

**HUMAN RIGHTS IN TOURISM:
EFFECTIVENESS OF THE LEGAL FRAMEWORK FOR TOURISM
IN MOZAMBIQUE UPON THE REALIZATION OF THE RIGHT TO
DEVELOPMENT OF LOCAL COMMUNITIES**

**Submitted in partial fulfilment of the requirements of the degree LLM
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By

EMERSON CASIMIRO UASSUZO LOPES

Student n° 10675699

**Prepared under the supervision of
Mrs Shivani Georgijevic
Faculty of Law & Management, University of Mauritius, Mauritius**

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DECLARATION

I, **Emerson Casimiro Uassuzo Lopes** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signature

Date.....

Supervisor: Mrs Shivani Georgijevic

Signature

Date.....

À Deus omnipresente, a minha eterna fé.

À todos que directa ou indirectamente contribuíram para
o culminar desta etapa

E, à todos aqueles que acreditam que a exploração dos recursos naturais de um país,
deve, primeiramente, ser orientada
a gerar riqueza para as suas populações.

'A maior desgraça de uma nação pobre é que em vez de produzir riqueza, produz ricos'

*'The greatest misfortune of a poor nation is that instead of producing wealth, it produces
rich people' (free translation)*

Mia Couto, 'pobres dos nossos ricos'

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LIST OF ABBREVIATIONS

| | |
|----------|--|
| CRM 2004 | Constitution of the Republic of Mozambique of 2004 |
| FAO | Food Agriculture Organization |
| ICJ | International Court of Justice |
| IFC | International Finance Corporation |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| MDG | Millennium Development Goals |
| NGOs | Non-Governmental Organizations |
| RTD | Right to Development |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations (Organization) |
| US\$ | United States Dollars |
| WTO | World Tourism Organization |

CHAPTER 1: INTRODUCTION

1.1 Background to the study

International tourism is one of the most dynamic growth sectors of the global economy. It employs 11% of the world's workforce (over 200 million people) and forms 11.5% of the global GDP.¹ Besides, tourism is nowadays three times bigger than world expenditures on defense.² It has been described by Louis Turner as 'the most promising, complex and under studied industry impinging on the third world'.³ It is often appointed as an important tool for achievement of millennium development goals⁴ and, ultimately, for the realization of the right to development ('RTD') of the local communities in developing countries, since it has contributed largely for development of infrastructure, including transport and communications, water supply, energy and health services.

Mozambique is growing as a promising tourism destination in Africa and in the world. Tourism has been considered the fastest growing sector of Mozambique's economy since the end of the civil war in 1992, attracting more foreign investment than any other sector. In 2005, the country had the largest growth rate in tourism in the world at 35 %.⁵ The annual average growth of the sector, in terms of income, tourism arrivals and investments is estimated at 13% per year⁶ and its tax revenues is calculated in US\$ 127 million a year (increasing every year).⁷ The Mozambican Government has identified

¹ B Slob & J Wilde, *Tourism and Sustainability in Brazil: the tourism value chain in Porto de Galinhas, Northeast Brazil* (2006) 7. Available at somo.nl/html/paginas/pdf/Tourism_in_Brazil_oct_2006_EN.pdf (accessed 12 April 2010)

² World Tourism Organization, *International Tourism: A Global Perspective* (1999) 12.

³ J Lea, *Tourism and Development in Third World* (1991) 1.

⁴ United Nations Economic and Social Council (Economic and Social Commission for Asia and the Pacific), *Regional Study on the Role of Tourism in Socio-Economic Development*. (2007) 74. Available at www.unescap.org/EDC/English/Commissions/E63/E63_14E.pdf (accessed 17 May 2010).

⁵ 'Tourism for Economic Development in Mozambique' *Media Global: The Voice of Global South*. Available at <http://www.mediaglobal.org/article/2010-02-04/tourism-for-economic-development-in-mozambique> (accessed 14 May 2010).

⁶ International Finance Corporation (IFC), *The Tourism Sector in Mozambique: A Value Chain Analysis, Volume I* (2006) 16. Available at [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/FIAS_Resources_Countryreports_MozambiqueVCA2006_Vol1/\\$FILE/Mozambique+-+Tourism+Value+Chain+Vol+1.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/FIAS_Resources_Countryreports_MozambiqueVCA2006_Vol1/$FILE/Mozambique+-+Tourism+Value+Chain+Vol+1.pdf) (accessed 12 April 2010).

⁷ See <http://www.snvworld.org> (accessed 12 October 2010).

tourism as having a key role in the country's growth and development strategy. The vision for the sector states that by 2020 the country aims to be the 'most vibrant, dynamic and exotic' destination in Africa, welcoming over 4 million visitors per year.⁸

Notwithstanding the exceptional economic contribution of tourism to the national economy, the country remains one of the poorest in the world, especially in terms of human development. Nearly 54.7 percent of the Mozambican population lives below the poverty line.⁹ Life expectancy is low, at 49 years, and infant mortality is high at 95.9 deaths per 1,000 live births.¹⁰ In 2009, Mozambique ranked at 172 out of 182 countries in terms of UN's Human Development Index.¹¹ Poverty is higher in the rural zones where 70% of the population of the country lives.¹² Despite the underline principle that tourism in Mozambique should increase net benefits and development strategies for the hosting communities,¹³ poverty is increasing amongst these communities in rural areas,¹⁴ where paradoxically most of the natural resources and tourism investments are located.

This study thus seeks to analyze the impact of tourism on the human rights of local communities in Mozambique. In particular, it seeks to determine the effectiveness of

⁸ S Jones & H Ibrahim, *The Contribution of Tourism in Mozambique – Present and Future* (2007) 3. Available at: www.mpd.gov.mz/gest/publicat.htm (accessed 18 March 2010).

⁹ Republic of Mozambique, *Report on Millennium Development Goals* (2010) 9. Available at <http://www.undp.org/mz/en/Publications/Other-Publications/Report-on-the-Millennium-Development-Goals-Mozambique-2010> (accessed 12 September 2010).

¹⁰ The World Bank, *World Development Indicators*, (2010). Available at: <http://search.worldbank.org/data?qterm=infant%20mortality%20in%20mozambique&language=EN&format=html> (Accessed 02 October 2010).

¹¹ See United Nations, *List of Countries by Human Development Index*. Available at <http://hdr.undp.org/en/statistics/> (accessed 21 September 2010).

¹² National Institute for Statistic (INE), *The 2008/2009 Household Survey (IAF, Inquérito aos Agregados Familiares)*. Accordingly, Rural Poverty in Mozambique was estimated on 55.3 % in 2002/2003 but it has increased to 56.9% in 2008/2009. Available at: http://www.ine.gov.mz/inqueritos_dir/iaf/inqueritos_dir/iaf/IOF2008_9.pdf (accessed 09 October 2010).

¹³ See Law 4/2004 of 17 July ('Tourism Law'), Article 3; and 2007 National Tourism Code of Conduct, its Preamble and Articles 4, 5 and 7.

¹⁴ B Cunguara & J Hanlon, *Poverty is Not Being Reduced in Mozambique* (2010) 4. Available at www.crisisstates.com/download/wp/wpSeries2/WP74.2.pdf (accessed 11 October 2010).

legislation and policies concerning tourism upon the realization of the RTD of such communities.

1.2 Statement of the research problem

Tourism that is primarily intended to result in increased net benefits development strategies in less developed countries for poor people is currently receiving enormous attention from the international and national actors and is considered an integral component of many sustainable tries. In fact, poverty reduction has become an important item on the tourism agenda.¹⁵ This study seeks to grapple with the following questions:

- a. Is there any connection between tourism, human rights and local communities?
- b. What are Mozambique's obligations, if any, to ensure the realization of the RTD of local communities?
- c. If any, is the Mozambican legal framework for tourism in synergy with the core elements of the RTD?
- d. What need to be done in order to enhance local communities' benefit from the gains derived from tourism investments in the country?

1.3 Focus and objectives of the study

Firstly, this dissertation proposes to explore the nexus between tourism, poverty alleviation and human rights of local communities, especially their RTD. Secondly, it seeks to inquire the international obligations of Mozambique, if any, to ensure the RTD of its population. In this sense, the study explores the synergies and conflicts between the Mozambican legal framework for tourism and the core elements of the human RTD. Ultimately, the study is aimed analyzing the effectiveness of legislation and policies concerning tourism, in a way that it scrutinizes both the substantive and factual strength

¹⁵ C Hall, *Pro-poor Tourism: Who Benefits? Perspectives on Tourism and Poverty Reduction* (2007) 1.

of the legal framework for tourism vis-à-vis the State international obligations concerning the RTD.

1.4 Significance of the study

This study is particularly significant as it seeks to explore, through a socio-legal analysis, the role of national legislation in incorporating human rights issues into tourism agenda. It tackles together the areas of tourism and human rights which have been subject to considerable research, but often in parallel rather than tackling these areas together. It will particularly address the issue of realization of the human RTD of the communities living within or adjacent to areas where the natural resources and tourism investments are located.

1.5 Literature review

There are few studies addressing the interconnections between human rights and tourism. As pointed out above, for too long the studies on tourism and human rights have been conducted in parallel, rather than tackling these areas together. In spite of this, it is not easy to find literature that addresses the precise issues raised by this dissertation.

The book edited by J Saarinen et al¹⁶ on *Sustainable Tourism in Southern Africa: Local Communities and Natural Resource on Transition* is of special relevance to this work in that it provides an analysis on the framework for integration of local communities in sustainable tourism initiatives in Southern Africa where Mozambique is located. The work, however, focuses largely on tourism from a social and economics perspective rather than from a human rights perspective.

Concerning the local communities' RTD, the Report prepared by the Grotius Center for International Legal Studies of the Leiden University on *The legal implementation on the*

¹⁶ J Saarinen et al (eds), *Sustainable Tourism in Southern Africa: Local Communities and Natural Resources in Transition* (2009).

*Right to Development*¹⁷ and the article wrote by Alice Diver and Jacinta Miller's¹⁸ on the *Global Tourism - A Hobbesian Covenant? The Rights to Development v. Indigenous Property Rights*, are important sources for the purposes of this study. While the Report provides a comprehensive analyzes on the legal status of the RTD in contemporary international Law and provides a concise discussion on the political debates concerning the effective implementation of the right, the article, however, provides an analysis on the framework within which indigenous socio-economic and cultural rights must be preserved in the context of development.

All these works do not, however, address the role of national legislation in incorporating human rights issues into tourism agenda and particularly the issue of realization of the human RTD of local communities living within or adjacent to areas where natural resources and tourism investments are located – which is the particular focus of this study. In addition, no one of the aforementioned literature has explored the synergies and conflicts between the national legal frameworks for tourism and the states' international obligations to realize human rights.

1.6 Methodology

The methodology on this dissertation will in essence consist of desktop based research. Primary sources such as civil society reports will play an important role. Secondary sources, such as documents, journals, books, unpublished works and similar material sources will also be used. The study adopts a socio-legal analysis and displays both analytical and critical research approaches. Moreover, this paper is aimed to combine as much as possible amount of theoretical and factual information. As the subject under consideration is of particular pertinence to the current African context, this study is not of academic interest only.

¹⁷ Grotius Center for International Legal Studies, Leiden University, *The legal Implementation of the Right to Development* (2009).

¹⁸ A Liver & J Miller, *Global Tourism - A Hobbesian Covenant? The Right to Development V. Indigenous Property Rights* (2006). Turk-Kazakh International Tourism Conference. Abstract Available at http://ertr.tamu.edu/index.php?option=com_content&view=article&id=979:global-tourism-a-hobbesian-covenant-the-right-to-development-v-indigenous-property-rights&catid=132:turk-kazakh-international-tourism-conference-&Itemid=64 (accessed 13 April 2010) Full article obtained through request to the authors.

1.7 Scope and limitations of the study

Despite the fact that there might be a number of factors impairing the local communities' enjoyment of the benefits derived from tourism industry in Africa (and in Mozambique in particular), this study focuses specially on the effectiveness of the legal framework in ensuring such beneficiation and enjoyment by the local communities. This is in part for practical reasons, and in part, due to the rationality of the study. In fact, within the confines of desktop research, information on legislative measures are more accessible, than the information on non legislative measures such as adequate budgetary provisions, and social measures relating to public education and awareness-raising, for example.¹⁹

This study is limited by the exiguity of the materials dealing with the issue under analysis, specifically with the link between tourism, human rights and local communities as a whole.

Furthermore, it is limited by the scarcity of statistical data concerning tourism in Mozambique. Limited reliable statistical data and satellite accounts to form a base for planning and to measure the actual economic impacts of tourism on the national economy have been usually identified as some of the major concerns to analyze tourism's contribution towards Mozambique's development.²⁰ Last but not least, the critical information for this study, such as law, policies and government's programmes, is in Portuguese while the study is written in English.

1.8 Overview of the chapters

The study consists of five chapters with emphasis to the chapters two and four. Chapter two provides a theoretical framework for nexus between tourism, human rights and local communities, and chapter four, provides a close examination on the actual effectiveness

¹⁹ Centre for Human Rights: *The Impact of the Protocol on the Rights of Women in Africa on Violence against Women in Six Selected Southern African Countries: An Advocacy Tool*. (2009) 10. Available at www.chr.up.ac.za (accessed 29 July 2010).

²⁰ Republica de Moçambique, Ministerio do Turismo, *The Strategic Plan for the Development of Tourism in Mozambique (2004 – 2013)* (2004) 42.

of Mozambican legislation and policies concerning tourism upon the realization of the RTD of local communities, respectively.

Chapter one will provide the context in which the study is set. It highlights the basis and structure of the study.

Chapter two endeavors to outline some of the basic concepts central to the study, namely: tourism; human rights; and local communities. In the main, the chapter attempts a problematization of the tourism-human rights nexus and the role of tourism on poverty alleviation in Africa.

Chapter three outlines the approaches to tourism in Mozambique and the state's obligations to ensure that the citizens realize their RTD through exploitation of their natural resources.

Chapter four tackles the issue of the effectiveness of Mozambican legislation and policies concerning tourism and its conformity with the state's international obligations to ensure the human RTD.

Ultimately, we conclude the study providing the main findings of the study and our recommendations.

CHAPTER 2: CONCEPTUAL FRAMEWORK AND BASIC CONCEPTS

2.1 Introduction

The previous chapter enunciated the background to this study, set forth the research questions and highlighted the significance of this study which goes beyond the academic field. It also stretched out the chapter's arrangement. This chapter, however, grapples with terminologies and concepts that should be enlightened before we engage in a more deep analysis. Accordingly, this chapter will provide the definition and contextualization of the key concepts, such as human rights, tourism and local communities. In the main, the chapter attempts an articulation of the tourism - human rights interface and ultimately, it set forth the main implications of the tourism activity upon the human rights of the local communities in destination countries.

2.2 Conceptual foundations

2.2.1 Human rights

Human Rights are commonly understood as the inalienable fundamental rights to which a person is entitled simply because he or she is a human being.²¹ The term “human rights” is used to refer to a wide spectrum of rights essential for a human life with dignity.

Human rights have their premises in the twin concepts of dignity and equality²² and they are based on the conviction that every human being is entitled to enjoy her/his rights without discrimination.²³ And as result, human rights are based in three basic principles, namely:

- a. they are inalienable, because the state of being human itself, cannot be renounced or lost;²⁴

²¹M Sepulveda et al, *Human Rights Reference Handbook* (2004) 6.

²²A Liver & J Miller (n 18 above) 1.

²³ M Sepulveda et al, (n 21 above) 6.

²⁴ J Donnelly, *International Human Rights: Dilemmas in World Politics* (1993) 19.

- b. they are inherent to all human being as a result of their condition of human beings; and finally
- c. they are equally applicable to all.

The main duties emerging from human rights rely not on the individuals, but on states, its authorities or agents.²⁵ In other words, states are the primary responsible for ensuring that everyone enjoy their human rights. Traditionally, human rights were understood as a freedom from state interference, except where such interferences can be clearly justified in law.²⁶ And as such, it was conceived that states had only a negative obligation to refrain itself from interfering in citizen's right to enjoy a life with dignity. However, developments on the doctrine of state Responsibility under international human rights influenced to a great extent the traditional idea of human rights as a freedom from state interference. It was acknowledged that human rights principles impose not only negative obligations, but equally positive obligation for a state that undertakes to adhere to a human rights regime. In fact, all human rights entail a combination of negative and positive duties. That said, human rights generate at least four level of duties for the states, namely to respect, protect, promote and fulfill - and these obligations universally apply to all rights.²⁷

Despite the fact that the states are the main duty bearer *vis-à-vis* human rights, it is recognized that the states are also under the duty to protect their citizens from the negative actions performed by the private sphere actors which may collide with the citizens' rights.

The African Commission on Human and Peoples' Rights stated that it is the governments' obligation to protect their citizens from damaging acts that may be perpetrated by private parties.²⁸ In the same line the Inter-American Commission held, in the case *Velasquez Rodriguez v Honduras*,²⁹ that when a state allows private persons or

²⁵ M Sepulveda et al, (n 21 above) 6.

²⁶ A Liver & J Miller (n 18 above) 1.

²⁷ *Social and Economic Rights Action Centre (SERAC) v Nigeria*. (2001) AHRLR 60 (AHRLR 2001), Paragraph 44.

²⁸ *SERAC v Nigeria* (n 27 above), Paragraph 57.

²⁹ IACRH, *Velasquez Rodriguez* Case, Judgment of 19 July 1988, Séries C, n 4.

group to act freely and with impunity to the detriment of the human rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens.

One of the most important classifications of human rights is the one that distinguishes between civil and political rights and economic, social and cultural rights. Accordingly, civil and political rights are considered those expressed in a very clear and precise language (e.g. the rights to life, freedom or political participation) imposing merely negative obligations on the states which do not require resources for their implementation, and which therefore can be applied immediately. Conversely, economic, social and cultural rights are considered those which have been expressed in vague terms (e.g. the right to housing, clothing or the right to education) and, imposing only positive obligations on the states, restricted to the existence and availability of resources and consequently involving a progressive realization. Despite such classification it is, however, undeniable that states' obligations to respect, protect, promote and fulfill human rights, universally apply to all sort of rights.

2.2.2 Tourism

Tourism is a field study of different subjects such as geography, sociology, anthropology, history, psychology, economics, etc., and its meaning differs accordingly. It can be described as a multidimensional activity.

There are different definitions for tourism but the most relevant for the purposes of this study is the one presented by the United Nations World Tourism Organization (UNWTO), which defines tourism as the activity of persons traveling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business, and other purposes.³⁰ Erik Cohen³¹ complements brilliantly the definition, describing a tourist as a voluntary, temporary traveler, traveling in the expectation of pleasure from the novelty and change experienced on a relatively long and non-recurrent round-trip.

³⁰ World Tourism Organization (n 2 above) 5.

³¹ Erik Cohen cited by J Lea (n 3 above) 4.

Tourism is no longer an activity reserved for only the privileged few but it is now engaged by millions of people around the world. It was a combination of desire, mobility, accessibility, and affordability that made mass travel possible.³² International tourism receipts reached US\$ 852 billion in 2009³³ and it is beyond doubts at the top of the most dynamic growth sectors of the global economy. Tourism is nowadays extended to a wide range of economic activities comprising not only travel and accommodation but a large spectrum of services and including, but not limited to marketing, publicity, shopping, entertainment, insurance, etc.

2.2.3 Local communities

Local communities are commonly understood as a group of people living in common location and organized based on common values. Local communities often have a strong dependent relationship with the natural resources located within their living area. As result, they usually establish norms and practices that in some way contribute to the conservation of those resources.

It is based on their norms, practices and customary traditions that the local communities contribute to the preservation of the environment. In fact the environment assumes a crucial importance for the local communities. On one hand it represents an important source of living for them and on the other hand it is an important source of their spiritual and religious creeds.

One of the difficulties encountered by those involved in tourism issues in Mozambique is the definition of the concept of local communities. For most purposes the preferred definition is the one set forth by the Mozambican Land Law which defines the local communities as,

A grouping of families and individuals living in a territorial area equal or inferior to a locality, with the aim of safeguarding common interests through the protection of

³²World Tourism Organization (n 2 above) 12.

³³ See <http://www.hospitalitynet.org/news/4046422.search?query=international%20tourism%20receipts%202009> (accessed 02 October 2010).

residential and agricultural areas (be they in use or fallow), forests, places of cultural importance, grazing lands, water resources and expansion areas³⁴

The Mozambican Government through the Inter-Ministerial Committee for the Revision of the Land Law noted that a local community,

- a. is that which really operates as a community in respect of land and natural resource use;
- b. has its own customary institutions and rules which regulate access to and use of land;
- c. it also notes that the institution responsible for managing resources and its representatives are those which the community recognizes as an authority and which exist and function.

For the purposes of this study local communities should be understood as the people or groups of people living within or adjacent to areas where the natural resources with potential for tourism and the tourism investments and enterprises, are located.

2.4 Exploring the tourism - human rights nexus

2.4.1 Tourism and human rights: two faces of the same coin?

For too long the studies on tourism and human rights have been conducted in parallel rather than tackling these areas together. The interconnections that may exist between them have been widely neglected even in emerging scholarships over the issue.

However, it is extremely important to understand the links between tourism and human rights. A clear understanding of the practical connections between tourism and human rights may entitle those who have legitimate claims to demand their rights and may

³⁴ Law n^o 19/97 of 01 October ('Land Law'), Article 1(1).

ultimately assist states to respect, protect, promote and fulfill their human rights obligations.

The tourism- human rights nexus can be analyzed on three different perspectives: (a) tourism itself as a human right, (b) tourism as a tool for realization of human rights, and (c) tourism as leading to human rights violations.

In regard to the first (tourism as a human right) international human rights instruments such as the Universal Declaration on Human Rights (UDHR)³⁵ and International Covenant on Economic Social and Cultural Rights (ICESCR)³⁶ set forth that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Tourism is beyond doubts the paramount activity that gives meaning to the component of this human right.

However, it is the other two groups of the connections between tourism and human rights that are most relevant to this work - (2.4.1.1) tourism as a tool for realization of human rights, and (2.4.1.2) tourism as leading to human rights violations.

2.4.1.1 Tourism as a tool for realization of human rights

The UN WTO considers tourism as an important vehicle to achieve economic development, international understanding, peace, prosperity, universal respect, and observance of human rights and fundamental freedoms for all – crucial standards for a human existence with dignity.

Besides, tourism creates a unique environment for development and friendly relations among nations – which are some of the main goals sought by humanity when adopting the UDHR.³⁷

³⁵ Universal Declaration of Human Rights, adopted in New York by 10 December 1948 ('UDHR'), Article 24.

³⁶ International Covenant on Economic Social and Cultural Rights adopted in New York, 16 December 1966, entry into force 3 January 1976 ('ICESCR'), Article 7.

³⁷ UDHR, Preamble.

Tourism, therefore, provides a single opportunity for interaction amongst human beings from the most diverse background, regardless of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, etc. Hence, tourism is in good position to foresee the human right to equality and non discriminations, as provided by international human rights instruments.³⁸

Moreover, it contributes to the realization of the right to freedom of movement. Both the UDHR and the International Covenant on Civil and Political Rights ('ICCPR') recognize that everyone shall have the right to liberty of movement within the territory of a state and shall be free to leave any country including his own.³⁹ Liberty of movement is an indispensable condition for the free development of a person⁴⁰ and the states are under obligation to respect this right.

Rest and Leisure are essential for a human existence with dignity⁴¹ and tourism is beyond doubts the paramount activity for realization of this human right.

Finally and importantly, tourism plays a crucial role in poverty alleviation and development of local communities. It is often appointed as an important tool for achievement of millennium development goals⁴² and indeed for realization of the RTD of the local communities in developing countries, since it contributes largely to development of infrastructure, including transport and communications, water supply, energy and health services. It is also an important vector for the realization of the right to work, provided by ICESCR.⁴³ Indeed, 11% of the world's workforce (over 200 million people) is employed on tourism industry and it forms 11.5% of the global GDP.⁴⁴

³⁸ UDHR, Article 7. International Covenant on Civil and Political Rights, adopted in New York, 16 December 1966, entry into force 23 March 1976.

('ICCPR'), Article 26.

³⁹ ICCPR, Article 12. UDHR, Article 13.

⁴⁰ Human Rights Committee, General Comment, 27, paragraph 1.

⁴¹ UDHR, Article 24. ICESCR, Article 7(d).

⁴² United Nations Economic and Social Council (Economic and Social Commission for Asia and the Pacific) (n 4 above) 74 ss.

⁴³ ICESCR, Article 6.

⁴⁴ B Slob & J Wilde (n 1 above) 7.

2.4.1.2 Tourism as leading to human rights violations

The negative impacts of tourism on human rights are those that had been neglected throughout the years. However, nowadays they can no more be disregarded.

Babu P. George and Vinitha Varghese stated that,

Tourism often becomes the gratification of the “self” at the expense of the “other”: in that process, tourists find that other stakeholders like the community and the industry violates their human rights; residents at the destination areas find their human rights being violated by the visitors and the industry; and, employees find that both their employers and the tourists disregard their dignity.⁴⁵

Specific groups like women and children are said to be particularly affected by the negative impacts of tourism. Absence of legal protection and in worst scenarios the lack of labor rights in developing countries, are appointed as factors that permits discriminatory practices against women to occur in the tourism industry⁴⁶. In addition, sex tourism industry is experiencing a boom worldwide accompanied by a rise in child prostitution.⁴⁷ Tourism is certainly not the only cause of child sex tourism, but it is a channel that provides offenders with a way to gain access to children and as a result, the tourism industry is well-placed to play a vital role in protecting children.⁴⁸

Labor rights constitute an important aspect of the tourism-human rights interface. In many countries, child labor is commonplace in the tourism industry, particularly in the informal sector.⁴⁹ Lack of effective labor protection for seasonal workers, underpayment and discriminatory and unfair labor practices are also often listed amongst the human rights abuses within the tourism industry.

⁴⁵ B George & V Varghese, 'Human Rights in Tourism: Conceptualization and Stakeholders Perspective' (2007) 41, *Electronic Journal of Business Ethics and Organization Studies*, Vol. 12, No. 2

⁴⁶ S Hemingway, 'The Impact of Tourism on the Human Rights of Women in South East Asia', (2004) 276, *The International Journal of Human Rights*, 8: 3, 275 — 304. Available at: <http://dx.doi.org/10.1080/1364298042000255216> (accessed 10 March 2010).

⁴⁷ B Slob & J Wilde (n 1 above) 30.

⁴⁸ As above.

⁴⁹ B George & V Varghese (n 45 above) 43.

Property rights related to land are often listed amongst the human rights concerns of local communities living on areas where the natural resources for development of tourism are located. Forced evictions and property destructions are amongst the common issues. Local communities are particularly vulnerable since their lands and properties are usually not secured by legal titles but rather by customary rules often not recognized as valid titles. These realities contravene human rights instruments undermining basic conditions for a human existence with dignity. In fact, local communities' relations to the land are not merely a matter of possession but a spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁵⁰

2.4.2 Achieving Sustainability: the UN-WTO Global Code of Ethics for Tourism

The Global Code of Ethics for Tourism represents the major breakthrough occurred in recent times *vis-à-vis* the consideration of human rights issues within tourism industry. It is aimed at protecting local communities against human rights abuses that may arise from tourism industry. It is part of the recently conceived ideal of sustainable tourism.⁵¹ The code was drafted and adopted by the WTO General Assembly in 1999 and later adopted by the UN General Assembly in 2001.⁵²

⁵⁰ IACRH *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of 31 August 2001. Series C No. 79, Paragraph 149.

⁵¹ See United Nations World Tourism Organization (UN WTO). Available at: http://www.nric.net/tourism/what_is.htm (Accessed 25 September 2010). Accordingly, Sustainable tourism is an enterprise that achieves an effective balance among the environmental, economic and socio-cultural aspects of tourism development in order to guarantee long term benefits to receipt communities. In conformity, it should:

- (i) make optional use of environmental resources, maintaining essential ecological processes and helping to conserve natural heritage and biodiversity;
- (ii) respect socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance; and
- (iii) ensure viable, long-term economic operations, providing socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation.

⁵² UN General Assembly, Resolution n° A/RES/56/212 of 21 December (“Global Code of Ethics for Tourism”).

It comprises ten articles which highlight, amongst others, the major human rights concerns that should drive tourism industry in its relation with the local communities. Some specific articles should be highlighted. For instances, Articles 1(5) which prohibits tourists from committing criminal offenses and adopting conducts that may harm the local communities; Article 2 (3), which contains a provision on non discrimination and elimination of all forms of exploitation of human beings in any form, particularly sexual, especially when applied to children; Article 5, which sets forth that local populations should be associated with tourism activities and share equitably in the economic, social and cultural benefits they generate, and particularly in the creation of direct and indirect jobs resulting from them; and finally Article 10, which refers to a monitoring body (World Committee on Tourism Ethics) as the organ responsible to monitor the implementation of the principles therein established and ultimately to address any disputes that may arise from the application or interpretation of the code..

It should, however, be made clear that the Code is soft law in its legal status and as such it is not binding on states. It has been a target of criticism and disbelief concerning its effectiveness and appropriateness, but it is beyond doubt that this instrument is important given that it sets forth the premises for the effective implementation of human rights concerns within the tourism industry.

2.5 Conclusions

This chapter presented the definition of main concepts that underline the study. In the main, the chapter provided a theoretical framework for the tourism - human rights nexus and ultimately, it exposed the human rights implications of the tourism activity upon the human rights of the local communities in destination countries. Tourism is a human right and it also has both positive and negative impacts on the human rights of the local communities. Having presented the conceptual framework of this study, the next chapter will analyze what Mozambique's obligations are, if any, to ensure the RTD of local communities residing in the areas where the natural resources for development of tourism are located.

CHAPTER 3: MOZAMBIQUE'S OBLIGATIONS TO ENSURE THE RIGHT TO DEVELOPMENT OF LOCAL COMMUNITIES

3.1 Introduction

The previous chapter enunciated the human rights - tourism interface and defined the concepts of human rights, tourism and local communities. It also stretched out how these concepts relate among themselves. This chapter, however, deals specifically with the human RTD. This right is widely entrenched in human rights treaties and declarations and has received special attention in the recent years. This chapter will define what the RTD is, and subsequently, it will discuss Mozambique's obligations to ensure the realization of the RTD of its local communities.

3.2 The Right to development

3.2.1 Definition

The RTD was first enunciated by the African Charter on Human and Peoples' Rights ('African Charter' or the "Charter) in 1991, and afterward it was set forth by the 1986 United Nations General Assembly Declaration on the RTD – which is nowadays the most comprehensive international human rights instrument concerning the right.

The Declaration has defined the RTD as,

(...) an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁵³

⁵³ United Nations General Assembly Resolution n^o 41/128 of 4 December 1986 ('Declaration on the Right to Development'), Article 1.

Yet, the RTD remains to this day a controversial concept and the process aiming to reach consensus on its meaning and practical interpretation is highly politicized.⁵⁴

On one hand, developing countries allege that the international economic and political order constitutes an obstacle for them to realize their citizens' RTD; on the other hand, developed countries fear that the RTD could be used as a tool to achieve a "right to development assistance" or a "right to everything" since it implies that if a state is too weak to grant the enjoyment of human rights to its citizens, the international community would have to take steps to enable the state to do so.⁵⁵

Despite the ongoing debate, the RTD has been progressively accepted by the international community and reaffirmed in declarations and resolutions adopted by the leaders of many states at the United Nations level. The subsequent subchapter will discuss in detail the legal status of the RTD in contemporary international law.

3.2.2. Legal status in international law

The legal framework for the RTD is set forth by a Declaration. In principle, Declarations are not binding in character. They are part of the so called 'soft-law' – human rights instruments that are not directly enforceable in courts, having a mere persuasive force, and therefore not binding on states. Nevertheless, soft law instruments have an important role in international human rights law in that they provide evidence of states practice. In that sense Church notes that,

There is a growing body of consensus that such instruments embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of binding international norms, especially in the field of human rights law.⁵⁶

⁵⁴ L Piron, *The Right to Development: A Review of the Current State of the Debate for the Department for International Development* (2002) 5. Available at www.odi.org.uk/resources/download/1562.pdf (accessed 21 September 2010).

⁵⁵ Friedrich Ebert Stiftung, *The Right to Development – Were do we Stand? State of the Debate on the Right to Development* (2006) 3. Available at www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf (accessed 21 September 2010).

⁵⁶ Church at all, cited by R Kapindu, *From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa* (2009) 11.

As per the aforesaid, one may argue that development is not an enforceable human right since there is no legally binding international convention to rely on, when claiming its realization.

However, such an argument does not proceed given the fact that failure to observe both, civil and political, as well as economic, social and cultural rights constitutes an obstacle to development.⁵⁷ In fact, the RTD draws its legal foundations from legally binding human rights instruments,⁵⁸ for instances, ICCPR and the ICESCR and even from the UDHR 'which has been widely relied upon as an authoritative instrument'.⁵⁹

Implicit recognition of the RTD can be found in a number of Articles of the aforementioned international covenants (both the ICCPR and ICESCR). For an instance, their common Article 1, that provides that all peoples are entitled to the right to self determination by virtue of which they can freely 'pursue their economic, social and cultural development'.⁶⁰ In addition, Article 11 of the ICESCR contains important provisions embedded within the core elements of the human rights to development. Accordingly, the states parties to the Covenant should take all necessary measures in order to ensure that 'everyone enjoys the right to an adequate standard of living' and the states should provide for 'the continuous improvement of living conditions'.

3.2.3 Content of the right

The content of the RTD has been subject to different interpretations and approaches. In fact, the meaning of the term 'development' has changed substantially throughout the years.⁶¹ According to Prof Arjun Sengupta, who served as the Independent Expert for the Right to Development, the RTD focuses on an inclusive process of development, in which all human rights and fundamental freedoms can be fully realized together with the growth of resources including GDP, technology and institutions in a rights-based

⁵⁷ Declaration on the RTD, Article 6.

⁵⁸ Friedrich Ebert Stiftung (n 55 above) 11.

⁵⁹ R Kapindu (n 56 above) 10.

⁶⁰ ICCPR, ICESCR. Common Article 1 (1).

⁶¹ Grotius Center for International Legal Studies (n 17 above) 18.

approach.⁶² Further, Article 8 of the Declaration contains a number of obligations imposed on states, which have been considered as the core elements of the RTD. Accordingly, the States are required to undertake all necessary measures for the realization of the RTD by ensuring popular participation, formulation of appropriate economic and social reforms with a view to eradicating all social injustices, and the full realization of all human rights.

The RTD is therefore considered to include key elements such as popular participation in development, respect for all human rights, self determination and sovereignty over natural resources.⁶³

That said development implies social justice and citizens' participation in wealth sharing⁶⁴ in order to eliminate all sort of social injustice. In addition, it should be respectful for all civil, political, economic, social and cultural rights. Failure to respect rights constitutes an obstacle to development,⁶⁵ given that all human rights are indivisible and interdependent. And finally, the RTD primes for a 'comprehensive and multifaceted' understanding of development⁶⁶ in that it implies full realization of the right of peoples to self determination.⁶⁷ Peoples shall dispose freely of their natural resources,⁶⁸ and ultimately they shall be free to adopt the form of development that seems to be the most appropriate to their lifestyle.

3.2.4 Nature of obligations imposed

The RTD places individuals and group of individuals at the centre of development.⁶⁹ Hence, development should not be seen as a simple economic growth of states, but in

⁶² Third Report of the Independent Expert on the Right to Development, Prof Arjun Sengupta, 2 January 2001 UN Doc E/CN.4/2001/WG18/2 (2001) 6, cited by Grotius Center for International Legal Studies (n 17 above) 19.

⁶³ Report of the Working Group on the Right to Development on its third session, 11 April 2002, UN Doc, E/CN.4/2002/28/Rev1 sect VIII.A.

⁶⁴ Declaration on the RTD. Articles 2(3) and 8(1).

⁶⁵ Declaration on the RTD. Article 6.

⁶⁶ L Piron (n 54 above) 10.

⁶⁷ Declaration on the RTD. Articles 1 and 5.

⁶⁸ ICCPR, ICESCR. Common Art 1 (2).

⁶⁹ Declaration on the RTD, Article 1 (1). African Charter, Article 22.

reality, as a multifaceted process, with social, cultural, political and economic elements.⁷⁰ Indeed, the RTD assumes particular relevance at international level in that it moved the concept of development a beyond a simple economic perspective.

Accordingly, the primary responsibility for the realization of the rights relies on the states. It is the states' obligation, either individually or collectively, to ensure the realization of this right. On one hand, the states must enact legislative and other measures to ensure an environment in which both the civil and political rights and economic social and cultural ones of their citizens are realized.⁷¹ On the other hand, they should cooperate with the international community towards the formulation of appropriate development policies.⁷² This is the so-called dualist nature of the RTD – a right within the state and between states.⁷³ The states are, therefore, under the double obligation: to ensure internal good governance, and at the same time to cooperate in devise fair international economic policies and 'effective international cooperation'.

States obligations *vis-à-vis* human rights can be resumed in four basic obligations, namely: to respect, to promote, to protect and to fulfill human rights. For a people to enjoy their human rights, states have to perform these obligations.

The obligation to respect is essentially a 'negative' obligation requiring the state to refrain from acts which endanger people's rights, while the obligations to promote, protect and fulfill are 'positive' obligations. Promoting require a state to prevent violations of rights by third parties; fulfilling a right requires a state to take appropriate legislative and other measures (e.g. allocation of budgetary resources) to ensure that people enjoy their right and finally promoting a right means that a state must educate the public and raise awareness about the right.

There is a violation of a human right when an act of a state is not in conformity with what is required of it by its human rights obligations.⁷⁴ That said, the state must act in

⁷⁰ Declaration on the RTD. Article 2(1), 4(2), and 8(1). See L Piron (n 54 above) 10.

⁷¹ Friedrich Ebert Stiftung (n 55 above) 11.

⁷² Declaration on the RTD .Articles 3 and 4. See L Piron (n 54 above) 10.

⁷³ Friedrich Ebert Stiftung (n 55 above) 3.

⁷⁴ J Terracino, *Hard Law Connections between Corruption and Human Rights* (2007) 12.

conformity with what is prescribed by the international covenant. Accordingly, the success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic (country) level.⁷⁵

3.3 Mozambique's obligations to ensure the right to development of local communities

It is a general principle of international law, that states are not bound by treaties to which they are parties. Consequently, they are not under the duty to respect, protect, promote and fulfill human rights therein embedded. A parenthesis should be added to those human rights that form part of the international customary and have reached a status of *ius cogens*. Human rights norms that are part of customary international law, that also reach the level of *ius cogens*, come with the corresponding obligation to realize them as an obligation *erga omnes*.⁷⁶ This means that in the view of the importance of the rights involved, all states have a legal interest in ensuring that the basic rights of human beings are protected.⁷⁷

Historically, there are two main sources of international law: customary law and treaties. Customary law evolves over time, becoming universally accepted through continuous practice, whereas treaties take the form of documents signed by governments that agree to be bound by their contents.⁷⁸ The RTD is entrenched in both customary international law and international treaties to which Mozambique is a state party. Below we discuss in

⁷⁵ C Heyns & F Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', *The Johns Hopkins University Press, Human Rights Quarterly*, Vol. 23, No. 3 (2001), pp. 483-535 at 483. Available at <http://www.jstor.org/stable/4489346> (accessed 30 July 2010).

⁷⁶ L Laplante, 'Outlawing Amnesty: the Return of Criminal Justice in Transitional Justice Schemes' *Virginia Journal of International Law*, 942. Available at www.law.wisc.edu/gls/documents/lisa_laplante_paper.pdf. (accessed 19 May 2010).

⁷⁷ See Unpublished: I T Gaparay 'Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunals' Unpublished Master's Thesis. Centre for Human Rights, University of Pretoria (2000) 25, referring C Van Den Wyngaert "War Crimes, Genocide and Crimes Against Humanity: Are States Taking National Prosecutions Seriously?" in M C Bassiouni (ed) (1996) *International Criminal Law III* (Typescript) 499-508.

⁷⁸ How Can Communities 'Use Soft' Law and Non Binding International Agreements? Available at http://www.idrc.ca/en/ev-30130-201-1-DO_TOPIC.html (accessed 23 September 2010).

detail what Mozambique's obligations are, to ensure the development of its local communities, in accordance to its obligations derived from (3.4.1) international human rights law, (3.4.2) African regional human rights law and (3.4.3) national law.

3.3.1 International human rights law

The RTD is explicitly entrenched in international human rights law. Besides, states practices, based on international customary law have proven an increasing acceptance of the right by the international community. Below we present a concise discussion on Mozambique's obligation's to ensure the RTD of its populations in the light of the main sources of international law: (3.3.1.1) international treaties and (3.3.1.2) international customary law.

3.3.1.1 International treaties law

The principal international human rights instrument concerning the RTD is the UN 1986 General Assembly Declaration. As such, a declaration is not binding in its nature and therefore, is neither directly enforceable in courts nor legally binding on states.

However, as previously enunciated, the RTD draws its legal foundations from legally binding human rights instruments⁷⁹ such as the ICCPR and the ICESCR. The content of the RTD requires that states create an enabling environment in which both the civil and political rights and the economic, social and cultural ones are realized.⁸⁰ Therefore, failure to provide human rights such as the right to education; the right to health; the right to self determination; the right to property; the right to housing; the right to food; the right to liberty and security of the person; etc. constitutes an obstacle for development.

That said, states are then required, amongst other things, to ensure internal good governance, citizens' participation, in order to guarantee that the drafting process of policies concerning peoples life's are conducted in a participatory manner, respecting peoples' self determination, international cooperation, social justice and ultimately the human rights.

⁷⁹Friedrich Ebert Stiftung (n 55above) 11.

⁸⁰ Declaration on the RTD. Article 6.

Mozambique is a state party to a number of international human rights instruments that provides for the aforementioned human rights encompassed within the RTD. As such, the state is under the international obligation to ensure the exercise of the RTD within its territory. It has ratified the ICCPR in 1993 but not yet the ICESCR, even though its Constitution does include provisions for the protection of economic social and cultural rights.

3.3.1.2 Customary international law

To succeed in a claim that a practice constitutes International Customary Law, two elements must be shown, namely, (a) *opinio iuris*, i.e. the conviction by states that they are bounded to adopt such conduct, and (b) states practice.

The number of states recognizing their responsibility to ensure the RTD under international law is growing considerably. For instances, the United Nations has consistently documented the importance of this right either by adoption of General Assembly Resolutions or by the establishment of working groups on the RTD. The appointment of an Independent Expert on the Right to Development (1998 – 2004), Prof Arjun Sengupta is paramount in this regard. Further, the Vienna Declaration on Platform of Action⁸¹ reaffirmed the RTD as a universal and inalienable right and an integral part of the fundamental human rights. Equally and recently, the Durban Program of Action⁸² reaffirmed the RTD as playing a key role on the prevention and elimination of racism and xenophobia. All these facts reflect that *opinion iuris*, concerning the existence of the RTD, is well established under international law.

⁸¹ The Vienna Declaration on Platform of Action. Adopted by The World Conference on Human Rights, on 25 June 1993, See paragraph 10.

⁸² Durban Program of Action. .Adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, on 8 September 2001, See paragraph 78, witch states that the nations in the world ‘affirm the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance’ (emphasis added). Available at : <http://www.un-documents.net/durban-d.htm> (accessed 12 October 2010).

States practice is also consistent in revealing acceptance of the RTD as an international obligation of states. States practice does not require similar acts by *all* states in the world but rather a widespread repetition of similar acts by a *significant number* of states. Examples of states practice vis-à-vis the recognition of their international obligations concerning the RTD can be inferred from the Monterrey Consensus, recently adopted at the UN Conference on Financing for Development, held on March 2002, in Mexico. This document is aimed at financing the Millennium Objectives and it includes several elements which are considered important for the realization of the RTD.⁸³

Importantly, the adoption of the UN Millennium Declaration itself and hence the Millennium Development Goals (MDG)⁸⁴ therein established, is a strong signal of extensive acceptance of development as a human right that should be realized by humanity. Paragraph 11 of the MDG, reads,

We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.

Mozambican Government committed itself to achieve the MDG. Recently, in June 2010, Mozambique has submitted its most recent Report concerning the stage of progress

⁸³ Grotius Center for International Legal Studies (n 17 above) 12. . See UN International Conference on Financing Development, Outcome of the International Conference on Financing for Development (Monterrey Consensus), (2002) Paragraph 6. UN Doc. A/CONF/198/3. Consensus reinforces the primary responsibility of States to create an enabling international economic environment.

⁸⁴ The Millennium Declaration was adopted by the UN general Assembly on 8 September 2000, during the three day Millennium Summit of World Leaders held in NY, EUA. The MDG constitute a framework for monitoring human development. There are eight main objectives, most of which should be met in the course of a 25-year period (1990-2015), namely:

- i. Eradicate extreme poverty and hunger
- ii. Achieve universal primary education
- iii. Promote gender equality and empower women
- iv. Reduce child mortality
- v. Improve maternal health
- vi. Combat HIV/AIDS, malaria and other diseases
- vii. Ensure environmental sustainability
- viii. Develop a Global Partnership for Development
- ix. The countries agreed on a list of 21 targets

towards achievement of the goals therein established.⁸⁵ Therefore, on the basis of international customary law, Mozambican state have the duty to ensure the development of the local communities, by enacting appropriate legislative or other measures in order to respect, promote, protect and fulfill the RTD.

3.3.2 African regional human rights law

The African Charter is the most important instrument setting up the human rights obligations of African states at the regional level. The Charter is, therefore, the paramount human rights instrument governing Mozambique's obligation to ensure the RTD of its population. In reality, the African Charter was the first legally binding international instrument on human rights, to include the RTD as a human right that states have the obligation to realize.

The preamble of the Charter reaffirms the commitment of the African states to achieve a better life for the peoples of Africa and therefore it is essential to pay special attention to the RTD.⁸⁶ It also reinforces, in connection to the RTD, that civil and political rights cannot be dissociated from economic, social and cultural right in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁸⁷

Article 22 of the Charter, reads:

1. All peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

⁸⁵ Republic of Mozambique, *Report on Millennium Development Goals* (n 9 above).

⁸⁶ African Charter. See Preamble.

⁸⁷ African Charter. See Preamble.

In other words, states parties to the African Charter are under the duty to implement national policies which give effect to the RTD.

Mozambique is one of such states, having ratified the African Charter in 1989. The Mozambican legal system is based on the Romano-Germanic tradition of the civil law, whereby once international treaties or other international instruments are ratified and officially published, they automatically enter into force in national law.⁸⁸ Additionally, its Constitution states that principles in respect of fundamental rights shall be interpreted and integrated in harmony with the UDHR and with the African Charter.⁸⁹

3.3.1 Mozambican law: the 2004 Constitution

The Constitution of Republic of Mozambique ('CRM 2004' or 'Constitution') is the supreme law of the land and contains important provisions concerning the RTD. Despite the fact that the word "right to development" is not expressly set forth in the Constitution, there are several norms that incorporate the core components of the right. For an instance, Article 11 of the Constitution, concerning the fundamental objectives of the Mozambican state, reads,

The fundamental objectives of the Republic of Mozambique shall be, amongst others:

(...)

- c) the building of a society of social justice and the achievement of material and spiritual well being and quality of life for its citizens;
- d) the promotion of balanced economic, social and regional development in the country;
- e) the defence and promotion of human rights and of the equality of citizens before the law;

(...)

While Article 96 (1) reads,

⁸⁸ CRM 2004, Article 18.

⁸⁹ CRM 2004, Article 43.

The State economic policy shall be directed towards laying the fundamental bases for development, improving the living conditions of the people (...) through the participation of citizens and the efficient use of human and material resources.

It is beyond doubt that these fundamental objectives incorporate the core principles underlining the RTD. It can, therefore, be said that Mozambican Constitution is in compliance with the established under the African Charter and no claw-back clauses are impairing the effectiveness of such norms concerning the RTD.

However, one of the critical issues is the incorporation of such constitutional norms within ordinary law. In general, Constitutional provisions such as the Bill of Rights and the ratification of international treaties and covenants are ineffective if they are not supplemented with national legislation and regulation relating to human rights.

As pointed out above, the Constitution sets forth that principles in respect of fundamental rights shall be interpreted and integrated in harmony with the UDHR and with the African Charter.⁹⁰ Yet, there have been some ongoing debates as to the interpretation of Article 17(2) of the Constitution which states that,

The Republic of Mozambique shall accept, observe and apply the principles of the Charter of the United Nations and of the Charter of the Organisation of African Unity.

This provision refers to application of the principles, but not the substantive provisions of the UDHR and the African Charter.

Mozambican courts have not yet seriously been put to the test in the application and interpretation of international instruments to which Mozambique is a party. Hence, many of the principles of international law still need to be substantively developed in the Mozambican context.⁹¹

⁹⁰ CRM 2004, Article 43.

⁹¹The Open Society Initiative for Southern Africa (OSISA), *Mozambique: Justice Sector and the Rule of Law* (2006)

3.4 Conclusions

The RTD remains to this day a controversial concept and the process aiming to reach consensus on its meaning and practical interpretation is highly dominated by politicization and ongoing debate. However, Conventional human rights law, the soft law of the United Nations and customary international law leave no doubt: the RTD is an important human right that must be realized by states. Support for this principle is overwhelming and has been repeated by nearly all states in various UN and regional conventions and resolutions and recently with the adoption of the MDG. This means that in the view of the importance of the rights involved, all states have a legal interest in ensuring that the basic rights of human beings are protected. Ultimately, Mozambique being a state party to African Charter, is not only entitled, but is obliged as well to ensure that local communities enjoy their RTD by enacting appropriate and other measures to give effect to that.

CHAPTER 4: EFFECTIVENESS OF THE LEGAL FRAMEWORK FOR TOURISM IN MOZAMBIQUE UPON THE REALIZATION OF THE RIGHT TO DEVELOPMENT OF LOCAL COMMUNITIES

4.1 Introduction

Tourism is considered the panacea for fast economic growth, poverty alleviation and increment of Mozambicans' standard of living. Stunning small islands surrounded by incredible coral reefs, great wildlife safaris, flawless and semi-deserted beaches with 'some of the best dive sites in Africa, and fascinating cultural history and experiences – without the crowds and kitsch of the more popular tourist destinations in Africa,⁹² are listed amongst the main attractions to visit Mozambique. In fact Mozambique has been commonly described as a 'beach and bush' tourism paradise where visitors can find a perfect combination of bio diversity and beach products.

The effectiveness of tourism as a mean to deliver the promise of fast economic growth and improvement of life conditions of citizens is largely determined by the laws and policies of governments. There are an increasing number of studies concerning Mozambique's tourism. However, most of these studies are aimed at scrutinize the obstacles impairing the improvement of the tourism investments environment in the country. Indeed, no one study have approached the issue from a human rights perspective, and more so, few have placed the interests of local communities at the heart of their inquiry. Consequently, this chapter aims to stimulate debate and highlight issues related to human rights of local communities in Mozambique. In particular, it seeks to discuss the effectiveness of the Mozambican legal framework for tourism in realizing local communities' RTD.

⁹² 'Tourism for Economic Development in Mozambique' *Media Global: The Voice of Global South* (n 5 above).

4.2 The Legal framework for tourism in Mozambique

The primary sources of law for tourism in Mozambique are the CRM 2004, the National Tourism Policy,⁹³ the Strategic Plan for the Development of Tourism in Mozambique (2004 – 2013),⁹⁴ the Tourism Law;⁹⁵ and the 2007 National Tourism Code of Conduct.

Besides, there are a number of policies and specific-sector legislation that somehow tackle tourism industry. These policies and legislation include areas such as Land, Environment, Maritime, Forest and Wildlife, Investment, etc.

In addition, the Government's Action Plan for Reduction of Absolute Poverty ('PARPA') also plays an important role within the legal framework for tourism in Mozambique. It serves as the guiding strategy for reduction of 'absolute poverty' in Mozambique. Key areas have been identified by the PARPA as having a key role on poverty alleviation in the country. Agriculture, Education, Health and Governance are traditionally considered the key sectors for reducing 'absolute poverty' in Mozambique. The most recent version of the PARPA, widely known as PARPA II has clearly identified Tourism, along with Agriculture, Mining and Fishery as the priority areas to fight poverty in Mozambique.⁹⁶ Particular reference is made in the PARPA II to the role of Tourism in contributing to wider employment opportunities and revitalization of areas of environmental conservation.⁹⁷

4.3 Analysis of the synergies and conflicts between the legal framework for tourism in Mozambique and the core principles of the right to development

This study is aimed at measuring the effectiveness of the legal framework for tourism in Mozambique, in a way that it considers both the substantive and factual strength of the framework vis-à-vis Mozambique's international obligations to realize the RTD.

⁹³ Resolution 14/2003 of 04 April.

⁹⁴ Resolution 45/2006 of 26 December.

⁹⁵ Law n° 4/2004 of 17 June.

⁹⁶ PARPA II (2006–2009) 125.

⁹⁷ PARPA II (2006–2009) 130.

Pursuant to both the Declaration on RTD and the African Charter, states are required to take necessary legislative and other measures, to ensuring the enjoyment of human rights, equality of opportunity, eradication of social injustices, and promotion of peoples' participation in the development process.⁹⁸

The RTD is therefore considered to include core principles such as, (4.3.1) peoples' direct participation in development, (4.3.2) respect for human rights, and (4.3.3) the right to self-determination and sovereignty over natural resources. Accordingly, this chapter explores critically the incorporation of these principles within the legal framework for tourism in Mozambique. It will also scrutinize the effectiveness of this framework in realizing the RTD of local communities, by way of critical analysis on the synergies and conflicts between its norms and the core principles abovementioned.

4.3.1 Peoples' direct participation in development

Studies on impacts of tourism have confirmed the importance of involving local communities at various stages of tourism development, from planning through implementation to its evaluation.⁹⁹ Failure to involve them has often resulted in human rights violations and social-economic tensions. Bellow we discuss, local communities' participation in the Mozambique's tourism industry, with specific reference to three basic elements, namely: (4.3.1.1) involvement in decision making processes, (4.3.1.2) acquisition of managerial skills, and (4.3.1.3) enjoyment of benefits derived from exploitation of the natural resources.¹⁰⁰

4.3.1.1 Involvement in decision-making processes

The legal framework for tourism contains important provisions concerning the participation of local communities in decision making processes. The paramount provision is embodied under the Land Law, which requires that any land application

⁹⁸ Declaration on the RTD, Article 8.

⁹⁹ H Manwa, 'Communal Areas Management Programme for Indigenous in Zimbabwe (CAMPFIRE)' in J Saarinen et al (eds) (n 16 above) 190.

¹⁰⁰As above.

process must include a community consultation.¹⁰¹ For development of many tourism enterprises, obtaining the right to use and enjoyment of land is indispensable.

The community's consultation is aimed at avoiding potential land conflicts between the communities and the investors. It also enables an environment in which the interests and concerns of the communities are heard, before the establishment of investments and development projects, within their area of location.

There is a good record of community's consultation in Mozambique. This has contributed for rising awareness within both the local communities and the investors on the legal requirement for consultations before any land attribution. Despite the good record of consultations happening all over the country since the adoption of the Land Law in 1997, a recent study by Food Agriculture Organization (FAO), pointed out that in these consultations,

Local people do not fully understand their rights and how to use them in the consultation to protect their interests or secure new resources for development. *In addition*, the public agencies responsible for implementing the new laws are also failing to apply the community or local rights provisions correctly and often appear to be firmly on the side of the new land right applicant. (emphasis added)¹⁰²

In fact, in terms of the procedural arrangements, the process of land attribution is highly centralized and 'top-down' process, whereby crucial decision-making is made by government through its agents and officials. In an economy largely controlled by informal institutional relationships, commercial interests often enter into partnership with powerful

¹⁰¹ Land Law, Article 13, paragraph 3 and Article 24, paragraph 1(c). The consultations are undertaken to reduce the likelihood of future land conflict between the communities and investors. They also provide a structured environment for dialogue between the potential investor, the community and other land holders in the area, and the government.

¹⁰² Food and Agriculture Organization of the United Nations (FAO), *Mozambique's Legal Framework for Access to Natural Resources: The Impact of New Legal Rights and Community Consultations on Local Livelihoods* (2006) 2. Available at www.fao.org/es/esw/lsp/cd/img/docs/LSPWP27.pdf (accessed 12 October 2010).

public officials in order to obtain market access.¹⁰³ A recently published study on the impact of consultation on communities livelihoods, concluded that,

The evidence suggests that a negotiation over “compensation” is becoming a standard feature of many *consultas*. What is really happening is a process of buying out local people who then sign the “no objection” in the *Acta* of the *consulta* – the land effectively becomes “de”-occupied.

Consequently, community’s consultation is often taken as a mere administrative procedure for formalization of the investor’s land titles rather than an opportunity to give expression to the concerns of local communities.

4.3.1.2 Acquisition of managerial skills

The successful involvement of local communities in development projects can also be measured by their acquisition of managerial skills.¹⁰⁴ It has been considered that one of the major contributions of development projects to local communities’ livelihood is that they help to equip local communities with managerial skills to run development projects.¹⁰⁵

In terms of the National Tourism Code of Conduct, which is generally akin to the UN Global Code for Tourism, the local populations should be associated with tourism activities and share equitably in the economic, social and cultural benefits they generate, and particularly in the creation of direct and indirect jobs resulting from them.¹⁰⁶ Yet, the practice shows a different reality. Andrew Rylance appoints that,

There have been increase in employment but these are predominantly for low waged jobs where there is little possibility for advancement.

¹⁰³Center on Ecotourism and Sustainable Development *East Africa: Trends in Coastal Tourism & Strategies for Promoting Sustainable Development* (2007) 24. Available at www.responsibletravel.org/.../FINAL_REPORT_Fred_Nelson_Jan_08.pdf (accessed 10 October 2010).

¹⁰⁴ H Manwa, ‘Communal Areas Management Programme for Indigenous in Zimbabwe (CAMPFIRE)’ in J Saarinen et al (eds) (n 16 above) 190.

¹⁰⁵ As above.

¹⁰⁶ National Tourism Code of Conduct, Article 7.

In reality, community's lack of core skills to be engaged in managerial positions can not be disregarded. As a matter of facts, most of the tourism's investments in Mozambique are located along the cost line, in rural areas where the rate of illiteracy is far higher when comparing to urban areas.

The effectiveness of the aforementioned provision of the National Tourism Code of Conduct has been severely impaired by the harsh reality of high proportions of uneducated population in areas where the natural resources for development of tourism are located. As a matter of facts, there are few community based tourism enterprises within the country. The state is therefore led with the task to enhance the levels of education of local communities in order to place them in a position that allows them to acquire managerial abilities through tourism development within their area of location.

4.3.1.3 Benefits sharing

Participation in development should involve exchange of benefits and should be capable of ensuring that those whose lives have been changed by the introduction of the development projects receive corresponding benefits, as well.¹⁰⁷ It implies that local communities' involvement in tourism industry should be taken from a holistic perspective. It should go a step further from the community's consultation in order to comprise the sharing of benefits and revenues deriving from tourism.

There are no provisions under the legal framework for tourism, addressing explicitly this assumption. However, it can be inferred from the established under the National Tourism Code of Conduct, in that populations should be associated with tourism activities and share equitably in the economic, social and cultural benefits they generate, and particularly in the creation of direct and indirect jobs resulting from them.¹⁰⁸

For an instance, in the mining and petroleum sectors, for example, there are specific provisions under their legal framework, establishing a percentage of the receipts

¹⁰⁷ H Manwa, 'Communal Areas Management Programme for Indigenous in Zimbabwe (CAMPFIRE)' in J Saarinen et al (eds) (n 16 above) 192.

¹⁰⁸ National Tourism Code of Conduct, Article 7.

generated from natural resources exploitation that should be channeled to the development of the communities of the areas where the respective resources are located.¹⁰⁹ Yet, there are no similar provisions under the legal framework for tourism in Mozambique. In fact, the few norms that implicitly recognize the need to involve local communities in benefit sharing, do not however, elaborate on how the benefits derived from tourism should be extended to the local communities.

4.3.2 Respect for human rights

Development processes should be respectful of all civil, political, economic, social and cultural rights¹¹⁰ since human rights and fundamental freedoms are indivisible and interdependent.¹¹¹ The Independent Expert on the right to development pointed out that,

It is not merely the realization of those rights individually, but the realization of them together in a manner that takes into account their effects on each other, both at particular time and over a period of time. Similarly, an improvement in the realization of the RTD implies that realization of some rights has improved while no rights is violated or deteriorated.¹¹²

In terms of the Mozambican Constitution, the defence and promotion of human rights and of the equality of citizens before the law are fundamental principles of the Republic.¹¹³

The legal framework for tourism contains a significant number of provisions concerning the respect for human rights and fundamental freedoms. These provisions include the rights to work,¹¹⁴ to a clean environment,¹¹⁵ equality and non discrimination,¹¹⁶ and the right to an adequate standard of living.¹¹⁷

¹⁰⁹Law n° 12/2007, of 27 de July ('Petroleum Production Tax), Article 11. Decree n° 5/2008 of 9 April ('Regulation of Tax Regime for Mining'), Article 28.

¹¹⁰ Declaration on the RTD, Article 6 (3).

¹¹¹ Declaration on the RTD, Article 6 (2).

¹¹² Third Report of the Independent Expert on the Right to Development, Prof Arjun Sengupta, 2 January (2001) 6, UN Doc E/CN.4/2001/WG.18/2

¹¹³ CRM 2004, Article 11 (e).

¹¹⁴ National Tourism Code of Conduct, Article 7.

The human rights to 'equality and non discrimination' and 'adequate standard of living' have been particularly highlighted within the laws and policies scrutinized. They have been embodied in a major number of instruments and often mentioned in more than one provision within the same instrument.

For an instance, the right to equality and non discrimination is contained on the Constitution ¹¹⁸ as a general principle, and furthermore recognized under the Tourism Law. In its terms, suppliers of tourism products and services shall,

provide services they have been authorised to provide, without discrimination on grounds of nationality, social circumstance, race, sex, ethnic origin, religion or political affiliation.¹¹⁹

The principle of non discrimination is a core principle of international human rights. This principle is reflected in almost all the international human rights instruments. In simple worlds, equality and non discrimination entrenches the ideal that every individual has the right to be protected by law on an equal basis. However, not all differentiate treatments amounts to unfair discrimination, in general international law, a violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; or c) if there is no proportionality between the aim sought and the means employed.¹²⁰ In this sense Affirmative Action, and other forms of preferential initiative, for instance, do not necessarily violate the principle of non-discrimination and in some instances may be required in order to remove discrimination.¹²¹

¹¹⁵ Tourism Law, Article 7.

¹¹⁶ Tourism Law, Article 16 (2) (a).

¹¹⁷ Tourism Law, Article (3) (h)

¹¹⁸ CRM 2004, Article 35 and 36.

¹¹⁹ Tourism Law, Article 16 (2) (a).

¹²⁰ Human Rights Committee, General Comment No. 18: Non-discrimination, paragraph 13.

¹²¹ International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (2009) 33.

Available at www.ichrp.org (accessed 25 June 2010).

One of the striking reasons for the inclusion of the principle of equality and discrimination within the legal framework for tourism is the escalation racism within tourism industry in Mozambique. Most of the tourism investments in Mozambique are held by non nationals and the gross of the visitors to the hotels and resorts in coastal areas are non nationals, as well. The communities living in areas surrounding tourism enterprises have been often prevented to access to coastal areas surrounding tourism enterprises creating an environment of social exclusion and 'deprivation'. The gravest situations have been reported in the coastal areas along the provinces of Maputo, Inhambane and Cabo Delgado, where the beaches have become populated with notices reading 'no blacks, no dogs.'¹²²

Despite having a comprehensive legal framework prohibiting discrimination on any grounds, the respect for human rights of local communities, in particular the right against discrimination is still far to be achieved as the facts suggest. Veiled discrimination against locals is also a problem. The Mozambican Minister for Tourism has described veiled discrimination as the imposition of unrealistic prices on food and drinking and also delay in serving clients aimed at excluding black Mozambicans (*maxime* the local communities) from tourism enterprises (hotels, resorts, etc.) located within their living areas.¹²³ Indeed, the absence of comprehensive and continuous inspections over the tourism suppliers' activities is one critical factor contributing to widespread human rights abuses within Mozambican tourism industry.

¹²² To tackle the issue, the government organized multisectorial inspections comprising amongst others, inspectors from the Ministry of Tourism, Ministry of Labor and Ministry of Finance – This, according to the Minister for Tourism, led to disappearance of such abuses. However, in practice the problem still prevails in coastal area of Maputo and Inhambane provinces in the south of the country, as the media report from time to time. See 'Ministro do Turismo, Fernando Sumbana, antevê: Seremos uma das jóias de África', *Jornal Notícias*, Maputo – Segunda-Feira 2 de Agosto de 2010. Available at <http://www.jornalnoticias.co.mz/pls/notimz2/berwsea0.simples> (accessed 16 October 2010). Mozambican Government has enacted multisectorial inspections aimed at tackling this situation. Such teams are composed, amongst others, by government officials from the Ministry of Tourism, Ministry of Finance and Ministry of Labor.

¹²³ See 'Ministro do Turismo, Fernando Sumbana, antevê: Seremos uma das jóias de África Maputo', *Jornal Notícias*, Segunda-Feira, 2 de Agosto de 2010 available at <http://www.jornalnoticias.co.mz/pls/notimz2/berwsea0.simples> (accessed 16 October 2010). Free Translation. The original text in Portuguese reads '*Neste momento, a nossa batalha é contra o racismo subtil que se caracteriza na demora no atendimento, tendo como motivação a pigmentação ou então, por alguma razão, alguém de raça negra entra naquele local e lhe apresentam um preço bastante elevado para determinado produto. Essa é que é a nossa grande batalha, porque é difícil de verificar.*'

Of special importance, as well, is the right to adequate standard of living, as well. This right is set forth by international law and it includes the rights to adequate food, clothing and housing, and to continuous improvement of living condition.¹²⁴

In terms of the Mozambican Constitution, the building of a society of social justice and the achievement of material and spiritual well being and quality of life for its citizen is a fundamental objective of the Republic of Mozambique.¹²⁵ Accordingly, the state economic policy shall be directed towards laying the fundamental bases for development, improving the living conditions of the people through the participation of citizens and the efficient use of human and material resources.¹²⁶

At the infra constitutional level, the Tourism Law itself is aimed at improving living conditions of local communities.¹²⁷ Indeed, the use of tourism as a tool for improvement of the standard of living of local communities is the oldest promise made by investment on tourism in the country. Yet, it is still difficult to tell if such promise has been realized. Even so, some researchers on Mozambique's tourism have already stated that 'in terms of being used as an instrument to alleviate poverty and increase employment, tourism has been found wanting.'¹²⁸

The recent deadly riots in the country over rising of food and fuel prices, allied to protests occurred in 2008 motivated by the rising on public transport prices, suggest that the government is failing to realize critical elements of the right to adequate standard of living. As a matter of facts, a survey conducted recently in the country revealed that three-quarters of Mozambicans considers that in the past five years their economic position had remained the same or become worst.¹²⁹ As a paradox, Mozambique's GDP

¹²⁴ ICESCR, Article 11.

¹²⁵ CRM 2004, Article 11(c).

¹²⁶ CRM 2004, Article 9.

¹²⁷ Tourism Law, Article 3(h).

¹²⁸ A Rylance, 'Local Economic Development in Mozambique: An Assessment of the Implementation of Tourism Policy as a Means to Promote Local Economies,' in A Spenceley (eds), *Responsible Tourism: Critical Issues for Conservation and Development* (2008) 31.

¹²⁹ J Hanlon, *Is Poverty Decreasing in Mozambique?* (2007) 1. Conference Paper n^o 14 at IESE. Available at www.open.ac.uk/technology/mozambique/pics/d53854.pdf (accessed 10 September 2010).

per capita has been among the fastest-growing in sub Saharan Africa, at an average of 8% per annum since 1990. However, despite this apparent economic success, the exceptional performance of the economy seems to be more in numbers and digits, rather than on the elevation of life conditions of Mozambicans. For both the World Bank and the UNICEF it's a 'paradox' the fact that chronic malnutrition in children is rising within the country in spite of the GDP growth.¹³⁰ The 2008/2009 Household Survey (IAF, *Inquérito aos Agregados Familiares*) revealed that poverty is not decreasing in the country¹³¹ in particular in rural areas where it seems to be increasing.¹³²

One the defining characteristic of the right to adequate standard of living, as all socio-economic rights, is that in general the obligation of the states relating to its implementation is to take steps to the maximum of their available resources in order to achieve, progressively, the full realization of the right. However, the interpretation of the word 'progressive realization' should not be in a way that the state postpones indefinitely the taking of steps aimed at realizing this right. Against this wrongful interpretation the UN Committee on Economic Social and Cultural Rights have imposed minimum core obligation that all states are required to put in place despite the resources or other constraints that they may have.¹³³

4.3.3 Self-determination and sovereignty over natural resources

Development implies the full realization of the peoples' right to self determination.¹³⁴ The right to self determination can be defined as a right, by virtue of that, peoples may freely determine their political status, and freely pursue their economic, social and cultural

¹³⁰ J Hanlon (n 129 above) 2.

¹³¹ National Institute for Statistic (INE), The 2008/2009 Household Survey (IAF, *Inquérito aos Agregados Familiares*) (n 12 above).

¹³² B Cunguara & J Hanlon (n 14 above) 4.

¹³³ Committee on Economic, Social and Cultural Rights, General Comment 3, paragraph 10. The right to adequate standard of living thus entails as a minimum core obligation, amongst others, that States provides for 'essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education.

¹³⁴ Declaration on the RTD, Article 1 (2).

development.¹³⁵ Accordingly, self determination can be either 'political self determination' or 'economic self determination'.

In terms of the Declaration on the RTD, self determination is interpreted as meaning the right of peoples to economic self determination. In its terms, persons belonging to minorities and indigenous groups have the right to determine for themselves the processes and forms of development that are appropriate for their cultures and circumstances.¹³⁶

The principle and right to self determination has been expressly recognized under the International Law and it has been considered as entailing an obligation *erga omnes* for the international community of States.¹³⁷

In terms of the Mozambican legal framework for tourism, there are no explicit provisions on the local communities' right to self determination. However, the process of community's consultation within the land application process seems to be the single and most important opportunity that the local communities may have to exercise their right to self determination. This is so, because these consultations are aimed at providing the communities with an opportunity to express their views and concerns on processes and forms of development that may be appropriate for their cultures and circumstances. However, the effective participation of local communities in these consultations has been impaired by several factors as indicated earlier on this study. Lack of education and proper access to information are some of these factors. Besides, the land application processes obey to a top-down structure, in which crucial decision-making is made by government through its agents and officials with minimal consideration to the communities interest. In fact, the processes of consultations have been turned into negotiation for reaching a price in which the communities agree to provide their consent, rather than proper consultations for considerations of the parties' interests and concerns.

¹³⁵ See UN Resolution 1514 (XV) on Declaration on the Granting of Independence to Colonial Countries and Peoples, Paragraph 4.

¹³⁶ Declaration on the RTD, Article 1 (2).

¹³⁷ *East Timor Case (Portugal v Australia)*, 1995 ICJ Reports 90 and, Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cited by J Dugard, *International Law: A South African Perspective* (2005) 44/5.

Closely related to the right to self determination is the principle of sovereignty over natural resources, also established in the Declaration on the RTD. This principle supports people's autonomy and independence over natural resources. In conformity, states should uphold peoples' interests in natural resources over foreign or separate state interests.¹³⁸

In practice, local poor people are employed in tourism in 'low level jobs, such as cleaners and bar staff, which hinders their opportunity for health advancement.'¹³⁹ This is reflected in Rogerson's analysis of South Africa. Accordingly,

Apart from the job opportunities created for black employees, the prime beneficiaries of this local tourism-led economic development process have been a set of white-owned tourism business.¹⁴⁰

In fact, up to 70% of the tourism enterprises in the country are hold by foreign investors, with minimal involvement of locals.

4.4 Conclusion

The incorporation of human rights principles into domestic legislation does not by itself ensures access to human rights. One striking example is the Mozambican legal framework for tourism. Despite containing the core elements of the RTD, in practice the effective implementation of these norms is minimal. The law means little to citizens if it is

¹³⁸ C Grossman & DD Bradlow 'Are we Being Propelled Towards a People-Centered Transnational Legal Order?' (1993) 9 *American University Journal of International Law and Policy* 1-25., cited by Unpublished: B Mugoya 'A Dry Udder in the Milk Season? Natural Resource Exploitation in Africa: Realising the Right to Economic Benefit for Host Communities' unpublished Master's thesis Centre for Human Rights, University of Pretoria (2009) 27.

¹³⁹ SVN 2006, cited by A Rylance, 'Local Economic Development in Mozambique: An Assessment of the Implementation of Tourism Policy as a Means to Promote Local Economies,' in A Spenceley (n 128 above) 34.

¹⁴⁰ Rogersons cited by A Rylance, 'Local Economic Development in Mozambique: An Assessment of the Implementation of Tourism Policy as a Means to Promote Local Economies,' in A Spenceley (n 128 above) 34.

not enforced effectively, and effective enforcement occurs usually when citizens interact forcefully with the system and assert their claims.¹⁴¹

¹⁴¹ International Council on Human Rights Policy, *Enhancing Access to Human Rights – Resume* (2004). Available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/KKAA-7GH68R/\\$file/ICHRP_Jul2008.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/KKAA-7GH68R/$file/ICHRP_Jul2008.pdf?openelement) (accessed 13 August 2010).

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents a summary of the conclusions drawn from the entire study and it further presents the general and specific recommendations vis-à-vis the issues analyzed throughout the work, *maxime* the effectiveness of the Mozambican legal framework for tourism in realizing the RTD of local communities.

5.2 Summary and conclusions

By a way of socio-legal analysis, this study scrutinized the role of national legislation in incorporating human rights issues into tourism agenda, with specific reference to Mozambique. The need to incorporate human rights of local communities into the tourism agenda is far from academic or theoretical preoccupation. Failure to respect the rights of the local communities in the destination countries has often resulted in human rights violations and negative social and economic impacts. Considering that for too long the studies on tourism and human rights have conducted in parallel rather than tackling these two areas together, the study proved to be instrumental in contributing to highlight the interconnections between tourism and human rights.

Central to the study is the firm assertion that a clear understanding of the practical connections between tourism and human rights may entitle those who have legitimate claims to demand their rights and may ultimately assist states to respect, protect, promote and fulfill their human rights obligations.

The various international and regional human rights instruments regulating the controversial human RTD have been explored, with a view to establish the obligations of Mozambican state through its government, to ensure the realization of the RTD of its populations. This was also aimed at providing a background for the upcoming assessment of the effectiveness of Mozambique's legal framework for tourism in ensuring the development local communities. In fact, the study asserts that despite all the controversy surrounding the RTD it has been widely embodied in international and regional human rights instrument to which Mozambique is a state party.

As per the national framework, the Mozambican Constitution entrenched important provisions concerning the RTD. Such provisions are complemented by the laws and policies that form part of the legal framework for tourism in the country.

However, the study revealed that despite having a relatively good record of incorporation of international and regional standards of the RTD within domestic legislation, there are shortcomings in practice and the implementation of these standards is minimal. In fact, incorporation of human rights principles into domestic legislation does not by itself ensure access to human rights. The law means little to citizens if it is not enforced effectively, and effective enforcement occurs usually when citizens interact forcefully with the system and assert their claims.¹⁴²

5.3 Recommendations

In spite of all the efforts to reduce poverty and elevate the living condition of local communities using the benefits derived from tourism, poverty persists and is paradoxically increasing within the rural communities in Mozambique. However, the legal framework perused during this study show that the national legislation seems to synergy with the international and regional standards concerning the RTD. The problem however, resides in its effective implementation. In fact, most of the provisions aimed at ensuring the realization of the RTD are often vague and imprecise. For an instance, the national code of conduct for tourism sets forth that there is a need to 'share equitably in the economic, social and cultural benefits they generate, and particularly in the creation of direct and indirect jobs resulting from tourism.' However, there is no clarity on how this should be realized / performed. In the mining and petroleum sectors, for example, it was determined a percentage of the receipts generated from natural resources exploitation that should be channeled to the development of the communities of the areas where the respective resources are located.¹⁴³ Yet, there is no correlative provision under the tourism framework. In other words, the tourism legal framework fail to elaborate on how the benefits derived from tourism should be extended to the local communities.

¹⁴² International Council on Human Rights Policy (n 141 above).

¹⁴³ Law on Petroleum Production Tax, Article 11 and Regulation of Tax Regime for Mining, Article 28.

In the light of the above, and considering that the problem resides mostly on the effective implementation of the laws, and not purely on its contents, the following recommendations if effectively and efficiently utilized with due commitment from all stakeholders and political will on the part of the executive and legislators would go a long way in ensuring the realization of the RTD of local communities in Mozambique.

5.3.1 Main recommendation

5.3.1.1 Guidelines on procedures of implementation of the legal framework regarding community development

This study recommends the considering of the adoption of guidelines for implementation of provisions of the legal framework that tackles with the RTD of the local communities. Amongst others, the guidelines could elaborate on how stakeholders should engage with each other toward the realization of the RTD. It could also provide a clear definition of the role of the private actors in community development. In addition, it could provide for indicators and benchmarks for assessment of the stakeholders' compliance with their commitments. Accordingly, stakeholders, in particular the government and private actors should be subject to periodic reviews and evaluation.

5.3.2 Other recommendations

Apart from the aforementioned recommendation, this study recommends a number of measures that may contribute substantially to extend the benefits derived from tourism industry to the local communities in Mozambique. These recommendations include:

5.3.2.1 Adopting a culture of joint responsibility

One critical factor for the effective implementation of the tourism's legal framework towards the realization of the RTD is the jointly assumption of responsibility by all stakeholders. For this purposes it is therefore central that all stakeholder be clear on their role in community development, and an effective monitoring and evaluation framework be established.

5.3.2.2 Developing a statistical data base for tourism industry

There is a need to develop a statistical information system for tourism in Mozambique. Keeping good statistics would enable effective studies on the contribution of tourism to the development of local communities in Mozambique and would ultimately enhance the organizational capacity of the tourism industry in the country.

5.3.2.3 Empowerment of the local communities

The state should empower the local communities as the one only way in which they can be enabled to participate effectively in the development of tourism industry. In this sense, it is fundamental that they get proper access to education and information in order to strengthening and ensure exchange of benefits, and put in place checks and balances to prevent the abuse of power within the unequal relationship between the communities and the other tourism stakeholders, *maxime* the state and private investors.

5.3.2.4 Private-community joint ventures initiatives

Importantly, the government should include in its policy the promotion of private-community joint ventures initiatives in order to increase the participation of local communities' enterprises in tourism. For the purpose, small enterprises such as, community-owned lodges and village-operator concessions should be prioritized. Mozambique should benefit from the existing 'best practices' in the region and in the world in order to ensure that development of its emerging tourism industry can effectively benefit local communities by ensuring the enhancement of their life conditions.

5.3.2.5 Tourism receipts channeled to the communities

Similarly to what is already established under the mining and petroleum sectors, a percentage of the receipts generated from tourism exploitation should be channeled to the development of the communities of the areas where the respective resources are located.

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