

**The classification of the violent situation in Mozambique between
2017 and December 2021**



**UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA**
Faculty of Law

Dissertation submitted by

Duan Broodryk

Student number: U17012377


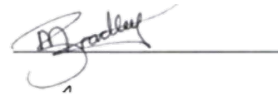
under the guidance and supervision of Professor MM Bradley

October 2022

Degree: LLM International Law (Course work)
with specialisation in International Humanitarian Law



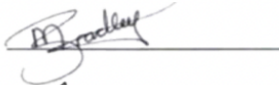
Submission form¹ for research output²

| Biographical information of student | |
|--|---|
| Student # | U17012377 |
| Title | Mr. |
| Surname | Broodryk |
| Initial(s) | D |
| Registered for the: LLM / MPhil (coursework) <input checked="" type="checkbox"/> or LLM / MPhil <input type="checkbox"/> : or LLD/PhD | |
| Email | Duanbroodryk@gmail.com |
| Mobile phone # | 0712969791 |
| Details of research output | |
| Title | The classification of the violent situation in Mozambique between 2017 and December 2021 |
| Supervisor | Prof MM Bradley |
| Co-supervisor | N/A |
| Statements | |
| <i>Candidate</i> | <i>Supervisor(s)</i> |
| <p>I declare that the research output, which I hereby submit for the abovementioned degree at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with university requirements. I am aware of university policy and implications regarding plagiarism. I will submit a Turnitin report together with my research output and all other required documents.</p>  | <p>I/We declare that I/we hereby approve that abovementioned candidate may submit his/her/their research output as well as the prescribed summary.</p>  |

¹ Annexure M to Postgraduate Administrative Processes for Registered Students – S1834/13 (amended).

² Research output, in this context, is defined as a mini-dissertation, dissertation or thesis.

Declaration of originality¹ for a research output²

| Biographical information of student | |
|--|---|
| Student # | u17012377 |
| Title | Mr <input type="radio"/> |
| Surname | Broodryk |
| Initial(s) | D |
| Registered for the: | LLM / MPhil (coursework) <input checked="" type="radio"/> : or LLM / MPhil <input type="radio"/> : or LLD / PhD <input type="radio"/> |
| Email | duanbroodryk@gmail.com |
| Mobile phone # | 0712969791 |
| Declaration | |
| <ol style="list-style-type: none"> 1. I understand what plagiarism is and am aware of the University's policy in this regard. 2. I declare that this research output is my own original work. Where other people's work has been used (either from a printed source, internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements. 3. I have not used work previously produced by another student or any other person to hand in as my own. 4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work. | |
| Signatures | |
| Student  Co-supervisor N/A | Supervisor  Head of Department |

¹ Annexure G to Postgraduate Administrative Processes for Registered Students – S1834/13 (amended).

² Research output, in this context, is defined as a mini-dissertation, dissertation or thesis.

Summary

The title of my mini-dissertation is, 'The classification of the violent situation in Mozambique between 2017 and December 2022'. The conflict was classified by firstly examining the conflict in relation to Common Article 3 and thereafter Additional Protocol II. Chapter 2 firstly examined the organisational criterion as encapsulated in Common Article 3 in relation to the ongoing violent situation in Cabo Delgado and the violent group involved therein. The chapter concluded that the violent group in Mozambique (Al-Shabab) is sufficiently organised to constitute an armed group for purposes of Common Article 3. Chapter 3 turns to an examination of the intensity threshold prescribed by Common Article 3 and offered an examination thereof in relation to the violent situation in Mozambique. The ultimate conclusion of Chapter 3 was that the violent situation in Mozambique was sufficiently protracted. Thereby meaning that both the intensity and organisational threshold has been met by the violent situation in Cabo Delgado as to constitute a Common Article 3 type Non International Armed Conflict.

In chapter 4, the dissertation shifted its focus to Additional Protocol II as to determine whether the ongoing Common Article 3 type Non International Armed Conflict in Cabo Delgado has developed to such an extent as to qualify as an Additional Protocol II type Non International Armed Conflict. In light thereof chapter 4 offered a two stage enquiry/examination into both the negative test and the positive test prescribed by Additional II after which it was concluded that the Common Article 3 type Non International Armed Conflict in Cabo Delgado does in fact constitute an Additional Protocol II type Non International Armed Conflict. The dissertation concludes in chapter 5 by offering a possible classification to the violent situation in Cabo Delgado, Mozambique.



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

**The classification of the violent situation in Mozambique between
2017 and December 2021**

Dissertation submitted by

Duan Broodryk

Student number: U17012377

under the guidance and supervision of Professor MM Bradley

October 2022

Degree: LLM International Law (Course work)
with specialisation in International Humanitarian Law

Contents

| | |
|--|-----------|
| Section 1: Introduction and context | 9 |
| Chapter 1: Introduction..... | 9 |
| 1. Introduction | 9 |
| 2. Importance of conflict classification and the types of armed conflict | 9 |
| 3. Background and historical overview | 12 |
| 4. Research objective | 14 |
| 5. Research questions | 15 |
| 6. Research methodology | 16 |
| 7. Delimitation of study area | 16 |
| 8. Chapter breakdown | 18 |
| 8.1. Chapter 2: The organisational threshold criteria of Common Article 3 | 18 |
| 8.2. Chapter 3: The intensity threshold criteria of Common Article 3 | 18 |
| 8.3. Chapter 4: Has the non-international armed conflict in Mozambique escalated to such an extent that article 1(1) of APII is fulfilled? | 19 |
| Section 2: Classification of the violent situation in Mozambique as a Common Article 3-type non-international armed conflict | 21 |
| Chapter 2: The organisational threshold criteria of Common Article 3..... | 21 |
| 1. Introduction | 21 |
| 2. Treaty interpretation | 22 |
| 3. Subsequent judicial practice | 24 |
| 4. Scholarly views | 26 |
| 5. Examination of the organisational requirement in light of the violent situation in Mozambique | 29 |
| 5.1. Command structure | 30 |
| 5.2. Sufficiently organised to launch a military attack | 32 |
| 5.3. Other factors indicative of a violent group being sufficiently organised in terms of Common Article 3 | 34 |
| 6. Conclusion..... | 36 |
| Chapter 3: The intensity threshold criteria | 38 |
| 1. Introduction | 38 |
| 2. Treaty interpretation | 39 |
| 3. Subsequent judicial practice | 40 |

| | |
|---|----|
| 4. Scholarly views | 42 |
| 5. Application of the intensity threshold to the violent situation in Cabo Delgado..... | 44 |
| 5.1. Duration of the violent situation | 45 |
| 5.2. The number and scale of the violent confrontations | 46 |
| 5.3. The type of weapons, equipment, calibre and amount of ammunition used | 48 |
| 5.4. The number and type of people involved | 49 |
| 5.5. The number of casualties caused and the number of civilians that fled the area | 50 |
| 5.6. The destruction and devastation caused | 51 |
| 6. Conclusion..... | 54 |

Section 3: Has the non-international armed conflict in Mozambique escalated to such an extent that it meets the criteria of an AP II NIAC? 56

Chapter 4: Has the non-international armed conflict in Mozambique escalated to such an extent that the requirements of APII are fulfilled? 56

| | |
|---|----|
| 1. Introduction | 56 |
| 2. Article 1(2) of Additional Protocol II (negative test) | 57 |
| 2.1. Introduction | 57 |
| 2.2. Treaty interpretation..... | 58 |
| 2.3. Subsequent judicial practice | 59 |
| 2.4. Scholarly views | 60 |
| 2.5. Conclusion | 61 |
| 3. Article 1(1) of Additional Protocol II (positive test) | 61 |
| 3.2. Responsible command structure requirement | 63 |
| 3.2.1. Treaty interpretation..... | 63 |
| 3.2.2. Subsequent judicial practice..... | 64 |
| 3.2.4. Application of responsible command to the violent group in Cabo Delgado..... | 67 |
| 3.3. Territorial control | 68 |
| 3.3.1. Treaty interpretation..... | 68 |
| 3.3.2. Subsequent judicial practice..... | 69 |
| 3.3.4. Scholarly views | 70 |
| 3.3.5. Territorial control requirement in light of the conflict in Mozambique..... | 70 |
| 3.4. Sustained and concerted military operations | 72 |
| 3.4.1. Treaty interpretation..... | 72 |
| 3.4.2. Subsequent judicial practice..... | 72 |
| 3.4.3. Scholarly views | 73 |

| | |
|--|------------------|
| 3.4.4. Sustained and concerted military operations in Cabo Delgado | 74 |
| 3.5. Implementation of Additional Protocol II..... | 76 |
| 3.5.1. Treaty interpretation..... | 76 |
| 3.5.2. Subsequent judicial practice..... | 76 |
| 3.5.3. Scholarly views | 77 |
| 3.5.4. The ability of the Al-shabab to implement APII..... | 78 |
| 3.6. Conclusion | 78 |
| 4. Conclusion..... | 79 |
| <i>Section 4: Conclusion</i> | <i>81</i> |
| Chapter 5: Conclusion and recommendation of classification..... | 81 |

SECTION 1: INTRODUCTION AND CONTEXT

Chapter 1: Introduction

1 Introduction

The purpose of this introduction is to introduce the overall research objective of this contribution, namely, the classification of the violent situation in Mozambique, more specifically in Cabo Delgado. The overall research objective that will be explored in the dissertation is whether the violent situation in the northern region of Mozambique, specifically in Cabo Delgado, between the Al-Shabab and Mozambique has escalated beyond the realm of peace time¹ so as to constitute an armed conflict in terms of international humanitarian law.² The chapter is accordingly structured by first stating the importance of conflict classification and the different types of conflict in international law (section 2). Thereafter the chapter provides the background and historical overview of the topic (section 3). The chapter subsequently sets out the research objectives of this project as a whole (section 4), and highlights the research questions (section 5). Thereafter the methodology used in writing the dissertation is identified (section 6), and the delimitation of the study area is outlined (section 7). The chapter finally outlines the breakdown of the rest of the contribution (section 8).

2 Importance of conflict classification and the types of armed conflict

In 2017 the violent situation in Mozambique was described by the country as mere acts of terrorism and internal disturbances, the situation and the significance thereof thus being underexaggerated and downplayed.³ There thus is a need for a proper

¹ Peace time refers to a period when a state is not involved in armed conflict and the domestic laws of the country find application as opposed to international humanitarian law.

² Christopher Giles and Peter Mwai, 'Mozambique Conflict: What's Behind the Unrest?' *BBC Reality Check* (29 March 2021) <<https://www.bbc.com/news/world-africa-56441499>> accessed 23 March 2021.

³ Amal El Ouassif Seleman Yusuph Kitenge, 'Terrorist Insurgency in Northern Mozambique: Context, Analysis, and Spillover Effects on Tanzania' 7 <https://www.policycenter.ma/sites/default/files/2022-01/PP_26-21_Ouassif-Seleman.pdf. November 2021> accessed 30 December 2021.

classification of the situation in order for the current violent situation to be dealt with accordingly and for the responsible people to be held accountable.

The classification will determine the legal framework that applies to the violent situation as well as the protection that will be afforded to the Mozambican civilians during the course of the armed conflict.⁴ This contribution will thus classify the violent situation in Mozambique in an attempt to assist the international community and Mozambique to deal with the violent situation in Mozambique.

In order for international law to find application, the violent situation must first exceed the realm of peace time and domestic laws and enter the realm of war time and international humanitarian law.⁵ Therefore, the classification of the violent situation is of utmost importance insofar as it will determine the applicable legal framework and enable the relevant bodies to regulate the violent situation and hold the relevant parties accountable.⁶ After it has been established whether peace time or war time is applicable, it is important to make a distinction between the type of conflict at hand, as the protection afforded by international law depends on the type of conflict.⁷ This contribution will thus classify the conflict in Mozambique by examining the different types of armed conflict and their requirements to determine whether the violent situation in Mozambique qualifies as an armed conflict.

International law makes provision for mainly three types of armed conflict that all have certain requirements and thresholds that must be met to qualify as such. Two broad categories of armed conflict are recognised in international law, namely, non-international armed conflicts and international armed conflicts. International humanitarian law treaties do not offer a definition of a non-international armed conflict. Reference must thus be made to other sources of international law in accordance with the Vienna Convention on

⁴ Marco Sassóli, *International Humanitarian Law, Rules, Controversies and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) paras 6.01-6.60.

⁵ *ibid* para 6.01.

⁶ *ibid*.

⁷ *ibid*.

the Law of Treaties (VCLT) to establish a definition for a non-international armed conflict.⁸ The *Tadic* appeals case defines a non-international armed conflict by stating that an armed conflict exists whenever there is resort to protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.⁹ Non-international armed conflicts (NIACs) can further be distinguished by Common Article 3-type NIACs¹⁰ and Additional Protocol II (APII)-type NIACs.¹¹ Common Article 3 applies to a conflict that is not of an international character and that is occurring in the territory of one of the High Contracting Parties (states).¹² On the other hand, Additional Protocol II applies to all armed conflicts that are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I) and which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹³

An international armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons for or the intensity of this confrontation.¹⁴ Apart from regular, inter-state armed conflicts, Additional Protocol I

⁸ United Nations Vienna Convention on the Law of Treaties *Treaty Series*, vol 1155 (May 1969).

⁹ ICTY, *The Prosecutor v Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision (2 October 1995) para 70.

¹⁰ Common Article 3 Common to the Geneva Conventions (Common Article 3): Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

¹¹ Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

¹² Common Article 3 to the Geneva Conventions (n 10).

¹³ Additional Protocol II to the Geneva Conventions (n 11) art 1(1).

¹⁴ ICRC Casebook <<https://casebook.icrc.org/glossary/international-armed-conflict>> accessed 15 December 2021.

extends its application of international armed conflicts to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.¹⁵ It thus is evident that armed conflicts have certain criteria/requirements/characteristics that must be met by the violent situation in question to qualify as either a Common Article-3 type NIAC, an APII-type NIAC or as an international armed conflict.¹⁶

It is evident from the above-mentioned definitions that there are various requirements and thresholds that a violent situation must satisfy in order to be characterised as a specific type of armed conflict. This contribution will examine the requirements of the different types of armed conflict in chronological order and thereafter determine whether the violent situation in Mozambique satisfies these requirements.¹⁷ This examination of the situation in Mozambique will be indicative of the criteria that the violent situation meets and, therefore, the class of conflict it constitutes.¹⁸

3 Background and historical overview

Mozambique is a coastal country located on the south-eastern coast of Africa that became independent in 1975.¹⁹ After only two years of independence the country descended into a 'civil war' in 1977 which lasted until 1992.²⁰ After 1992 the country was relatively stable with only minor violent situations and low-intensity insurgencies taking place in the northern part of Mozambique.²¹ Due to the history of civil war, insurgency and violent situations in Mozambique, the economy and the infrastructure have been

¹⁵ *ibid.*

¹⁶ Sassóli (n 4) paras 6.01-6.60.

¹⁷ Sassóli (n 4) para 6.01.

¹⁸ *Tadic* (n 9) para 561; International Committee of the Red Cross (ICRC) 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' Opinion Paper (March 2008) <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 12 January 2021.

¹⁹ Jeanne Marie Pevenne, 'República de Moçambique' *Britannica* (10 March 2021) <<https://www.britannica.com/contributor/Jeanne-Marie-Penvenne/3986>> accessed 12 January 2022.

²⁰ *ibid.*

²¹ *ibid.*

devastated, leaving the country and its people extremely impoverished.²² The beginning of the twentieth century marked a new beginning for Mozambique in so far as tourism returned to the country, providing a much-needed boost to the local economy.²³ Furthermore, the rich and extensive natural resources of Mozambique were being explored by international companies, and countries such as South Africa, Spain, Belgium, Brazil and Portugal were busy concluding trade agreements.²⁴ Therefore, the future of Mozambique looked promising with tourism, trading and investment on the rise as is evident from companies such as Total investing \$20 billion in a natural gas project in Mozambique with the aim to start gas shipment in 2024.²⁵ These developments in Mozambique were promising insofar as it would not only have a positive effect on the economy of Mozambique but also on its people as it would assist in elevating the poverty in the country by creating job opportunities, and so forth.²⁶ However, in 2017 a violent situation once again erupted in Mozambique when Mozambican and Tanzanian militants, called the Al-shabab,²⁷ started launching violent attacks against Mozambique and its people.²⁸ The group consists of Islamic militants who use tactics akin to the terrorisation

²² Claire Brenner, 'Poverty in Mozambique: Challenges and Hope' The Borgen Project <<https://borgenproject.org/poverty-in-mozambique/>> accessed 12 January 2022.

²³ African Development Bank Group, 'Mozambique Economic Outlook 2021' <<https://www.afdb.org/en/countries/southern-africa/mozambique/mozambique-economic-outlook>> accessed 17 November 2021.

²⁴ *ibid.*

²⁵ African Development Bank Group, 'African Development Bank Set to Join Landmark \$20 Billion Mozambique LNG Financing' (21 July 2020) <<https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-set-join-landmark-20-billion-mozambique-lng-financing-36929>> accessed 17 November 2021.

²⁶ 'After almost two decades of civil war, Mozambique is rapidly emerging as one of the fastest growing economies in Africa. Economic growth is expected to average around 8% over the next few years, inflation is slowing from 8% in 2012 to an estimated 6% by 2016, and current account deficits are declining as a proportion of gross domestic product (GDP) to around 4.8% by 2016.' The World Bank in Mozambique (17 April 2022) <<https://www.worldbank.org/en/country/mozambique/overview>> accessed 10 August 2022

²⁷ The Al-shabab has various names and cells. However for purposes of this study, the Al-shabab refers to the Al-Shabaab (the Youth), also known as Ansar al-Sunna (supporters of the tradition), Ahlu al-Sunna, Swahili Sunna, Ahlu Sunna Wal Jammah, and Mashababos, an Islamist militant group situated in Cabo Delgado, Mozambique. Ansar al-Sunna's name is similar to the name of an Iraqi Sunni insurgent group that fought against US troops between 2003 and 2007. Locals call them 'al-Shabaab' but they are a separate organisation from the Al Shaba in Mozambique.

²⁸ Centre for International Humanitarian and Operational Law, Workshop/Presentation (17 March 2022) <<https://www.youtube.com/watch?v=1Q3hwEO7IxU>> accessed 12 April 2022.

of civilians²⁹ such as burning homes;³⁰ beheading people;³¹ shooting large groups of people;³² cutting telecommunication links;³³ and causing destruction to state infrastructure³⁴ in the northern region of Mozambique.³⁵ The main motive behind these attacks is the Al-shabab, which is of the opinion that the government is causing political and economic marginalisation as a result of local corruption and displacement of local communities.³⁶ These attacks has been ongoing and increasingly intensifying in frequency and nature ever since and as a result thereof tourism, international trade, international development and investment in Mozambique has come to a halt.³⁷ The ongoing violent situation in Mozambique thus poses a threat to the country and its people as it could send the country into poverty and decay if the violent situation is not regulated and dealt with accordingly, as can be seen from the previous armed conflict that took place in Mozambique.³⁸

4 Research objective

The overall research objective of this contribution is to classify the violent situation in the northern region of Mozambique between the Al-shabab and Mozambique in order to determine its legal stance in international law.³⁹ In order to achieve this objective the violent situation in Mozambique must be examined to obtain a better understanding of the

²⁹ Referring to persons not in the armed forces, police force or armed group and not taking part in the violent situation.

³⁰ Giles and Mwai (n 2).

³¹ 'Mozambique Insurgency: Children Beheaded, Aid Agency Reports' *BBC* (16 March 2021) <<https://www.bbc.com/news/world-africa-56411157>> accessed 16 April 2021.

³² Kyla Hermansen & Catherine Byaruhanga, 'Mozambique: Dozens Dead After Militant Assault on Palma' (29 March 2021) <<https://www.bbc.com/news/world-africa-56557623>> accessed 16 April 2021.

³³ 'Mozambique Palma Attack: Why IS Involvement is Exaggerated' (17 April 2021) <<https://www.bbc.com/news/world-africa-56773012>> accessed 16 April 2021.

³⁴ Giles and Mwai (n 2).

³⁵ Centre for International Humanitarian and Operational Law, Workshop/Presentation (17 March 2022) <<https://www.youtube.com/watch?v=1Q3hwEO7IxU>> accessed 12 April 2022.

³⁶ Edward A Burrier, 'New US Plan to Address Conflict Could Boost Mozambique's Gains: The Country's Designation as a Priority Under the Global Fragility Act Presents an Opportunity to Address Deep-Seated Drivers of Conflict' (5 April 2022) <<https://www.usip.org/publications/2022/04/new-us-plan-address-conflict-could-boost-mozambiques-gains>> accessed 19 April 2022.

³⁷ African Development Bank Group (n 23).

³⁸ Giles and Mwai (n 2).

³⁹ *ibid.*

situation and the magnitude thereof. Once an understanding has been reached as to what the violent situation entails, the study will attempt to classify this violent situation in Mozambique. This will be done by first examining the violent situation in light of Common Article 3 to determine whether the situation meets the criteria of a Common Article 3-type non-international armed conflict.⁴⁰ Thereafter the violent situation in Mozambique will be examined in light of Additional Protocol II to determine whether the situation has met the higher thresholds/requirements of an Additional Protocol II-type NIAC.⁴¹

5 Research questions

The primary research question in this study is whether the violent situation in the northern region of Mozambique between the Al-shabab and Mozambique constitutes an armed conflict in terms of international law. It must be noted that in order to answer the primary research questions, a few secondary research questions need to be answered. The first secondary research question is whether the violent situation in Mozambique constitutes a non-international armed conflict or whether it is merely an internal disturbance. The second secondary research question enquires into the requirements/thresholds that must be met for a violent situation to qualify as a Common Article 3-type non-international armed conflict.⁴² The third secondary research question is whether the violent situation in Mozambique meets the minimum organisational and intensity requirements. The fourth secondary research question relates to the requirements/thresholds that the violent situation must reach in terms of Additional Protocol II to become a non-international armed conflict. The fifth research question asks whether the armed conflict in Mozambique escalated to such an extent that the requirements of articles 1(1) and 1(2) of APII have been fulfilled.⁴³

⁴⁰ Common Article 3 to the Geneva Conventions.

⁴¹ Additional Protocol II to the Geneva Conventions.

⁴² Common Article 3 to the Geneva Conventions.

⁴³ Arts 1(1) and 1(2) of Additional Protocol II to the Geneva Conventions.

6 Research methodology

The author of this dissertation conducted academic, desk-based research by employing as a point of departure the traditional sources of international law. Traditional sources are the sources of international law listed in article 38(1) of the International Court of Justice (ICJ) Statute.⁴⁴ As this study seeks to classify the violent situation in Mozambique, and the context of Common Article 2 and 3⁴⁵ as well as the Additional Protocols⁴⁶ is of specific importance, the law of treaty interpretation as set out in articles 31 to 33 of the Vienna Convention is frequently employed to facilitate the interpretation of the relevant provisions.⁴⁷ Furthermore, secondary sources such as journal articles and treaty commentaries were used to support or confirm interpretations of the various provisions.⁴⁸

7 Delimitation of study area

It should be noted from the outset that the violent situation in Mozambique remains ongoing. The topic thus is relatively novel in international law and the information is fairly limited with regard to the violent situation in Mozambique. The author therefore wishes to note that while this is a legal analysis of the violent situation and not field-based research, he can rely only on the information available at the time of writing. Therefore, the study relies largely on conflict trackers,⁴⁹ news articles and the latest updates of the International Committee of the Red Cross (ICRC) for information on the violent situation in Mozambique. The author is also aware of the fact that the violent situation in Mozambique can change (escalate or deteriorate) to such an extent that the classification

⁴⁴ Art 38(1) of the Statute of the International Court of Justice, SATS 6 (1945) (ICJ Statute).

⁴⁵ Common Article 3 to the Geneva Conventions.

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (8 June 1977); Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

⁴⁷ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁴⁸ Art 38(1) of the Statute of the ICJ (n 44).

⁴⁹ ACLED conflict tracker, the leading conflict tracker on the violent situation in Mozambique providing accurate and recent data on the violent situation; <<https://acleddata.com>> accessed 19 April 2022.

herein no longer is applicable. Therefore, the information, classification and examination of the violent situation will be limited to the time of writing. The contribution will further focus mainly on the law as classified in Common Article 3,⁵⁰ Additional Protocol II⁵¹ and the interpretation thereof. Customary international law will be considered only when treaty interpretation demands its consideration.

It should further be noted that this study will not address international armed conflicts and internationalisation in relation to the violent situation in Mozambique. The violent situation and the research objectives of the study do not allow for a proper discussion and consideration of the principle of international armed conflicts and internationalisation. This is mainly because the violent situation in Mozambique is currently taking place between a violent group (the Al-shabab) and the state of Mozambique in Cabo Delgado (a region of Mozambique). The conflict thus occurs in the territory of Mozambique and only one High Contracting Party is involved as no other states are involved or provide assistance to the violent group (Al-shabab).⁵² It thus is evident that such a violent situation will not satisfy the requirements of an international armed conflict as encapsulated in Common Article 2 and Additional Protocol I.⁵³ Therefore, a discussion regarding international armed conflicts and internationalisation will be redundant for purposes of this study. The reason for implementing these limitations is to keep the contribution manageable and limited to the main research objective, namely, the classification of the violent situation in Mozambique.

⁵⁰ Common Article 3 to the Geneva Convention.

⁵¹ Additional Protocol II to the Geneva Convention.

⁵² The ICTY confirmed in *Tadić* (n 9) para 70 that 'an international armed conflict exists whenever there is a resort to armed force between States'. This definition was confirmed by the ICTY in *The Prosecutor v Ljube Boškoski and Johan Tarčulovski*, IT-04-82-T, Judgment of 10 July 2008, para 175, stating that 'an international armed conflict exist whenever there is a resort to armed force between States'.

⁵³ Common Article 2 states that the Convention shall apply to all cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Protocol I to the Geneva Conventions extends the situations that are covered by Common Article 2 to include armed conflict in which peoples are fighting against colonial domination, alien occupation and racist regimes in the exercise of their right to self-determination.

8 Chapter breakdown

The above-mentioned research questions and objectives will be addressed in the following manner:

8.1 Chapter 2: The organisational threshold criteria of Common Article 3

This chapter examines and argues that Common article 3 requires a violent group involved in a violent situation to meet a certain level of organisation, as one of the requirements, for a violent situation to be classified as a Common Article 3-type non-international armed conflict.⁵⁴ This is done by employing the interpretive mechanisms of the Vienna Convention on the Law of Treaties.⁵⁵ After a clear understanding of the organisational requirement has been reached, the violent situation in Mozambique will be examined in order to determine whether the violent situation and the violent group (Al-shabab) in Mozambique have met the required threshold of organisation under Common Article 3 to be classified as an armed group.⁵⁶

8.2 Chapter 3: The intensity threshold criteria of Common Article 3

In this chapter the writer analyses Common Article 3 and the fact that it requires a violent situation to meet a certain level of intensity, as the second and final requirement, for a violent situation to be classified as a Common Article 3-type non-international armed conflict.⁵⁷ The purpose of this chapter is to examine Common Article 3 by employing the interpretative measures as incapsulated in the Vienna Convention on the Law of Treaties,⁵⁸ so as to determine whether Common Article 3 requires of a violent situation a certain level of intensity in order for it to be regarded as a Common Article 3-type NIAC.⁵⁹

⁵⁴ Common Article 3 to the Geneva Convention.

⁵⁵ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁵⁶ Common Article 3 to the Geneva Convention.

⁵⁷ *ibid.*

⁵⁸ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁵⁹ Common Article 3 to the Geneva Convention.

Once it has been established that Common Article 3 requires a certain level of intensity, the required threshold will be examined to determine the level of intensity that a violent situation must satisfy in order to be regarded as a Common Article 3-type NIAC.⁶⁰ The violent situation in Mozambique will then be examined to determine whether the intensity criterion has been satisfied for the violent situation to be considered a Common Article 3-type NIAC.⁶¹

8.3 Chapter 4: Has the non-international armed conflict in Mozambique escalated to such an extent that article 1(1) of APII has been fulfilled?

In this chapter the writer first examines Additional Protocol II to determine the criteria that must be met by a Common Article 3-type NIAC to be classified as an Additional Protocol type II-type NIAC,⁶² in other words, the extent to which a Common Article 3 type-NIAC must have escalated to be regarded as an APII-type NIAC. Thereafter these requirements are examined in relation to the anticipated Common Article 3-type NIAC in Mozambique to determine whether this NIAC has escalated to such an extent that it could possibly be classified as an APII-type NIAC.⁶³ This chapter first examines articles 1(1) and 1(2) of APII to determine the criteria that a non-international armed conflict must satisfy to be seen as an APII-type NIAC.⁶⁴ Thereafter the chapter examines the anticipated Common Article 3-type NIAC in Mozambique to determine whether it meets the requirements as outlined in Additional Protocol II to qualify as an APII-type NIAC.

8.4 Chapter 5: Conclusion and recommendation of classification

The conclusion marks the end of this contribution by offering a conclusion to the legal principles and the legal content as outlined in the previous chapters. In concluding the

⁶⁰ *ibid.*

⁶¹ Rulac Geneva Academy Mozambique, 'Our RULAC Classifies Two New Non-International Armed Conflicts' (30 September 2021) <<https://www.rulac.org/news/voa-wikimedia-commons-mozambique-our-rulac-classifies-two-new-non-internati>> accessed 12 October 2021.

⁶² Additional Protocol II to the Geneva Convention.

⁶³ *ibid.*

⁶⁴ Arts 1(1) and 1(2) of Additional Protocol II to the Geneva Convention.

chapter suggests/proposes a classification of the armed conflict in Mozambique (at the time of writing) in consideration of all the above legal principles as applied to the violent situation in Mozambique.

SECTION 2: CLASSIFICATION OF THE VIOLENT SITUATION IN MOZAMBIQUE AS A COMMON ARTICLE 3-TYPE NON-INTERNATIONAL ARMED CONFLICT

Chapter 2: The organisational threshold criteria of Common Article 3

1 Introduction

Chapters 2 and 3 aim to determine the scope of application of Common Article 3,⁶⁵ namely, when an armed conflict not of an international character occurs for purposes of Common Article 3.⁶⁶ This will be done by first determining whether Common Article 3 requires a violent situation and the violent group involved therein to meet a certain level of organisation, as one of the requirements, for a violent situation to be classified as a Common Article 3-type non-international armed conflict (NIAC).⁶⁷ The need for such an examination arises from the fact that Common Article 3 appears to be silent on the organisational requirement.⁶⁸ Therefore, interpretive measures such as the Vienna Convention on the Law of Treaties, as well as subsidiary sources, will be employed to determine whether Common Article 3 requires a certain level of organisation.⁶⁹

After a clear understanding of the organisational requirement in terms of Common Article 3 has been obtained, the violent situation in Mozambique will be examined. This examination will determine who the militants are in Mozambique and whether this violent group has met the required threshold of organisation under Common Article 3,⁷⁰ more specifically whether the violent group (the Al-shabab) has met the required threshold of organisation to qualify as an organised armed group for purposes of Common Article 3.

⁶⁵ Common Article 3 to the Geneva Convention.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁷⁰ Common Article 3 to the Geneva Convention.

2 Treaty interpretation

Common Article 3 is somewhat ambiguous in the sense that it offers neither explanations nor definitions for the terminology used in the wording of the article.⁷¹ It is for this reason that articles 31 and 32 of the Vienna Convention will be used to provide a textual interpretation of Common Article 3.⁷² Common Article 3 merely states that it finds application 'in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply ...'⁷³

The above phrase does not offer much clarity but it does provide two key phrases, namely, an *armed conflict not of an international character* and a *High Contracting Party*.⁷⁴ In order to determine the ordinary meaning of these phrases, one needs to be mindful of the individual meaning of the words in these phrases. Accordingly, to determine the meaning of the term 'armed conflict not of an international character' one first needs to determine the meaning of the word 'armed'. The dictionary meaning of the word 'armed' is 'equipped with or carrying arms'.⁷⁵ 'Conflict' is defined as a serious disagreement or clash between two sides.⁷⁶ 'International character' is defined as a situation occurring, carried or existing between nations.⁷⁷ Therefore, the phrase 'non-international character' refers to a situation that is not occurring or carried on between nations or different countries.⁷⁸ It is further evident that the ordinary meaning of a party to a conflict as defined in the *Oxford Dictionary* is a group, country or state.⁷⁹

It thus is evident from the wording of Common Article 3 that no express mention is made of the organisational threshold criteria that must be met by a group to qualify as a party.

⁷¹ *ibid.*

⁷² *ibid.*; arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁷³ Common Article 3 to the Geneva Convention.

⁷⁴ *ibid.*

⁷⁵ John Simpson and Edmund Weine, *Oxford English Dictionary* (OUP 1989).

⁷⁶ Simpson and Weine (n 75).

⁷⁷ Simpson and Weine (n 75).

⁷⁸ Simpson and Weine (n 75).

⁷⁹ Simpson and Weine (n 75).

This in itself is problematic and provides an interpretive obstacle from the outset since the exact threshold of organisation remains unclear and reference must thus be made to subsequent practice and supplementary means of interpretation in determining the organisational threshold.⁸⁰ As stated above, it is evident from the wording of Common Article 3 that reference is made to 'parties' to an armed conflict not of an international character occurring in the territory of the High Contracting Party.⁸¹ A determination is thus required as to whether a 'party' under Common Article 3 includes an organised armed group and, if so, the level of organisation that is required by Common Article 3 for a violent group to constitute an organised armed group.⁸²

The ordinary meaning of the words contained in Common Article 3 is not of much assistance. However, it does make it clear that the violent situation must be of a non-international nature and it must occur between parties.⁸³ Furthermore, the drafting history of Common Article 3 is not of much assistance as it merely refers to 'parties' as rebel groups, insurgents, and so forth, without providing an express definition.⁸⁴ The reason for the vagueness found in the drafting history of Common Article 3 as to who qualifies as a 'party' may be attributed to states fearing that regulating the repression of rebellions 'would strike at the root of national sovereignty and endanger their national security'.⁸⁵ Therefore, the lack of consensus between states as to who qualifies as a party for purposes of Common Article 3, and the threshold of organisation that a violent group must meet to qualify as such, have led to the vague terminology found to date in Common Article 3.⁸⁶

However, it is clear from the drafting history that Common Article 3 requires a level of organisation that a violent group must meet in order to qualify as a party, but the exact

⁸⁰ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁸¹ Common Article 3 to the Geneva Convention.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ Final Record of Diplomatic Conference of Geneva, 1949, Vol II Section B 42.

⁸⁵ Federal Political Department (Switzerland), Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B (1949) 10 (United Kingdom).

⁸⁶ Final Record (n 84) 42.

level of organisation required does not appear from the drafting history of Common Article 3.⁸⁷ This is evident from the drafting history which states that the purpose of this 'organisational' criterion is to distinguish an armed conflict from a sporadic clash, protest or mere disorder.⁸⁸ Therefore, the threshold of organisation required by Common Article 3 is unsettled in law and reference must be made to subsequent judicial practice in order to determine the threshold of organisation required by Common Article 3 in order for a violent group to qualify as a 'party'.⁸⁹

3 Subsequent judicial practice

The *Tadic* appeals case is of cardinal importance in conflict classification as before this case there was a definitional void in Common Article 3.⁹⁰ The *Tadic* appeals case states that the wording of Common Article 3 in referring to 'parties' to an armed conflict not of an international character includes both non-state parties (organised armed groups) and governmental authorities (state parties).⁹¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) specifically stated that a Common Article 3-type NIAC exists when there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.⁹² The ICTY provides the 'twin criteria' to determine the existence of a Common Article 3-type NIAC, in that the violence must be sufficiently intense and the parties to the conflict sufficiently organised.⁹³ This approach of the ICTY filled this definitional void in Common Article 3 by providing guidance in relation to the required threshold of

⁸⁷ Final Record (n 84) para 44.

⁸⁸ Final Record (n 84); see also *Juan Carlos Abella v Argentina*, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998) para 147 (*La Tablada* case).

⁸⁹ MM Bradley, 'Revisiting the Notion of "Organised Armed Group" in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements' (2019) *African Yearbook of International Humanitarian Law* 50-79.

⁹⁰ *Prosecutor v Dusko Tadic aka 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-A, A.Ch, 19 July 1998 paras 69-70; Jann K Kleffner, 'The Legal Fog of an Illusion: Three Reflections on "Organisation" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 *Stockholm Centre for International Law* 164.

⁹¹ *Tadic* (n 90) paras 69-70.

⁹² *Tadic* (n 90) para 70.

⁹³ *Tadic* (n 90) para 562.

organisation and intensity that must be met by a violent situation to qualify as a Common Article 3-type NIAC.⁹⁴ The legal principles and definitions as laid out in the *Tadic* appeals decision have been confirmed in various decisions before the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) ever since and have gained widespread support in the international community.⁹⁵ It thus is evident that the ICTY confirmed the view that Common Article 3 requires the non-state party (organised armed group) to a Common Article 3-type NIAC to be organised to some extent or degree.⁹⁶ Furthermore, one of the requirements for a violent situation to be seen as a Common Article 3-type NIAC is that there must be a non-state party that has taken up arms and that is to some extent or degree organised (organised armed group).⁹⁷

It has thus been established that, although it appears that Common Article 3 is silent on the element of organisation, by not making specific reference thereto, it still prescribes an organisational criterion to qualify as a party to a Common Article 3-type NIAC.⁹⁸ However, the question arises as to the level of organisation or the threshold that must be met by a violent group in terms of Common Article 3. In order to determine the level of organisation required by Common Article 3, one needs to examine subsequent judicial practice.⁹⁹

The *Tadic* appeals case also makes mention of factors indicative of the organisational threshold being met but fails to elaborate on these factors.¹⁰⁰ A further examination of the most recent international case law, such as the *Boskoski* case, reveals a non-exhaustive list of factors indicative of an armed group being sufficiently organised for purposes of

⁹⁴ *Tadic* (n 90) paras 69-70; Kleffner (n 90) 164.

⁹⁵ *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Judgment; *Prosecutor v Katanga*, Case No ICC-01/04-01/07, Judgment.

⁹⁶ *Tadic* (n 90) paras 69-70.

⁹⁷ D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 RCADI 147. For a detailed analysis of these criteria, see ICTY, *The Prosecutor v Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, paras 94-134.

⁹⁸ *ibid*; Sassóli (n 4) paras 6.34-6.641.

⁹⁹ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

¹⁰⁰ *Tadic* (n 90) paras 69-70.

Common Article 3.¹⁰¹ These factors include the presence of a command structure;¹⁰² an internal disciplinary process;¹⁰³ that the armed group must be sufficiently organised to launch a military attack;¹⁰⁴ and must possess a relative degree of organisation.¹⁰⁵ From an examination of the subsequent judicial practice it is evident that a clear definition of the organisational threshold required is not possible, but there is a non-exhaustive list of indicative factors that are indicative of the organisational threshold being met.¹⁰⁶ These indicative factors and further judicial practices will be further examined and discussed in more depth under the examination of the organisational requirement in light of the violent situation and the Al-shabab in Mozambique, under part 5 of this chapter.

4 Scholarly views

In accordance with article 38 of the ICJ Statute one may apply scholarly teachings of the most highly-qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.¹⁰⁷ In considering the subsidiary means of interpretation, the Commentary of the ICRC on Common Article 3 states that in order for the non-state party to be capable of being a 'party' to the conflict under Common Article 3, it must meet a minimum level of organisation.¹⁰⁸ The 2020 Commentary of the ICRC on Common Article 3 further states that the non-state party to the armed conflict must have resorted to arms and that they must be capable of being parties to the armed conflict.¹⁰⁹ Academics such as Sassóli confirm the view that there is no clear definition of the organisational threshold

¹⁰¹ *Prosecutor v Boskoski and Tarculovski* Case No IT-04-82-T Trial Chamber 10 July 2008; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga* Case No ICC-01/04-01/07 Trial Chamber 7 March 2014 (*Katanga*); *La Tablada* case (n 88) para 152.

¹⁰² *Boskoski* (n 101) para 121.

¹⁰³ *ibid* para 202.

¹⁰⁴ *Katanga* (n 101) para 681.

¹⁰⁵ *La Tablada* case (n 88) para 152.

¹⁰⁶ Sassóli (n 4) paras 6.34-6.41.

¹⁰⁷ Art 38(1) of the Statute of the ICJ (n 44).

¹⁰⁸ Convention (III) Relative to the Treatment of Prisoners of War, Geneva (12 August 1949); Commentary of 2020 – Article 3: Conflicts Not of an International Character para 457 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#_Toc44265089>.

¹⁰⁹ *ibid* para 456.

requirement.¹¹⁰ Pejic confirms this view but states that the reason why there is no clear definition is because 'such a strict definition would not be capable of capturing the factual situations that reality throws up'.¹¹¹ Rodenhäuser is of the opinion that a certain margin of flexibility in conflict classification and the reliance of the indicative factors as listed above are needed as a framework defining and setting out the requisite degree of organisation of armed groups.¹¹² However, Rodenhäuser warns against the over-reliance on these indicative factors as it might set the threshold too high.¹¹³ He suggests that 'one should not read the definition of an organised armed group as being limited to groups with headquarters, fully-functioning logistics or ironclad discipline, but rather suggests a pragmatic approach that will avoid any law-based disavowal of those realities'.¹¹⁴ Rodenhäuser concludes this topic by stating that the organisational threshold is too important to leave overly vague and states that in order for an armed group to meet the organisational requirement of Common Article 3, it must be a collective entity that is able to engage in sufficiently intense armed violence against an adversary and have the ability to ensure respect for basic humanitarian norms.¹¹⁵ Therefore, rather than comparing non-state entities to state armed forces, the assessment should focus on which structures and logistics enable a non-state entity to act jointly, to challenge the adversary militarily, and to establish internal discipline.¹¹⁶

There are also scholars who offer a different view to that of judicial practice, which suggests that the presence of a command structure,¹¹⁷ the existence of an internal

¹¹⁰ Sassóli (n 4) para 6.34.

¹¹¹ J Pejic, 'Status of Armed Conflicts' in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 77-100, 85.

¹¹² Tilman Rodenhäuser, 'Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organisation Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict' (2016) 19 Yearbook of International Humanitarian Law 3-35.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *Boskoski* (n 101) para 199; *Prosecutor v Milosevic* Case No IT-02-54-T Trial Chamber Decision on Motion for (Judgment) of Acquittal, 16 June 2004; *Prosecutor v Haradinaj and Others* Trial Judgment), IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008 para 52.

disciplinary system,¹¹⁸ the ability of the group to implement the laws of armed conflict,¹¹⁹ the use of military tactics in an organised manner,¹²⁰ the group having logistical capacity,¹²¹ and the ability of the armed group to speak with one voice, are merely indicative.¹²² This is evident from the work of Kleffner and Bradley who suggest that some of these requirements bear more weight than others, to such an extent that they are in fact constitutive elements or determinative factors rather than indicative factors.¹²³ The factors that are suggested as being determinative or constitutive are the ability of an armed group to engage in a military operation; that the armed group possesses some sort of a leadership structure; and that the armed group must have access to weaponry.¹²⁴ Therefore, these ‘determinative factors’ may be seen as the most basic organisational criterion needed for a violent group in question to qualify as an organised armed group.¹²⁵

In summary, although there is no clear or rather settled definition of the organisational requirement in terms of Common Article 3, it still requires a certain level/threshold of organisation.¹²⁶ Academics agree that this threshold requires one of the parties (the non-state party) to be an organised armed group that is sufficiently organised.¹²⁷ In order to determine whether the violent group is sufficiently organised, one must examine the situation in question with due regard to the indicative factors, specific factors or the suggested constitutive factors, as contained in judicial practice without placing undue reliance thereupon.¹²⁸ The significance of the sufficiently-organised criterion is not only to determine whether the group in question is a party to the conflict, but this criterion also

¹¹⁸ *Boskoski* (n 101) para 202; *Milosevic* (n 117).

¹¹⁹ *Haradinaj* (n 117).

¹²⁰ *Boskoski* (n 101) para 200; *Prosecutor v Halilovic* (Trial Judgment), IT-01-48-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 16 November 2005 paras 161, 163, 166, 168-169, 172; *Haradinaj* (n 117).

¹²¹ *Boskoski* (n 101) para 201; *Milosevic* (n 117); *Haradinaj* (n 117) para 64.

¹²² *Boskoski* (n 101) para 203.

¹²³ Kleffner (n 90) 178; MM Bradley, ‘An Analysis of the Notions of “Organised Armed Groups” and “Intensity” in the Law of Non-International Armed Conflict’ (LLD thesis, University of Pretoria 2018) 54, 55.

¹²⁴ Bradley (n 123) 54, 55.

¹²⁵ Bradley (n 123) 55.

¹²⁶ Sassóli (n 4) paras 6.34-6.41.

¹²⁷ *ibid*; *Tadic* (n 90) para 70.

¹²⁸ See *Limaj* (n 97) para 84. See also *Boškoski* (n 101) para 175; and ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Judgement and Sentence)*, ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), para 92; Rodenhäuser (n 112).

serves as a criterion to differentiate a peaceful group that is protesting from an organised armed group participating in a NIAC.¹²⁹ Therefore, this criterion, together with the intensity requirement, directly determines whether a violent situation may be classified as an armed conflict not of an international character in terms of Common Article 3.¹³⁰

5 Examination of the organisational requirement in light of the violent situation in Mozambique

From the discussion above it has now been established what the organisational threshold requirement of Common Article 3 entails and the factors that must be considered to determine whether a specific violent group is sufficiently organised.¹³¹ Therefore, the violent situation and the violent group in Mozambique will now be examined in line with these 'constitutive factors' and indicative factors to determine whether the violent group in Mozambique (the Al-shabab) is sufficiently organised for purposes of Common Article 3.¹³² However, before one can examine the violent group and whether they meet the constitutive and indicative factors, one must first understand who the armed group is and what they set out to achieve.

The question that is thus posed is who exactly the militants in Mozambique are and whether they are they sufficiently organised for purposes of Common Article 3. An examination of the militant group in Mozambique reveals that the militants are mostly Islamist from the coastal zone of Cabo Delgado, recruited by local fundamentalist preachers with the belief that Islamic law would bring equality and everyone would share in the coming resource of wealth.¹³³ These militants have received backing from Tanzanian militants and the Islamic state claiming that it is behind the ongoing violent

¹²⁹ *Milosevic* (n 117) paras 23 and 24; Rodenhäuser (n 112).

¹³⁰ Final Record (n 84) 335.

¹³¹ Common Article 3 to the Geneva Conventions.

¹³² *ibid.*

¹³³ International Crisis Group, Report 303 Africa (11 June 2021) 'Stemming the Insurrection in Mozambique's Cabo Delgado' <<https://www.crisisgroup.org/africa/southern-africa/mozambique/303-stemming-insurrection-mozambiques-cabo-Delgado>> accessed 22 June 2021.

situation in Mozambique.¹³⁴ The militants are referred to by the locals as al-Shabab or Ansar al-Sunna (not to be confused with Al-Shabaab, the jihadist group in Somalia).¹³⁵ It is evident from the discussion above who the militant group is that is responsible for the violent situation in Mozambique. However, the question that remains is whether this group is sufficiently organised to be seen as an organised armed group to qualify as a party to a Common Article 3-type NIAC. The violent group that is responsible for the violent situation in Mozambique will thus be examined in light of the indicative factors above to determine whether the group is sufficiently organised:¹³⁶

5.1 Command structure

The first factor that is indicative of a sufficiently-organised armed group is the fact that the violent group in question possesses a command structure.¹³⁷ However, what is meant by a command structure? The *Oxford Dictionary* defines a command structure as a hierarchy of authority in which each rank is accountable to the one directly superior.¹³⁸ This provides us with a general idea of what is meant by the phrase 'command structure'. However, to obtain certainty regarding the meaning of this phrase, reference will be made to subsequent judicial practice.

In the *Boskoski* case the tribunal stated that a sophisticated command structure is not required.¹³⁹ The case further provided factors that are indicative of a command structure, such as the presence or the establishment of a general staff or high command that appoints and gives directions to commanders; disseminates internal regulations; organises the weapon supply and military action; assigns tasks to individuals in the organisation and issues political statements; and which is informed by the operational units of all developments within the unit's area of responsibility.¹⁴⁰ Further factors are the

¹³⁴ *ibid.*

¹³⁵ Caleb Weiss, 'Islamic State Claims First Attack in Mozambique' Long War Journal (4 June 2019).

¹³⁶ *Boskoski* (n 101); *Katanga* (n 101); *La Tablada* case (n 88).

¹³⁷ *Boskoski* (n 101) para 121.

¹³⁸ Simpson and Weine (n 75).

¹³⁹ *Boskoski* (n 101) para 203.

¹⁴⁰ *ibid.*

presence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the reporting of military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad; the creation of a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.¹⁴¹

The views and factors as encapsulated in the *Boskoski* judgment were later confirmed and applied in the *Haradinaj* judgment, where the Court stated that these factors needed to be applied 'flexibly' rather than following a rigid approach.¹⁴² This flexible approach was also confirmed in the *Oric* judgment in which it was stated that 'organised armed groups do not necessarily need to be as organised as the armed forces of a State'.¹⁴³ It thus is evident that a complicated command structure is not required. However, the question then remains as to what constitutes a command structure that will be indicative of a sufficiently-organised armed group. According to Rodenhäuser, a command structure suggests a broad criterion, in that the group in question should be a collective entity, being more than a loose collection of individuals.¹⁴⁴ Kleffner agrees with the view in the *Boskoski* case by stating that what is required is that the armed group must be organised in a way that allows individual members to command, and exert authority over, other individual members.¹⁴⁵ There must, therefore, be a superior/subordinate structure in the group resulting in the violence being of a collective nature.¹⁴⁶

The question that must thus be asked is whether the violent group in Mozambique has a command structure in so far as it is more than a mere collection of individuals,¹⁴⁷ as well

¹⁴¹ *ibid* para 197.

¹⁴² *Haradinaj* (n 117) paras 49, 60; see, eg, *Lubanga* (n 95) 537.

¹⁴³ *Prosecutor v Naser Oric* (Appeal Judgment), IT-03-68-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 3 July 2008 para 254; *Boškoski* (n 101) para 197.

¹⁴⁴ Rodenhäuser (n 112).

¹⁴⁵ Kleffner (n 90) 169.

¹⁴⁶ *ibid*.

¹⁴⁷ *Boskoski* (n 101) para 121.

as whether there is a superior/subordinate structure present in the violent group.¹⁴⁸ The Southern African Development Community (SADC) confirmed that one of the ‘leaders’ of the violent groups in Mozambique with the name of Rajab Awadhi Ndanjile had been killed along with other fighters on 25 September 2021 in the Nangade district of Cabo Delgado.¹⁴⁹ The SADC stated that this ‘leader’ recruited, indoctrinated fighters and had been involved in the first attack in the region of Cabo Delgado and ‘subsequent attacks on villages’ as well as the ‘abduction of women and children’.¹⁵⁰ It is clear from the discussion above that the violent group in Mozambique has leaders, meaning that there is a hierarchy of authority in the violent group (although not sophisticated) and it thus is safe to say that the group does have a command structure.

5.2 Sufficiently organised to launch a military attack

The second factor that is indicative of a sufficiently-organised armed group is when the violent group in question is sufficiently organised to launch sustained military attacks.¹⁵¹ The *Oxford Dictionary* defines ‘sustained’ as a situation that has been lasting for an extended period of time without interruption,¹⁵² while military attacks or action is defined as military activity.¹⁵³

This view is confirmed in the *Boskoski* case where the Court listed factors that are indicative of the fact that a group could carry out sustained military operations, which would be indicative of an organised group.¹⁵⁴ These factors include the group’s ability to determine a unified military strategy and to conduct large-scale military operations; the

¹⁴⁸ Kleffner (n 90) 169.

¹⁴⁹ ‘Jihadist Chief, 18 Fighters Killed in Mozambique, Bloc Says’ *VOA News* (2 October 2021) <<https://www.voanews.com/a/jihadist-chief-18-fighters-killed-in-mozambique-development-group-says/6254823.html>> accessed 19 October 2021. This has also been confirmed by *News 24* in an article ‘Jihadist Chief, 18 Fighters Killed in Mozambique’ SADC (2 October 2021) <<https://www.news24.com/news24/africa/news/jihadist-chief-18-fighters-killed-in-mozambique-sadc-20211002>> accessed 19 October 2021.

¹⁵⁰ *VOA News* (n 149).

¹⁵¹ *Katanga* (n 101) para 681.

¹⁵² Simpson and Weine (n 75).

¹⁵³ Simpson and Weine (n 75).

¹⁵⁴ *Boškoski* (n 101).

capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of brigades and other units and the appointment of commanding officers for such units; the capacity of operational units to coordinate their actions; and the effective dissemination of written and oral orders and decisions.¹⁵⁵ Kleffner confirms the view that if a group is sufficiently organised to launch a military attack, it will be indicative of the fact that the group in question is sufficiently organised to qualify as an organised armed group.¹⁵⁶ Rodenhäuser agrees in this regard by stating that an indication of a violent group being sufficiently organised is their ability to plan and carry out concerted military operations, and to impose discipline.¹⁵⁷

An examination of recent events in Mozambique, specifically in the Cabo Delgado region, unveils the fact that various attacks have been perpetrated by this violent group,¹⁵⁸ as is evident from the large number of civilians that were killed and at least 11 000 displaced after the militants invaded Palma on 24 March 2021,¹⁵⁹ as well as the fact that the violent group executed an attack on government forces in Roma, Mocimboa da Praia district, on 16 February 2021 via a sporadic shooting that escalated into a heavy firefight that began in the early morning and maintained and lasted until late in the evening.¹⁶⁰ Furthermore, the violent situation in Mozambique has been ongoing since 2017 and is continuing while this dissertation is being written.¹⁶¹ There can thus be no question as to whether this violent group is able to launch military attacks as they have already launched various attacks against the military forces of the state party and the military forces of SADC countries as well as various civilians.¹⁶²

¹⁵⁵ *ibid.*

¹⁵⁶ Kleffner (n 90) 167.

¹⁵⁷ Rodenhäuser (n 112).

¹⁵⁸ 'Mozambique Town Palma "Retaken" From Militant Islamists' *BBC News* (5 April 2021) <<https://www.bbc.com/news/world-africa-56637573>> accessed 4 May 2021.

¹⁵⁹ ACLED, 'Situation Summary of Cabo Delgado' Weekly, 15-21 February 2021 <<https://acleddata.com/2021/02/23/cabo-delgado-weekly-15-21-february-2021/>> accessed 4 May 2021.

¹⁶⁰ *ibid.*

¹⁶¹ *BBC News* (n 158).

¹⁶² *ibid.*

It is clear from the discussion above that this violent non-state group has been launching attacks against the state of Mozambique and its people since 2017 for a continued period without interruption, with the purpose of achieving their social/religious goals.¹⁶³ It thus is fair to state that this violent group is sufficiently organised to launch a military attack and to conduct military operations.¹⁶⁴

5.3 Other factors indicative of a violent group being sufficiently organised in terms of Common Article 3

The *Boskoski* case lists further factors that are indicative of a violent armed group being sufficiently organised in terms of Common Article 3.¹⁶⁵ These factors include a level of discipline and the ability to implement the basic obligations of Common Article 3; evidence that the level of logistics has been taken into account; and; lastly; that the armed group is able to speak with one voice.¹⁶⁶ Kleffner confirms what is stated in the *Boskoski* case and discussed each of the indicative factors as follows:¹⁶⁷

First, in determining whether the group has taken into account a certain level of logistics, Kleffner suggests examining the violent group and determining whether the group has the ability to recruit new members; whether the group provides military training; whether the group has an organised supply of military weapons; whether the group uses uniforms; and whether the group possesses communication equipment.¹⁶⁸ Second, in determining whether the group has a level of discipline and the ability to implement the basic obligations of Common Article 3, Kleffner states that the focus must be placed on whether the group has established disciplinary rules and regulations and whether the members of the group are aware of these rules and regulations.¹⁶⁹ Lastly, in determining whether the armed group has the ability to speak with one voice, one must consider its capacity to act

¹⁶³ VOA News (n 149).

¹⁶⁴ *La Tablada* case (n 88) para 152.

¹⁶⁵ *Boškoski* (n 101) 199-203.

¹⁶⁶ *ibid.*

¹⁶⁷ Kleffner (n 90) 161-178.

¹⁶⁸ Kleffner (n 90) 166-167.

¹⁶⁹ *ibid.*

on behalf of its members in political negotiations with representatives of international organisations and foreign countries, and its ability to negotiate and conclude agreements such as ceasefire or peace accords.¹⁷⁰ Bradley agrees that these indicative factors, as encapsulated in case law, shed light on the indicative factors that could be employed to establish whether or not an armed group is sufficiently organised.¹⁷¹

At face value it would appear that the group meets most of these indicative factors, if not all, and thus is sufficiently organised, as it is evident that the group has taken into account a certain level of logistics as the group violently recruits new members and loots weapons from police stations as they move through villages in the northern region of Mozambique.¹⁷² However, not much is known about whether the group possesses communication equipment or whether they provide military training. It further is unclear from the information available on the Al-shabab (the violent group in Mozambique) as to whether the group has a level of discipline and the ability to implement the basic obligations of Common Article 3, as there is no information that would suggest that the group has established disciplinary rules and regulations and that the members of the group are aware of these rules and regulations.¹⁷³ However, it can be said that the group speaks with one voice insofar as the group has a common purpose and on multiple occasions has stated its intentions and reasons for the attacks, although the group has not negotiated agreements such as ceasefire or peace accords.¹⁷⁴

It is evident that the violent group in Mozambique (Al-Shabab) satisfies a number of these indicative factors. It is also evident from the examination of the Al-Shabab in relation to the indicative factors that the group possess a command structure;¹⁷⁵ that the group is sufficiently organised to launch a military attack;¹⁷⁶ that the group speaks with one

¹⁷⁰ *ibid.*

¹⁷¹ Bradley (n 123) 53, 54.

¹⁷² Marie Toulemonde, 'Mozambique: Following the Rise of Islamist Group al-Shabab in Cabo Delgado' (12 April 2021) <<https://www.theafricareport.com/78864/mozambique-following-the-rise-of-islamist-group-al-shabab-in-cabo-Delgado/>> accessed 17 June 2021.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *Boskoski* (n 101) para 121.

¹⁷⁶ *Katanga* (n 101) para 681.

voice;¹⁷⁷ that the group has logistical capacity;¹⁷⁸ and that the group possesses a relative degree of organisation.¹⁷⁹ It can thus be said with a relative degree of certainty that this group is an organised armed group and that it will qualify as an organised armed group to a Common Article 3-type NIAC due the indicative factors above being present in this violent group.¹⁸⁰ Thus, the first requirement (being a sufficiently-organised armed group) of a Common Article 3-type NIAC has been met.

6 Conclusion

The primary purpose of this chapter was to unpack the organisational requirement as contained in Common Article 3. This was done by first examining Common Article 3 itself to determine whether the wording of the article prescribes an organisational requirement. Thereafter the VCLT was used to establish the level or threshold of organisation that must be met by a violent group to be sufficiently organised for purposes of qualifying as an armed group under Common Article 3, by examining the drafting history, subsequent judicial practice and scholarly writings in relation to Common Article 3. After a clear understanding of the level of organisation required by Common Article 3 had been obtained, the chapter examined the violent situation in Mozambique and the violent group involved therein (Al-Shabab), so as to determine whether the violent group is sufficiently organised for purposes of Common Article 3. In establishing whether the Al-shabab is sufficiently organised, the chapter examined the violent situation through the lens of the indicative factors set out by judicial practice and the determinative factors as set out and substantiated in scholarly work.

It is clear from this chapter that a minimum degree of organisation is required from a violent group to meet the required level of organisation. To determine whether this level of organisation has been met by a violent group, one needs to examine the determinative

¹⁷⁷ *Boskoski* (n 101) 199; *Milosevic* (n 117) para 203.

¹⁷⁸ *ibid*; *Haradinaj* (n 117) para 64.

¹⁷⁹ *La Tablada* case (n 88) para 152.

¹⁸⁰ *Boskoski* (n 101) para 203.

and indicative factors. In applying these indicative and determinative factors in relation to the Al-Shabab it is clear that the violent group in Mozambique possesses a command structure;¹⁸¹ that the group is sufficiently organised to launch a military attack;¹⁸² that the groups speaks with one voice;¹⁸³ that the group has logistical capacity;¹⁸⁴ and that the group possesses a relative degree of organisation.¹⁸⁵ Thus, it can be said with a relative degree of certainty that this group at the very least is sufficiently organised to launch a military attack. Therefore, the group will qualify as an organised armed group to a Common Article 3-type NIAC due the indicative factors above being present in this violent group. Thus, the first requirement (being a sufficiently-organised armed group) of a Common Article 3-type NIAC has been met.

The following chapter will offer an examination of the second requirement (intensity threshold criteria) of a Common Article 3-type NIAC. This will be done to determine whether the violent situation in Mozambique meets the required intensity threshold of Common Article 3 in order to be seen as a Common Article 3-type NIAC.

¹⁸¹ *Boskoski* (n 101) para 121.

¹⁸² *Katanga* (n 101) para 681.

¹⁸³ *Boskoski* (n 101) para 203.

¹⁸⁴ *Boskoski* (n 101) para 201; *Milosevic* (n 117); *Haradinaj* (n 117) para 64.

¹⁸⁵ *La Tablada* case (n 88) para 152.

Chapter 3: The intensity threshold criteria

1 Introduction

The previous chapter established that the violent group in Mozambique is sufficiently organised for purposes of Common Article 3. The first requirement of Common article 3 has thus been met insofar as the Al-Shabab is sufficiently organised.¹⁸⁶ The overall research purpose of this chapter is to determine whether the fighting between the Al-Shabab and the state of Mozambique is sufficiently intense to qualify as a Common Article 3-type non-international armed conflict (NIAC).¹⁸⁷

In order to determine this overall research question, this chapter will assess whether Common Article 3 requires a violent situation to meet a certain level of intensity, as the second and final requirement, for a violent situation to be classified as a Common Article 3-type NIAC.¹⁸⁸ The purpose of this chapter is thus to examine Common Article 3 by employing the interpretative measures as incapsulated in the Vienna Convention on the Law of Treaties,¹⁸⁹ to determine whether Common Article 3 requires of a violent situation a certain level of intensity in order to be classified as a Common Article 3-type NIAC.¹⁹⁰ Once it has been established that Common Article 3 requires a certain level of intensity, the required threshold will be examined to determine the level of intensity that a violent situation must satisfy in order to be regarded as a Common Article 3-type NIAC.¹⁹¹ The violent situation in Mozambique will subsequently be examined to determine whether the intensity criterion has been satisfied by the violent situation to be classified as a Common Article 3-type NIAC.¹⁹²

¹⁸⁶ Rulac (n 61).

¹⁸⁷ Common Article 3 to the Geneva Conventions.

¹⁸⁸ *ibid.*

¹⁸⁹ Arts 31- 33 of the Vienna Convention on the Law of Treaties (n 8).

¹⁹⁰ Common Article 3 to the Geneva Conventions.

¹⁹¹ *ibid.*

¹⁹² Rulac (n 61).

2 Treaty interpretation

As stated in the previous chapter, Common Article 3 is worded rather ambiguously and offers neither definitions nor explanations for the terminology contained in its wording. Common Article 3 merely states that it finds application ‘in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply ...’¹⁹³ Common Article 3 does not expressly refer to intensity or a certain threshold that a violent situation must meet for it to be seen as an armed conflict for purposes of Common Article 3.¹⁹⁴ Thus, to determine whether Common Article 3 requires a violent situation to meet a certain level of intensity, to be regarded as a non-international armed conflict, the rules of treaty interpretation must be used in order to provide a textual interpretation.¹⁹⁵ Therefore, one must first examine the ordinary meaning of the phrase ‘a conflict not of an international character occurring in the territory of one of the High Contracting Parties’.¹⁹⁶ The ordinary dictionary meaning of this phrase contained in Common Article 3 is a clash or friction between two or more parties that does not exceed the national territory within the borders of a specific country.¹⁹⁷ The ordinary meaning of the wording of Common Article 3 is not of much assistance in determining the level of intensity prescribed by Common Article 3. However, it is clear that it does require some level of intensity insofar as the violent situation must be seen as a *conflict* not of an international character, thereby prescribing a certain standard/level of intensity.¹⁹⁸

The drafting history of Common Article 3 reveals that the drafting of this article was somewhat of a contentious process as the states wished to maintain their sovereignty and, on the other hand, the International Committee of the Red Cross (ICRC) wanted Common Article 3 to apply as broadly as possible.¹⁹⁹ The drafting committee thus had to

¹⁹³ Common Article 3 to the Geneva Conventions.

¹⁹⁴ *ibid.*

¹⁹⁵ Art 31-33 of the Vienna Convention on the Law of Treaties (n 8).

¹⁹⁶ Common Article 3 to the Geneva Conventions.

¹⁹⁷ Simpson and Weine (n 75).

¹⁹⁸ Common Article 3 to the Geneva Conventions.

¹⁹⁹ Final Record (n 84) 42.

reach a 'middle ground' as to when Common Article 3 applies, in order not to impede on the sovereignty of the state.²⁰⁰ This 'middle ground' was achieved by the drafting committee indicating that a Common Article 3-type NIAC requires both a certain degree of organisation (as discussed in the previous chapter) and a certain threshold of violence (intensity).²⁰¹ However, it appears from the drafting history that the notion of intensity was neither explained extensively nor is much explanation offered as to what exactly it entails.²⁰² Nevertheless, in order to establish the required threshold of intensity that a violent group must meet, further reference must be made to subsequent practice and supplementary means of interpretation, in determining the required level of intensity in terms of Common Article 3.²⁰³

The drafting history merely stated that the threshold of violence should be similar to that of a civil war, in order to exclude internal disturbances such as protest.²⁰⁴ It appears from the drafting history of Common Article 3 that the drafters intended the threshold of intensity under Common Article 3 to be a very severe degree of violence.²⁰⁵ It thus is clear from the discussion above that Common Article 3 requires a high level of violence to satisfy its intensity threshold, which will be elaborated on under subsequent judicial practice and scholarly views below.²⁰⁶

3 Subsequent judicial practice

Neither Common Article 3 nor its drafting history provides clear indicators or factors that are indicative of the required intensity threshold being met.²⁰⁷ Therefore, reference must be made to international case law that dealt specifically with the notion of intensity, in the

²⁰⁰ *ibid*; MM Bradley, 'Revisiting the Notion of "Intensity" Inherent in Common Article 3: An Examination of the Minimum Threshold Which Satisfies the Notion of "Intensity" and a Discussion of the Possibility of Applying a Method of Cumulative Assessment' (2017) 17 *International Comparative Law Review* 13.

²⁰¹ Final Record (n 84) 42.

²⁰² *ibid*.

²⁰³ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 84).

²⁰⁴ Sassóli (n 4) paras 6.34-6.641; Final Record (n 84) 42; Bradley (n 200) 15.

²⁰⁵ Common Article 3 to the Geneva Conventions.

²⁰⁶ Bradley (n 200) 15.

²⁰⁷ Common Article 3 to the Geneva Conventions.

context of Common Article 3 to understand the criterion in more detail.²⁰⁸ In the prominent *Tadic* appeals case the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that the intensity threshold required by a Common Article 3-type NIAC is that of 'protracted armed violence'.²⁰⁹ Therefore, the question that must be asked is whether, in determining whether a violent situation satisfies the minimum level of intensity to constitute a NIAC under Common Article 3, the violent situation is 'sufficiently protracted'.²¹⁰

Substantial international judicial practice has followed this notion of 'protracted violence' as per the *Tadic* case, which further fleshed out this notion by listing indicators that are indicative of when a violent situation is sufficiently protracted.²¹¹ The ICTY offered a clear, non-exhaustive list of indicators in the *Haradinaj* case that are to be considered in the case of a violent situation, to determine whether the threshold of 'protracted armed violence' has been met.²¹² The ICTY considered factors such as the duration, number and scale of the violent confrontations; the type of weapons and equipment used during these confrontations; the calibre and number of ammunitions used; the number and type of people involved in the confrontation; the number of casualties and the number of civilians that fled the area due to the situation; the destruction caused by this violent situation; and, lastly, the involvement of the United Nations (UN) Security Council.²¹³ These factors were confirmed and further expanded upon in the *Boskoski* case where the tribunal considered these indicative factors in determining whether the 'protracted armed violence' threshold had been met.²¹⁴ The tribunal further considered indicative factors such as the number of troops and units deployed; the occupation of territory; the deployment of government

²⁰⁸ *Tadic* (n 90) para 70; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, International Criminal Court (ICC) 25 September 2009; *Boskoski* (n 101); *La Tablada* case (n 88) para 152; *Haradinaj* (n 117).

²⁰⁹ *Tadic* (n 90) para 70;

²¹⁰ *Prosecutor v Matric* Case No IT-95-1+R61 Trial Chamber, Judgment 8 March 1996 41.

²¹¹ *Tadic* (n 90) para 70; *Katanga and Chui* (n 208); *Boskoski and* (n 101); *La Tablada* case (n 88) para 152; *Haradinaj* (n 117).

²¹² *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj* Case No IT-04-84-T Trial Chamber 3 April 2008 para 39.

²¹³ *Ramush Haradinaj* (n 212) para 40.

²¹⁴ *Boskoski* (n 101) para 177.

forces to the crisis area; the closure of roads; ceasefire agreements; and the attempts by representatives from international organisations to broker and enforce a ceasefire.²¹⁵ These indicative factors were further used and confirmed in the *Lubanga* case in which the Pre-Trial Chamber found the Front National Intégrationniste (FNI) to have met the intensity threshold, as armed attacks were carried out continuously over a period of time.²¹⁶ Furthermore, in the *Bemba* case the International Criminal Court (ICC) Pre-Trial Chamber stated that on the basis of the length of the armed conflict, lasting for more than four and a half months, and the regular hostilities, the armed conflict was ‘protracted’ beyond a reasonable doubt.²¹⁷

Due the simplicity and the meaning of these factors being clear from its ordinary wording, these factors require no further interpretation and will be discussed further in its application thereof on the violent situation in Cabo Delgado.

It is clear from the discussion above that the intensity threshold required by Common Article 3 is that of ‘protracted armed violence’ and that the violent situation must be ‘sufficiently protracted’ to constitute a violent situation under Common Article 3. Furthermore, the indicative factors as established in the *Hardinaj* and *Boskoski* cases and confirmed by further judicial practice must be used to determine whether a violent situation is ‘sufficiently protracted’ for purposes of Common Article 3.²¹⁸

4 Scholarly views

In accordance with article 38 of the ICJ statute one may apply the teachings of the most highly-qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²¹⁹ Cullen confirmed the view that Common Article 3 is very

²¹⁵ *ibid.*

²¹⁶ *The Prosecutor v Thomas Lubanga Dyilo* ICC Pre-Trial Chamber 1 ICC-01/04-01/06 29 January 2007 para 58.

²¹⁷ *In the Case of The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 15 June 2009 para 663.

²¹⁸ *Katanga and Chui* (n 208).

²¹⁹ Art 38(1) of Statute of the ICJ.

vague and does not offer much assistance in determining the minimum intensity threshold.²²⁰ The vague wording and ‘silence’ of Common Article 3 regarding the minimum threshold of intensity are attributable to the debate that arose as a result of states being concerned that the article will impede on their state sovereignty.²²¹ Draper, Cullen and Bradley acknowledge the fact that as a result of this debate, the drafting history of Common Article 3 suggests a high level of intensity similar to that of an international armed conflict of the time, to avoid interference with state sovereignty.²²² It thus is clear that a certain level of intensity is required from a violent situation to qualify as a Common Article 3-type NIAC, as a severe degree of violence is required so as to not impede on the sovereignty of the state in which the violent situation occurs.²²³ This high level of violence was further confirmed in the 1952 Commentaries to Common Article 3 in which Pictet listed indicative criteria that closely resembled the high level of intensity of an international armed conflict.²²⁴ Clapham and Gaeta agree with the notion of ‘protracted armed violence’, as determined by the ICTY in the *Tadic* decision, by stating that an armed conflict exists when there is resort to protracted armed violence between governmental authorities and organised armed groups.²²⁵ However, the questions remains as to when a conflict is considered to be sufficiently protracted.²²⁶ In determining whether a violent situation is sufficiently protracted, Bradley states that for purposes of Common Article 3 the notion of ‘intensity’ is satisfied if the violence is of a protracted nature,²²⁷ which is determined on a case-by-case basis with due regard to the factors as set out in judicial practice.²²⁸ This view is confirmed by Sassóli who warns that cognisance

²²⁰ A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 27-29.

²²¹ GIAD Draper, ‘Humanitarian Law and Internal Armed Conflicts’ (1983) 13 Ga J Int’l & Comp L 253 <<https://digitalcommons.law.uga.edu/gjicl/vol13/iss4/15>> (accessed 21 October 2021).

²²² Cullen (n 220) 129; Bradley (n 200) 15; Draper (n 221) 265.

²²³ Bradley (n 200) 15.

²²⁴ Jean S Pictet, the Geneva Conventions of 12 August 1949: Commentary Published Under the General Editorship of Jean S Pictet, Director for General Affairs of the International Committee of the Red Cross (translated from the original French): I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (International Committee of the Red Cross 1952) 49.

²²⁵ Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford Handbooks 2014) 357.

²²⁶ *Matric* (n 210) 41.

²²⁷ Bradley (n 200) 35.

²²⁸ *ibid* 17-35.

must be taken of the factors on a case-to-case basis to determine whether the situation meets the required level of intensity, but warns that undue emphasis or reliance must not be placed on the duration of the violence as a criterion.²²⁹ Sassoli further outlined the importance of having due regard to both the intensity of the violent situation and the duration of the violence in assessing whether the situation is sufficiently organised.²³⁰ Kleffner states that in order for a violent situation to be sufficiently intense, it needs to involve the loss of life, injury, destruction, or damage of objects in the form of ‘fighting’ between opposing parties.²³¹

There are various lengthy debates in international law on the notion of ‘sufficiently protracted’ and whether the term refers to the duration of the violent situation or the nature of the violent situation.²³² These debates are directed more towards complex situations where several organised armed groups and state armed forces are pitted against one another, or situations where fighting only lasted for a short period of time, which is not the case in Cabo Delgado.²³³ The author will thus briefly address the controversy surrounding this topic in the relevant subsections below, relating to the situation in Cabo Delgado, and will not venture into an in-depth discussion thereof.

5 Application of the intensity threshold to the violent situation in Cabo Delgado

The discussion above confirmed that Common Article 3 requires a violent situation to be ‘sufficiently protracted’ to be classified as a Common Article 3-type NIAC.²³⁴ It also provided a brief outline of the indicators that need to be considered in determining whether a violent situation has indeed reached the required threshold of ‘protracted armed

²²⁹ Antonio Cassese, *The Oxford Companion to International Criminal Justice* (OUP 2009) 120.

²³⁰ *ibid.*

²³¹ Kleffner (n 90) 178.

²³² Dustin A Lewis, ‘The Notion of “Protracted Armed Conflict” in the Rome Statute and the Termination of Armed Conflicts Under International Law: An Analysis of Select Issues’ (2019) *International Review of the Red Cross* 1099.

²³³ Kleffner (n 90) 178.

²³⁴ *Matric* (n 210) 41.

violence'. This subsection will examine the violent situation in the northern region of Mozambique, due regard being had to the indicative factors as mentioned above, to determine whether the violent situation in Mozambique has reached the required threshold of 'protracted armed violence'.²³⁵

5.1 Duration of the violent situation

It must be noted that that the duration of a violent situation is controversial topic due to the *La Tablada* case in which the Inter-American Commission of Human Rights stated that a violent situation that lasted merely 30 hours, had a low death toll and in which only lights weapons were used, constituted 'protracted armed violence' and thus constituted a NIAC in terms of Common Article 3.²³⁶ The Commission based its decision on indicative factors such as the concerted nature of the hostile acts undertaken by the attackers; the direct involvement of state armed forces; and the nature and level of the violent situation.²³⁷ In essence, this decision supports the notion that in determining whether a violent situation constitutes 'protracted violence', the emphasis should be placed on the manner in which the violent situation is conducted rather than the duration of the violent situation.²³⁸ However, in the *Limaj* case the ICTY was faced with multiple clashes similar to those in the *La Tablada* case, and Trial Chamber II of the ICTY stated that the first attacks in the *Limaj* case, which were similar to those in the *La Tablada* case, did not constitute 'protracted armed violence'.²³⁹ According to the ICTY in the *Limaj* matter, the violent situation only became 'protracted' later on in the final period of the situation and only then constituted a Common Article 3-type NIAC.²⁴⁰

²³⁵ *Tadic* (n 90) para 70;

²³⁶ *La Tablada* case (n 88) para 155.

²³⁷ *ibid* para 156.

²³⁸ K Dörmann and others (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (Cambridge University Press 2016) para 92.

²³⁹ *Limaj* (n 97) 171-173.

²⁴⁰ *ibid*.

It thus is evident that there are divergent views as to what constitutes 'protracted armed violence' and when a violent situation is sufficiently protracted. In discussions many academics have agreed that despite this debate, both the nature and the duration of the armed conflict must be considered and due regard must be had to both these factors.²⁴¹ In considering the discussion above, it is evident that the duration of the violent situation is a factor that needs to be considered.

In the *Haradinaj* case the Court considered the duration of the violent situation as an indicative factor.²⁴² In examining the latest violent situation in Mozambique, it is clear that this situation has been ongoing since October 2017, when the initial attack took place, and is still ongoing at the time of writing.²⁴³ The duration of this violent situation is quite extensive as it has been ongoing for at least five years.²⁴⁴ However, the duration of the violent situation in itself is not sufficient to determine whether the violent situation is 'sufficiently protracted' for purposes of a Common Article 3-type NIAC.²⁴⁵

5.2 Number and scale of the violent confrontations

The second indicative factor to examine is the number and the scale of the violent confrontations occurring in Mozambique during this violent situation.²⁴⁶ According to the leading source on the violent situation in Mozambique, the Armed Conflict Location and Event Data Project (ACLED), there have been more than 570 violent confrontations every year in Cabo Delgado, ranging from kidnappings, beheadings, attacks and destruction of infrastructure.²⁴⁷ This is evident from the attack by the Al-Shabab on three police stations

²⁴¹ Dörmann and others (n 238) para 92; Lewis (n 232) 1099.

²⁴² *Haradinaj* (n 117).

²⁴³ Joseph Hanlon, 'Ignoring the Roots of Mozambique's War in a Push for Military Victory' (24 August 2021) <<https://www.accord.org.za/conflict-trends/ignoring-the-roots-of-mozambiques-war-in-a-push-for-military-victory/>> accessed 12 January 2022.

²⁴⁴ *ibid.*

²⁴⁵ Dörmann and others (n 238) para 92.

²⁴⁶ *Ramush Haradinaj* (n 212) para 40.

²⁴⁷ Giles and Mwai (n 2).

in the coastal village Mocimboa da Praia resulting in 16 fatalities in 2017.²⁴⁸ In 2018 this armed group in Mozambique further expanded its geographic scope of operations and increased its targeting of civilians by engaging government security forces, beheading civilians and further increasing confrontations with the government.²⁴⁹ Between 2019 and 2020 the violent situations escalated further with armed attacks on civilians in hotels, the destruction of government infrastructure and mobile communication towers as well as attacks around Mocimboa da Praia to control access to roads and ports by advanced armed groups.²⁵⁰ Furthermore, the armed group has gained significant momentum, especially in Cabo Delgado, which acts as a stronghold allowing the armed group to plan and execute concurrent insurgent actions and sustained attempts to coerce and recruit civilian support.²⁵¹ Between the period of 2020 to 2021 the violent situation further intensified and was further militarised by attacks on civilians and villages regarded by the Al-Shabab as having worked with the security forces.²⁵² This led to the use of military groups such as Dyck Advisory Groups as well as military units from South Africa and other countries that also have an interest in Mozambique.²⁵³ However, despite these efforts the conflict continues to escalate, as is evident from the attack on a passenger bus in Manica, attacks on a military basis in the Quissanga district, the demolition of bridges by armed groups as well as sustained insurgent movement through the Muidumbe district.²⁵⁴ Unfortunately, because of the nature of this study each and every violent confrontation cannot be discussed in detail due to the number of violent confrontations occurring in Mozambique every week. However, it is evident from the discussion above that since the start of the violent situation in Mozambique there have been a high number

²⁴⁸ ACLED Mozambique November 2017 update by Daniel Wigmore Sheppard (27 December 2017) <<https://acleddata.com/2017/12/27/>> accessed 12 August 2021.

²⁴⁹ Hilary Matfess, 'Clear Threat Murky Objectives: Ahlu Sunna Wal Jamaa and Instability in Cabo Delgado' (30 November 2018) <<https://acleddata.com/2018/11/30/clear-threat-murky-objectives-ahlu-sunna-wal-jamaa-and-instability-in-cabo-delgado-mozambique/>> accessed 12 August 2021.

²⁵⁰ ACLED Cabo Legado Mozambique Conflict Observatory <<https://acleddata.com/2020/05/19/cabo-ligado-weekly-1017-may-2020/>> accessed 12 August 2021.

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ *ibid.*

of large-scale violent confrontations between the armed group and military forces as well as between it and civilians.²⁵⁵

5.3 Type of weapons, equipment, calibre and amount of ammunition used

The third set of indicative factors to consider is the type of weapons and equipment used as well as the calibre and amount of ammunition used during the violent situation.²⁵⁶ It is evident from the *Limaj* case that the Court considered the use of ‘heavy weaponry’ (grenades, mortars, rockets and land mines) as opposed to ‘light’ weaponry (rifles, and so forth) as an indicative factor of ‘protracted armed violence’.²⁵⁷

An examination of the violent situation in Mozambique reveals that the weapons used by the armed group in Mozambique ranges from armed vehicles, machetes, various types of explosives (IEDs, mortars, RPGs, and so forth) and automatic rifles (type 56 AK47s, Chinese type 80 MG, and so forth).²⁵⁸ The equipment used by the armed group in Mozambique is mostly ‘left-over’ equipment and weapons from the previous civil wars in Mozambique.²⁵⁹ Furthermore, weapons and equipment are obtained through capture and raids of state armouries in both Tanzania and Mozambique, while some were also sourced from the black market.²⁶⁰

The type of ammunition used by the armed group will depend on the situation at hand. For example, in a beheading a machete will be used.²⁶¹ However, in an attack on a military base the armed group will use different weapons to disable vehicles and military personnel, for example, an RPG7 using an 85mm rocket-propelled grenade or an

²⁵⁵ *ibid.*

²⁵⁶ *Ramush Haradinaj* (n 212) paras 146-153.

²⁵⁷ *ibid.*

²⁵⁸ Lenin Ndebele, ‘These are the Types of Weapons Used by Insurgents in Mozambique’ *News 24* (23 December 2021) <<https://www.news24.com/news24/southafrica/news/these-are-the-types-of-weapons-used-by-insurgents-in-mozambique-20211223>> accessed 4 January 2022.

²⁵⁹ *ibid.*

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

automatic machine gun such as an AK47 using 7.62x39mm ammunition.²⁶² To provide an example of the scale of weaponry and equipment used in Mozambique, the Soviet Union used similar weaponry and equipment such as the RPG 7 and AK47s in World War II.²⁶³ It thus is evident that the equipment and weapons used by the armed group in Mozambique are serious military-grade weaponry and equipment, similar to that used in previous international and current non-international armed conflicts around the world.²⁶⁴

5.4 Number and type of people involved

The fourth indicative factor to consider is the number and the type of people fighting in the violent confrontation in Mozambique.²⁶⁵ It must be noted from the outset of the discussion of this requirement that information in this regard is very limited,²⁶⁶ making it extremely difficult to determine the number of Al-Shabab members involved and responsible for each attack.²⁶⁷ It is well known that that this armed group mostly attacks villages and vulnerable points of interest in the Cabo Delgado with large armed groups.²⁶⁸ However, information on the exact number of Al-Shabab members involved in each attack is not readily available at this stage. It is also well known that these large groups are well coordinated and trained as is evident from the attack of the Al-Shabab in Mocimboa which aimed at controlling the main points of entry into Mocimboa da Praia.²⁶⁹ These attacks were executed by groups splitting into smaller cells who then destroyed fibre optic cables belonging to mobile operators Vodacom and Movitel, cutting mobile service in the district and severely curtailing the communication of tactical intelligence.²⁷⁰ It thus is clear that

²⁶² *ibid.*

²⁶³ Blake Stillwell, 'The AK 47: Everything You Want to Know' Military.com (11 August 2020) <<https://www.military.com/off-duty/ak-47-all-about.html>> accessed 12 October 2021.

²⁶⁴ *ibid.*

²⁶⁵ *Boskoski* (n 101).

²⁶⁶ ACLED (n 250).

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

the Al-Shabab is a well-trained coordinated armed group carrying out attacks that are well planned in advance with the purpose of achieving a predetermined tactical objective.²⁷¹

5.5 Number of casualties caused and number of civilians that fled the area

The fifth set of factors to consider that are indicative of 'protracted armed violence' is the number of casualties caused by the violent situation and the number of civilians that fled the area due to the violent situation in Mozambique.²⁷² The amount of fatalities caused by the violent situation ranges from 50 to 1 500 people per year depending on the amount of violent confrontations in that year.²⁷³ In 2017 the violent situation in Mozambique was directly responsible for the deaths of 21 people.²⁷⁴ However, since October 2017 it would seem as if the violent situation has become more severe and intense.²⁷⁵ This is evident from the 3 926 fatalities caused by the violent situation between October 2017 and February 2021.²⁷⁶ These fatalities are a direct result of the 798 'organised violent events' including kidnappings, beheadings and demonstrations that occurred over the last four years in Mozambique.²⁷⁷ Furthermore, with regard to the number of people displaced by the violent situation, recent statistics shows that more or less 800 000 people have been displaced as a direct result of the ongoing violent situation in Mozambique, and specifically Cabo Delgado.²⁷⁸ It thus is clear from the number of fatalities as well as the number of people displaced that this violent situation has had a severe impact on Mozambique and its people.

²⁷¹ *ibid.*

²⁷² *Haradinaj* (n 117).

²⁷³ Statista, 'Number of Deaths Due to Terrorist Attacks in Mozambique' (2020) <<https://www.statista.com/statistics/1243730/number-of-deaths-due-to-terrorist-attacks-in-mozambique/>> accessed 15 April 2021.

²⁷⁴ *ibid.*

²⁷⁵ Paulo Conceição João Faria, 'The Rise and Root Cause of Islamic Insurgency in Mozambique and its Security Implication to the Region' (2021) 15-04 IPSS <<https://reliefweb.int/sites/reliefweb.int/files/resources/Policy-Brief-The-rise-and-root-causes-of-Islamic-insurgency-in-Mozambique-1.pdf>> accessed 15 April 2021.

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

²⁷⁸ Erick Mathias, 'Mozambique: Humanitarian Crisis Grows in Cabo Delgado as Conflict Continues' OCHA Services, relief web <<https://reliefweb.int/report/mozambique/mozambique-humanitarian-crisis-grows-cabo-Delgado-conflict-continues>> accessed 15 April 2021.

5.6 Destruction and devastation caused

The sixth indicative factor to consider in determining whether the violent situation in Mozambique meets the threshold of 'protracted armed violence' is an examination of the destruction caused by the violent situation.²⁷⁹ Despite the devastation and destruction discussed above, a further examination of violent confrontations in Mozambique will be examined to establish the extent of destruction caused by this violent situation. It must be noted from the outset that because of the nature, limits and scope of this study all the violent confrontations cannot be discussed in detail. Therefore, only the most recent events that caused the most devastation and destruction will be discussed in relation to 'protracted armed violence'.

In 2017 the armed group Al-Shabab started its operations by carrying out relatively small attacks on remote security posts in Cabo Delgado.²⁸⁰ However, since 2017 these small units of Al-Shabab have grown into an armed group with heavily-equipped companies the attacks of which not only pose a threat to Mozambique and its locals but also to international peace and security.²⁸¹ This is evident from the attack in Mocimbo da Praia when 30 members of the Al-Shabab attacked the town's police station, raided their armouries and battled with security forces.²⁸² This attack lasted more or less three days causing severe destruction to the police station and leaving more than a dozen people dead.²⁸³ The rest of 2017 and 2018 was marked by raids on villages, in a search for supplies, and attacks on state security forces. However, in 2019 the armed group became more violent, burning homes and beheading people, while raiding villages, to instil fear in the local villagers to deter them from cooperating with security forces.²⁸⁴ By the beginning of 2019 the armed group was dominating most of the coast line of Cabo Delgado and

²⁷⁹ *Haradinaj* (n 117).

²⁸⁰ International Crisis Group (n 133).

²⁸¹ *ibid.*

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ *ibid.*

started moving inland, displaying more confidence in their ability to engage security forces.²⁸⁵ This is evident from the attack on a convoy in the Palma district, which killed a company contractor, and from a later attack on a military base in the Mocimboa da Praia district in which the armed group stole a significant amount of weaponry and equipment.²⁸⁶ The group seemed to grow stronger forming three separate attack groups in the northern centre and south of Cabo Delgado.²⁸⁷ This level of organisation enabled the armed group to cause further destruction by carrying out various raids and attacks in which they aim to destroy state infrastructure, as can be seen from the attack on and destruction of government buildings such as health centres in the Quissanga district.²⁸⁸

The Al-Shabab continued these attacks moving from one district to another and ordering civilians to relocate, to join their armed group or to be killed.²⁸⁹ While moving between different districts the armed group further caused destruction by disrupting communication lines/towers and transport routes by collapsing bridges and destroying communication towers.²⁹⁰ The beginning of 2020 marked the beginning of the COVID generation and a 'golden opportunity' for the armed group as the state also had to deal with a pandemic.²⁹¹ The armed group used this opportunity to overrun a military base in Mocimboa da Praia, raising their flag and handing out food to their supporters.²⁹² Because of the large scale of the armed group and the divided attention of the state the armed group launched multiple attacks in which they destroyed the police headquarters of Quissanga, burned down military barracks and inflicted severe damage to state infrastructure.²⁹³ They continued this attack on the state by proceeding to the island of Quirimba, in Ibo district, where they destroyed a school, a health centre and an administrator's residence.²⁹⁴ These attacks led to the state of Mozambique requesting assistance by and involvement

285 ibid.
286 ibid.
287 ibid.
288 ibid.
289 ibid.
290 ibid.
291 ibid.
292 ibid.
293 ibid.
294 ibid.

of private military companies such as Dyck Advisory Group as well as neighbouring countries and members of the SADC to bring the situation under control.²⁹⁵ Some progress has been made, but the violent situation remains unstable posing a threat to Mozambique and international peace and security.²⁹⁶

It is clear from the discussion above that the violent situation in Mozambique is of a significant scale and that it has had a major effect on Mozambique and its people and international peace, safety and security.

In consideration of all of the indicative factors discussed above, it is clear that the violent situation in Mozambique has reached the intensity of 'protracted armed violence' as required by Common Article 3. This is evident from the duration of the situation; the destruction caused; the scale of the violent confrontations; the type of weapons and equipment used during these confrontations; the calibre and number of ammunitions used; the number and type of people involved in the confrontation; the number of casualties and the number of civilians that fled the area due to the situation; the destruction caused by this violent situation; and, lastly, the involvement of the UN Security Council.²⁹⁷

Other factors that were not discussed in much detail are the vast number of troops and units deployed in Mozambique; the large territory that has been occupied by the Al-Shabab and subsequently lost; the number of government forces deployed to the crisis area; and the road closure caused by the Al-Shabab.²⁹⁸ Therefore, there can be no doubt as to whether this violent situation has met the minimum intensity threshold of Common Article 3 to as it clearly is a textbook example of 'protracted armed violence'.²⁹⁹

²⁹⁵ Amade Miquidade, 'Insurgência em Moçambique: Governo obrigado a adaptar estratégia e meios' *Deutsche Welle* (15 May 2020); 'South African Chopper in Mozambique Operation Makes Emergency Landing' *SA People News* (10 April 2020).

²⁹⁶ International Crisis Group (n 133).

²⁹⁷ *Ramush Haradinaj* (n 212) para 40.

²⁹⁸ *Boskoski* (n 101) para 177.

²⁹⁹ *Rulac* (n 61).

6 Conclusion

The above section clearly outlined that the criterion for a violent situation to qualify as a non-international armed conflict under Common Article 3 is that it should be ‘sufficiently protracted’. The criteria were then further examined in order to establish what ‘protracted armed violence’ entails and when a violent situation will be ‘sufficiently protracted’. It was established that subsequent judicial practice has laid down certain indicative factors of a violent situation being ‘sufficiently protracted’. These factors are uncomplicated and their meaning was evident from its ordinary wording.

These indicative factors were then applied to the ongoing violent situation in Mozambique to determine whether the violent situation meets the minimum criterion of ‘protracted armed violence’ to qualify as a non-international armed conflict. It is evident from the discussion that the violent group in Mozambique (Al-Shabab) is ‘sufficiently organised’ to meet the organisational threshold of Common Article 3.³⁰⁰ Consequently, the Al-Shabab qualifies as an organised armed group and the first requirement for a Common Article 3-type non-international armed conflict has been satisfied.³⁰¹

Furthermore, taking into consideration all the indicative factors, as outlined in both the *Boskoski*³⁰² and *Haradinaj*³⁰³ cases, it is evident that the violent situation in Mozambique has reached the intensity of ‘protracted armed violence’,³⁰⁴ meaning that the violent situation has satisfied the minimum intensity threshold and the second requirement of a Common Article 3-type NIAC.³⁰⁵ In conclusion, both the organisational threshold and the intensity threshold as required by Common Article 3 have been satisfied by the violent situation in Mozambique.³⁰⁶ Therefore, the violent situation in Mozambique qualifies as a

³⁰⁰ *ibid.*

³⁰¹ *ibid.*

³⁰² *Boskoski* (n 101).

³⁰³ *Ramush Haradinaj* (n 212) para 40.

³⁰⁴ *Rulac* (n 61).

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

Common Article 3-type non-international armed conflict.³⁰⁷ Since the violent situation has been classified as a non-international armed conflict, the following section will further examine this non-international armed conflict in Mozambique, to determine whether it has escalated to such an extent that it that it meets the higher criteria of an Additional Protocol II-type NIAC and, if so, whether it has escalated to such an extent as to further qualify as an international armed conflict.

307

ibid.

**SECTION 3: HAS THE NON-INTERNATIONAL ARMED CONFLICT IN
MOZAMBIQUE ESCALATED TO SUCH AN EXTENT THAT IT MEETS THE
CRITERIA OF AN ADDITIONAL PROTOCOL II-TYPE NON-INTERNATIONAL
ARMED CONFLICT?**

Chapter 4 Has the non-international armed conflict in Mozambique escalated to such an extent that the requirements of APII are fulfilled?

1 Introduction

The previous chapters proved that the violent situation in Mozambique constitutes a non-international armed conflict (NIAC) in terms of Common Article 3.³⁰⁸ This chapter offers a further examination to determine whether this NIAC, as identified in the previous chapters, possibly meets the higher threshold of Additional Protocol II (APII) to qualify as an APII-type NIAC.³⁰⁹ To determine whether APII would apply to the NIAC in Mozambique, one must first determine whether Mozambique is a party to APII.³¹⁰ A brief examination of the signatories to the Protocol makes it is clear that Mozambique in fact is a state party to APII, with the result that APII will find application if the internal criteria of Additional Protocol II are met.³¹¹

In the second place one must examine the internal criteria of APII.³¹² This will be done by first assessing article 1(2) which speaks to the lower threshold of APII, in other words, situations in which APII will not find application (the negative test).³¹³ Thereafter article 1(1) of APII will be examined to determine the armed conflicts in which APII will find application (the positive test).³¹⁴

³⁰⁸ Common Article 3 to the Geneva Conventions.

³⁰⁹ Additional Protocol II to the Geneva Conventions.

³¹⁰ Additional Protocol II to the Geneva Conventions.

³¹¹ ICRC Treaties, State Parties and Commentaries <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475> accessed 15 August 2021.

³¹² Art 1(2) Additional Protocol II to Geneva Convention.

³¹³ *ibid.*

³¹⁴ Art 1(1) Additional Protocol II to the Geneva Convention.

2 Article 1(2) of Additional Protocol II (negative test)

2.1 Introduction

The wording of article 1(2) of Additional Protocol II specifically states that it shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.³¹⁵ Article 1(2) thus provides for a 'lower threshold or the below threshold', as to when Additional Protocol II will not find application.³¹⁶ In other words, article 1(2) of APII provides a negative test, meaning that if a situation qualifies as an 'internal disturbance' it falls within the ambit of article 1(2) of APII, and domestic law will apply to the situation and not APII.³¹⁷

The primary research objective in this sub-section is thus to determine whether the Common Article 3 type-NIAC in Cabo Delgado (as classified in the previous chapters of this contribution) will exceed this minimum threshold as prescribed by article 1(2).³¹⁸ This will be done by first interpreting article 1(2) of APII in order to determine the lower limits of APII and thereafter applying such interpretation to the situation in Cabo Delgado.³¹⁹ It must be noted from the outset of this subsection that in order to prevent repetition, the notion of 'intensity' and 'protracted armed violence', as previously discussed in detail in chapter 3, will not be discussed again. Instead this sub-section will determine whether a Common Article 3-type NIAC is sufficient to exceed the minimum threshold prescribed by article 1(2) of APII so as not to be regarded as an 'internal disturbance'.³²⁰

³¹⁵ Additional Protocol II to Geneva Conventions.
³¹⁶ Art 1(2) Additional Protocol II to Geneva Conventions.
³¹⁷ *ibid.*
³¹⁸ *ibid.*
³¹⁹ *ibid.*
³²⁰ *ibid.*

2.2 Treaty interpretation

In establishing the situations in which APII will not find application, one must first establish the meaning of 'internal disturbance' as referred to in article 1(2) of APII.³²¹ The rules of treaty interpretation must thus be applied to provide a textual interpretation of the wording contained in the article.³²² Accordingly, the rules of treaty interpretation prescribe that the ordinary meaning of the phrase 'internal disturbance' must first be considered.³²³ The ordinary dictionary meaning of 'internal' refers to 'situated on the inside', and 'disturbance' is defined as the interruption of a settled peaceful condition.³²⁴ The phrase 'internal disturbance' thus refers to the situation on the inside of a state (within the borders of the state) which disturbs or, alternatively, disrupts the peace.³²⁵

It is evident from the discussion above that the ordinary meaning of the wording of APII does not provide much clarity as to what is meant by the wording of the Protocol in referring to 'internal disturbances'.³²⁶ It must be noted that the wording of article 1(2) of APII provides specific examples of internal disturbances, by stating 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. This provides some guidance.³²⁷

It is evident from the wording of article 1(2) of APII and the reference examples provided by article 1(2) that a certain level of 'intensity' or level of fighting is required. A situation that qualifies as an 'internal disturbance' will fall below the required level of fighting ('intensity threshold') and will thus be excluded from the protection afforded by APII and the state's national laws will find application, as opposed to international law. Any situation that is not considered an 'internal disturbance' will exceed this prescribed level of fighting

³²¹ *ibid.*

³²² Art 31-33 of the Vienna Convention on the Law of Treaties (n 8).

³²³ Art 1(2) Additional Protocol II to Geneva Conventions.

³²⁴ Simpson and Weine (n 75).

³²⁵ Simpson and Weine (n 75).

³²⁶ Art 1(2) Additional Protocol II to Geneva Conventions.

³²⁷ *ibid.*

(‘intensity threshold’) and the situation will be afforded protection under APII and international law will find application.

Because the ordinary meaning of the wording contained in article 1(2) of APII does not provide much clarity as to when a situation will fall below the required ‘intensity threshold’ and qualify as an ‘internal disturbance’ and when a situation will exceed the ‘intensity threshold’ and qualify as an armed conflict, reference must be made to subsequent judicial practice and further interpretative mechanisms.³²⁸

2.3 Subsequent judicial practice

It is well known that the notion of intensity is not defined in treaty law but rather in subsequent judicial practice.³²⁹ In the *Tadić* Opinion and Judgment, Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (ICTY) determined that a non-international armed conflict exists when violent group involved in the conflict is sufficiently organised and the violence associated with the conflict is ‘protracted in nature’. The Trial Chamber further stated that the significance of the term ‘protracted violence’ aims to exclude cases of mere civil unrest or single acts of terrorism from cases of armed conflict not of an international character. The Trial Chamber’s statement thus is in line with the wording adopted in article 1(2) of APII. It thus is evident that for a violent situation not to be excluded by article 1(2) of APII, the violent situation must qualify as an armed conflict in terms of the *Tadic* decision.

This practice of the ‘protracted armed violence threshold’ as being ‘used solely for the purpose, as a minimum threshold, of distinguishing an armed conflict from “internal disturbances” such as banditry, unorganised and short-lived insurrections, or terrorist activities which are not subject to international humanitarian law’ has been confirmed in

³²⁸ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

³²⁹ *Prosecutor v Duško Tadić AKA ‘Dule’* Case No IT-94-1-T, Opinion and Judgment (Trial Chamber I) 7 May 1997, para 562.

various cases.³³⁰ This is evident from the decision of the International Criminal Tribunal for Rwanda (ICTR) in the case of *Prosecutor v Jean-Paul Akayesu*, in which case the Trial Chamber stated that the violent situation in Rwanda was sufficiently protracted, thus constituting an armed conflict by applying the *Tadic* decision, which consequently ruled out situations of internal disturbances and tensions.³³¹ In the case of *Prosecutor v Alfred Musema* the tribunal confirmed that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organisation of the parties to the conflict so as to distinguish an armed conflict from 'internal disturbances'.³³² The tribunal further confirmed that since the violent situation in Rwanda constituted a Common Article 3-type NIAC, the lower threshold prescribed by article 1(2) of APII has been met.³³³

2.4 Scholarly views

According to article 38(1)(d) of the International Court of Justice (ICJ) Statute one may scholarly apply the teachings of the most highly-qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³³⁴ Pedrazzi states that article 1(2) of APII refers to a lower threshold so as to exclude internal disturbances, but the author elaborates by stating that such threshold not only is below the threshold of an APII-type NIAC but rather below the threshold of any armed conflict specifically below the *Tadic* threshold.³³⁵ Pedrazzi is of the opinion that international law will not find application in the 'internal disturbances' as stated in article 1(2), not even Common Article 3.³³⁶

³³⁰ *Hazim Delic Esad Landzo*, Case No IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 183-192; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v Jean-Paul Akayesu*, Case No ICTR 96-4-T, Judgment (Trial Chamber I), 2 September 1998, para 627; ICTR, *Prosecutor v Alfred Musema*, Case No ICTR-96-13-A, Judgment and Sentence (Trial Chamber I), 27 January 2000, paras 248-251; *Limaj* (n 97) paras 171-173.

³³¹ *Akayesu* (n 330) para 627.

³³² *Musema* (n 330) para 256.

³³³ *Musema* (n 330) paras 248-251.

³³⁴ Art 38(1) of the Statute of the ICJ.

³³⁵ Marco Pedrazzi, 'Additional Protocol II and Threshold of Application' in Franco Angeli and Marco Pedrazzi (eds), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law 2017) 48-50.

³³⁶ *ibid.*

This view is further confirmed by both Dinstein and Bradley, who are of the view that the purpose of the minimum threshold contained in article 1(2) of APII is to identify situations that resemble an armed conflict in character but in which the fighting is not sufficiently violent so as to isolate such situations from a law enforcement paradigm (regulated by domestic law and human rights law) and to elevate these to the sphere of non-international armed conflict (regulated by the law of non-international armed conflict).³³⁷ Bradley further states that this minimum threshold is crossed once the violence escalates beyond the degree of violence associated with an 'internal disturbance' and when Common Article 3 or APII is triggered.³³⁸

2.5 Conclusion

It thus is evident from the discussion above that a Common Article 3-type NIAC exceeds the threshold prescribed by article 1(2) of APII and will not be considered an 'internal disturbance'.³³⁹ This means that the ongoing Common Article 3-type NIAC exceeds the minimum threshold (negative test) of article 1(2) of APII and can now be examined in light of the positive test as prescribed by article 1(1) of APII to determine whether the conflict in Cabo Delgado qualifies as an APII-type NIAC.³⁴⁰

3 Article 1(1) of Additional Protocol II (positive test)

3.1 Introduction

The previous sub-section examined article 1(2) of APII to determine when APII does not find application (the negative test or the lower threshold).³⁴¹ The purpose of this sub-

³³⁷ Y Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 22-23; Bradley (n 200) 11.

³³⁸ *ibid.*

³³⁹ *ibid.*

³⁴⁰ *ibid.*

³⁴¹ Art 1(2) of Additional Protocol II to the Geneva Conventions.

section is to examine article 1(1) of APII so as to determine when APII will find application (the positive test).³⁴² Article 1(1) of the Protocol states that it shall apply to all armed conflicts that are not covered by article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military operations and to implement this Protocol.³⁴³

It is clear from the ordinary wording of APII that an APII-type NIAC needs to meet certain criteria:³⁴⁴ The first criterion is that it must not be an international armed conflict as an international armed conflict is covered by article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).³⁴⁵ Second, the NIAC must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups.³⁴⁶ Third, the dissident armed force or organised armed group must contain a responsible command structure.³⁴⁷ Fourth, it must be able to exercise control over a part of the territory of the state.³⁴⁸ Fifth, the armed group must be able to carry out sustained and concerted military operations; and, lastly, the armed group must be able to implement APII.³⁴⁹

These requirements will be examined and then applied in relation to the ongoing Common Article 3-type NIAC in Mozambique in order to determine whether this NIAC in Cabo Delgado has escalated to such an extent that it could possibly be classified as an APII-

³⁴² Art 1(1) of Additional Protocol II to the Geneva Conventions.

³⁴³ Art 1(2) of Additional Protocol II to the Geneva Conventions.

³⁴⁴ Additional Protocol II to the Geneva Conventions.

³⁴⁵ Art 1(1) of Additional Protocol II to the Geneva Conventions.

³⁴⁶ *ibid.*

³⁴⁷ *ibid.*

³⁴⁸ *ibid.*

³⁴⁹ *ibid.*

type NIAC.³⁵⁰ This sub-section will first examine article 1(1) of APII to determine the criteria that a NIAC must satisfy to be seen as an APII-type NIAC.³⁵¹ Thereafter, the sub-section will examine the Common Article 3-type NIAC in Mozambique to determine whether it meets the requirements as outlined in APII to qualify as an APII-type NIAC.

3.2 Responsible command structure requirement

3.2.1 Treaty interpretation

APII states that it shall apply to all armed conflicts that are not covered by article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, *under responsible command*, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.³⁵² In examining the ordinary meaning of the phrase ‘responsible command’, the *Oxford Dictionary* defines the term as accountable authority or the ability to give orders to lower-ranking members of that command.³⁵³ The ordinary meaning thus points to an armed group that is structured to such an extent that the group has some sort of a hierarchy in terms of which higher-ranking members of the group have the ability to hold lower-ranking members accountable.³⁵⁴ This understanding of ‘responsible command’ as per the ordinary meaning is confirmed by the drafting history of APII, which states that the ability of an armed group to implement and observe the conditions of APII is one of the duties underlying the doctrine of responsible command.³⁵⁵ However, to confirm with certainty

³⁵⁰ Additional Protocol II to the Geneva Conventions.

³⁵¹ Additional Protocol II to the Geneva Conventions.

³⁵² Art 1(1) of Additional Protocol II to the Geneva Conventions.

³⁵³ Simpson and Weine (n 75).

³⁵⁴ Simpson and Weine (n 75).

³⁵⁵ Bradley (n 89) 93.

what the term ‘responsible command’ means, reference must be made to subsequent judicial practice and scholarly views on this topic.³⁵⁶

3.2.2 Subsequent judicial practice

In order to confirm the interpretations as outlined above, one needs to have regard to subsequent judicial practice in terms of the Vienna Convention on the Law of Treaties.³⁵⁷

In the *Musema* case the Trial Chamber stated that sufficient territorial control is exercised where the dissident armed force or organised armed group is capable of utilising the territory under its command to engage in sustained and concerted military operations.³⁵⁸

The Trial Chamber further stated that the armed group must exercise control in such a way as to enable it to implement APII.³⁵⁹ The ICTR stated that the term ‘responsible command’ refers to structured leadership and the fact that such structured leadership can exercise control over territory and increase the territory over which they have control is an indicative factor of high-level organisation and responsible command.³⁶⁰ The Tribunal further held in the *Akayesu* case that that one of the duties implied by a ‘responsible command’ is that a commander has to enforce the law of armed conflict upon his subordinates.³⁶¹

Further judicial practice confirms this view. In the *Halilovic* case it was held by the Appeals Chamber that the duty to prevent violations of the law of armed conflict was a general obligation inherent in responsible command.³⁶² It thus appears from this discussion that a ‘responsible command structure’ will depend on the group’s ability to launch sustained and concerted military operations as well the ability to implement APII.

³⁵⁶ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

³⁵⁷ *ibid.*

³⁵⁸ *Musema* (n 330).

³⁵⁹ *ibid.*

³⁶⁰ Bradley (n 89) 95; *Akayesu* (n 330) para 623; *Prosecutor v Zejnil Delalic and Zdravko Mucic, Hazam Delic and Esad Landzo* ICTY (Trial Chamber) (16 November 1998) Case No IT-96-21-T; *Prosecutor v Sefer Halilovic* (Appeals Chamber) (16 October 2007) Public Case No IT-01-48-A (*Halilovic Appeal*); *Prosecutor v Halilovic* ICTY (Trial Chamber) (16 November 2005) Case No IT-01-48-T.

³⁶¹ *Akayesu* (n 330) para 623.

³⁶² *Halilovic Appeal* (n 360) paras 79-90.

3.2.3 Scholarly views

According to article 38 of the ICJ Statute one may apply the teachings of the most highly-qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.³⁶³ The ICRC's Commentary on APII further confirms the interpretation of 'responsible command' as outlined above.³⁶⁴ In terms of the Commentary, responsible command implies some degree of organisation of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organisation similar to that of regular armed forces.³⁶⁵

It is evident that the additional requirements of APII (requiring a responsible command structure, that the organised armed group exercise control over a part of state territory and that the organised armed group must be able to implement APII) all directly or indirectly relate to the level of 'organisation' in the armed group.³⁶⁶ In other words, and as a brief explanation, if an armed group does not have a responsible command structure, it would neither be able to exercise control over a part of state territory nor would it be able to implement APII.³⁶⁷ This is because an armed group lacking a responsible command structure will neither have the structure to exercise control over state territory, nor would it have the capability to hold its members accountable to APII.³⁶⁸ It is thus clear that the main difference between a Common Article 3 type NIAC and an Additional Protocol II type NIAC mainly lies in the elevation of the organisational threshold, as Additional Protocol II requires a higher threshold of organisation from the armed group than that of Common Article 3.³⁶⁹

³⁶³ Art 38(1) of the Statute of the ICJ.

³⁶⁴ Y Sandoz, C Swinarski and B Zimmerman *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 4463; Bradley (n 89) 93.

³⁶⁵ *ibid.*

³⁶⁶ Bradley (n 89) 92.

³⁶⁷ *ibid.*

³⁶⁸ *ibid.*

³⁶⁹ *ibid.*

Therefore, the extent to which an organised armed group is 'organised' is of fundamental importance in determining whether a Common Article 3-type NIAC has escalated to such an extent that it has reached the upper limit to cross over into an APII-type NIAC.

The organisational threshold required for a NIAC to qualify as an APII-type NIAC is an armed group with a 'responsible command structure'.³⁷⁰ This means that there should be leadership or authority figures in the armed group who can order or have the authority to compel lower-ranking or subordinate members of the armed group to do or refrain from doing something.³⁷¹ An examination of the other factors listed in APII makes it abundantly clear that the armed group must have a leadership and command structure that is of such a nature that it enables them to exercise control over a portion of territory of the state, launch concerted military operations from such territory and, lastly, the ability to hold members of the armed group accountable to APII.³⁷² Junod agrees with Bradley and with the approach to 'responsible command', as outlined above in stating:³⁷³

The existence of responsible command implies that the armed group is organised to some degree. Responsible command does thus not require a rigid military hierarchy but rather a *de facto* authority, sufficient to plan and carry out concerted and sustained military operations and to impose the discipline required for the rules of the Protocol to be applied.³⁷⁴

This level of organisation and the indicative factors thereof are further confirmed by Rodenhäuser who states that APII requires a high level of organisation referred to as a 'responsible command structure' and the ability of an armed group to exercise control over a portion of the territory of a state, the ability of an armed group to launch sustained military operations from that territory and the ability of the armed group to implement APII.

³⁷⁰ Art 1(1) of Additional Protocol II to the Geneva Convention.

³⁷¹ Bradley (n 89) 93.

³⁷² *ibid.*

³⁷³ Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 *American University Law Review*

37.

³⁷⁴ *ibid.*

These are all indicative or, rather, constitutive factors of a 'responsible command structure'.³⁷⁵

3.2.4 Application of responsible command to the violent group in Cabo Delgado

In order to determine whether the organised armed group in Mozambique (Al-Shabab) has a 'responsible command structure', the internal organisation and structure of the group must be examined. However this is a difficult task as there is limited information available with regard to the structure of the Al-Shabab and the internal functioning thereof.³⁷⁶ The organisational threshold will thus be determined on the information available at the time of writing.³⁷⁷

The organised armed group in Mozambique (Al-Shabab) has received backing from Tanzanian militants and the Islamic state claiming that it is behind the ongoing violent situation in Mozambique.³⁷⁸ Furthermore, the Southern African Development Community (SADC) confirmed that one of the 'leaders' of the Al-Shabab in Mozambique by the name of Rajab Awadhi Ndanjile was killed along with other fighters on 25 September 2021 in the Nangade district of Cabo Delgado.³⁷⁹ The SADC stated that this 'leader' had recruited, indoctrinated fighters and had been involved in the first attack in the region of Cabo Delgado and 'subsequent attacks on villages' as well as the 'abduction of women and children'.³⁸⁰ It thus is clear that there is some form of organisation in the Al-Shabab in so far as there are leaders and subordinates.³⁸¹ It would appear from the information available that the Al-Shabab in Mozambique is organised, but the organisation and the structure of the armed group are questionable as it does not appear at first glance to be sufficiently sophisticated to be seen as a responsible command structure.

³⁷⁵ Tilman Rodenhäuser, 'Organised Armed Groups in Contemporary International Practice' in Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP 2018) 64.

³⁷⁶ ACLED (n 250).

³⁷⁷ *ibid.*

³⁷⁸ International Crisis Group (n 133).

³⁷⁹ VOA News (n 150).

³⁸⁰ *ibid.*

³⁸¹ *ibid.*

However, before a definitive conclusion can be made as to whether or not the Al-Shabab has a responsible command structure, one must also examine the other criteria under APII.³⁸² If the armed group concerned is not sufficiently organised it would neither be capable of controlling territory, launching sustained and concerted military operations, nor would it be able to implement APII.³⁸³ However, if the Al-Shabab is able to control territory, launch sustained and concerted military attacks from the territory and the Al-Shabab is able to implement APII, it would be indicative of the fact that they do in fact have a responsible command structure.³⁸⁴

Therefore, an examination of the further requirements of APII follows which will be examined in light of the armed conflict in Mozambique. A conclusion will then be reached as to whether the armed group has a responsible command structure and whether the armed conflict in Mozambique qualifies as an APII-type NIAC.³⁸⁵

3.3 Territorial control

3.3.1 Treaty interpretation

Additional Protocol II requires the armed group to exercise control over part of the state's territory.³⁸⁶ This phrase seems simple at first glance. However, the question arises as to the size the territory needs to be in order to be regarded as territory, how long there needs to be control over the territory and what actually constitutes control.

Therefore, reference must be made to articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) to determine the meaning of this phrase.³⁸⁷ The ordinary meaning

³⁸² Bradley (n 89) 92.

³⁸³ *ibid.*

³⁸⁴ *ibid.*

³⁸⁵ *ibid.*

³⁸⁶ Art 1(1) of Additional Protocol II to the Geneva Conventions.

³⁸⁷ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8)

of 'control' is defined in the *Oxford Dictionary* as the power to influence or direct people's behaviour or the course of events.³⁸⁸ It is evident that control in this context refers to the armed group being able to direct the course of events and activities in the particular territory concerned.³⁸⁹ However, the question then remains as to what constitutes territory or what is the minimum size requirement of an area to be classified as territory for purposes of this requirement under APII. Although no reference to a size requirement is made in APII, it is evident from the drafting history of APII that the drafters suggested that the territory over which the armed group has control has to be substantial, but this requirement was left out of the final version of APII.³⁹⁰ Therefore, to confirm this interpretation of territorial control, reference must further be made to subsequent judicial practice and scholarly views on the topic.³⁹¹

3.3.2 Subsequent judicial practice

Although no reference is made to the size of territory required for this requirement to be met in APII, case law provides assistance. In the *Musema* case the Trial Chamber found that an organised armed group must be capable of dominating a sufficient part of the territory belonging to the High Contracting Party against which it is fighting.³⁹² The Trial Chamber also stated that sufficient territorial control will be exercised in a case where the organised armed group is capable of utilising the territory under its command to engage in sustained and concerted military operations.³⁹³ Furthermore, the armed group must exercise control over the territory under its command to such an extent that it is able to implement APII.³⁹⁴ In order for the armed group to achieve this level of territorial control as required by APII, the armed group must exercise stable control over the territory or

³⁸⁸ Simpson and Weine (n 75).

³⁸⁹ Bradley (n 89) 102.

³⁹⁰ Sandoz and others (n 364) para 4465.

³⁹¹ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

³⁹² *Musema* (n 330) paras 253 and 258; Bradley (n 89) 101.

³⁹³ *ibid.*

³⁹⁴ *ibid.*

else it would neither be able to launch military attacks therefrom nor would they be able to implement APII.³⁹⁵

3.3.4 Scholarly views

It would appear from the discussion above that the requirement of territorial control is much more concerned with the exercise of control over the territory than the actual territory or the size of the territory. Moir states that the nature of the territorial control by the armed group must be such as to enable the group to launch concerted military operations from such territory.³⁹⁶ Bradley argues that it is not the size of the territory that is central to determining whether or not the organisational requirement of territorial control has been complied with, but rather the quality of control exercised over the territory which is fundamental in making a determination as to territorial control.³⁹⁷ Moir and Bradley both suggest that the territorial control should be exercised to the extent that the organised armed group can carry out concerted military operations and is able to implement APII.³⁹⁸ Rodenhäuser agrees with Bradley and Moir by stating that territorial control must enable the armed group to regroup in their territory after attacks so as to enable them to plan new attacks from such a 'safe haven' and to coordinate its next operations.³⁹⁹

3.3.5 Territorial control requirement in light of the conflict in Mozambique

The Al-Shabab has indeed captured territory in Mozambique throughout the armed conflict and such cannot be disputed.⁴⁰⁰ This is evident from various news updates and articles that state that the armed group is once again capable of controlling territory as

³⁹⁵ Bradley (n 89) 104.

³⁹⁶ Martha M Bradley 'The "Territorial Control" Requirement under Additional Protocol II in an Era of Complex Conflicts' (2020) 11 *Journal of International Humanitarian Legal Studies*; L Moir *The Law of Internal Armed Conflict* (Cambridge University Press 2003) 89-132.

³⁹⁷ Bradley (n 89) 103.

³⁹⁸ Martha M Bradley 'Additional Protocol II: Elevating the Minimum Threshold of Intensity?' (2020) *IRRC* 5; Bradley (n 396) Moir (n 396) 89-132.

³⁹⁹ Rodenhäuser (n 112) 96.

⁴⁰⁰ Tore Refslund Hamming, 'Lawfare, the Islamic State in Mozambique' (24 January 2021) <<https://www.lawfareblog.com/islamic-state-mozambique>> accessed 9 January 2021.

they captured the north-eastern port city of Mocimboa da Praia in the Cabo Delgado province in August 2020.⁴⁰¹ However, the armed group lost control over the territory a few weeks after the initial attack when Mozambican security forces reclaimed the city.⁴⁰² The armed group also took this city a few months earlier but also lost control over the territory when they retreated from the Mozambican security forces.⁴⁰³ They also held the city of Quissanga, approximately 120 kilometres further south, for about 48 hours, before retreating to evade a large-scale confrontation with the Mozambican army.⁴⁰⁴

It is evident from the discussion above that the armed group in fact captured and controlled territory throughout the armed conflict in Mozambique.⁴⁰⁵ The territory captured by the armed group is of substantial size, enabling the armed group to launch sustained military attacks therefrom, as is evident from previous discussions re the attacks by the Al-Shabab.⁴⁰⁶ Furthermore, although the armed group only had control over these territories for a short period of time, given the extent of the control that the armed group exercised over these areas by way of violent attacks, and so forth, this would suggest that the armed group would be capable of implementing APII.⁴⁰⁷ Therefore, the armed group in Mozambique will satisfy this requirement, as APII requires that the armed group must be able to launch sustained and concerted military operations as well as to implement APII.⁴⁰⁸ Therefore, it is clear from this examination that the territorial control criterion was met by the armed group in Mozambique as they exercised sufficient control over the territory concerned.

401 ibid.

402 ibid.

403 ibid.

404 ibid.

405 ibid.

406 *Musema* (n 330) para 258; Bradley (n 89) 101.

407 Hamming (n 400).

408 Bradley (n 89) 102.

3.4 Sustained and concerted military operations

3.4.1 Treaty interpretation

Additional Protocol II states that the armed group at hand must be able to launch sustained and concerted military operations from the territory under their control.⁴⁰⁹ However, APII does not provide much clarity as to what is meant by this phrase. Therefore, articles 31 and 32 of the VCLT will once again be implemented to interpret the meaning of this phrase.⁴¹⁰ The VCLT provides that reference should be made to the ordinary meaning. An examination of the ordinary dictionary meaning of 'sustained and concerted military operations' means coordinated military operations that are or have been continuing for an extended period of time without interruption.⁴¹¹ Therefore, the wording of APII would suggest that it requires the armed group to have such control over part of the state's territory that they are able to launch coordinated and continuous military operations for an extended period of time without interruption.⁴¹² The drafting history of APII is not of much assistance in this regard and does not offer clarity as to what is meant by 'sustained and concerted military operations'.⁴¹³ Further interpretation with reference to subsequent judicial practice is thus required to confirm the meaning of 'sustained and concerted military operations'.

3.4.2 Subsequent judicial practice

It is stated and outlined in the *Boskoski* case that a higher threshold of organisation and intensity is required by APII as opposed to that of Common Article 3.⁴¹⁴ This view was adopted by the ICTY in the *Boskoski* case when Trial Chamber II stated that the wording 'sustained and concerted' requires a higher threshold of organisation and intensity from

⁴⁰⁹ Art 1(1) of Additional Protocol II to the Geneva Convention.

⁴¹⁰ Arts 31-33 of the Vienna Convention on the Law of Treaties (n 8).

⁴¹¹ Simpson and Weine (n 75).

⁴¹² Simpson and Weine (n 75).

⁴¹³ Additional Protocol II to the Geneva Convention.

⁴¹⁴ Bradley (n 89) 106.

the armed group.⁴¹⁵ It thus is clear that the phrase contains both an intensity requirement, in that the armed group has to engage in more than one military operation, as well as a temporal element insofar as the conflict and the armed group must have been in existence for a period of time.⁴¹⁶ This approach is echoed in the *Katanga* case where the Court had to consider the phrase 'sustained and concerted military operations'.⁴¹⁷ Trial Chamber II stated that the temporal element attaches an element of sustainability to the duration of the armed group itself and emphasised the fact that territorial control and a certain degree of organisation enabled the armed groups to plan and carry out sustained and concerted military attacks.⁴¹⁸

3.4.3 Scholarly views

According to article 38 of the ICJ Statute one may apply the teachings of the most highly-qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.⁴¹⁹ The ICRC Commentaries state that 'sustained and concerted military operations' is an objective criterion and implies that an armed group under responsible command exercises such control over a part of its territory so as to enable such armed group to carry out continuous and organised or planned military operations.⁴²⁰

Junod echoes the view of the ICRC Commentary by stating that it is the sustained and concerted character of the military operations that ensures effective control of part of the territory, and that the terms 'sustained' and 'concerted' imply an element of duration and intensity.⁴²¹ Bradley confirms the view encapsulated by the ICRC Commentaries but elaborates thereupon,⁴²² by stating that an armed group under responsible command needs to exercise such control over a part of its territory so as to enable the armed group

⁴¹⁵ *Boskoski* (n 101) para 197; Bradley (n 89) 107.

⁴¹⁶ *ibid.*

⁴¹⁷ *Katanga* (n 101) 8.

⁴¹⁸ *ibid.*

⁴¹⁹ Art 38(1) of the Statute of the ICJ.

⁴²⁰ *Sandoz and others* (n 364) para 4469.

⁴²¹ Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 Am U L Rev 37.

⁴²² Bradley (n 89) 106.

to carry out continuous and organised or planned military operations.⁴²³ It does not suffice for the armed group to be merely organised in order to use the territory under its control for launching the planned and prolonged APII-type military operation.⁴²⁴ In addition, the armed group needs to satisfy the high threshold of violence implied by the wording 'sustained and concerted'.⁴²⁵ The wording of 'sustained and concerted' thus refers to, first, the ability of an organised armed group to launch attacks and, second, such attacks meeting a high threshold of violence showing that it satisfies the organisational criterion.⁴²⁶

3.4.4 Sustained and concerted military operations in Cabo Delgado

The question as to whether there are sustained military operations from the territory under the control of the armed group in Mozambique is examined in this sub-section. However, it must be noted from the outset that the armed group in Mozambique does not necessarily launch sustained and concerted military operations from the territory under their control, as most of the time they do not have territory under their control. The armed group in Mozambique has launched and launches military attacks that are both coordinated and that have been ongoing since 2017.

In 2017 the armed group (Al-Shabab) started its operations by carrying out relatively small attacks on remote security posts in Cabo Delgado.⁴²⁷ The attacks became bigger and more coordinated as is evident from the attack on the police station in Mocimbo da Praia.⁴²⁸ The attack lasted more or less three days, causing severe destruction to the police station and leaving more than a dozen people dead.⁴²⁹ The rest of 2017 and 2018 was marked by spontaneous attacks on state security forces and villages.⁴³⁰ However, in

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ *ibid.*

⁴²⁶ *ibid.*

⁴²⁷ International Crisis Group (n 133).

⁴²⁸ *ibid.*

⁴²⁹ *ibid.*

⁴³⁰ *ibid.*

2019 the armed group became more violent, burning down homes and beheading people, while raiding villages, to instil fear in the local villagers.⁴³¹ This is evident from the attack on a convoy in the Palma district which killed a company contractor and from a later attack on a military base in the Mocimboa da Praia district in which the armed group stole a significant number of weaponry and equipment.⁴³² The group seemed to grow stronger, forming three separate attack groups in the north, centre and south of Cabo Delgado.⁴³³ This level of organisation enabled the armed group to cause further destruction by carrying out various raids aimed at destroying state infrastructure. Such is evident from the attack and destruction of government buildings in the Quissanga district.⁴³⁴ The armed group further succeeded in their attacks by disrupting communication lines/towers and transport routes as well collapsing bridges.⁴³⁵ In the beginning of 2020 the armed group overran a military base in Mocimboa da Praia, raising their flag and handing out food to their supporters.⁴³⁶ They continued their attacks on the state by proceeding to the island of Quirimba, in Ibo district, where they destroyed a school, a health centre and an administrator's residence.⁴³⁷

It is submitted that an argument can be made that this requirement of 'sustained and concerted military operations' in terms of APII has been satisfied due to the coordination and continuity of these attacks since early 2017 by the armed group in Mozambique. However, an argument can also be made that this requirement has not been satisfied as the attacks in Mozambique are not always launched from an area controlled by the armed group and the armed group does not maintain control over the territory for an extended period of time. This contribution is in favour of the former viewpoint that this requirement of 'sustained and concerted military operations' has been met, as APII clearly states that the armed group must exercise such control over a part of its territory as to enable them

431 ibid.
432 ibid.
433 ibid.
434 ibid.
435 ibid.
436 ibid.
437 ibid.

to ‘carry out sustained and concerted military operations’.⁴³⁸ It is abundantly clear from the discussion above that the armed group has been and continues to launch ‘concerted and sustained military operations’.

3.5 Implementation of Additional Protocol II

3.5.1 Treaty interpretation

One must once again refer to articles 31 and 32 of the VCLT to determine the meaning of this phrase of APII which specifically states that the armed group concerned must be able to implement the Protocol.⁴³⁹ The wording above might appear simple, but the question arises as to when an armed group is able to implement APII. The ordinary wording/meaning of this phrase makes it clear that this criterion requires that the armed group must have the ability, skill or means to implement APII.⁴⁴⁰ The drafting history of APII does not offer much assistance in determining when the armed group has this ability to implement APII. Therefore, reference must be made to subsequent judicial practice so as to confirm what exactly is meant by the term ‘the armed group concerned must be able to implement Additional Protocol II’.⁴⁴¹

3.5.2 Subsequent judicial practice

The courts seem to be in agreement with the ordinary meaning of the phrase as discussed above, as the ICTR stated in the *Akayesu* case that a group must be able to apply Additional Protocol II.⁴⁴² This view was reiterated in the *Musema* case where the ICTR stated that ‘the insurgents must be in a position to implement this Protocol’.⁴⁴³ The same conclusion was reached in the *Fofana* case by the Special Court for Sierra Leone in which

⁴³⁸ Additional Protocol II to the Geneva Conventions.

⁴³⁹ Art 1(1) of Additional Protocol II to the Geneva Conventions.

⁴⁴⁰ *ibid.*

⁴⁴¹ Additional Protocol II to the Geneva Conventions.

⁴⁴² *Akayesu* (n 330) para 623.

⁴⁴³ *Musema* (n 330) para 258.

the Court stated that ‘dissident armed forces or organised armed group must be able to implement APII’.⁴⁴⁴ The Special Court for Sierra Leone supports the view that the requirement relates to ability rather than implementation.⁴⁴⁵ The Court stated that although RUF applied the provisions of APII selectively to their benefit, the question is not whether they completely adhered to the provisions of APII but rather whether they had the ability to implement APII.⁴⁴⁶

3.5.3 Scholarly views

The ICRC Commentary states that the phrase ‘implementation Additional Protocol II’ requires that the parties are reasonably expected to apply the rules developed in the Protocol when they have the minimum infrastructure required therefor.⁴⁴⁷ Therefore, the requirement relates to the ability of the armed group to implement APII and does not require the physical implementation thereof.⁴⁴⁸ Junod states that the insurgents must be able to implement APII and that such ability to implement APII is found in the adequate infrastructure of an armed group.⁴⁴⁹ Dinstein confirms the view that what is required is the ability to implement the Protocol rather than the physical implementation thereof, by stating that as long as an organised armed group possesses the means to implement APII the requirement is met.⁴⁵⁰ However, contrary to this view, other scholars such as Sivakumaran are of the opinion that the armed group must physically implement APII to satisfy this requirement.⁴⁵¹

⁴⁴⁴ *The Prosecutor v Moinina Fofana, Allieu Kondewa* (the CDF Accused) (Appeal Judgment), SCSL-04-14-A, Special Court for Sierra Leone, 28 May 2008 paras 126, 127.

⁴⁴⁵ *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (RUF accused) (Trial judgment) (1-2 March 2009) Case No SCSL-04-15-T, Special Court for Sierra Leone paras 978-981 <<http://www.refworld.org/cases.SCSL.49b102762.html>> (accessed 20 May 2022); Bradley (n 89) 117.

⁴⁴⁶ *ibid.*

⁴⁴⁷ Sandoz and others (n 364) para 4470; Bradley (n 89) 115.

⁴⁴⁸ Art 1(1) of Additional Protocol II.

⁴⁴⁹ Junod (n 421) 38.

⁴⁵⁰ Dinstein (n 337) 47.

⁴⁵¹ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 188-189.

This study tends to agree with the former approach by merely requiring the ability rather than the physical implementation, as an armed group should not be excluded from this criterion in selectively applying APII.⁴⁵² This 'ability to implement APII' requires a sophisticated level of organisation from the armed group so as to constitute a responsible command structure, as the armed group would not have the capability to implement APII if it cannot hold its members and others accountable under APII.⁴⁵³ Furthermore, it also requires the armed group to have territorial control, as it would be impossible for an armed group to be able to implement APII over the territory of which it is not in control.⁴⁵⁴

3.5.4 Ability of the Al-Shabab to implement APII

The previous sub-section discussed 'the ability to implement APII' and examined this requirement in detail. From this discussion it is clear that the satisfaction of this requirement is largely dependent on whether the other criteria under Additional Protocol II have been satisfied, insofar as the armed group requires a sophisticated command structure to have the ability to implement APII as well as to be in control of territory in which it operates.⁴⁵⁵ This is because an armed group must have territorial control to be able to implement APII, as it would be impossible for an armed group to be able to implement APII over the territory of which it is not in control.⁴⁵⁶ It is evident from previous discussions in this contribution, under concerted and sustained military operations as well as territorial control, that these requirements have been met. In my opinion the Al-Shabab has the ability to implement APII although it does not do so.

3.6 Conclusion

In conclusion of this sub-section regarding article 1(1) of Additional Protocol II and after due consideration of all of the requirements of APII, it is clear that the armed group in

⁴⁵² Bradley (n 89) 111.

⁴⁵³ *ibid.*

⁴⁵⁴ *ibid.*

⁴⁵⁵ *ibid.*

⁴⁵⁶ *ibid.*

Mozambique does have a 'responsible command structure' and territorial control so as to enable the armed group to launch sustained and concerted military operations and to implement APII. Therefore, the armed conflict in Mozambique meets the requirements as prescribed by article 1(1) of APII to be classified as an AP II-type non-international armed conflict.⁴⁵⁷

4 Conclusion

In conclusion this chapter discussed and examined Additional Protocol II in detail with reference to the interpretive measures as provided for in the Vienna Convention on the Law of Treaties.⁴⁵⁸ The chapter achieved its objective by examining APII in two parts. The first part of the chapter examined article 1(2) of APII in order to determine the lower threshold of APII (the negative test). The second part of the chapter examined article 1(1) of APII to determine when Additional Protocol II will find application (the positive test). The criteria of APII were then further examined to determine the meaning of a responsible command structure, sustained and concentrated military operations, territorial control and the ability of the armed group to implement APII.⁴⁵⁹ Subsequently the command structure, military operations and territorial control of the Al-Shabab (the violent group in Mozambique) were examined to determine whether the organised armed group contains a responsible command structure,⁴⁶⁰ is able to exercise control over a part of the territory of the state,⁴⁶¹ is able to carry out sustained and concerted military operations and, lastly the group's ability to implement APII.⁴⁶²

In conclusion it was found that the Al-Shabab not only satisfied the lower threshold of APII as prescribed by article 1(2) of APII but also the higher threshold (the positive test) of APII in order to be classified as an Additional Protocol II-type NIAC.⁴⁶³ Therefore, the ongoing

⁴⁵⁷ Additional Protocol II to the Geneva Conventions.

⁴⁵⁸ Vienna Convention on the Law of Treaties (n 8).

⁴⁵⁹ Art 1(1) of Additional Protocol II to the Geneva Conventions.

⁴⁶⁰ *ibid.*

⁴⁶¹ *ibid.*

⁴⁶² *ibid.*

⁴⁶³ Additional Protocol II to the Geneva Conventions.

armed conflict in Mozambique will receive the protection afforded by Additional Protocol II.⁴⁶⁴

⁴⁶⁴ Additional Protocol II to the Geneva Conventions.

SECTION 4: CONCLUSION

Chapter 5: Conclusion and recommendation of classification

The purpose of this study was to classify the ongoing armed conflict in Mozambique, more specifically in Cabo Delgado. The rationale behind this idea is based on the fact that such a classification of the violent situation in Cabo Delgado will determine the applicable legal framework to the armed conflict in Mozambique and would thus be indicative of the protective measures that should be applied to the violent situation in Cabo Delgado.

The classification was done in chronological order. Chapter 1 provided an introduction to the topic in general and the terminology used throughout the dissertation as well as a brief history and background of Mozambique and the situation in Cabo Delgado, in order to establish the roots of this contribution and the reason for such a classification.

Once the basis of the contribution was set out, the article shifted its focus to Common Article 3.⁴⁶⁵ This was done by means of two chapters. Chapter 2 offered an examination and unpacking of the organisational requirement of a Common Article 3-type non-international armed conflict (NIAC) by following the interpretive measures as set out in the Vienna Convention on the Law of Treaties (VCLT).⁴⁶⁶ In the interpretation of the organisational requirement it became evident that the violent group in question needs to be sufficiently organised, meeting certain indicative and constitutive factors. These indicative and constitutive factors were then examined in relation to the violent group in Mozambique which made it clear that the violent group (Al-Shabab) has a command structure, is sufficiently organised to launch a military attack, has taken into account a certain level of logistics and has the ability to speak with one voice. Therefore, it can be stated with certainty that the violent group meets the threshold of organisation as required by Common Article 3 and, therefore, will qualify as an organised armed group for

⁴⁶⁵ Common Article 3 to the Geneva Conventions.

⁴⁶⁶ *ibid.*

purposes of a Common Article 3-type NIAC.⁴⁶⁷ In meeting the required threshold of organisation, it has been established that the violent situation in Mozambique has satisfied one of the two requirements that a violent situation must meet in order to be classified as a Common Article 3-type NIAC.⁴⁶⁸

Thereafter the contribution shifted its focus to the second requirement of a Common Article 3-type NIAC in chapter 3, by examining the intensity threshold that a violent group must meet in terms of Common Article 3.⁴⁶⁹ Chapter 3 accordingly employed the various interpretative measures as per the VCLT to determine the required threshold that a violent situation must meet in order to satisfy the intensity threshold of Common Article 3.⁴⁷⁰ This examination made it clear that once again there are both indicative and constitutive factors that must be met by a violent situation in order to meet the required intensity threshold. Upon a close inspection of the ongoing violent situation in Cabo Delgado, it is evident that the violent situation has been ongoing for an extended period of time' it is a large-scale violent situation encompassing numerous violent events; the type of weapons used by the armed group are those normally used in armed conflicts; many people are involved and affected by the violent situation; the violent situations has resulted in a high number of casualties; a significant number of people were displaced; and the violent situation caused extensive damage and destruction to the infrastructure of the northern region of Mozambique. Bearing all of this in mind, it is evident that the violent situation in the northern region of Mozambique meets most, if not all, of the indicative and constitutive factors of protracted armed violence. This means that the violent situation in Cabo Delgado meets the second requirement of a Common Article 3-type NIAC insofar as the intensity is that of protracted armed violence.⁴⁷¹

Considering chapters 2 and 3 of this study, it is evident that the violent group is 'sufficiently organised' and the violent situation has met the required threshold of 'protracted armed

⁴⁶⁷ *ibid.*

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.*

⁴⁷⁰ Vienna Convention on the Law of Treaties (n 8); Common Article 3 to the Geneva Conventions.

⁴⁷¹ Common Article 3 to the Geneva Conventions.

violence', meaning that the violent situation in Cabo Delgado, Mozambique constitutes a Common Article 3-type NIAC.⁴⁷²

After establishing in chapters 2 and 3 that the violent situation in Cabo Delgado, Mozambique meets the requirements of a Common Article 3-type non international armed conflict, the study shifted its focus to Additional Protocol II.⁴⁷³ Chapter 4 offered a two-part examination of Additional Protocol II (APII).⁴⁷⁴ The first part of chapter 4 offered an examination of article 1(2) of APII which prescribes the lower threshold (negative test) as to when a violent situation is excluded from the ambit of APII.⁴⁷⁵

Article 1(2) of APII was then applied to the violent situation in Cabo Delgado. Since the violent situation in Cabo Delgado was classified as a Common Article 3-type NIAC in the previous chapters, it was evident that it would not qualify as an internal disturbance and, thus, would not be excluded by article 1(2) of APII.⁴⁷⁶

The second part of chapter 4 continued with a further examination into APII, more specifically art 1(1) of the Protocol, in order to determine whether the ongoing Common Article 3-type NIAC in Mozambique has possibly developed to such an extent that it constitutes an APII-type NIAC.⁴⁷⁷ The primary purpose of the second part of chapter 4 was to examine the further, alternatively the extra, requirements that a Common Article 3-type NIAC must meet in order to be regarded as an Additional Protocol II-type NIAC. In determination thereof the interpretive measures of the VCLT⁴⁷⁸ were once again implemented, and it was established that what is further required by APII is a responsible command structure; territorial control; sustained and concerted military operations; and the ability of the armed group to implement APII.⁴⁷⁹ These requirements were then applied to

⁴⁷² Common Article 3 to the Geneva Conventions.

⁴⁷³ Common Article 3 to the Geneva Conventions; Additional Protocol II to the Geneva Conventions.

⁴⁷⁴ Additional Protocol II to the Geneva Conventions.

⁴⁷⁵ Art 1(2) of Additional Protocol II to the Geneva Conventions.

⁴⁷⁶ Art 1(2) of Additional Protocol II to the Geneva Conventions; Common Article 3 to the Geneva Conventions.

⁴⁷⁷ Art 1(1) of Additional Protocol II to the Geneva Conventions.

⁴⁷⁸ Vienna Convention on the Law of Treaties (n 8); Common Article 3 to the Geneva Conventions.

⁴⁷⁹ Additional Protocol II to the Geneva Conventions.

the ongoing Common Article 3-type NIAC in Mozambique to determine whether it might constitute an Additional Protocol II-type NIAC.⁴⁸⁰ In application thereof, it became clear that the Al-Shabab has a responsible command structure; does from time to time have territorial control; launches sustained and concerted military operations from the territory under their control; and has the ability to implement APII due to the group's sophisticated level of organisation.⁴⁸¹ Therefore, it is safe to say that the violent situation in Mozambique has developed to such an extent that it has met the higher thresholds and requirements of an APII-type NIAC.⁴⁸²

In conclusion, after due consideration and interpretation of Common Article 3 and Additional Protocol II in relation to subsequent judicial practice and scholarly views, the violent situation in Mozambique constitutes an Additional Protocol II-type non-international armed conflict and its protection will apply to the non-international armed conflict in Mozambique.

⁴⁸⁰ Additional Protocol II to the Geneva Conventions; Common Article 3 to the Geneva Conventions.

⁴⁸¹ Additional Protocol II to the Geneva Conventions.

⁴⁸² *ibid.*

BIBLIOGRAPHY

Dictionary

Collins English Dictionary (2015)

Simpson J and Weine E, Oxford English Dictionary (OUP, 1989)

Conflict trackers and statistics

ACLED 'Clear Threat Murky Objectives: Ahlu Sunna Wal Jamaa and Instability in Cabo Delgado by Hilary Matfess (30 November 2018). <<https://acleddata.com/2018/11/30/clear-threat-murky-objectives-ahlu-sunna-wal-jamaa-and-instability-in-cabo-delgadoDelgado-mozambique/>>

ACLED Cabo Legado Mozambique Conflict Observatory <<https://acleddata.com/2020/05/19/cabo-ligado-weekly-1017-may-2020/>>

ACLED Conflict tracker, which is the leading conflict tracker on the violent situation in Mozambique and provides accurate and recent data on the violent situation. <Accessible at <https://acleddata.com>>

ACLED Mozambique November 2017 update by Daniel Wigmor Sheppard (27 December 2017) <<https://acleddata.com/2017/12/27/>> accessed 12 August 2021.

Hanlon J, Accord 'Ignoring the Roots of Mozambique's War in a Push for Military Victory' (by Joseph Hanlon, 24 August 2021) <<https://www.accord.org.za/conflict-trends/ignoring-the-roots-of-mozambiques-war-in-a-push-for-military-victory/>>

Situation Summary of Cabo Delgado *Weekly*: (15-21 February 2021) by ACLED <<https://acleddata.com/2021/02/23/cabo-ligado-weekly-15-21-february-2021/>> accessed 4 May 2021.

Statista 'Number of Deaths Due to Terrorist Attacks in Mozambique' (2020)
<<https://www.statista.com/statistics/1243730/number-of-deaths-due-to-terrorist-attacks-in-mozambique/>>

News articles

'Jihadist Chief, 18 Fighters Killed in Mozambique, Bloc Says' *VOA News* (2 October 2021) <<https://www.voanews.com/a/jihadist-chief-18-fighters-killed-in-mozambique-development-group-says/6254823.html>>

'Jihadist Chief, 18 Fighters Killed in Mozambique' *SADC News* (24 October 2021)
<<https://www.news24.com/news24/africa/news/jihadist-chief-18-fighters-killed-in-mozambique-sadc-20211002>>

'Mozambique Insurgency: Children Beheaded, Aid Agency Reports' *BBC* (16 March 2021) <<https://www.bbc.com/news/world-africa-56411157>>

'Mozambique Palma Attack: Why IS Involvement is Exaggerated' (17 April 2021)
<<https://www.bbc.com/news/world-africa-56773012>>

'Mozambique Town Palma "Retaken" from Militant Islamists' *BBC News* (5 April 2021)
<<https://www.bbc.com/news/world-africa-56637573> accessed 4 May 2021>

African Development Bank Group, Mozambique Economic Outlook 2021
<<https://www.afdb.org/en/countries/southern-africa/mozambique/mozambique-economic-outlook>>

Burrier EA, 'New US Plan to Address Conflict Could Boost Mozambique's Gains: The Country's Designation as a Priority Under the Global Fragility Act Presents an Opportunity to Address Deep-Seated Drivers of Conflict' (5 April 2022)

<<https://www.usip.org/publications/2022/04/new-us-plan-address-conflict-could-boost-mozambiques-gains> Accessed 19 April 2022>

Giles C and Mwai P, 'Mozambique Conflict: What's Behind the Unrest?' BBC Reality Check *BBC News* (29 March 2021) <<https://www.bbc.com/news/world-africa-56441499>>

Hermansen K and Byaruhanga C, 'Mozambique: Dozens Dead After Militant Assault on Palma' (29 March 2021) <<https://www.bbc.com/news/world-africa-56557623>>

Miquidade A, 'Insurgência em Moçambique: Governo obrigado a adaptar estratégia e meios' *Deutsche Welle* (15 May 2020) 'South African Chopper in Mozambique Operation Makes Emergency Landing' *SA People News* (10 April 2020)

Ndebele L, 'These are the Types of Weapons Used by Insurgents in Mozambique' *News 24* (23 December 2021) <<https://www.news24.com/news24/southafrica/news/these-are-the-types-of-weapons-used-by-insurgents-in-mozambique-20211223>>

Pevenne JM, 'República de Moçambique' *Britannica* (10 March 2021) <<https://www.britannica.com/contributor/Jeanne-Marie-Penvenne/3986>>

The World Bank in Mozambique (17 April 2022) <<https://www.worldbank.org/en/country/mozambique/overview>> Toulemonde M, 'Mozambique: Following the Rise of Islamist Group Al-Shabab in Cabo Delgado' (12 April 2021) in the Africa report <<https://www.theafricareport.com/78864/mozambique-following-the-rise-of-islamist-group-al-shabab-in-cabo-Delgado/>>

International case law

The Prosecutor v Dusko Tadić, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995

The Prosecutor v Dusko Tadic aka 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-A, A.Ch, 19 July 1998

The Prosecutor v Ljube Boškoski and Johan Tarčulovski, IT-04-82-T, Judgment of 10 July 2008

Prosecutor v Lubanga, Case No ICC-01/04-01/06, Judgment

Juan Carlos Abella v Argentina, Report No 55/97, Case 11.137, Inter-Am CHR 271, OEA ser.L/V/11.98, Doc 6 rev (1998)

Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga Case No ICC-01/04-01/07 Trial Chamber 7 March 2014

The Prosecutor v Moinina Fofana, Allieu Kondewa (the CDF Accused) (Appeal Judgment), SCSL-04-14-A, Special Court for Sierra Leone, 28 May 2008

Prosecutor v Haradinaj and Others (Trial Judgment), IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008

Prosecutor v Halilovic (Trial Judgment), IT-01-48-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 16 November 2005

Prosecutor v Milosevic Case No IT-02-54-T Trial Chamber (Judgment) Decision on Motion for Acquittal 16 June 2004

The Prosecutor v Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005

Prosecutor v Limaj and Others (Trial Judgment), IT-03-66-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 30 November 2005

Georges Anderson Nderubumwe Rutaganda v The Prosecutor (Appeal Judgment), ICTR-96-3-A, International Criminal Tribunal for Rwanda (ICTR), 26 May 2003

Prosecutor v Naser Oric (Trial Judgment), IT-03-68-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 30 June 2006

Prosecutor v Matric Case No IT-95-1+R61 Trial Chamber, Judgment 8 March 1996
In the Case of The Prosecutor v Jean-Pierre Bemba Gombo No ICC-01/05-01/08 15 June 2009

The Prosecutor v Thomas Lubanga Dyilo ICC Pre-Trial Chamber 1 No ICC-01/04-01/06 29 January 2007

Hazim Delic Esad Landzo Case No IT-96-21-T, Judgment (Trial Chamber), 16 November 1998

Prosecutor v Jean-Paul Akayesu International Criminal Tribunal for Rwanda (ICTR) Case No ICTR 96-4-T, Judgment (Trial Chamber I), 2 September 1998

Prosecutor v Alfred Musema, ICTR, Case No ICTR-96-13-A, Judgment and Sentence (Trial Chamber I) 27 January 2000

Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu, ICTY Case No IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005

Prosecutor v Zejnil Delalic and Zdravko Mucic, Hazam Delic and Esad Landzo ICTY (Trial Chamber) (16 November 1998) Case No IT-96-21-T

Prosecutor v Sefer Halilovic (16 October 2007) Public Case No IT-01-48-A

Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF accused) (Trial Judgment) Case No SCSL-04-15-T Special Court for Sierra Leone (1-2 March 2009)

Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu (Judgment) Case No IT-03-66-T, 30 November 2005, Trial Chamber II

International instruments

United Nations Vienna Convention on the Law of Treaties

Common Article 3 Common to the Geneva Conventions (Common Article 3): Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II)

Statute of the International Court of Justice, SATS 6 (1945)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977; Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II)
Common Article 2 to the four 1949 Geneva Conventions

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Commentary of 2020 Article 3 : Conflicts Not of an International Character

Federal Political Department (Switzerland), Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B, (1949) 10 (United Kingdom)

Final Record of the Diplomatic Conference of Geneva of 1949, Vol II

Final Record of the Diplomatic Conference of Geneva of 1949, Vol II, Section B (Federal Political Department Berne)

Books

Cassese A, *The Oxford Companion to International Criminal Justice* (OUP 2009)

Clapham A and Gaeta P, *The Oxford Handbook of International Law in Armed Conflict* (Oxford Handbooks 2014)

Cullen A, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010)

Dinstein Y, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014)

Dörmann K, Lijnzaad L, Sassòli M and Spoerri P (eds), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (Cambridge University Press 2016)

Moir L, *The Law of Internal Armed Conflict* (Cambridge University Press 2003)

Pictet JS, *The Geneva Conventions of 12 August 1949: Commentary Published Under the General Editorship of Jean S Pictet, Director for General Affairs of the International Committee of the Red Cross* (translated from the original French): I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (International Committee of the Red Cross 1952)

Sandoz Y, Swinarski C and Zimmerman B, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987)

Sassòli M, *International Humanitarian Law, Rules, Controversies and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019)

Sivakumaran S, *The Law of Non-International Armed Conflict* (OUP 2012)

Chapters in books

Pedrazzi M, 'Additional Protocol II and Threshold of Application' in Angeli F and Pedrazzi M (eds), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law 2017) 46

Pejic J, 'Status of Armed Conflicts' in Wilmschurst E and Breau S (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 77

Rodenhäuser T, 'Organised Armed Groups in Contemporary International Practice' in Rodenhäuser T, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP 2018)

64

Video

Centre for International Humanitarian and Operational Law, Workshop/Presentation (17 March 2022) <<https://www.youtube.com/watch?v=1Q3hwEO7IxU>>

Other

ICRC Casebook <<https://casebook.icrc.org/glossary/international-armed-conflict>>

International Crisis Group Report 303 Africa 11 June 2021. Stemming the Insurrection in Mozambique's Cabo Delgado <<https://www.crisisgroup.org/africa/southern-africa/mozambique/303-stemming-insurrection-mozambiques-cabo-Delgado>>

International Committee of the Red Cross (ICRC) 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' Opinion Paper (March 2008) <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>>

Kitenge, A 'Terrorist Insurgency in Northern Mozambique: Context, Analysis, and Spill-Over Effects on Tanzania' 7 <https://www.policycenter.ma/sites/default/files/2022-01/PP_26-21_Ouassif-Seleman.pdf. November 2021>

Mathias E, 'Mozambique: Humanitarian Crisis Grows in Cabo Delgado as Conflict Continues' OCHA Services, relief web <<https://reliefweb.int/report/mozambique/mozambique-humanitarian-crisis-grows-cabo-Delgado-conflict-continues>>

Rulac Geneva Academy Mozambique, 'Our RULAC Classifies Two New Non-International Armed Conflicts' (30 September 2021) <<https://www.rulac.org/news/voa-wikimedia-commons-mozambique-our-rulac-classifies-two-new-non-internati>>

Dissertation

Bradley MM, 'An Analysis of the Notions of "Organised Armed Groups" and "Intensity" in the Law of Non-International Armed Conflict' (LLD thesis, University of Pretoria 2018)

Journal articles

Bradley MM, 'Additional Protocol II: Elevating the Minimum Threshold of Intensity?' (2020) IRRC 5

Bradley MM, 'Classifying Non-International Armed Conflicts: The "Territorial Control" Requirement under Additional Protocol II in an Era of Complex Conflicts' (2020) 11 Journal of International Humanitarian Legal Studies

Bradley MM, 'Revisiting the Notion of "Intensity" Inherent in Common Article 3: An Examination of the Minimum Threshold Which Satisfies the Notion of "Intensity" and a Discussion of the Possibility of Applying a Method of Cumulative Assessment' (2017) 17 International Comparative Law Review 7

Bradley, MM 'Revisiting the Notion of "Organised Armed Group" in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements' (2019) African Yearbook of International Humanitarian Law 50

Draper GIAD, 'Humanitarian Law and Internal Armed Conflicts' (1983) 13 Ga J Int'l & Comp L 253

Faria PCJ, 'The Rise and Root Cause of Islamic Insurgency in Mozambique and its Security Implication to the Region' (2021) 15-04 IPSS <https://reliefweb.int/sites/reliefweb.int/files/resources/Policy-Brief-The-rise-and-root-causes-of-Islamic-insurgency-in-Mozambique-1.pdf>

International Crisis Group report 303 Africa 11 June 2021. Stemming the Insurrection in Mozambique's Cabo Delgado <https://www.crisisgroup.org/africa/southern-africa/mozambique/303-stemming-insurrection-mozambiques-cabo-Delgado>

Junod S, 'Additional Protocol II: History and Scope' (1983) 33 American University Law Review 37

Kleffner JK, 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 Stockholm Centre for International Law 164

Lewis DA, 'The Notion of "Protracted Armed Conflict" in the Rome Statute and the Termination of Armed Conflicts Under International Law: An Analysis of Select Issues' (2019) 101 International Review of the Red Cross 1091

Rodenhäuser T, 'Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organisation Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict' (2016) 19 Yearbook of International Humanitarian Law 3

Schindler D, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 RCADI 147

Weiss C, 'Islamic State Claims First Attack in Mozambique' Long War Journal (4 June 2019)

Websites

Military.com The AK 47 Everything you want to know, Blake Stillwell, 11 August 2020

<https://www.military.com/off-duty/ak-47-all-about.html>

Lawfare, the Islamic state in Mozambique by Tore Refslund Hamming, January 24th

2021 <https://www.lawfareblog.com/islamic-state-mozambique>

ICRC Treaties, State Parties and Commentaries https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475