abuses by the CRBC?
6. In your view, is it easier for the KNCHR to monitor human rights in private MNCs than in state-owned or state-controlled MNCs?
7. In your view is the current framework for corporate human rights responsibility adequate?
9. What are your thoughts on the viability of an international legally-binding treaty on multinational corporations and human rights?

### **D. Focus Group Discussion**

#### **I. CRBC Workers**

1. Who was your employer?
2. What was your job description?
3. What was the duration of your employment/indenture learnership/apprenticeship?
4. Did you have a contract or not?
5. What were your hours of work?
6. What was your interaction with other employees- both vertically and horizontally?



7. Were you a member of a trade union?
8. Were you briefed of or aware of your rights as an employee?
9. What was your salary/wage payment frequency?
10. Did your employer provide you with appropriate protective gear for the job?
11. Describe your overall experience as an SGR worker.

## **II. Citizens**

1. What do you think about the proliferation of Chinese-funded projects and citizens in Kenya?
2. What do you think about the SGR project from a common *mwananchi* perspective?

## **E. Officer - COTU-K**

1. What are your views on the allegations of workers' rights violations by the CRBC?
2. Has COTU-K taken any steps to address the issue?
3. What action would you recommend to remedy the situation for workers?

## **F. Office of the Attorney General, Kenya**

1. Are the contracts signed between the Kenyan government and the EXIM Bank of China, and the contracts signed by the Kenyan government and the CRBC accessible for perusal?

## **G. Kenya Railways Corporation**

1. Please explain the relationship between the CRBC and Kenya Railways in respect of the SGR project.
2. Between the CRBC and the Kenya Railways Corporation, who is the employer of the SGR workers?