

**UNIVERSITY OF CAPE TOWN FACULTY OF LAW**



**The Nexus of International Humanitarian Law and International Human Rights  
Law Application and Enforcement in a Non-International Armed Conflict: A  
Study of the Mozambican Armed Conflict**

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**I dedicate this work to my late friend Kupakwashe, I fulfilled one of our shared dreams, thank you for being a source of motivation.**

**To the people of Mozambique, I hope this work shed more light to your plight**

## **Abstract**

Mozambique has experienced armed violence since its independence from the Portuguese. There has been a persistent security crisis perpetuated by different ideologies from Frelimo and Renamo, and, more recently, the inception of the Islamist armed group Al-Shabaab. As a result of armed clashes civilians have been succumbing to all forms of human rights violations including but not limited to maiming, torture, abduction, killings, all forms of sexual assault, and denial to access humanitarian assistance. The intensity and organization of these armed groups have given room for the application of International Humanitarian Law and International Human Rights Law in Mozambique's armed conflict. The paper relies on a qualitative methodology to investigate the complementarity of International Humanitarian Law and International Human Rights Law in the Mozambican armed conflict. The study seeks to assess the extent of International Humanitarian Law and International Human Rights' application and enforcement in ensuring comprehensive protection of civilians in Mozambique. The author concludes that there is a nexus between International Humanitarian Law and International Human Rights Law in Mozambique's armed conflict, and that the complementary relationship has not ensured comprehensive protection of civilians.

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## **Abbreviations/Acronyms**

African Charter on Human and Peoples' Rights: ACHPR

African Union: AU

Charter of the United Nations: UN Charter

Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)

Convention on the Elimination of All Forms of Discrimination Against Women: CEDAW

Customary International Humanitarian Law Rules: CHL

Convention on the Rights of the Child: CRC

Frente de Libertação Moçambique: FRELIMO

International Covenant on Economic, Social and Cultural Rights: ICESCR

International Convention on Civil and Political Rights: ICCPR

International Criminal Court: ICC

International Criminal Tribunal for the Former Yugoslavia: ICTY

International Criminal Tribunal for Rwanda: ICTR

International Court of Justice: ICJ

International Armed Conflict: IAC

International Committee of the Red Cross: ICRC

International Humanitarian Law: IHL

International Human Rights Law :IHRL

Non-International Armed Conflict: NIAC

Organization of African Unity: (OAU)

Resistência Nacional Moçambicana: RENAMO

Responsibility to Protect: R2P

Southern African Development Community: SADC

United Nations: UN

Southern African Development Community Mission in Mozambique: SAMIM

United Nations Declaration of Human Rights: UDHR

United Nations General Assembly: UNGA

United Nations Security Council: UNSC

# Chapter 1

## Introduction

Armed violence has been a daunting element in Mozambican history since its independence from Portuguese rule. Armed clashes between Frente de Libertação Moçambique (FRELIMO), the revolutionary party whose armed struggle led to the collapse of Portuguese rule and Resistência Nacional Moçambicana (RENAMO), the biggest opposition movement in Mozambique have persisted since the 1990s. Protracted insecurity in the country due to diverging ideologies between parties with military capabilities has led to a growing political, social, and economic crisis. A crisis that has been seen as an opportunity by Islamist groups such as Al-Shabaab, who have advanced their efforts in Mozambique's province of Cabo Delgado. In addition, the *RENAMO Military Junta*, a splinter from RENAMO has also been active in perpetuating armed violence in the country. The protracted armed violence between the Mozambican government, RENAMO, RENAMO splinters, and Islamist groups such as Al-Shabaab, the intensity of the armed violence and its effects, and the level of organization has led to the characterization of the conflict as a non-international armed conflict. The nature of the conflict is unpacked in detail further in the paper. As a result of the armed conflict, massive human rights violations have been experienced by civilians, including sexual assault, torture and maiming, denial of humanitarian relief, attacks on civilian objects such as schools or hospitals, and indiscriminate killings.

The paper addresses the relationship between International Humanitarian Law and International Human Rights Law in the context of the Mozambican armed conflict. The paper examines whether International Humanitarian Law and International Human Rights Law dovetail to provide comprehensive protection to civilians through application and enforcement. The paper contends that there has been a complementary relationship between International Humanitarian Law and International Human Rights Law in the Mozambican armed conflict.

The paper also contends that insofar as International Humanitarian Law and International Human Rights legal machinery have made huge strides to ensure the

protection of civilians, it has not ensured the comprehensive protection of civilians in a non-international armed conflict as exhibited by the case of Mozambique. This is demonstrated by selective action by international bodies because of highly politicized enforcement machinery; massive centralization of the international courts on State participation; lack of judicial guarantees to ensure fair due process which propels International Humanitarian Law violations; and lack of direct obligations on all actors.

The paper begins by establishing the background and nature of the conflict in Mozambique as a non-international armed conflict, and then highlights the applicable law in the armed conflict. While addressing the application of International Humanitarian Law and International Human Rights Law, the paper establishes the protection due to civilians in the Mozambican armed conflict. The paper goes further to expose acts in contravention of International Humanitarian Law and International Human Rights Law in Mozambique. An attempt is made to analyze the enforcement mechanisms of the two legal regimes in ensuring the protection of civilians. Recommendations to ensure comprehensive protection of civilians are offered. The conclusion is reached by evaluating the comprehensiveness of International Humanitarian Law and International Human Rights legal machinery in ensuring the protection of civilians in Mozambique.

Comprehensive protection is ensuring that the designated legal framework (IHL&IHRL) achieves its objectives. The courts and respective international bodies in exercising their function, make an exhaustive effort to cover all civilians' concerns and ensure accountability from all parties in the armed conflict through robust enforcement mechanisms that can encourage, deter, induce, and sanction all parties of the armed conflict. In this regard, systems and procedures that ensure transparency and accountability of States and non-state actors vis-à-vis civilian conduct should be independent, impartial, thorough, and authoritative.

## **Background**

Mozambique has experienced insecurity and armed confrontations since its independence from Portuguese colonial authority in the 1970s. Frelimo, the liberation party had diverging ideologies from Renamo, a combatant grouping turned opposition

party. Renamo accused Frelimo of being a puppet government with Marxist ideologies and policies.<sup>1</sup> Armed clashes resulted in heavy casualties and destruction of Mozambique's economy and infrastructure until the 1992 Rome General Peace Accord.<sup>2</sup> In that agreement, Renamo demanded decentralization of power by Frelimo and advocated for independent provincial governors elected by the people, not the government. In return, Frelimo expected demobilization, disarmament, and reintegration of Renamo and Frelimo forces into the Mozambican army.<sup>3</sup> Despite the agreement, Frelimo continued to consolidate its power by creating a constitutional amendment that ensured provinces and districts were accountable to the central government.<sup>4</sup> In 2013 the armed clashes between Renamo and the government reemerged, with Renamo pushing the same decentralization demands. After the death of Dhlakama, the leader of Renamo who initiated the negotiations, an agreement was reached between the government and Renamo in 2019. This development that was not received well by some purist members of Renamo who formed a Military junta, a splinter group from Renamo, and also launched attacks against the government. The growing insecurity and disgruntled population of Mozambique's rich province of Cabo Delgado who have been experiencing poverty, neglect, corruption, and poor governance of the spoils of natural resources led to the infiltration by Islamist group Al-Shabaab. Al-Shabaab, which has pledged allegiance to Islamic State (ISIS) launched concerted attacks in Mozambique.<sup>5</sup> The casualties and massive damage caused by organized and intense armed violence from Al-Shabaab resulted in the Mozambican government requesting foreign intervention from Rwanda, and South Africa, and even used private military contractors to thwart and evict Al-Shabaab out of Cabo Delgado. The armed conflict in Mozambique presents a dynamic contemporary conflict with different parties with the shared agenda of fighting against the State.

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<sup>1</sup> Faleg, G. (2019). *CONFLICT PREVENTION IN MOZAMBIQUE: Can there be peace after the storm?* p2.

<sup>2</sup> United Nations Security Council, LETTER DATED 6 OCTOBER 1992 FROM THE PERMANENT REPRESENTATIVE OF MOZAMBIQUE TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, S/24635 8 October 1992

<sup>3</sup> Supra note 1.

<sup>4</sup> Ibid.

<sup>5</sup> *Stemming the insurrection in Mozambique's Cabo Delgado*. (2021, August 9). Crisis Group.

<https://www.crisisgroup.org/africa/southern-africa/mozambique/303-stemming-insurrection-mozambiques-cabo-delgado>

## **Identifying the Armed Conflict in Mozambique as a Non-International Armed Conflict**

International Humanitarian Law can only be applicable when there is an ‘armed conflict’, hence establishing this principle is fundamental for the application and enforcement of International Humanitarian Law.<sup>6</sup> Defining an armed conflict has been subject to contest in International Humanitarian Law scholarship with diverging views about widening the scope of International Humanitarian Law.<sup>7</sup> The identification of armed groups and the classification of an armed conflict has always been a matter of fact rather than a matter of political considerations of parties or recognition by the *de facto* government.<sup>8</sup> The Appeals Chamber in the case of *Prosecutor v Tadic* established that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State”.<sup>9</sup> The definition established by the International Criminal Tribunal for the Former Yugoslavia (ICTY) is not only fundamental in providing a threshold of a non-international armed conflict but provides an essential jurisprudence relied on in subsequent case law.<sup>10</sup> It is essential to highlight that the definition of an armed conflict established by the ICTY is broad in application and hence differs from the Additional Protocol II definition, which provides a high threshold for an armed conflict.<sup>11</sup> This research acknowledges the developments from the Geneva Conventions’ Additional Protocol II to the International Criminal Tribunal for the Former Yugoslavia. In this regard, for the present purposes, this paper considers the ICTY and Additional Protocol II definition of armed conflicts as complementary in providing an authoritative definition of an armed conflict.

The definition of a non-international armed conflict centers on two critical aspects in establishing the nature of a conflict, thus intensity and organization of

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<sup>6</sup> Crowe, J., & Weston-Scheuber, K. (2013). *Principles of International Humanitarian Law*. Edward Elgar, p10-11.

<sup>7</sup> O’Connell, M. E. (2008). Defining Armed Conflict. *Journal of Conflict and Security Law*, 13(3), 393–400.

<sup>8</sup> The Prosecutor v. Akayesu, (Judgment), Case No. ICTR-96-4-T, Trial Chamber I (2 September 1998), para 603.

<sup>9</sup> Prosecutor v Tadic, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Decision on Jurisdiction, 2 October 1995.

<sup>10</sup> Prosecutor v. Tadic Trial Chamber Judgment, 7 May 1997, ICTY Case No.IT-94-1-AR72, para. 561; Prosecutor v. Haradinaj et al., Judgment, Trial Chamber I, ICTY Case No. IT-04-84-T, 3 April 2008. paras. 37–49; Prosecutor v. Boškoski and Tarulovski, Judgment, Trial Chamber II, Case No. IT-04-82-T, 10 July 2008, para. 175.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987) ; Supra note 3.

armed groups involved.<sup>12</sup> Intensity and organization of an armed group have been consistently used as a threshold to define the nature of a conflict and distinguish what is known as a non-international armed conflict from mere violence by terrorists, insurgents, and banditry.<sup>13</sup> This is evident in subsequent International Humanitarian Law jurisprudence, the *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, the Trial Chamber emphasized that to distinguish from civil unrest or terrorist activities there is a need to establish ‘protracted extent of violence’ and ‘organization of the parties involved’.<sup>14</sup> In addition, Additional Protocol II in its efforts to set conditions for its application, references the intensity and organization of the armed groups involved in a specific armed conflict.<sup>15</sup> In particular, Article 1 of AP II stipulates that

“This Protocol develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application shall apply to all armed conflicts which 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 *organized 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”.<sup>16</sup>

The development from ICTY, which requires ‘*protracted violence*’ of armed groups to Additional Protocol II’s definition that emphasized the nature of military operations as *concerted and sustained* is clear.<sup>17</sup> From the definition developed by the Additional Protocol II to ICTY, intensity and organization are two critical factors distinguishing an armed conflict from mere violence, which will be under the domestic jurisdiction. The definition constantly relied on can be argued to hold customary international status due to its general acceptance and usage. It is thus a vital

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<sup>12</sup> Supra note 5.

<sup>13</sup> Ibid, para. 561.

<sup>14</sup> *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T, para. 184; *Prosecutor v. Kordic and Cerkez*, Appeals Chamber Judgment, 17 December 2004, ICTY Case No. IT-95-14/2-T, para. 334 ; Supra note para 620,

<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987)

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287, Article 3 - Conflicts not of an international character, page 170

<sup>17</sup> Supra note para. 561;Ibid, Article 1 (2).

component relied on in this research to unpack the situation in Mozambique.<sup>18</sup> This threshold is central in unpacking the nature of the situation in Mozambique from what has been claimed as mere domestic instability triggered by political differences and terrorist induced violence to a full-blown non-international armed conflict warranting the application of International Humanitarian Law.<sup>19</sup>

### 1. Level of Intensity

It is imperative to note that to establish the intensity of the violence from an armed group, various considerations have been posed by international courts' jurisprudence. Highlighted by the Trial Chamber in the *Prosecutor v. Boškoski and Tarčulovski case*, various indications are used to assess the intensity of fighting in a non-international armed conflict. These encompass the number of casualties, the siege of towns, the closure of infrastructure like roads, military deployment against armed groups, the type of weapons used, and the diffusion of violence over the territory.<sup>20</sup> This was also reiterated by the Trial Chamber in the *Prosecutor v. Ramush Haradinaj case*, in which the court established that the criterion for intensity included:

- the number, duration and intensity of individual confrontations;
- the type of weapons and other military equipment used;
- the number and caliber of munitions fired;
- the number of persons and type of forces partaking in the fighting;
- the number of casualties;
- the extent of material destruction, and
- the number of civilians fleeing from combat zones.
- the involvement of the UN Security Council may also reflect the intensity of a conflict".<sup>21</sup>

There has been consensus on the intensity of violence from the armed groups to establish that there is a non-international armed conflict that is far from mere domestic disturbance and isolated acts of violence. Looking at the ongoing armed conflict in

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<sup>18</sup> North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3 (Feb. 20) International Court of Justice; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article I, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287, Article 3 - Conflicts not of an international character, page 170

<sup>19</sup> Mozambique: Extremism and Terrorism. (n.d.). Retrieved from <https://www.counterextremism.com/countries/mozambique-extremism-and-terrorism>

<sup>20</sup> ICTY, *Prosecutor v. Boškoski and Tarčulovski*, (Judgment), Case No. IT-04-82-T, Trial Chamber II (10 July 2008), para 177

<sup>21</sup> ICTY, *Prosecutor v. Ramush Haradinaj*, (Judgment), Case No. IT-04-84-T, Trial Chamber I (3 April 2008), para 49; *Supra* note 5, para. 561

Mozambique holding the assessment highlighted by case law makes the identification of the nature of the conflict less problematic and a matter of fact.

Looking at the situation in Mozambique through the lens of the judgment by the Appeals Chamber of the ICTY, ICTR, and many more it can be argued that there is an armed conflict in Mozambique.<sup>22</sup> The history of armed violence by different actors in Mozambique points to ‘protracted armed violence’, which surpasses the threshold of mere acts of violence or domestic disturbances.<sup>23</sup> Armed confrontations can be traced back to the 1990s, as Mozambique witnessed clashes between FRELIMO the ruling party, and RENAMO the biggest opposition party, as they had diverging ideologies and political interests post-independence from the Portuguese. More than two decades after the civil war in Mozambique, 2013 Mozambique saw a rise in armed confrontations between RENAMO and government forces. These clashes were accelerated by the stalemate due to claims of election fraud in 2014. During the contestation between RENAMO and FRELIMO, armed Islamist groups popularly known as Al-Shabaab and Ahlu Sunna wal Jama’a have emerged.

The political and economic instability encouraged the emergence of the above Islamist armed groups who have been constantly launching strategic attacks against village leaders, and police stations.<sup>24</sup> It is reported by the Armed Conflict Location & Event Data Project (ACLED) that from 2017 to 2020 the total number of reported fatalities from organized violence reached 24 626, the number for organized violence events reached 711, and the total number of reported fatalities from civilian targeting 1226.<sup>25</sup> Due to continued clashes between the government forces and the local militias, RENAMO splinters and Al-Shabaab, more than 70 000 people have fled their homes and more than 800 000 people overall have been displaced in this ongoing

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<sup>22</sup> Ibid, para 49; Prosecutor v. Tadic Trial Chamber Judgment, 7 May 1997, ICTY Case No.IT-94-1-AR72, para. 561; ICTY, Prosecutor v. Boškoski and Tarčulovski, (Judgment), Case No. IT-04-82-T, Trial Chamber II (10 July 2008), para 177; Prosecutor v. Delalic, Mucic, Delic and Landzo, Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T, para. 184; Prosecutor v. Kordic and Cerkez, Appeals Chamber Judgment, 17 December 2004, ICTY Case No. IT-95-14/2-T, para. 334; ICTR, The Prosecutor v. Akayesu, (Judgment), Case No. ICTR-96-4-T, Trial Chamber I (2 September 1998), para 620,

<sup>23</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1 (2), 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987)

<sup>24</sup> *CrisisWatch Database*. (2023, September 13). Crisis Group. [https://www.crisisgroup.org/crisiswatch/database?location\[\]=118](https://www.crisisgroup.org/crisiswatch/database?location[]=118)

<sup>25</sup> Project, A. C. L. & E. D. (2021, February 4). *Cabo Ligado Weekly: 30 november-6 December 2020*. ACLED.

conflict.<sup>26</sup> In 2021 armed confrontation between the government forces and non-state armed groups intensified in Palma, Nangade, and Mocimboa da Praia districts in Cabo Delgado, resulting in the Southern African Development Community (SADC) mobilizing stand-by forces to assist the Mozambican government with troops from Botswana, Lesotho, South Africa and Rwanda.<sup>27</sup>

Looking at the casualties, number of displaced people, military activity and parties in this conflict, the extent of material destruction, and the duration of confrontations in Mozambique's ongoing conflict, it can be argued that these developments meet the standard necessary to establish the 'intensity' of armed groups as a prerequisite for a non-international armed conflict. It is also important to establish that the intensity of hostilities is also used as an indication of the level of organization of an armed group. The requirement of intensity is closely related to the level of organization as far as establishing the existence of non-international armed conflict.<sup>28</sup>

## 2. Level of Organization

The minimum organization of an armed group is one of the vital elements to identifying and determining the existence of an armed group recognized under International Humanitarian Law. This is illuminated by Additional Protocol II, Article 1(1), and the Tadic judgment of 1999 in which the appeal chamber of the ICTY held that, "An organized group differs from individual in that the former normally has structure, a chain of command and set of rules as well as the outward symbols of authority..."<sup>29</sup> The Tadic formula of an organized group is emphasized in the Milosevic Trial, in which the court assessing the Kosovo Liberation Army (KLA) established that command structure with specific roles was a vital element to establish that a group is organized.<sup>30</sup> The roles and functions of an organized armed group included the appointment of zone commanders, distribution of regulations to subordinates, authorization of military action, negotiations with other respective

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<sup>26</sup> *Mozambique: Violence continues in Cabo Delgado, as agencies respond to growing needs.* (2021, June 16). UN News. <https://news.un.org/en/story/2021/06/1093872>

<sup>27</sup> *Situation Report: Mozambique.* (2021, September 1). <https://reports.unocha.org/en/country/mozambique/>

<sup>28</sup> Cullen, A. (2010). *The Concept of Non-International Armed Conflict in International Humanitarian Law* (1st ed.). Cambridge University .

<sup>29</sup> *Prosecutor v Tadic (Judgement)*, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber (1999), *ILM* 1518,1541 (1999).

<sup>30</sup> *Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion for Judgment of Acquittal (Miloševi Rule 98bis Decision)*, ICTY Case No. IT-02-54-T, 16 June 2004, para. 23.

governments or institutions, and issuance of political statements.<sup>31</sup> This position was cemented in the *Boskoski case* in which the Trial Chamber compiled five factors that prescribe the organization of an armed group in a non-international armed conflict, the ‘existence of a chain of command, capacities of the armed group to devise strategy, taking large scale military operations or coordinate activities of discrete units, level of logistical abilities including recruitment of new members and training, the armed group should possess some level of discipline and lastly evidence that the group can speak with one voice’.<sup>32</sup> The establishment of the criterion points to an armed group that is well organized according to the International Humanitarian Law standards, thereby making the classification of the conflict apparent.

The events in Mozambique support the assertion that there is an armed conflict with dynamic parties involved from RENAMO the opposition party, RENAMO military junta, and other splinters, and Islamist armed groups. This conflict reflects the complexity of modern-day conflict with various active parties having different ideologies and agendas in a specified territory.

#### **a) RENAMO**

RENAMO, the biggest opposition party in Mozambique, rejuvenated armed confrontation against the local government in 2013 under the leadership of Afonso Dhlakama. RENAMO’s leadership and structure for many years has not been clear due to its unconventional model of operations. It is reported that RENAMO has a national council led by a secretary general The President and Commander-in-Chief Afonso Dhlakama wields real power over a traditional military hierarchy.<sup>33</sup> The northern, central, and southern regions of RENAMO have been divided into provinces, each with its own commander.<sup>34</sup> Dhlakama re-established one of RENAMO’s wartime bases in Satandijira, where he mobilized more than 1000 RENAMO men.<sup>35</sup> Even after demobilization and disarmament efforts post-civil war in

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<sup>31</sup> Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion for Judgment of Acquittal (Milošević Rule 98bis Decision), ICTY Case No. IT-02-54-T, 16 June 2004, para. 46,94-101.

<sup>32</sup> Supra note 5 para 199-203; Dinshteyn, Y. (2014). *Non-international armed conflicts in international law*. Cambridge University Press.. p 43-44.

<sup>33</sup> Mozambique. (2023, September 20). *Mozambique: Opposition party Renamo names Magibire as new secretary-general*. Mozambique. <https://clubofmozambique.com/news/mozambique-opposition-party-renamo-names-magibire-as-new-secretary-general/>

<sup>34</sup> Morgan, G. (1990). Violence in Mozambique: The Case of Renamo. *Africa Insight*, 20(2), 74-80.

<sup>35</sup> Wiegink, N. (2015). Former military networks a threat to peace? The demobilisation and remobilization of Renamo in central Mozambique. *Stability: International Journal of Security and Development*, 4(1).

1992, Dhlakama and his commanders proved resourceful with an extensive network.<sup>36</sup> The leader of RENAMO in his mobilization and re-establishment efforts issued political statements and used media to intimidate the Mozambican government to succumb to his demands.<sup>37</sup> RENAMO is an armed group with a hierarchy and power structure consisting of a military wing comprised of army generals and commanders from Mozambique's civil war. The political wing has been heavily involved in negotiations with the Mozambican government to decentralize and disarm.<sup>38</sup> In addition, RENAMO in its engagement with members of the press utilized the media and other outlets to combat news issued by the Mozambican government. RENAMO proved to have a unified voice and structure as they relied on their spokesman Fernando Mazanga to 'set the record straight' in light of what they regarded as 'propaganda'.<sup>39</sup> This mechanism managed to gain RENAMO sympathizers who understood and justified their violent actions across Mozambique.<sup>40</sup> After alleged rigged elections, RENAMO launched strategic attacks at police stations in Mozambique harming village leaders known for being sympathizers of FRELIMO (the ruling party). RENAMO has been constantly having negotiations with the government to disarm, demobilize, and have decentralization of government offices, and assimilation of RENAMO forces into the main Mozambican army. In 2019 the government formally signed an agreement with RENAMO to begin disarmament and demobilization and ensure the integration of RENAMO armed force into the government military force.<sup>41</sup> It is important to highlight that as part of the general peace agreement of August 2019, about 13 RENAMO bases have been closed under the disarmament, demobilization, and reintegration programme.<sup>42</sup> This reinforces the notion of RENAMO as an organized group, which managed more than 13 bases with strategic operations across Mozambique. The organized movement of RENAMO as

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<sup>36</sup> Vines, A (2013). Renamo's Rise and Decline: The Politics of Reintegration in Mozambique. *International Peacekeeping* 20(3): 386–388.

<sup>37</sup> Mozambique: Opposition Leader Threatens Destruction. (2012, December 4). *allAfrica.com*. Retrieved from <https://allafrica.com>

<sup>38</sup> *Non-international armed conflicts in Mozambique* | Rulac. (n.d.). <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mozambique#collapse2accord>.

<sup>39</sup> *Ibid.*

<sup>40</sup> BBC News. (2013, October 22). Mozambique's Renamo "ends 1992 peace deal" after raid. *BBC News*. Retrieved from <https://www.bbc.com> ; Wiegink, N. (2015). Former Military Networks a Threat to Peace? The Demobilisation and Remobilization of Renamo in Central Mozambique. *Stability: International Journal of Security and Development*, 4(1), Art. 56.

<sup>41</sup> *CrisisWatch Database*. (2022c, August 31). Crisis Group. [https://www.crisisgroup.org/crisiswatch/database?location\[\]=118](https://www.crisisgroup.org/crisiswatch/database?location[]=118).

<sup>42</sup> Mozambique. (2023, June 16). Mozambique: Renamo military base in Montepuez closed. Retrieved from <https://clubofmozambique.com/news/mozambique-renamo-military-base-in-montepuez-closed-223239/>

an armed group, involved in negotiating with the local government as a united front with a central leader capable of appointing zone commanders, distributing regulations to subordinates, and having a well-structured military force and military bases and a clear hierarchy supports the assertion that RENAMO has been a well-organized armed group in the Mozambican conflict.

### **b) RENAMO military junta**

The death of RENAMO's long-time leader Dhlakama saw the emergence of various splinters of militant groups from RENAMO with their own agendas.<sup>43</sup> Due to interest by the RENAMO opposition party to demobilize and reintegrate with the Mozambican forces after credible elections, military splinters have emerged threatening to derail the integration process. RENAMO military junta elected its leader Lieutenant General Mariano Nyongo who challenged Ossufo Momade's authority, leader of RENAMO due to peace negotiations with the Mozambican government.<sup>44</sup> Under Nyongo's authority, the RENAMO military junta has been accused of killing civilians who are supporters of FRELIMO and launching strategic attacks against civilians to thwart and threaten the swearing-in of Filipe Nyusi as President of Mozambique in 2019. To propel instability in polling stations, RENAMO military junta leader Nyongo also used misinformation and disinformation to perpetuate the conflict in Mozambique suggesting the government forces have been actively intimidating civilians to vote for them and killing election observers.<sup>45</sup> RENAMO military junta leader Nyongo continued to discredit the demobilization process and declined the invitation to be part of the peace negotiation process. Nyongo established that most of the former RENAMO soldiers part of the demobilization, disarmament, and Reintegration process are still in fear of murder and kidnappings.<sup>46</sup> After the Death of Nyongo who was the breakaway leader of the RENAMO Military Junta, the armed group proved to have hierarchy and structure by electing a new leader Lieutenant-General Augusto Faindane Phyrri in line with their

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<sup>43</sup> *Crisis Watch Database*. (2022, August 31). Crisis Group. [https://www.crisisgroup.org/crisiswatch/database?location\[\]=118](https://www.crisisgroup.org/crisiswatch/database?location[]=118).

<sup>44</sup> Vines, A. (2020). Violence, Peacebuilding, and Elite Bargains in Mozambique Since Independence. In *Springer eBooks* (pp. 321–342).

<sup>45</sup> *Crisis Watch Database*. (2023c, September 13). Retrieved from [https://www.crisisgroup.org/crisiswatch/database?location\[\]=118](https://www.crisisgroup.org/crisiswatch/database?location[]=118)

<sup>46</sup> Mpofu, M., & Mpofu, M. (2020). Renamo Military Junta leader General Mariano Nhongo refuses to hand over weapons to government | My Zimbabwe News. *My Zimbabwe News*. Retrieved from <https://www.myzimbabwe.co.zw/news/69797-renamo-military-junta-leader-general-mariano-nhongo-refuses-to-hand-over-weapons-to-government.html>

agenda against RENAMO and the Mozambican government.<sup>47</sup> It is important to note that other prominent figures within RENAMO such as Andre Matsangaissa (nephew of the founders) temporarily joined the RENAMO military junta due to shared messages and discontent with Momade's leadership and military resume.<sup>48</sup> These events point out that RENAMO military junta is a well-organized group with a chain of command, issuing politically charged statements, leadership authorizing military action and the ability to devise strategic attacks such as misinformation campaigns and intimidation.

### c) Islamist armed group (Al Shabaab)

Early in March 2021, the Islamic State Group occupied the City of Palma, which is near the multi-billion-dollar gas project invested in by a lot of first-world countries (*France, the US, and Russia*).<sup>49</sup> It was reported that the armed group used automatic guns in its operation. The group is known for using violent acts such as beheading to intimidate civilians in villages into submission and in 2020 the armed group was reported to have seized control of an entire town in Mocimboa da Praia, which is used for the transit of goods, and workforce in the gas projects.<sup>50</sup> The armed group has been involved in recruitment of the dissatisfied and disgruntled youths in various provinces in Mozambique and launched organized attacks on authorities.<sup>51</sup> Children in Cabo Delgado Province have been indoctrinated and recruited to join the Islamist groups and those who are not willingly joining the armed group are reported to have been abducted from their villages and families.<sup>52</sup> The leader of Al Shabaab reportedly pledged allegiance to ISIS in April 2018 for logistical support as these groups share ideologies.<sup>53</sup> Al Shabaab has been recognized as a Jihadist group with a

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<sup>47</sup> De Coning, C., Saraiva, R., & Muto, A. (2023). *Adaptive peacebuilding: A New Approach to Sustaining Peace in the 21st Century*. Springer Nature.p. 121-150.

<sup>48</sup> Ibid.

<sup>49</sup> Jazeera, A. (2021, March 24). Mozambique: Armed group attacks town near gas project. *Al Jazeera*. <https://www.aljazeera.com/news/2021/3/24/mozambique-armed-groups-attack-town-near-gas-projects>

<sup>50</sup> Staff, R. (2021, March 24). Armed groups attack Mozambique town closest to gas projects: sources. *U.S.* <https://www.reuters.com/article/us-mozambique-insurgency-idUSKBN2BG2V1>

<sup>51</sup> UNICEF. (2022, June). UNICEF RESPONSE TO CHILDREN AFFECTED BY ARMED CONFLICT IN NORTHERN MOZAMBIQUE. unicef.org. Retrieved April 20, 2023, from <https://www.unicef.org/mozambique/en/reports/unicef-response-children-affected-armed-conflict-northern-mozambique>

<sup>52</sup> *Children 'indoctrinated' to fight for insurgents in Mozambique: UNICEF*. (2021, October 7). UN News. <https://news.un.org/en/story/2021/10/1102202>

<sup>53</sup> *State Department Terrorist Designations of ISIS Affiliates and Leaders in the Democratic Republic of the Congo and Mozambique - United States Department of State*. (2021, March 10). United States Department of State.

unified ideology, enforcing Sharia law across the northern part of Mozambique.<sup>54</sup> In 2022, the Central command of ISIS recognized Al Shabaab as one of their provinces highlighting their growing expansion efforts on the African Continent.<sup>55</sup>

In addition, Al Shabaab has demonstrated a hierarchical structure with coordinated ranks ranging from leaders to low-level fighters. According to reports, the armed group's leaders range from Tanzania to Mozambique, and the low-level fighters are former farmers and local fishermen.<sup>56</sup> It is reported that Bonomade Machude Omar, also known as Abu Sulayfa Muhammad and Ibn Omar, is the leader of the Military and External Affairs Departments for ISIS-Mozambique and operates as the senior commander, lead coordinator for all attacks conducted by the group in the northern part of Mozambique and the lead facilitator and communications conduit for the group.<sup>57</sup> Bonomade Machude Omar led one group of fighters during the March 2021 attack on Palma, while Abu Yasir Hassan, the leader of ISIS-Mozambique, led another, and Omar also led the attack on the Amarula Hotel in Palma. Omar is responsible for attacks in Mozambique's Cabo Delgado Province. In addition, Ali Mohamed Rage, known as Ali Dheere, is an Al-Shabaab spokesman and a senior leader of the group. He replaced Sheikh Mukhtar Robowas Al-Shabaab's top spokesman in May 2009. Ali Mohamed Rage has been involved in attack planning that has targeted areas in Kenya and Somalia. Abdikadir Mohamed Abdikadir, also known as Ikrima, is a facilitator and operational planner.<sup>58</sup> These individuals who are well ranked and have deployed duties within Al Shabaab suggest that the armed group is organized as it has proven to have a distribution of regulations to subordinates, conduct duties, and an established hierarchy.<sup>59</sup> These developments in Mozambique by Al Shabaab support the notion that this is a well-organized group with access to

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<https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/>

<sup>54</sup> The Islamist insurgency in Mozambique. (n.d.). Retrieved from <https://www.iiss.org/publications/strategic-comments/2021/the-islamist-insurgency-in-mozambique>

<sup>55</sup> Non-international Armed Conflicts in Mozambique | Rulac. (n.d.). Retrieved from <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mozambique#collapse2accord>.

<sup>56</sup> Non-international Armed Conflicts in Mozambique | Rulac. (n.d.). Retrieved from <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mozambique#collapse2accord>

<sup>57</sup> Designations of ISIS-Mozambique, JNIM, and al-Shabaab Leaders - United States Department of State. (2021, August 10). Retrieved from <https://www.state.gov/designations-of-isis-mozambique-jnim-and-al-shabaab-leaders/>

<sup>58</sup> Designations of ISIS-Mozambique, JNIM, and al-Shabaab Leaders - United States Department of State. (2021, August 10). Retrieved from <https://www.state.gov/designations-of-isis-mozambique-jnim-and-al-shabaab-leaders/>

<sup>59</sup> Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion for Judgment of Acquittal (Milošević Rule 98bis Decision), ICTY Case No. IT-02-54-T, 16 June 2004, para. 46,94-101

logistical support, capable of launching strategic attacks, occupying strategic geographic locations for their agenda, with a military structure and extensive network with access across the African continent to resources to fuel their efforts in Mozambique.

#### **d) Foreign involvement**

The government of Mozambique has requested assistance from the SADC and foreign parties to assist in bringing stability and reclaiming provinces such as Palm district and Cabo Delgado that have been seized by armed groups.<sup>60</sup> Foreign actors have been involved in the Mozambican conflict assisting the government to confront the growing presence of Islamist actors in Palma District and Cabo Delgado Province. It is reported that apart from SADC stand-by forces supplied by Rwanda, South Africa, and Botswana, and Russian private military contractors are involved under the request from the government.<sup>61</sup> It is essential to note that the involvement of foreign actors upon the request of the State does not change the nature of the conflict. The ICC Pre-Trial Chamber in the *Prosecutor v. Mbarushimana* case established that Rwanda's participation in Operation Umoja Wetu was not characterized as a "difference arising between two States" because two governmental forces fought side by side against a common (non-state) enemy.<sup>62</sup> Following this decision, the assistance provided to Mozambique by SADC and the respective States does not transform the conflict into an international armed conflict.

## **CHAPTER 2**

### **Applicable Law**

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<sup>60</sup> *Non-international Armed Conflicts in Mozambique* | Rulac. (n.d.-b). <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mozambique#collapse4accord>

<sup>61</sup> Martin, G. (2021). An overview of foreign security involvement in Mozambique. *DefenceWeb*. <https://www.defenceweb.co.za/featured/an-overview-of-foreign-security-involvement-in-mozambique/>

<sup>62</sup> ICC, *The Prosecutor v. Mbarushimana*, (Decision on the Confirmation of Charges), Case no. ICC-01/04-01/10-465-Red, Pre-Trial Chamber I (16 December 2011)

## 1. International Humanitarian Law Applicability in the Mozambican Conflict

International Humanitarian Law is designed to regulate armed combat and most importantly to ensure the protection of civilians and civilian objects during armed conflicts. The existence of an armed conflict is the prerequisite for the application of International Humanitarian Law.<sup>63</sup> The determination made that there is a non-international armed conflict is sufficient to warrant the application of International Humanitarian Law. This can be reiterated by looking at the definition of the *Prosecutor v. Tadic case*, which established that “an armed conflict exists when there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State”.<sup>64</sup> Looking at the Mozambican conflict, a case has been made that the level of violence, casualties, and related factors surpass the level of mere domestic violence or disturbance.<sup>65</sup> This definition is consistent with the situation in Mozambique, where a government is fighting against the RENAMO opposition party, RENAMO military splinters, and Islamist armed actors (Al Shabab).<sup>66</sup>

## 2. International Human Rights Law Applicability in the Mozambican Conflict

The inherent nature of human rights is the premise for its applicability in every situation and to all subjects under International Law. This is emphasized in the Universal Declaration of Human Rights preamble and Article 1, which highlights the inherent nature of human rights to mankind to combat barbarism.<sup>67</sup> It is essential to establish that the Universal Declaration of Human Rights has been a substantive legal instrument relied on in International Law.<sup>68</sup> Due to usage and general acceptance of

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<sup>63</sup> Ben, S., & Dapo, A. (Eds.). (2020). *The Oxford Guide to International Humanitarian Law*. Supra note 55.p 52

<sup>64</sup> Prosecutor v Tadic, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Decision on Jurisdiction, 2 October 1995; ; Prosecutor v. Haradinaj et al., Judgment, Trial Chamber I, ICTY Case No. IT-04-84-T, 3 April 2008 paras. 37–49; Prosecutor v. Boškoski and Tarulovski, Judgment, Trial Chamber II, Case No. IT-04-82-T, 10 July 2008, para. 175; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987) ; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287, Article 3 - Conflicts not of an international character.

<sup>65</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, Article 1 (2), 1977.1; Rome Statute of the International Criminal Court, Article 8(2)(d) and (f) July 17, 1998 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998)125 U.N.T.S. 609; 26 I.L.M. 568 (1987)

<sup>66</sup> Non-international Armed Conflicts in Mozambique | Rulac. (n.d.). Retrieved from <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mozambique>

<sup>67</sup> Universal Declaration of Human Rights, Dec. 8, Preamble & Article 1, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)

<sup>68</sup> Shaw, M. (2008). *International Law* (6th ed.). Cambridge: Cambridge University Press.

the inherent nature of Human Rights Law and subsequent provisions in the declaration of human rights, it can be argued that the provisions in the instrument have assumed Customary International Law status.<sup>69</sup> The inherent nature of human rights attests to International Human Rights Law's universality as a legal corpus. International Human Rights Law continues to apply in an armed conflict environment, as people do not lose their ethos as humans due to an armed conflict climate.

In addition, the universal application of International Human Rights Law has been consistently expressed in International Law jurisprudence. This is exhibited by the International Court of Justice's advisory opinion on *the legality of the threat of the use of Nuclear weapons case*, in which the court established that International Human Rights Law norms do not cease to be applicable during times of war or peace.<sup>70</sup> In support of this position, the Court reiterated the applicability of International Human Rights during times of armed conflict in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case*. The court attested that

“the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between International Humanitarian Law and human rights law, there are thus three possible situations: some rights may be exclusively matters of International Humanitarian Law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, International Humanitarian Law”.<sup>71</sup>

From the assertion established by *the Construction of a Wall in the Occupied Palestinian Territory Case*, *lex specialis* does not undermine the application of International Human Rights Law. International Human Rights Law can continue to apply in armed conflict environments, but International Humanitarian Law establishes

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<sup>69</sup> Supra note 13.

<sup>70</sup> Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 [hereinafter "Nuclear Weapons"], para 24 &25

<sup>71</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, para 106-112

its scope.<sup>72</sup> Other schools of thought argue that *lex specialis* is a contextual principle and is suited to establish relations between IHL and IHRL in specific cases rather than in the abstract.<sup>73</sup> Instead of focusing on the legal corpus, the focus is on specific provisions and unique situations where IHL and IHRL is applicable.<sup>74</sup> In the context of the Mozambican conflict, which involves non-state actors, International Human Rights Law is applicable but it has its limitations in imposing obligations on non-state actors. In this case, International Humanitarian Law covers such limitations and others which will be explored in this paper.

The International Court of Justice's advisory opinion was also relied on in the *Democratic Republic of the Congo/Uganda case*, which the court recalled had addressed the issue of International Human Rights instruments in armed conflict.<sup>75</sup> In the court's conclusion, International Human Rights Law was considered as applicable law during times of armed conflict. Consistent reliance on the International Court of Justice's advisory opinion on the legality of the threat of the use of nuclear weapons in subsequent cases establishing the applicability of International Human Rights Law shows how the decision has assumed customary status.<sup>76</sup> This position of the court attests to the assertion that International Human Rights Law is applicable in armed conflict. The non-international armed conflict situation in Mozambique is no different, thereby cementing the position that International Human Rights Law is applicable in Mozambique's armed conflict.

Although a majority of International Human Rights Law treaties do not explicitly highlight obligations on non-state actors involved in armed conflict, these actors nonetheless bear duties under human rights law. International Human Rights obligations have developed over the years, establishing obligations on all actors

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<sup>72</sup>HPCR. (2007). *From Legal Theory to Policy Tools: IHL and International Human Rights Law*.

<sup>73</sup> Lindroos, A. (2005). Addressing norm conflicts in a fragmented legal system: the doctrine of *Lex specialis*. *Nordic Journal of International Law*, 74(1), 42; Olson, L. M. (2009). Practical challenges of implementing the complementarity between international humanitarian and human rights law demonstrated by the procedural regulation of internment in non-international armed conflict. *Case Western Reserve Journal of International Law*, 40(3), 437-462.

<sup>74</sup> Ibid.

<sup>75</sup> *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), ICJ, Judgment, 19 December 2005, para 216. Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=1116&code=co&p3=4&lang=en>

<sup>76</sup> Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 [hereinafter "Nuclear Weapons"], para 24 & 25; Supra note 13.

during a conflict.<sup>77</sup> The Security Council Resolution 1894 acknowledged that while States hold primary responsibility to uphold International Law, International Human Rights & International Humanitarian Law obligations, parties to the armed conflict are expected by law to do as such.<sup>78</sup> International Covenant of the on Civil and Political Rights General Comment 31 also reinforces obligations borne by non-state actors in an armed conflict to respect International Human Rights Law.<sup>79</sup> It is clear that International Human Rights Law remains applicable even during times of armed conflict.<sup>80</sup> This reinforces the notion that International Human Rights law is applicable in the Mozambican conflict, as the existing International Law jurisprudence points to International Human Rights obligations borne by armed actors in an armed conflict, not just States.

Its imperative to point out the aforementioned *cases* point out the continued applicability of International Human Rights Law during armed conflict. This suggests that there is special way of imposing obligations on non-state actors to respect human rights merely because there is an armed conflict. Non-state actors would not have these obligations in peacetime, however, as in the on going Mozambican conflict they have a legal responsibility to respect International Human Rights. This view sheds light on the fundamental function of International Human Rights Law in non-international armed conflict. IHRL's inherent and universal nature ensures protection of civilians by imposing obligations on non-state actors in a manner only possible because an armed conflict exists.

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<sup>77</sup> United Nations. (2011). INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT. Retrieved July 18, 2023, from [https://www.ohchr.org/sites/default/files/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf)

<sup>78</sup> United Nations Security Council, Adopted by the Security Council at its 6216th meeting, on 11 November 2009, S/RES/1894 (2009)\*, p 3 (Nov 11, 2009)

<sup>79</sup> United Nations, International Covenant on Civil and Political Rights Human Rights Committee eightieth session, General Comment No.31. 'The Nature of the General Legal obligations imposed on States parties to the Covenant', CCPR/C/21/Rev.1/Add.1326 May 2004, available at < [https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnj\\_RO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuujQRnbJEaUhby31WiQPI2\\_mLFDe6ZSwMMvmQGVHA%3d%3d](https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnj_RO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuujQRnbJEaUhby31WiQPI2_mLFDe6ZSwMMvmQGVHA%3d%3d)

<sup>80</sup> Hampson, F. (2023). The Relationship Between the Law of Armed Conflict and International Human Rights Law. *Lieber Institute West Point*. Retrieved from <https://lieber.westpoint.edu/relationship-law-of-armed-conflict-international-human-rights-law/>

## CHAPTER 3

### **Application of International Humanitarian Law and international human rights**

#### **1. Protection due to Civilians in the Mozambican Armed Conflict**

Before and during World War II, there were no ‘special provisions’ in the law governing armed conflict to safeguard the civilian population and ensure the protection of civilians apart from some isolated Hague Regulations.<sup>81</sup> Only after the war was the Geneva Conventions and its subsequent protocols established to ensure the protection of civilians by creating rules that propel distinction between civilians, civilian objects, and military personnel including military objects.<sup>82</sup> The parties covered by the term “*civilian*” are highlighted looking at specific vulnerabilities of these actors in a non-international armed conflict environment.

In this chapter, the protection due to civilians in Mozambique is approached within the context of a non-international armed conflict. The rules governing non-international armed conflict, which supposedly ensure the protection of civilians during and after non-international armed conflict are highlighted. There is no distinction made between rules governing international armed conflict and non-international armed conflict as far as the protection of civilians is concerned. Apart from the distinction emanating from the status of combatants and prisoners of war, there is merely no difference between the two since the adoption of the Additional Protocols to the Geneva Conventions.<sup>83</sup> In addition to the rules governing non-international armed conflict, there is an attempt to exhaust all international legal channels that ensure the protection of civilians during a non-international armed conflict. International human rights norms, which are argued to contain normative values that continue to apply during times of conflict or peace will also be stressed.<sup>84</sup> The chapter also relies on International Committee of the Red Cross codified

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<sup>81</sup> Green, L. C. (Leslie C.). *The Contemporary Law of Armed Conflict*. 2nd ed. New York: Juris Pub.229, 2000. Print.

<sup>82</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.’ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 [hereinafter "Nuclear Weapons"], para 24 &25

customary IHL rules, and these contain highly persuasive force but are not hard law or legally binding.

### a) Definition of Civilians

The definition of “*civilian*” in armed conflicts has been a subject of contention. The definition of civilians is not explicitly stated in non-international armed conflict statutes. The lack of an explicit classification of civilians is not consistent with the International Humanitarian Law’s primary objectives.<sup>85</sup> International Humanitarian Law’s primary objective is to regulate means and methods of warfare between parties in the conflict and most importantly ensure the protection of those not taking direct part in the hostilities.<sup>86</sup>

The term civilian has been widely used, giving a wide room for humanitarian interpretation to ensure the protection of those not taking part in hostilities.<sup>87</sup> The term civilian in International Humanitarian Law has an umbrella effect of covering all non-combatants and all those not part of any armed force during an armed conflict.<sup>88</sup> Customary International Humanitarian Law rule 5 cements the wide definition to ensure the protection of all persons not taking part in the armed conflict and who are not members of the armed forces.<sup>89</sup> This definition is implied in Common Article 3 of the Geneva Convention IV, which establishes minimum protection of ‘persons taking no active participation in the hostilities, including of armed forces who have laid down their arms and those who placed *hors de combat* by sickness and wounds, detention and any other causes’.<sup>90</sup>

The lack of an explicit definition under the Fourth Geneva Convention led to the Additional Protocol I Article 50’s efforts to clarify who are civilians. According to Additional Protocol I

, “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the third Convention and in Article 43 of

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid p17.

<sup>87</sup> Kolb, R., & Hyde, R. (2008). *An introduction to the international law of armed conflicts*. Hart, p224.

<sup>88</sup> Prosecutor v. Brdjanin (Trial Judgment) IT-99-36-T (1 September 2004) para [125].

<sup>89</sup> ICRC Database, Customary IHL, Definition of Civilians, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule5> (Last accessed on 24.09.2023)

<sup>90</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 3 (1), e, 12 August 1949, 75 U.N.T.S. 287

this Protocol. In case of doubt, whether a person is a civilian, that person shall be considered to be a civilian”.<sup>91</sup>

As much as there is an effort to define civilians in legal instruments applicable to international armed conflicts, there is no clear definition of civilians in treaties that govern non-international armed conflict. There has been use of the term without defining it or giving clear parameters for all actors in non-international armed conflicts. The lack of comprehensive statutes defining civilians in non-international armed conflict has raised concerns about the effectiveness of International Humanitarian Law in ensuring protection. How can comprehensive protection be ensured without defining who is regarded as civilians in a non-international armed conflict? Conversely, the wide consideration given by the negative definition is also supported as it broadens the scope of protection to cover everyone who is not taking any direct part in hostilities. However, customary rule 5 establishes that civilians are persons who are not members of the armed forces.<sup>92</sup> While it is clear that state armed forces are not considered civilians, there is a blurry line to be drawn when considering whether members of the armed opposition group are civilians subject to lose protection as enshrined by customary law rule 6.<sup>93</sup>

#### **b) Distinction between combatants/fighters and civilians**

In pursuit of comprehensive protection of civilians in a conflict environment, one of the primary objectives of the parties involved is to distinguish between civilians, civilian objects, combatants and objects that can be susceptible to military attack.<sup>94</sup> Civilian objects are negatively defined as all objects which are not military objects.<sup>95</sup> In this regard, military objects are regarded as,

“those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.<sup>96</sup>

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<sup>91</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 50(1), 8 June 1977

<sup>92</sup> Customary International Humanitarian law rule 5.

<sup>93</sup> *Customary IHL - Rule 5. Definition of civilians*. (n.d.). <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule5>

<sup>94</sup> Ibid, Article 52(1), 8 June 1977

<sup>95</sup> Ibid,

<sup>96</sup> Ibid, article 52(2), Customary International Humanitarian Law rule 8.

Two critical elements are important for the characterization of a military objective, thus it must contribute effectively to the adversary's military action and it has to do so by its nature and an object must make an effective contribution to the enemy's military action. Anything that does not satisfy these elements cannot be characterized as a military objective.<sup>97</sup>

Article 48 of the Additional Protocol I emphasizes that distinction shall be made at all the times between civilian populations and combatants.<sup>98</sup> The principle of distinction is one of the cardinal pillars of International Humanitarian Law, which serves in line with the purpose of rules governing conflict thus 'protection of civilians'. In the Nuclear Weapons Advisory Opinion, the International Court of Justice regarded the principle of distinction as a 'cardinal' and 'intransgressible' principle that forms part of the fabric of International Humanitarian Law.<sup>99</sup> In this regard, parties involved in the conflict must ensure a clear distinction in deploying their attacks to exclude civilians from harm.

### **c) Civilian direct participation in hostilities**

The only exception for attacks directed at civilians is when they are 'direct participants' in the conflict.<sup>100</sup> Under the law of non-international armed conflict, losing civilian protection suggests 'full exposure to the risks of armed operations in which a person has decided to engage.'<sup>101</sup> International Humanitarian Law does not provide a comprehensive definition of conduct that amounts to direct participation in hostilities.<sup>102</sup> However, efforts have been made by the International Committee of the Red Cross interpretive guidance, which attempts to give clarity on who qualifies as a member of an armed group.<sup>103</sup> In non-international armed conflicts, the principle of distinction is ambiguous, as it does not guide as to who qualifies as a member of an

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<sup>97</sup> Supra note 55,p 92.

<sup>98</sup> Ibid Article 48.

<sup>99</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996,para 78-79.

<sup>100</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 13 June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

<sup>101</sup> Dinstein, Y. (2014). *Non-international armed conflicts in international law*. Cambridge University Press ,p59.

<sup>102</sup> Supra note 55, 353.

<sup>103</sup> Melzer, N. (2009). *Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law*, p20-33

armed group.<sup>104</sup> The notion of continuous combat function is highlighted for NIAC situations thus determining the situations in which individuals of an armed group can be legitimate targets even if they do not directly participate in hostilities at the moment of the attack.<sup>105</sup> In addition, the prosecution in support of the Pre-Trial Chamber in the *Prosecutor v. Thomas Lubanga Dyilo* case established that direct participation in combat includes, ‘combat-related activities such as scouting, spying, sabotage and the use of children at military checkpoints or as decoys and couriers’.<sup>106</sup> Even in circumstances where civilians take a direct part in hostilities, they still retain the right to be treated in a humane manner consistent with the Geneva Convention, and its subsequent protocols.<sup>10</sup>

#### **d) Indiscriminate attacks**

Customary rule 5 of the IHL makes it unequivocally clear under Additional Protocol I that discriminate attacks are prohibited.<sup>108</sup> This is part of the effort to ensure civilian protection from any military operations. Although the protection of civilians against indiscriminate attacks is not explicitly stated under additional protocol II for non-international armed conflict situations, the protocol’s article 13(2) is argued to ensure protection against indiscriminate attacks.<sup>109</sup> In addition, the principle has assumed customary status, as exhibited by the International Court Tribunal of Yugoslavia’s jurisprudence, which provides further evidence of the customary nature of the principle against indiscriminate attacks.<sup>110</sup>

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<sup>104</sup> Henry, S. (2018). Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application? *International Review of the Red Cross*, 100(907–909), 270–275.

<sup>105</sup> See Melzer, N. (2009). *Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law*, p20-35

<sup>106</sup> The Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court, Trial Chamber I, Public Judgment pursuant to Article 74 of the Statute, Para 575. ICC-01/04-01/06, 14 March 2012

<sup>107</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.’ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

<sup>108</sup> Customary IHL rule 11.

<sup>109</sup> Supra note 93 Article 13(2).

<sup>110</sup> ICRC Database, Customary IHL rule 11, Indiscriminate Attacks, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule11> (Last accessed on 25.11.2023); Tadic case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction para 134, <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>

### e) Human shields

According to International Humanitarian Law, belligerent parties are obligated to refrain from using civilians as human shields. Using the movement of civilians and other protected persons to achieve military advantage and shield military objectives in any military or adversary operation is prohibited.<sup>111</sup> This is supported by the International Criminal Court statute, which established that ‘utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations’ constitutes a war crime.<sup>112</sup> The deliberate use of human shields is in contravention of the principle of distinction and precautionary measures to ensure civilian protection.<sup>113</sup> According to Schmitt (2008) parties in the conflict have the duty to discern whether individuals involved are shielding and, if so, whether they are acting voluntarily.<sup>114</sup> It is also important to highlight that, the prohibition of using civilians, as human shields against any military operations should not be construed as absolute immunity of civilians guaranteed by International Humanitarian Law.<sup>115</sup> In certain circumstances, civilian casualties can be tolerated as a side effect of military operations.<sup>116</sup>

Under International Human Rights Law, there is no express prohibition of the use of human shields, however, the mere fact of placing civilians in line with danger that can potentially cost their non-derogable right to life is a violation of International Human Rights Law.<sup>117</sup> The Human Rights Committee has expressed that the right to life should not be given a narrow interpretation.<sup>118</sup> Instead, the right to life should be given a wide scope. In this case, the right to life involves not only the right not to be killed but imposes a non-derogable obligation to States to take all measures to protect

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<sup>111</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 28 12 August 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 51(7), 8 June 1977

<sup>112</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, Article 8(2)(b)(xxiii), 17 July 1998, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 24 November 2023]

<sup>113</sup> Customary International Humanitarian law rule 23-24..

<sup>114</sup> Schmitt, M. N. (2008). Human shields in International Humanitarian Law. In *Brill | Nijhoff eBooks* (pp. 57).

<sup>115</sup> , Fleck, D., & Bothe, M. (2008). *The Handbook of International Humanitarian Law*. Oxford University Press, USA.p 246-247.

<sup>116</sup> Ibid.

<sup>117</sup> International Covenant on Civil and Political Rights, Article 6 ,Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

<sup>118</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 6:para 1, Article 6 (Right to Life)*, 30 April 1982, available at: <https://www.refworld.org/docid/4538840a.html> [accessed 24 November 2023]

human life.<sup>119</sup> This is in line with the European Court of Human Rights judgment in the *Demiray v. Turkey* case, in which the court established that ,

“Article 2 may ... imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for which they are responsible”.<sup>120</sup>

#### **f) Precautionary measures**

The parties to an armed conflict have an obligation to ensure that during the conduct of military operations, constant care and sufficient preparation is taken to safeguard civilians and civilian objects.<sup>121</sup> Sparing civilians from any armed action is a way to avoid, and mitigate incidental loss of life and damage to property. There is not any explicit obligation to take precautionary measures under Additional Protocol II, however, article 13(1) requires parties to a conflict to ensure that, “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”.<sup>122</sup> It is impossible for parties to a conflict to oblige to the other International Humanitarian Law obligations if they do not exercise precautionary measures. The principle of precaution has assumed Customary International Law status, which makes it applicable in both international and non-international armed conflicts.<sup>123</sup> This is further supported by the Inter-American Commission on Human Rights in the *La Tablada events case*, in which evidence of the customary nature of this rule admitted to being applicable in both international and non-international armed conflict.<sup>124</sup>

#### **g) Right to life and protection against torture**

The mere fact of individuals identified as civilians comes with an entitled right to be protected under International Humanitarian Law. The parties in the conflict have a general obligation to ensure the protection of civilians. This is expressed by Article 27 of the Geneva Convention IV, which covers all interaction between parties in a

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<sup>119</sup> Ibid, para 5

<sup>120</sup> European Court of Human Rights, THIRD SECTION Case of *Demiray v. Turkey* (*Application no. 27308/95*), *Judgment* 21 November 2000.

<sup>121</sup> Customary International Law Rule 5.

<sup>122</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 13(1) June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

<sup>123</sup> Customary IHL rule 15.

<sup>124</sup> Inter-American Commission on Human Rights, *Case 11.137 (Argentina)*

conflict and civilians.<sup>125</sup> Common Article 3 of the Geneva Convention as developed further by Additional Protocol II imposes an obligation on parties involved in the conflict to treat all people not involved in the conflict humanely.<sup>126</sup>

A case for the protection of civilians' right to life and protection against torture is central across the International Law jurisprudence.<sup>127</sup> However, there is less consideration of the vulnerability of women and children as far as their exposure to life-threatening situations and susceptibility to inhuman treatment like torture in International Humanitarian Law. The issue of vulnerability requires recognizing what makes people vulnerable, as this differs for different groups of people.<sup>128</sup> Women having different roles, that are culturally determined, are exposed them to danger in conflict environments. Also, the children's youth and innocence make them an easy target that can be utilized by armed groups. This is evident in the *Lubanga case*, in which children were actively recruited. Warlords took advantage of the children's innocence to radicalize them for their cause while exposing them to life-threatening situations.<sup>129</sup>

The rules governing non-international armed conflicts do not have exhaustive regulations ensuring the protection of vulnerable groups in detail, specifically tailored to these groups' reality during the conflict. The shortcomings of International Humanitarian Law in ensuring comprehensive protection of civilians paying attention to their specific needs and vulnerabilities has given room to International Human Rights Law to fill in the gap. This is exhibited by International Human Rights Law's effort to specifically establish legal regimes that ensure the rights of children and women at all times.<sup>130</sup>

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<sup>125</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 27 12 August 1949, 75 U.N.T.S. 287.

<sup>126</sup> Supra note 112, Article 3 (1).e ,12 August 1949, 75 U.N.T.S. 287.

<sup>127</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 50(1), Article 75 8 June 1977.

<sup>128</sup> ICRC Guidance Document. (n.d.). *Addressing the needs of women affected by armed conflict*. <[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0840\\_women\\_guidance.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf)>retrieved 29/09/2023; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [hereinafter Lubanga Judgment].

<sup>129</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute.

<sup>130</sup> African Charter on Human and Peoples' Rights, Article 4, June 27, 1981, 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982); International Covenant on Civil and Political Rights, Article 6-7, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989) Article 6 & 37; Organization of African Unity (OAU), African Charter on the Rights and Welfare of the

## **h) Protection against rape and grave sexual violence**

Grave sexual violence includes rape, sexual slavery, trafficking, forced prostitution, forced marriage or pregnancy, forced sterilization, or sexual exploitation and/or abuse of children. Sexual violence is sometimes used to intentionally humiliate a population or to force people to flee their homes.<sup>131</sup> The protection of civilians against rape and other forms of sexual assault was first established in the Lieber code.<sup>132</sup> The Common Article 3 of the Geneva Conventions offers umbrella protection from all forms of violence, which has been interpreted to offer protection to civilians against any conduct that ‘outrages upon the honor’ of civilians.<sup>133</sup> The interpretation of Common Article 3 of the Geneva Conventions is made apparent by Article 8 (2)(b) of the Rome Statute that references all grave crimes that constitute war crimes.<sup>134</sup> In addition, the fourth Geneva Convention and Additional Protocol I also impose a legal obligation to parties in an armed conflict to protect women and children in particular against rape and other forms of assault that impede on their privacy, will, and integrity. Despite the obligations enshrined under International Humanitarian Law to protect vulnerable groups from sexual violence International Humanitarian Law is still criticized for its lack of expressiveness to show the gravity of these issues. Provisions on women emphasize more on ‘protection of women’ instead of imposing strict ‘prohibitions’ to parties in conflict.<sup>135</sup> These factors have ignited the conversation around the lack of full comprehension of women’s vulnerability to rape and sexual violence during armed conflict as far as the application of International Humanitarian Law is concerned.

Apart from International Humanitarian Law, rape and sexual violence is also prohibited in the Convention on the Elimination of all Forms of Discrimination

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Child, 11 July 1990, CAB/LEG/24.9/49 (1990) Article 5&16, available at: <https://www.refworld.org/docid/3ae6b38c18.html> [accessed 29 September 2023]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980)

<sup>131</sup> *Six grave violations against children in times of war* | UNICEF. (n.d.). Retrieved November 9, 2023, from <https://www.unicef.org/stories/children-under-attack-six-grave-violations-against-children-times-war>

<sup>132</sup> *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*. Article 44, 24 April 1863. (n.d.). Retrieved November 9, 2023, from <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863>

<sup>133</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 3, 12 August 1949, 75 U.N.T.S. 287

<sup>134</sup> Arsanjani, M. H. (1999). The Rome Statute of the International Criminal Court. *American Journal of International Law*, 93(1), 22–43. <https://doi.org/10.2307/2997954>; *ibid*

<sup>135</sup> *Civilian population | How does law protect in war? - Online casebook*. (n.d.). Retrieved November 9, 2023, from [https://casebook.icrc.org/law/civilian-population#footnote22\\_137dzbd](https://casebook.icrc.org/law/civilian-population#footnote22_137dzbd) ; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 50, Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 76-77, 8 June 1977, 1125 U.N.T.S. 3.

against Women. Discrimination has been interpreted to include sexual violence, hence protection of women against all forms of violence. Critics have also questioned the International Human Rights Law position on the protection of women against rape and other forms of sexual assault.<sup>136</sup> Various human rights instruments deal with violence against women in general but express references to sexual offenses and violence are limited.<sup>137</sup> However, the International Human Rights regime is argued to have proven its consideration of women and children by dedicating a specific legal framework to ensure protection during conflict. This is exhibited by the Convention on the Rights of Children and its protocol that ensures probation for rape and sexual violence against children.<sup>138</sup> It is essential to establish that the Convention on the Rights of Children offers special consideration for children's interests. The protection of children as a vulnerable group by the Convention on the Rights of Children ensures the realization of children's development.<sup>139</sup>

#### **i) Right to Humanitarian Relief**

Civilians in a conflict are entitled to access humanitarian aid. Humanitarian assistance also covers the right to receive essential supplies/goods such as water, food medicine, medical help, and shelter.<sup>140</sup> Unfortunately, the Geneva Conventions' Additional Protocol II only contains provisions that emphasize that relief action for civilians should be organized, however, there are not any specific provisions that establish that civilians are entitled to access humanitarian relief in a non-international armed conflict.<sup>141</sup>

Due to state practice, the right to access humanitarian relief by civilians in need has been crystallized into customary international law. This is exhibited by customary International Humanitarian Law rule 55, which establishes that 'The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief

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<sup>136</sup> ICRC Guidance Document. (n.d.). *Addressing the needs of women affected by armed conflict*.p26 <  
[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0840\\_women\\_guidance.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf)>retrieved 29/09/2023

<sup>137</sup> Ibid; 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict and the 1993 UN Declaration on the Elimination of Violence against Women

<sup>138</sup> Convention on the Rights of the Child, article 19(1) & 34, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

<sup>139</sup> Peleg, N. (2019). *The Child's Right to Development* (1st ed.). Cambridge University Press.

<sup>140</sup> Fleck, D. (2008). *The handbook of International Humanitarian Law* (2nd ed). Oxford University Press, p 269.

<sup>141</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 18(2) June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.<sup>142</sup> Both parties in international and non-international armed conflicts have been repeatedly condemned by the Security Council to allow unimpeded access to humanitarian personnel and supplies essential for civilian welfare.<sup>143</sup> In addition, the United Nations General Assembly and the United Nations Commission on Human Rights have repeatedly established the obligation borne by all parties during an armed conflict to grant civilians access to humanitarian relief.<sup>144</sup> It is important to establish that under International Human Rights Law, access to humanitarian access is not considered a human right.<sup>145</sup> However, within the International Human Rights Law architecture, there is an obligation for States to ensure the collective protection of all people within their territory.<sup>146</sup> States have the obligation to ensure fundamental protection such as the right to life.<sup>147</sup> Humanitarian access in an environment where there is no access to goods essential to their survival is also impeding people's right to life.

#### **j) Protection against Abduction and Recruitment of Civilians**

International Humanitarian Law does not expressly offer provisions against abduction or enforced disappearance. However, enforced disappearance violates other protections that are offered to civilians, notably the minimum protection offered to civilians by common article 3 of Geneva Convention IV.<sup>148</sup> Children are the most vulnerable to most abduction situations in a non-international armed conflict.<sup>149</sup> Convention on the Rights of the Child, establishes that all feasible measures are supposed to be taken to ensure children's safety in an armed conflict environment.<sup>150</sup>

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<sup>142</sup> Customary International Humanitarian Law Rule 55, Access for Humanitarian Relief to Civilians in Need, [https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55#Fn\\_E763511D\\_00006](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55#Fn_E763511D_00006) (Last accessed on 09.11.2023).

<sup>143</sup> United Nations Resolution 752 (1992) / adopted by the Security Council at its 3075th meeting, on 15 May 1992; ibid Res 442; ibid Res 757; ibid Res.792; ibid Res .1059; ibid Res.1160; ibid Res.998; ibid Res.1004; ibid Res.453; ibid Res.1333.

<sup>144</sup> United Nations Resolution adopted by the General Assembly [without reference to a Main Committee (A/55/L.2)] 55/2. United Nations Millennium Declaration, A/RES/55/2, 18 September 2000; UN Commission on Human Rights, Res. 1995/77, 8 march 1995.

<sup>145</sup> Rushing, E. (2022, November 24). *When hostilities end but suffering remains: The necessary continuation of humanitarian activities in the aftermath*. Humanitarian Law & Policy Blog. <https://blogs.icrc.org/law-and-policy/2022/11/24/hostilities-suffering-remains-humanitarian-aftermath/>

<sup>146</sup> International Covenant on Civil and Political Rights, Article 2 Dec. 16, 1966 999 U.N.T.S. 171.

<sup>147</sup> Ibid article 6.

<sup>148</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 3, August 1949, 75 U.N.T.S. 287.

<sup>149</sup> *Six grave violations against children in times of war* | UNICEF. (n.d.). Retrieved November 9, 2023, from <https://www.unicef.org/stories/children-under-attack-six-grave-violations-against-children-times-war>

<sup>150</sup> Supra note 127, article 36, article 38(4).

Apart from abduction, civilians especially children are protected from recruitment and forced direct participation in hostilities. This is enshrined in Additional Protocol I & II, which impose an obligation to ‘parties to the conflict to take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities and they shall refrain from recruiting children in armed forces’.<sup>151</sup> Additional Protocol I Article 77 has been criticized for its ambiguous nature that can potentially leave a leeway for the exploitation of children.<sup>152</sup>

In addition, provisions in the Convention on the Rights of the Child and its subsequent protocol offer more strict rules leaving no room for the conscription of children below the age of 18 into the armed forces.<sup>153</sup> One of the most important additions made by the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children is ensuring that children below the age of 18 should not be under any circumstances recruited by armed groups distinct from the armed forces of the State.<sup>154</sup> The Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children is a fundamental development that reflects better on consideration of children’s vulnerability, survival, future development, and evolving capacity in a conflict environment.<sup>155</sup> Unlike Additional Protocol I, Additional Protocol II, and the Convention on the Rights of the Child, which have a very low threshold that leads to exploitation of children.<sup>156</sup>

As much as there is a huge effort by International Humanitarian Law to ensure the protection of civilians, it is clear that the International Humanitarian Law application is often not authoritative and clear on the protection offered to civilians in non-international armed conflict. Some of the rules are ambiguous in their application,

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<sup>151</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 77, June 8, 1977, 1125 U.N.T.S. 3.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(3)(c) June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

<sup>152</sup> Supra note 129 ,p 245.

<sup>153</sup> Supra note 127, Article 38 (2).

<sup>154</sup> Ibid; UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, Article 2&4 , 25 May 2000, available at: <https://www.refworld.org/docid/47fdfb180.html> [Accessed 9 November 2023]

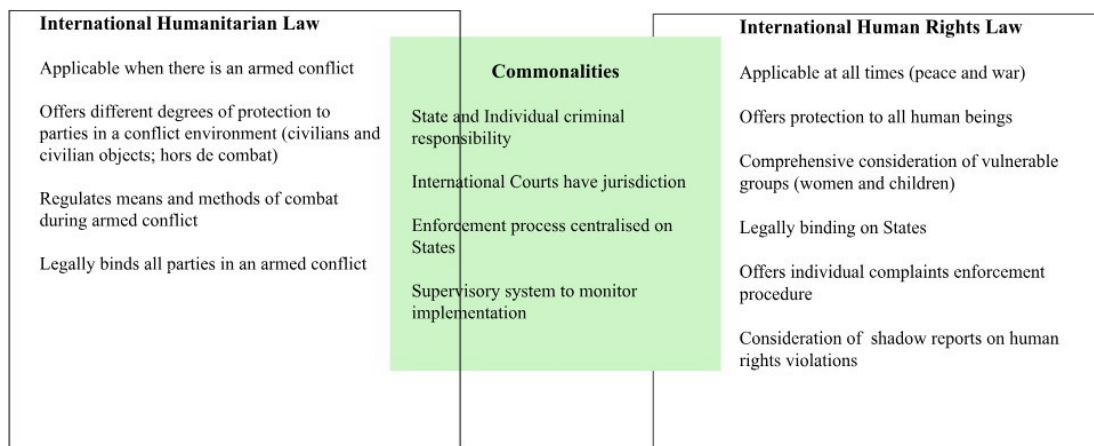
<sup>155</sup> Hanson, K. (2011). International children's rights and armed conflict. *Human Rights & International Legal Discourse*, 5(1), 40-62; Ibid

<sup>156</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 77, June 8, 1977, 1125 U.N.T.S. 3.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(3)(c) June 8, 1977.1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

especially towards special protection offered to women and children. This reinforces the need to consider international human right’s contribution to promoting civilian protection. The limitations of International Humanitarian Law in offering comprehensive protection of civilians fuel arguments to consider International Human Rights Law to play a complementary role in non-international armed conflict.

The symbiotic relationship between International Humanitarian Law and International Human Rights Law is summarized below:

*Diagram 1*



## Chapter 4

### Acts in contravention of International Humanitarian Law and International Human Rights Law

Recently political violence and armed conflict-induced activities have grown in Mozambique, particularly in the province of Cabo Delgado.<sup>157</sup> The Mozambican government has received support from Rwanda and Southern African counterparts. Islamic state groups have been battling to seize control of small towns, and the RENAMO military junta has been waging sporadic attacks.<sup>158</sup> These activities have resulted in a gross violation of both International Humanitarian Law and International Human Rights Law. This chapter seeks to highlight all acts, which are in contravention of the two legal regimes.

<sup>157</sup>Stepansky, J. (2021, April 9). Mozambique’s conflict and the question of foreign intervention. *Al Jazeera*. <https://www.aljazeera.com/news/2021/4/9/mozambique-conflict-question-foreign-intervention>

<sup>158</sup>*Winning peace in Mozambique’s embattled north*. (2022, September 6). Crisis Group. <https://www.crisisgroup.org/africa/southern-africa/mozambique/winning-peace-mozambiques-embattled-north>

## 1. Lack of distinction between civilians and combatants

In the Mozambican conflict, there have been reports of indiscriminate attacks on civilians. The Dyck advisory group, a private South African military group working under the provision of the Mozambican government has been reported to have launched ‘repeated attacks on defenseless civilians and civilian objects who were not taking part directly in the conflict.’<sup>159</sup> Since it’s acting on behalf of the government of Mozambique, the Mozambican government has an obligation to ensure respect for humanitarian law.<sup>160</sup> The Islamic State group was reported to have conducted its first improvised explosive device attack, targeting southern African mission soldiers and also resulted in civilian deaths.<sup>161</sup> The Dyck advisory group and Islamic State group are acting in contravention of the aforementioned principle distinction and prohibition of indiscriminate attacks on civilians.<sup>162</sup>

## 2. Killing, Maiming, and torture of civilians

It is reported that pre-pandemic, one in three women endured violence in Mozambique.<sup>163</sup> Post-pandemic in June 2022, it is reported that Al-Shabaab launched attacks in Ancuabe, targeting civilians including women and children, beheading the victims.<sup>164</sup> Al-Shabaab reportedly launches repeated attacks using firearms and machetes.<sup>165</sup> Civilians who have shown resistance have been heavily tortured before being decapitated in front of their families. These acts of violence have been used as a tool by Islamist groups in Mozambique to intimidate and send a message to critics and opponents.<sup>166</sup> In addition, the government forces have been accused of carrying out

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<sup>159</sup> *Mozambique: Civilians killed as war crimes committed by armed group, government forces, and private military contractors – new report.* (2021, March 2). Amnesty International. <https://www.amnesty.org/en/latest/news/2021/03/mozambique-civilians-killed-as-war-crimes-committed-by-armed-group-government-forces-and-private-military-contractors-new-report/> [last accessed 28 September 2023].

<sup>160</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 2,5,7,8 November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, [accessed 8 November 2023].

<sup>161</sup> *National Counterterrorism Center | FTOs.* (n.d.). Retrieved November 27, 2023, from [https://www.dni.gov/nctc/ftos/isis\\_mozambique\\_fto.html](https://www.dni.gov/nctc/ftos/isis_mozambique_fto.html).

<sup>162</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996, para 78-79; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 51(4), 8 June 1977.

<sup>163</sup> *Freeing women and girls from violence in Mozambique | Spotlight Initiative.* (n.d.). <https://spotlightinitiative.org/news/freeing-women-and-girls-violence-mozambique>

<sup>164</sup> *Mozambique.* (2023, January 20). Human Rights Watch. <https://www.hrw.org/world-report/2023/country-chapters/mozambique>

<sup>165</sup> *Ibid.*

<sup>166</sup> *Mozambique police say northern village, site of reported beheadings, retaken from insurgents.* (2020, November 20). Reuters. <https://www.reuters.com/article/idUSKBN2800UD/>

vicious attacks on civilians, accusing them of collaborating with armed groups<sup>167</sup> The acts of violence conducted by armed groups, including burning people to death inside their homes have resulted in disproportionate suffering of the elderly women, men, and children who happen to have limited mobility during attacks.<sup>168</sup> These acts of violence show the continued violation of international law and consideration of civilians' welfare in the ongoing armed conflict. Under International Humanitarian Law and International Human Rights Law, civilians and even members of armed forces should not be subject to torture and direct attacks with the intent to kill them.<sup>169</sup>

### 3. Rape and other grave forms of sexual assault

There have been cases of rape and sexual assault of civilians, women, and children in the Mozambican ongoing conflict. Since 2017 there has been an increase in cases of rape and sexual violence, with women and girls exposed to forced marriages, and prostitution by community leaders due to fear of being displaced and denied other general access to resources.<sup>170</sup> Both women and men have been exposed to sexual violence by armed groups in their resettlement areas. In addition, rape among intimate partners has increased since the conflict heightened due to the lack of jobs.<sup>171</sup> Al-Shabaab has been actively abducting girls in the province of Cabo Delgado keeping them captive as sex slaves and trophy wives for the fighters.<sup>172</sup>

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<sup>167</sup> Amnesty International. (2021, August 12). *Mozambique: Civilians killed as war crimes committed by armed group, government forces, and private military contractors – new report*. <https://www.amnesty.org/en/latest/news/2021/03/mozambique-civilians-killed-as-war-crimes-committed-by-armed-group-government-forces-and-private-military-contractors-new-report/>

<sup>168</sup> "What I saw is death": war crimes in Mozambique's forgotten Cape - Mozambique. (2021, March 2). ReliefWeb. <https://reliefweb.int/report/mozambique/what-i-saw-death-war-crimes-mozambique-s-forgotten-cape>

<sup>169</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 3, Article 27, 12 August 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 50(1), Article 75 8 June 1977; African Charter on Human and Peoples' Rights, Article 4, June 27, 1981, 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982); International Covenant on Civil and Political Rights, Article 6-7, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989) Article 6 & 37; Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) Article 5&16, [accessed 29 September 2023]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

<sup>170</sup> *Turning the tide for women and girls caught in Mozambique's Cabo*. (2021, February 25). Africa Renewal. <https://www.un.org/africarenewal/magazine/march-2021/turning-tide-women-and-girls-caught-mozambique%E2%80%99s-cabo-delgado-crisis>.

<sup>171</sup> *Conflict, displacement and violence against women and girls in Mozambique | LSHTM*. (2021, December 8). LSHTM. <https://www.lshtm.ac.uk/newsevents/news/2021/conflict-displacement-and-violence-against-women-and-girls-mozambique>

<sup>172</sup> *'Kidnapped, Raped and Trafficked': Women and girls exposed to sexual violence in war-torn Mozambique*. (n.d.). Pulitzer Center. <https://pulitzercenter.org/stories/kidnapped-raped-and-trafficked-women-and-girls-exposed-sexual-violence-war-torn-mozambique>

#### 4. Denial of humanitarian access

In the ongoing Mozambican conflict, humanitarian access has been weaponized to perpetrate other human rights violations on innocent civilians. There have been reports in Cabo Delgado of community leaders requesting sex and money in exchange for access to humanitarian aid.<sup>173</sup> Aid work has been regarded by insurgent groups as unwanted intervention.<sup>174</sup> This is evidenced by attacks that have been launched against humanitarian aid personnel on Makoe Island. The people in the province of Cabo Delgado have been deprived of essential healthcare facilities and services due to growing insecurity in the region.<sup>175</sup> Health facilities have been forcibly closed, leading to an upsurge of people with HIV, women, and children relying on health supplies for survival.<sup>176</sup> In addition, even the military has been reported to conduct acts of violence directed at UN vehicles near Chuba Beach, Pemba City, and Cabo Delgado province.<sup>177</sup> Civilians are entitled to humanitarian access during armed conflict, therefore any act to deprive civilians of this right is a violation of the law.<sup>178</sup> Denial of humanitarian access is not only a violation of an isolated right but impedes the realization of other fundamental rights such as health, education, and life of civilians.

#### 5. Abduction and recruitment of civilians

Since 2018, the Islamic State (ISIS) has kidnapped more than 600 women and girls in Mozambique's province of Cabo Delgado. Most of the people who have been abducted have been sold to sustain Islamic State's logistical needs and finances.<sup>179</sup> In addition, cases of recruitment of children have been reported, exposing children to high-level forms of violence.<sup>180</sup> The extremist group Al-Shabaab has been at the forefront of recruiting children, some of whom are as young as twelve, in the region

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<sup>173</sup> *Conflict Sensitive Rapid Gender Analysis Cabo Delgado, Mozambique, April 2022 - Mozambique*. (2022, June 14). ReliefWeb. <https://reliefweb.int/report/mozambique/conflict-sensitive-rapid-gender-analysis-cabo-delgado-mozambique-april-2022>.

<sup>174</sup> *Northern-Mozambique-Vigil-InSight-Situation-Report.pdf*. (n.d.). Retrieved November 10, 2023, from

<https://insecurityinsight.org/wp-content/uploads/2021/06/Northern-Mozambique-Vigil-InSight-Situation-Report.pdf>

<sup>175</sup> *Mozambique*. (2021, September 1). <https://reports.unocha.org/en/country/mozambique/>. Cambridge University Press.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*.

<sup>178</sup> Customary International Humanitarian Law Rule 55, Access for Humanitarian Relief to Civilians in Need, [https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55#Fn\\_E763511D\\_00006](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55#Fn_E763511D_00006) (Last accessed on 29.11.2023)

<sup>179</sup> Mozambique: Hundreds of women, girls abducted. (2022, June 30). *Human Rights Watch*.

<https://www.hrw.org/news/2021/12/07/mozambique-hundreds-women-girls-abducted>

<sup>180</sup> *UNICEF statement on abduction of minors in Cabo Delgado*. (n.d.). <https://www.unicef.org/mozambique/en/press-releases/unicef-statement-abduction-minors-cabo-delgado>.

of Cabo Delgado.<sup>181</sup> In addition, Al-Shabaab has been capitalizing on the growing dissatisfaction of the government by the disenfranchised youth.<sup>182</sup> Mainly the youth from the Mwani tribe have been easily radicalized and recruited to join Al-Shabaab due to their marginalized predicament. Even when children voluntarily join the armed group, recruiting children under the age of 18 is a war crime, thus a violation of both International Human Rights and International Humanitarian Law.<sup>183</sup> The abduction and recruitment of children result in subsequent violation of children's inherent rights and impede the realization of other fundamental rights.<sup>184</sup>

## Chapter 5

### Enforcement of International Humanitarian Law and International Human Rights Law

States are at the core of International Humanitarian Law and International Human Rights Law enforcement. In this regard, it is the role of international bodies to enact mechanisms that support efforts at the national level; establish activities that induce governments to uphold internationally recognized standards; liaise with states in collaboration initiatives, and launch cooperative procedures to ensure that states respond to violations of International Law rules.<sup>185</sup> This chapter attempts to analyze the enforcement of International Humanitarian Law and International Human Rights Law mechanisms in the sense of 'encouraging, inducing and sanctioning' governments or individuals to fulfill their obligations under the two aforementioned legal regimes.<sup>186</sup> The chapter highlights the enforcement mechanisms utilized by International Humanitarian Law and International Human Rights Law to ensure the protection of civilians. An analysis is made of the relevant enforcement's jurisdiction, what the law

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<sup>181</sup> Schlein, L. (2021, October 5). UNICEF: Mozambique insurgents recruiting children to fight in Cabo Delgado. *Voice of America*. <https://www.voanews.com/a/unicef-mozambique-insurgents-recruiting-children-to-fight-in-cabo-delgado-/6258648.html>

<sup>182</sup> Pinaud, M. (2020, February 25). *Mozambique Update*. ACLED. <https://acleddata.com/2018/07/21/mozambique-update/>

<sup>183</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Article 3, August 1949, 75 U.N.T.S. 287; Convention on the Rights of the Child, article 36, article 38(4), Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989)

<sup>184</sup> International Covenant on Civil and Political Rights, Article 2 Dec. 16, 1966 999 U.N.T.S. 171.

<sup>185</sup> Ramcharan, B. B. (1983). The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflicts. *American University Law Review*, 33(1), p99.

<sup>186</sup> *Ibid* p100..

has done in Mozambique, exposing the limitations of the law, and what can be done to ensure enforcement of the law in Mozambique.

Section 1 of chapter 5 discusses several factors that induce compliance under International Humanitarian Law and International Human Rights Law. It also Examines the enforcement of the law in NIAC at three levels, namely enforcement at the international, regional, and domestic levels. At the international level, the paper addresses several mechanisms including the Security Council, the International Committee of the Red Cross, International Humanitarian Law treaty-based mechanisms, international human rights treaty-based mechanisms, and the Human Rights Council. At the regional level, the African Union and SADC's mechanisms will be assessed in relation to the conflict in Mozambique. In addition, at the domestic level, the enforcement mechanisms include the utilization of national criminal law, and obligations under International Humanitarian Law to investigate and prosecute.

### **1. Enforcement at the international level**

Firstly, it is important to highlight that in the enforcement of International Humanitarian Law at international, regional, and domestic levels the enforcement machinery mainly provides a deterrent effect to all parties in the non-international armed conflict. However, the deterrent effect is not enough to ensure comprehensive protection of civilians in a non-international armed conflict. The International Humanitarian Law enforcement mechanism falls short due to:

- selective action by international bodies because of highly politicized enforcement machinery;
- massive centralization of the international courts on State participation;
- unrealistic expectation of International Humanitarian Law treaty-based mechanisms of mutual consent of parties for enforcement; and
- lack of judicial guarantees to ensure fair due process propels the International Humanitarian Law violations.

The shortcomings of International Humanitarian Law enforcement create room for to play a complementary role in order to ensure the comprehensive protection of civilians.

Moving further, the enforcement of International Human Rights Law is only practical against States, not against non-state actors in a non-international armed conflict. This then raises the question, who do the enforcement mechanism engage?, Pursuant to violations of the law by insurgents and armed groups, International Humanitarian Law addresses the violations as it has the suitable enforcement machinery. This shows the complementarity nature of the two legal regimes to ensure the protection of civilians. However, the heavy centralization of the enforcement mechanism of International Human Rights Law on States is highly questioned, especially if the State is at the forefront of committing human rights violations as witnessed in the case of Mozambique.

The supervisory mechanism of International Human Rights Law is optional for States. The function of the human rights enforcement machinery relies on State consent and willingness to act. In this regard, it limits the possibility of legal sanctions against perpetrators. In addition, the time frame for human rights supervision means those human rights violations in a non-international armed conflict are only addressed long after the fact. This form of operation betrays the ethos of international human rights, thus ensuring that human beings are treated with dignity and respect not a reactive form of mechanism. The shortcomings of the international human rights mechanisms support the assertion that International Human Rights Law lack effective enforcement tools that can be relied on to ensure comprehensive protection of civilians in a non-international armed conflict.

#### **a) Security Council**

##### ***i. Jurisdiction***

The United Nations bodies have taken an active role in addressing humanitarian crises and human rights violations across the globe. The Security Council, in particular, assumed a fundamental role in addressing crimes against humanity, war crimes, and any related acts that impede the realization of international peace and security. The link between the Security Council and International Humanitarian Law has grown stronger over time, to the point that one can argue that the council's role and duty can be used as a mechanism to ensure compliance with International

Humanitarian Law.<sup>187</sup> The Security Council has regularly condemned all acts of International Humanitarian Law violations and encouraged States to respect and uphold their obligations under the law of armed conflict.<sup>188</sup>

In resolution 1265 (1999), the Security Council demonstrated preparedness to adopt appropriate action as retaliation for intentional violations of International Humanitarian Law.<sup>189</sup> The aforementioned actions are argued to be in line with the purpose of the Security Council as enshrined under Article 1(3) of the Charter.<sup>190</sup> Roberta Arnold and Noëlle Quénivet (2008), establish that when serious violations of International Humanitarian Law and International Human Rights Law constitute a threat to peace in the sense of Article 39 of the UN Charter, and when the Security Council considers measures to prevent such violations in order to maintain international peace and security, one can argue that IHL and IHRL also fall under Article 1(1) of the UN Charter.<sup>191</sup> The general acceptance of the central role played by the Security Council and its expansive interpretation of Articles 1 & 39 of the United Nations, shows that it's an enforcement mechanism that is heavily used to ensure respect for International Humanitarian Law.<sup>192</sup>

## *ii. Limitations in Mozambique*

Considering the intensity of the armed violence in Mozambique, and its subsequent security and humanitarian effect on neighboring countries hosting displaced refugees, one would expect the Security Council to act in such a manner as it reacted to atrocities in Rwanda.<sup>193</sup> Looking at the conflict in Mozambique that has been ongoing for more than 16 years, there has not been any effort from the Security Council to establish a tribunal that will prosecute the International Humanitarian Law violations in Mozambique. Lack of condemnation of International Humanitarian Law

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<sup>187</sup> Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, Article 24, 59 Stat. 1031; T.S. No. 993.

<sup>188</sup> United Nations Security Council. Resolution. 752, UN Doc. S/RES/752 (1992) (May 15, 1992), para. 8. See for example resolutions. *ibid.* Res. 758, *Ibid.* RES/758 (1992) (June 8, 1992); *ibid.* Res. 761, UN Doc. S/RES/761 (1992) (June 29, 1992); *ibid.* Res. 764, UN Doc. S/RES/764 (1992) (July 13, 1992); *ibid.* Res. 787, UN Doc. S/RES/787 (1992) (Nov. 16, 1992); *ibid.* Res. 819, UN Doc. S/RES/819 (1993) (April 16, 1993); *ibid.* Res. 836, UN Doc. S/RES/836 (1993) (June 4, 1993).

<sup>189</sup> United Nations Security Council, Resolution. 1265, UN Doc. S/RES/1265 (1999) (Sept. 17, 1999), para. 10.

<sup>190</sup> Gowlland-Debbas, V. (2021). *United Nations Sanctions and international law* (Vol. 1). Brill; Arnold, R., & Quénivet, N. N. R. (2008). *International Humanitarian Law and human rights law: Towards a New Merger in International Law*. BRILL.P325 191 *ibid.*

<sup>192</sup> Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, Article 24, 59 Stat. 1031; T.S. No. 993.

, *Mozambique: Cabo Delgado displacement could reach 1 million, UN officials warn.* (2021, March 24). UN News. <https://news.un.org/en/story/2021/03/1087952> ; ISSAfrica.org. (n.d.). *What can the AU do about the conflict in Mozambique?* ISS Africa. Retrieved December 2, 2023, from <https://issafrika.org/pscreport/psc-insights/what-can-the-au-do-about-the-conflict-in-mozambique>.

violations in Mozambique by the Security Council weakens International Humanitarian Law. It invalidates the endured human rights violations as acts that are not serious enough to require the Security Council's action. Selective action of the Security Council is based on its political bias rather than the validity of International Humanitarian Law violations since it's a political organ.<sup>194</sup> In this regard, legal arguments will be viewed through a political lens, which remains the determining factor.<sup>195</sup>

Recently, Mozambique has been elected to serve as a non-permanent member of the Security Council.<sup>196</sup> This presents an opportunity for the Security Council to reflect on the non-permanent member's security crisis and humanitarian catastrophe. One of the reasons is the lack of acknowledgment by Mozambique that there is a non-international armed conflict in Mozambique that requires the application of International Humanitarian Law and mechanisms available to neutralize the conflict, thereby ensuring the protection of civilians.

The "selective application of IHL or the misinterpretation of the rules for domestic or other political purposes has a direct negative impact on the lives of the civilians who continue to endure human rights violations in vain".<sup>197</sup>

Regardless of Mozambique's characterization of the security crisis in the country, its the mandate of the Security Council to halt any threats to international peace and security. The Security Council in exercising its duties has not ensured the protection of civilians in the Mozambican conflict.

## **b) International Criminal Court**

### **i. Jurisdiction**

If the other jurisdiction factors are met, the International Criminal Court has jurisdiction over violations of International Humanitarian Law in any armed conflict

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<sup>194</sup> Wellens, K. (2003). The UN Security Council and new threats to the peace: Back to the future. *Journal of Conflict and Security Law*, 8(1), 15–70; Arnold, R., & Quéniwet, N. N. R. (Eds.). (2008). *International Humanitarian Law and human rights law: Towards a new merger in international law*. Nijhoff. P323.

<sup>195</sup> Ibid.

<sup>196</sup> *Mozambique assumes presidency of UN Security Council, sets priorities*. (2023, March 20). Africa Renewal. <https://www.un.org/africarenewal/magazine/march-2023/mozambique-un-security-council>

<sup>197</sup> "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts." *International review of the Red Cross* (2005) 89.867 (2007): 719–757. Web.

<sup>198</sup> The court can exercise its jurisdiction for acts committed in the territory of a State that is party to the Rome Statute and has jurisdiction over acts of personality, hence the jurisdiction of the court is not universal but territorial.<sup>199</sup> Any individual who commits the crimes within the jurisdiction of the Court shall be liable for punishment in accordance with the Rome Statute.<sup>200</sup> The court also has jurisdiction over cases that are referred to it by the Security Council; by a State party to the treaty; and when the prosecutor initiates an investigation due to the alleged violations of International Humanitarian Law *proprio motu*.<sup>201</sup> In December 2004, the Central African Republic referred the atrocities and grave breaches of International Humanitarian Law during the armed conflict to the International Criminal Court prosecutor.<sup>202</sup> It is imperative to establish that the International Criminal Court exercises its function as a humanitarian law mechanism in unison with the domestic courts (complementarity). Therefore, for the International Criminal Court to fully exercise its function, it relies on the notion of complementarity. The court does not have jurisdiction over a case that's before the national courts unless there is evidence that the national courts are unwilling and unable to handle the matter, and when it's clear that the national courts are protecting the individual from criminal responsibility.<sup>203</sup> Looking at the situation in Mozambique, the International Criminal Court has jurisdiction that extends into Mozambique, because it signed the Rome statute.<sup>204</sup>

## ***ii. Limitations in Mozambique***

No inquiry has been made from the prosecutors' office into the mass violations of International Humanitarian Law in the Mozambican armed conflict. Considering the nature of the conflict in Mozambique that involves intense armed hostilities between the government of Mozambique and armed groups including as Al-Shabaab, RENAMO, RENAMO military junta, and small Islamist groups, the court's enforcement apparatus can be utilized in collaboration with national courts to

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<sup>198</sup> Perna, L. (2006). *The formation of the treaty rules applicable in non-international armed conflicts*. Martinus Nijhoff Publishers p155. Rome Statute of the International Criminal Court, article 5 July 17, 1998 2187 UN UNTS. 90; 37 ILM. 1002 (1998).

<sup>199</sup> Ibid, article 12(2); Shaw, M. N. (2008). *International law* (6th ed). Cambridge University Press p 412.

<sup>200</sup> Ibid, article 25.

<sup>201</sup> Ibid, article 13(a)(c); *ibid*, article 14; *ibid*, article 15.

, May 2007 the prosecutor launched the investigation: see [www.icc-cpi.int/library/press/press\\_releases/ICC-OTP-BN-20070522-220\\_A\\_EN.pdf](http://www.icc-cpi.int/library/press/press_releases/ICC-OTP-BN-20070522-220_A_EN.pdf) and Schabas, International Criminal Court, pp. 51–2.

<sup>203</sup> Ibid Article 17, Article 20(3).

<sup>204</sup> Mozambique. (2024, January 4). *International Criminal Court Project*. <https://www.aba-icc.org/country/mozambique/>; Vienna Convention on the Law of Treaties, article 1, article 11, , May 23, 1969 1155 UN UNTS. 331; 8 ILM. 679 (1969)

prosecute the perpetrators of International Humanitarian Law. However, there is no guarantee that the national courts and authorities will not be biased and protect all individuals who are violating International Humanitarian Law as long as they are representing the State's interest. Reports of soldiers and private military contractors committing war crimes have been made, However, little effort is placed in investigating, and seeking legal action against these actors because they represent the State.<sup>205</sup> This form of party bias betrays the ethos of International Humanitarian Law, thus ensuring the protection of civilians and regulating means and methods of warfare. No party is exempted from respecting International Humanitarian Law, however, the mechanism enshrined in the International Criminal Court presents a gap that can be utilized to prolong violations of International Humanitarian Law with limited legal consequences. It is important to reiterate that the prosecutor's office has the power to take over cases if the national courts are failing to ensure judicial guarantees or are unwilling to prosecute.<sup>206</sup> However this function only works if the court has made an enquiry into the IHL and IHRL violations in the conflict. Unfortunately the ICC has not launched any enquiry into the International Humanitarian Law and International Human Rights Law violations in Mozambique.

### **c) International Committee of the Red Cross**

#### ***i. Jurisdiction***

While at the core of enforcement of International Humanitarian Law remains the duty of States and relevant international organizations, other organizations such as the International Committee of the Red Cross have been championing IHL norms through their respective channels.<sup>207</sup> The International Committee of the Red Cross has been generally accepted as a guardian and omniscient watchdog of International Humanitarian Law.<sup>208</sup> The ICRC within the context of non-international armed conflict has been known for relying on two forms of enforcement mechanisms, thus

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<sup>205</sup>Amnesty International. (2021, August 12). *Mozambique: Civilians killed as war crimes committed by armed group, government forces, and private military contractors – new report*. <https://www.amnesty.org/en/latest/news/2021/03/mozambique-civilians-killed-as-war-crimes-committed-by-armed-group-government-forces-and-private-military-contractors-new-report/>

<sup>206</sup> Supra note 203.

<sup>207</sup> Fleck, D. (2006). International accountability for violations of the ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law. *Journal of Conflict and Security Law*, 11(2), 195.

<sup>208</sup> Forsythe, D. P. (2005). *The humanitarians: The international committee of the Red Cross*. Cambridge University Press; Bussmann, M., & Schneider, G. (2015). A porous humanitarian shield: The laws of war, the Red Cross, and the killing of civilians. *The Review of International Organizations*, 11(3), 337–338; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, common article 3 Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287.

persuasion, and naming and shaming in very exceptional circumstances where persuasion has failed.<sup>209</sup> The ICRC has been leveraging its presence in the conflict environment as an alternative to halt violations of civilian rights; conducting seminars and related capacity-building initiatives to promote adherence to International Humanitarian Law norms to parties involved.

## *ii. Limitations in Mozambique*

The mechanisms utilized by the International Committee of the Red Cross have proven to be of little effect. Persuasion, naming, and shaming only work when dealing with non-state actors who are striving to have legitimacy. The ICRC does not have legal backing and is not followed by sanctions upon lack of compliance, as it is not legally binding. The presence of ICRC only provides a deterrent effect on perpetrators, as they are afraid to be identified.<sup>210</sup> Even with the presence of the International Committee of the Red Cross, the violations of civilians have not been stopped by all actors, especially rebel groups.<sup>211</sup> In Mozambique, the government is fighting against Al-Shabaab, an Islamist group that has pledged allegiance to ISIS.<sup>212</sup> Naming and shaming, not only is not an effective deterrent to their acts of violence against civilians but also fuels and propels their agenda on the global stage. Their motivation is not to become a legitimate government but to orchestrate a consolidated network of terrorist groups with control of Mozambique's strategic ports and resources.<sup>213</sup>

## **d) International Humanitarian Law treaty-based mechanisms**

### *i. Jurisdiction*

International Humanitarian Law has established four treaty-based enforcement mechanisms.<sup>214</sup> These mechanisms include the ad hoc fact-finding commission;

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<sup>209</sup> Ibid.

<sup>210</sup> Kuperman, A. J. (2004). *The limits of humanitarian intervention: Genocide in Rwanda*. Rowman & Littlefield.

<sup>211</sup> Bussmann, M., & Schneider, G. (2015). A porous humanitarian shield: The laws of war, the Red Cross, and the killing of civilians. *The Review of International Organizations*, 11(3), p338.

<sup>212</sup> *Salafi-Jihadi Global Tracker: Islamic State affiliates pledge to new leader*. (n.d.). Critical Threats. <https://www.criticalthreats.org/briefs/al-qaeda-global-tracker>

<sup>213</sup> Morier-Genoud, É. (2020). The jihadi insurgency in Mozambique: origins, nature and beginning. *Journal of Eastern African Studies*, 14(3), 396–412; *State Department Terrorist designations of ISIS affiliates and leaders in the Democratic Republic of the Congo and Mozambique - United States Department of State*. (2021, March 10). United States Department of State. <https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/>

<sup>214</sup> Zyberi, G. (2018). Enforcement of International Humanitarian Law. In *Precision manufacturing* (pp. 1–24).

international fact-finding commission; and the International Committee of the Red Cross that has been assessed above. During an armed conflict, a party to the conflict can request an inquiry.<sup>215</sup> According to Article 149 of Geneva Convention IV, “An inquiry shall be instituted in a manner to be decided between parties”.<sup>216</sup> Commencing the inquiry depends on the consent of the parties in the conflict.<sup>217</sup> Given the lack of compliance that emanated from the ad hoc fact-finding commission, as it requires some form of cooperation between parties engaged in armed hostilities, an international fact-finding commission was created.<sup>218</sup> The international fact-finding Commission is competent to enquire into the alleged violations of the Geneva Conventions.<sup>219</sup> However, the commission does not have the competency of the court in issuing judgments or addressing facts concerning law.<sup>220</sup> The reoccurring limitation of these treaty-based mechanisms is that they require parties involved in the conflict to give their consent for the enforcement mechanisms to be active. This poses a great problem for International Humanitarian Law enforcement in order to ensure civilian protection.

## *ii. Limitations in Mozambique*

Regarding consideration of the International Humanitarian Law treaty-based mechanisms, the Mozambican government does not recognize some of the parties as legitimate actors that can be negotiated with. Al-Shabaab has been recognized globally as a terrorist group, therefore it is undesirable to negotiate with terrorists.<sup>221</sup> The closest form of engagement that has been fruitful has been between the Mozambican government and RENAMO to demilitarize and initiate a disarmament programme after their peace agreement.<sup>222</sup> This agreement is a political solution to the feud between the government and RENAMO, however, it has a limited effect in

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<sup>215</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 149 Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 90 June 8, 1977 1125 UN UNTS. 3.

<sup>219</sup> Ibid.

<sup>220</sup> ICRC Advisory Service, ‘*The International Humanitarian Fact-Finding Commission*’. (n.d.).

<sup>221</sup> State Department Terrorist designations of ISIS affiliates and leaders in the Democratic Republic of the Congo and Mozambique - United States Department of State. (2021, March 10). United States Department of State. <https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-leaders-in-the-democratic-republic-of-the-congo-and-mozambique/>

<sup>222</sup> Adigun, O., & Adigun, O. (2023, September 24). *Mozambique successfully closes last Renamo military base*. BNN Breaking. <https://bnnbreaking.com/breaking-news/mozambique-successfully-closes-last-renamo-military-base/>

ensuring the protection of civilians who are still exposed to violations from other parties to the conflict.

**e) International human rights treaty-based mechanism**

**i. Jurisdiction**

In pursuit of comprehensive protection of civilians and respect for humanitarian values in an armed conflict environment, there is consideration of other bodies of law besides International Humanitarian Law. The International Human Rights legal architecture can be relied on to ensure the protection of civilians in a non-international armed conflict. In some areas, International Human Rights Law and International Humanitarian Law utilize the same enforcement tools.<sup>223</sup>

In an effort to ensure the protection of human rights, the International Human Rights enforcement machinery established human rights treaty committees. Nine human rights legal instruments have monitoring bodies with the specific function of ensuring accountability.<sup>224</sup> The human rights legal instruments include but are not limited to:

- the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,
- the International Covenant on Civil and Political Rights,
- the International Covenant on Economic,
- Social and Cultural Rights, Convention on the Rights of the Child, and

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<sup>223</sup> Moir, Lindsay. *The Law of Internal Armed Conflict*. Cambridge: Cambridge University Press, 2002. p256 Print.

<sup>224</sup> United Nations. Dag Hammarskjöld Library. (n.d.). *Research guides: UN Human Rights Documentation: Treaty-based bodies*. <https://research.un.org/en/docs/humanrights/treaties> ; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UN UNTS. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 ILM. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UN UNTS. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 ILM. 360 (1967); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 UN UNTS. 13; 19 ILM. 33 (1980); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965..S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 UN UNTS. 195, 212; Convention on the Rights of the Child, Nov. 20, 1989 1577 UN UNTS. 3; 28 ILM. 1456 (1989); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography: 1753; Convention on the Rights of Persons with Disabilities, May 3, 2008 A/RES/61/106, Annex 1 ; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 1465 UN UNTS. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 ILM. 1027 (1984) ; Convention on the Rights of the Child, Nov. 20, 1989 1577 UN UNTS. 3; 28 ILM. 1456 (1989) ; International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006 G.A. res. A/61/177 (2006) reprinted in 14 Int'l. Hum. Rts. Rep. 582 (2007).

- Convention on the Elimination of All Forms of Discrimination against Women.<sup>225</sup>

Mozambique is a State party to all the aforementioned legal instruments; therefore it is legally obligated to ensure the protection of human rights as enshrined by the commitment of the treaties.<sup>226</sup>

## *ii. Limitations in Mozambique*

### *State reports procedure*

According to the human rights legal instruments, Mozambique is obligated to submit periodic reports that cover the human rights environment at present, including any issues impeding the realization of collective human rights protection in the country.

<sup>227</sup>The respective committees have the mandate to assess the reports and give feedback. The enforcement process is centralized on the State in question to fully participate in order for it to be fully effective. In the case of Mozambique which is experiencing a non-international armed conflict that involves non-state actors, the State report procedure is highly flawed in ensuring comprehensive protection of civilians. The mechanism does not guarantee compliance, which is needed in order to ensure accountability of the parties involved at the international level. States have the sole responsibility to report, excluding other parties to the conflict. This is exhibited by the Convention on the Rights of the Committee, the Committee on Economic, Social and Cultural Rights, and, the Human Rights Committee among others that rely on State participation for its implementation.<sup>228</sup> This enforcement tool leaves behind armed groups and other non-state actors who are critical stakeholders in a non-international armed conflict.<sup>229</sup>

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<sup>225</sup> Ibid.

<sup>226</sup> United Nations Human Rights Treaty Bodies, 'UN Treaty body Database'. Retrieved December 13, 2023, from [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Lang=en).

<sup>227</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, Article 40, 999 UN UNTS. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 ILM. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Article 16-17, 993 UN UNTS. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 ILM. 360 (1967)

<sup>228</sup> Convention on the Rights of the Child, article 43 & 45, Nov. 20, 1989, 1577 UN UNTS. 3; 28 ILM. 1456 (1989); Ibid

<sup>229</sup> Fleck, & Provost, R. (1997). The Handbook of humanitarian law in armed conflicts [Review of The handbook of humanitarian law in armed conflicts]. Canadian Yearbook of International Law, XXXV, 76.

In addition, reliance on State reports is problematic especially if the State in question is also perpetrating human rights violations during the armed conflict.<sup>230</sup> In Mozambique, the military and private contractors hired by the government have been accused of launching indiscriminate attacks killing and abusing civilians.<sup>231</sup> Even when the Committees utilize shadow reports from civil society, reporting procedures can be manipulated especially if the State is also at the center of human rights violations.<sup>232</sup> It is important to highlight that the fundamental role of shadow reports to cross-examine the State-submitted reports is an important function that International Humanitarian Law can also utilize to ensure comprehensive coverage and illuminate human rights violations emanating from an armed conflict environment.

The State reports procedure assumes all States are upstanding members of the international community who will comply with the law for its effective enforcement. This assumption creates a gap that is exploited by States, especially in an armed conflict environment. The States perpetuating human rights violations are notorious for chronic delays in submitting their reports.<sup>233</sup> This has negative implications for the effective enforcement of human rights protection in a non-international armed conflict, as urgency to critical human rights violations and the plight of civilians is lost thereby undermining their plight. There have been reported cases of torture, extrajudicial killings, and massive violation of other human rights in Mozambique. None of these human rights concerns are reported to respective treaty committees.<sup>234</sup> Mozambique ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in September 1999, but it has not submitted a single report since 14 October 2000.<sup>235</sup> This does not mean there are no human rights violations experienced by civilians during this time. The lack of any State reports by Mozambique to the respective human rights committees illuminates the existing

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<sup>230</sup> Moir, Lindsay. *The Law of Internal Armed Conflict*. Cambridge: Cambridge University Press, 2002.p259 Print. , , All sides commit abuses in Mozambique conflict, says report | AP News. (2021, April 20). *AP News*. <https://apnews.com/article/africa-south-africa-mozambique-war-crimes-45a3c451f586859271e17dfd62a93ff9>

<sup>232</sup> *Human rights enforcement mechanisms of the United Nations*. (n.d.). ESCR-Net. <https://www.eschr-net.org/resources/human-rights-enforcement-mechanisms-united-nations>.

<sup>233</sup> John Dugard. (2011). *International Law. A South African Perspective* 4th edition Juta & Co. Ltd 327-338, 340-341.

<sup>234</sup> “*What I saw is death*”: war crimes in Mozambique’s forgotten Cape - Mozambique. (2021, March 2). ReliefWeb. <https://reliefweb.int/report/mozambique/what-i-saw-death-war-crimes-mozambique-s-forgotten-cape>

<sup>235</sup> United Nations Human Rights Treaty Bodies, ‘UN Treaty body Database’ Retrieved December 13, 2023, from [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=en)

shortcomings of centralization of the reporting process on States that happen to be at the center of the conflict. There has been no effort shown by the State to report on human rights initiatives implemented to ensure respect for human rights and the protection of civilians during conflict. The reliance of the report procedure on the State as the sole actor in an armed conflict suggests that International Human Rights Law does not provide effective mechanisms to ensure comprehensive protection of civilians.

***General comments, observations, and recommendations***

In Mozambique the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights concluded observations and requested the Mozambican government to provide relevant information on their progress in implementing human rights protection in three key areas; arbitrary arrest and legal safeguards for persons in detention; monitoring places of detention, alternatives to detention and deaths in custody; and judicial reform, including judges, court fees and community courts.<sup>236</sup> However, the NGO coalition report on the follow-up to the urgent recommendations of the United Nations Human Rights Committee concluded that the Mozambican government did not initiate any action to implement and enforce the recommended suggestions on the aforementioned three key areas.<sup>237</sup> The underlying factor in this development in Mozambique is the lack of authority in the general comments and recommendations that States are not compelled to act. This form of supervisory capacity of treaty-based mechanism carries a deterrent function for States to exercise caution dealing with human rights issues surrounding armed conflict. It is not authoritative apart from naming and shaming a State that is not compliant. This does not ensure comprehensive protection of civilians, especially in a non-international armed conflict. The International Human Rights Law lacks effective enforcement devices to ensure the comprehensive protection of civilians.

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<sup>236</sup>Centre for Civil and Political Rights | Human Rights. (n.d.). Retrieved from [https://www.ccpcentre.org/doc/2013/10/CCPR\\_C\\_MOZ\\_CO\\_1\\_en.doc](https://www.ccpcentre.org/doc/2013/10/CCPR_C_MOZ_CO_1_en.doc)

<sup>237</sup>United Nations Human Rights Treaty Bodies, (N.d.). Retrieved January 2, 2024, from [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&CountryID=118&DocTypeID=46](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&CountryID=118&DocTypeID=46)

### *Individual Complaints*

The individual complaint is regarded as one of the key features of human rights treaty-based machinery. Its consideration to listen to the voices of the individuals succumbing to human rights violations is applauded.<sup>238</sup> The International Covenant on Civil and Political Rights Protocol I allows individuals to lodge complaints. However, the admissibility of individual petitions is based on the exhaustion of local remedies.<sup>239</sup> It is important to note that this requirement is waived only in exceptional circumstances when it can be demonstrated that the pursuit of local remedies will not be effective.<sup>240</sup> This enforcement device does not consider the reality of civilians on the ground in a non-international armed conflict. Victims of non-international armed conflict are vulnerable and not in any position to go through a strenuous legal process.<sup>241</sup> This condition does not do justice to victims of State-sanctioned human rights violations. The courts, which are an extension of the State, have room to overlook the human rights violations by military personnel, as has been the case in Mozambique's lack of judicial guarantees and extrajudicial killings. It is important to stress that Mozambique is a State party to the International Covenant on Civil and Political Rights but has not ratified its subsequent protocol and other protocols that guarantee individual complaints for victims in Mozambique.<sup>242</sup> This development denies victims of human rights violations in the non-international armed conflict a voice, as complaints are only accepted by a State party. In addition, the committee, which holds the individual complaints' decision is not a court, the decisions are not legally binding as it can only issue views in its annual report. Individual complaints are not a sufficient enforcement device to ensure the protection of civilians in a non-international armed conflict.

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<sup>238</sup> Bennett, T. W. *Introduction to International Law*. 1st ed. Cape Town: Juta & Company, Limited, 2013.p192-195 Print.

<sup>239</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UN UNTS. 171; 6 ILM. 368 (1967); Martin, Francisco Forrest et al. *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis*. Cambridge: Cambridge University Press, 2006.p8. Web.

<sup>240</sup> *The Resource : Part II. International Human Rights System, 3/11*. (n.d.). <https://www.un.org/esa/socdev/enable/comp202.htm#2.4>; International Covenant on Civil and Political Rights Human Rights Committee, General Comment No.33, obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33 25 June 2009.

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<sup>242</sup> United Nations Human Rights Treaty Bodies, 'UN Treaty body Database 'Retrieved December 13, 2023, from [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=en)

## **f) Human Rights Council**

Mozambique has consistently submitted periodic reports to the Human Rights Council.<sup>243</sup> However, within the Human Rights Council machinery, there is no consideration of non-state actors who are also critical stakeholders in the conflict.<sup>244</sup> This poses a loophole in the international human rights efforts to ensure comprehensive protection of civilians in a non-international armed conflict. Consistent interaction with one stakeholder in a non-international armed conflict does not guarantee adherence to International Human Rights rules by all parties. In addition, the State centralized enforcement tool raises questions as far as International Human Rights Law's suitability to regulate non-international armed conflict. Is International Human Rights Law capable of inducing compliance with non-state actors in a non-international armed conflict? If so, does this suggest that non-state actors are recognized as legal subjects with some form of legitimacy? If yes, why is it that International Human Rights Law does not explicitly establish obligations to armed groups to ensure respect for international human rights and the protection of civilians?<sup>245</sup> These questions show the shortcomings in International Human Rights Law enforcement mechanisms. It lacks effective enforcement devices that will guarantee comprehensive protection for civilians from all parties in a non-international armed conflict.

## **2. Enforcement by regional bodies in Mozambique**

### **a) African Union and Southern African Development Community**

#### ***i. Jurisdiction***

The African Union through the Peace and Security Council has been at the forefront of championing International Humanitarian Law enforcement in Africa. According to the Constitutive Act article 4(h), the African Union has the right to intervene in a Member State pursuant to a decision of the assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity.<sup>246</sup> The Southern African Development community's quest for peace and security emanates

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<sup>243</sup>OHCHR. (n.d.). *Universal Periodic Review - Mozambique*. <https://www.ohchr.org/en/hr-bodies/upr/mz-index>

<sup>244</sup>Mapako, K. (2023). "War on Children" A reflection of International Human Rights Law protection of children's rights in the Mozambican armed conflict. *Social Science Research Network*.

<sup>245</sup> *Ibid.*

<sup>246</sup> Constitutive Act of the African Union, article 4(h), May 9 2001.

from the African Union's African Peace and Security Architecture (APSA) agenda of fostering regional integration and operational functions. SADC in exercising the function of its office as a regional block has the authority to provide and regulate collective self-defense and collective action in any of the Member States. According to Article 7 of the Mutual Defence Pact, SADC can take collective action at the request of the Member State or in exceptional circumstances in which action is required in order to comply with the legal framework.<sup>247</sup> As a way to uphold international law standards, acts of violence that surpass mere domestic violence, including genocide, crimes against humanity, and war crimes warrant collective action without the consent of the member state.<sup>248</sup> SADC can sanction such action pursuant to approval by the United Nations Security Council as enshrined in Article 53 and Chapter VII.<sup>249</sup> Mozambique is a member state of SADC and the African Union, which warrants these enforcement bodies to exercise their function in relevant matters happening in Mozambique.

## *ii. African Union and African Commission of Human Rights*

Due to the humanitarian crisis in Mozambique with thousands displaced, the African Union pledged to assist Mozambique and complement the local government's efforts to combat terrorism through training of the military and information sharing.<sup>250</sup> In addition, the African Union Commission provided support to the Southern African Development Community (SADC) to enhance their efforts in collaboration with the Mozambican government to fight terrorism by providing military equipment.<sup>251</sup>

Since 1992 Mozambique has made four submissions before the African Commission on Human Rights.<sup>252</sup> The African Commission on Human Rights' State reporting function has been heavily undermined and abused, as a significant number

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<sup>247</sup> Southern African Development Community Mutual Defence Pact, article 6, Article 7, 2003.

<sup>248</sup> *Ibid*, article 11.

<sup>249</sup> Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, Article 53, 59 Stat. 1031; T.S. No. 993; Dzinesa, G. A. (2023). The Southern African Development Community's Mission in Mozambique (SAMIM): Policymaking and effectiveness. *International Peacekeeping*, 30(2), 198–229.

<sup>250</sup> Mozambique, C. of. (2021, September 12). African Union pledges support for Mozambique. *FurtherAfrica*. <https://furtherafrica.com/2021/09/12/african-union-pledges-support-for-mozambique/>; ISSAfrica.org. (2020, February 13). *Can the African Union help Mozambique combat terrorism? - ISS Africa*. ISS Africa. <https://issafrika.org/iss-today/can-the-african-union-help-mozambique-combat-terrorism>

<sup>251</sup> *African Union hands over military equipment to SADC's SAMIM in Mozambique | African Union*. (n.d.). <https://au.int/en/pressreleases/20231117/african-union-hands-over-military-equipment-sadcs-samim-mozambique>

<sup>252</sup> *States reporting status*. (n.d.). African Commission on Human and Peoples' Rights. <https://achpr.au.int/en/states-reporting-status>

of States chronically submit late reports long after the designated time frame<sup>253</sup> This illustrates irregularities within this enforcement tool, especially within the context of a non-international armed conflict. There are consistent human rights violations even in the period the Mozambique government did not make periodic reports. The period set by the Commission for reports from State parties is two years as enshrined in the African Charter on Human and People's Rights.<sup>254</sup> These massive delays by State parties undermine the authority of the African Commission on Human Rights and propels the assertion that International Human Rights Law lacks effective enforcement devices that ensure comprehensive protection of civilians in a non-international armed conflict environment.

### *iii. Southern African Development Community (SADC)*

Upon request of the Mozambican government, the Southern African Development Community created the SADC Mission in Mozambique (SAMIM).<sup>255</sup> The mandate of the operation is to provide a regional response to combat terrorism and acts of extremism and to restore and strengthen peace in the region.<sup>256</sup> It is important to highlight that the mission has been reportedly successful in driving Islamist groups out of some parts of Cabo Delgado. However, reflecting on the SADC regional mechanisms the focus has been on driving out warring factions and terrorist groups instead of directly ensuring the protection of civilians and promotion of peace and security.

In the efforts of SADC to ensure peace and security in Mozambique, emphasis has been placed on combating the Islamist group Al-Shabaab. However, the conflict in Mozambique is dynamic and not a clear-cut armed conflict between the State and an armed group. Other armed non-State actors such as RENAMO and RENAMO military junta have been active and also causing International Humanitarian Law violations.<sup>257</sup> The selective response by SADC to the Mozambique security crisis does not ensure comprehensive protection for civilians who are still susceptible to attacks

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<sup>253</sup> Moir, Lindsay. *The Law of Internal Armed Conflict*. Cambridge: Cambridge University Press, 2002.p269 Print.

<sup>254</sup> African Charter on Human and Peoples' Rights, Article 62. June 27, 1981, 1520 UN UNTS. 217; 21 ILM. 58 (1982).

<sup>255</sup> SADC Mission in Mozambique (SAMIM) in brief | SADC. (n.d.). <https://www.sadc.int/latest-news/sadc-mission-mozambique-samim-brief>

<sup>256</sup> Ibid.

<sup>257</sup> Schäfer, J. (2007). Violence on the periphery: Renamo combatants, civilians, and war. In *Palgrave Macmillan US eBooks* (pp. 53–76); Dangazela, Thamsanqa (2021) "PEACE AND SECURITY CHALLENGES: SADC AND MOZAMBIQUE CONFLICT MANAGEMENT," *Journal of African Conflicts and Peace Studies*: Vol. 5: Iss. 1. Available at: <https://digitalcommons.usf.edu/jacaps/vol5/iss1/3>.

from the RENAMO and RENAMO military junta. In addition, the SADC enforcement mission in Mozambique armed conflict has been based on complementary initiatives to combat insurgency rather than utilizing other enforcement tools that ‘encourage, induce and sanction’ the State and individuals to also uphold International Humanitarian Law and IHRL standards. It is imperative to reiterate that the role of international bodies is to carry out mechanisms that support efforts at the national level; establish activities that induce governments to uphold internationally recognized standards; liaise with States in collaboration initiatives, and launch cooperative procedures to ensure that States respond to violations of international law rules.<sup>258</sup>

The Mozambican government took a long time to acknowledge the severity of the security crisis in Mozambique.<sup>259</sup> Downplaying the nature of the conflict in Mozambique by the government has resulted in the prolonged suffering of civilians and International Humanitarian Law violations.<sup>260</sup> The SADC enforcement mechanism, which waits for a Member State's invitation to intervene in the name of respect for the State's sovereignty and integrity, is more political than effective in ensuring civilian protection.<sup>261</sup> The main question remains, how effective is the regional enforcement action to ensure the protection of civilians when it highly prioritizes respecting a member State's sovereignty while allowing an armed conflict to intensify and fester? The case of Mozambique makes it clear that SADC's enforcement mechanisms in its efforts to ensure peace and security, trade on a thin line of non-interference and working in unison with the Member State in question, sometimes at the expense of the civilians enduring the result of the conflict.

### **3. Enforcement at the domestic level**

In the domestic arena, States have an inherent obligation to ensure the respect of International Humanitarian Law at all times.<sup>262</sup> In this case of non-international armed conflict, even when non-state actors do not comply with the law, States have a duty to

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<sup>258</sup>Ramcharan, B. B. (1983). The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflicts. *American University Law Review*, 33(1), p99.

<sup>259</sup>*Regional security support: a vital first step for peace in Mozambique*. (n.d.). United States Institute of Peace. <https://www.usip.org/publications/2022/06/regional-security-support-vital-first-step-peace-mozambique>

<sup>260</sup> Ibid.

<sup>261</sup> Southern African Development Community Mutual Defence Pact, article 7, 2003.

<sup>262</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Common article 1 Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287; Customary International Humanitarian Law Rule 139.

ensure adherence to International Humanitarian Law.<sup>263</sup> In to the *Nicaragua v. United States of America case*, the court established that the duty to respect and ensure compliance constituted a general principle of International Humanitarian Law, which is applicable in all acts, under the legal regime irrespective of treaty obligations.<sup>264</sup> It is imperative to establish that there seems to be less debate over the State's obligation to adhere to International Humanitarian Law, What is still subject of contention is the State's actions to ensure respect for International Humanitarian Law.<sup>265</sup> International Humanitarian Law jurisprudence establishes that contracting parties must take measures necessary for the suppression of all acts contrary to the IHL provisions.<sup>266</sup> According to Melzer (2016), these measures include:

- domestic legislation and regulation,
- instructions, military orders, and legal advice,
- training and the dissemination of all pertinent information,
- the establishment of national International Humanitarian Law committees;
- technical preparation and
- criminal repression.<sup>267</sup>

#### **a) Domestic legislation and regulation**

The enforcement of International Humanitarian Law is heavily reliant on State participation at the national level. A State needs to enact national legislation that incorporates International Humanitarian Law norms in order for a State to ensure respect for International Humanitarian Law.<sup>268</sup> In addition, national courts play a fundamental role in the enforcement of International Humanitarian Law. National enforcement architecture requires an impartial judiciary system, equal access to the

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<sup>263</sup> Vienna Convention on the Law of Treaties, article 60(5) May 23, 1969, 1155 UN UNTS. 331; 8 ILM. 679 (1969).

<sup>264</sup> ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Nicaragua case)*, Judgment (Merits), 27 June 1986, para. 220.

<sup>265</sup> Zyberi, G. (2018). Enforcement of International Humanitarian Law. In *Precision manufacturing* (pp. 1–24).

<sup>266</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 146(2) Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 80(1) June 8, 1977 1125 UN UNTS. 3.

<sup>267</sup> Melzer, N., & Kuster, E. (2016). New IHL handbook. *International Review of the Red Cross*, 98(901),p268-269

<sup>268</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 145, Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 84 June 8, 1977 1125 UN UNTS. 3; Geneva Convention Relative to the Treatment of Prisoners of War, Article 128 Aug. 12, 1949 6 U.S.T. 3316; 75 UN UNTS. 135

courts for all actors, and an understanding of the seriousness of International Humanitarian Law violations.<sup>269</sup> The national authorities are given a green light by International Humanitarian Law to investigate and prosecute all acts, which constitute a breach of IHL.<sup>270</sup> In this process, the authorities have to respect due process no matter the status of the person before the court. In the Mozambican conflict, it was reported that in 2020 verified evidence showed attempted beheading, torture, ill-treatment of prisoners, and extrajudicial executions.<sup>271</sup> Common article 3 of the Geneva Conventions prohibits carrying out executions without due process and judgment pronounced.<sup>272</sup> Judicial guarantees in an armed conflict environment should not be compromised depending on the party accused of alleged International Humanitarian Law violations.<sup>273</sup> Denial of fair trial and other related judicial guarantees by the Mozambican authorities is a violation of International Humanitarian Law. The party bias and its influence in impeding the fair enforcement of International Humanitarian Law at the national level propels a lack of compliance and loss of respect by non-state actors in the International Humanitarian Law machinery. Hence perpetual violations of International Humanitarian Law with no signs of compliance continue to affect the civilians who are not taking part in the hostilities.

#### **b) Instructions, military orders, and legal advice**

After establishing relevant national laws, States and non-state actors have an obligation to issue instructions for combatants and fighters to respect International Humanitarian Law.<sup>274</sup> The obligation to issue instructions and orders to fighters in a non-international armed conflict environment is not only borne by the State military but all participants, even armed groups.<sup>275</sup> This obligation enshrined by International Humanitarian Law jurisprudence induces states to abide by the legal standards

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<sup>269</sup>Weill, S. (2014). Building respect for IHL through national courts. *International Review of the Red Cross*, 96(895–896), 859–879.

<sup>270</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 146(2) Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 80(1) June 8, 1977 1125 UN UNTS. 3.

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<sup>272</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Common article 3, Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287

<sup>273</sup> Sassòli, M., & Bouvier, A. (1999). HOW DOES LAW PROTECT IN WAR? *Revue De Droit Militaire Et De Droit De La Guerre*, 38(1–4), 460–461; *The Domestic Implementation of International Humanitarian Law, A Manual*. (n.d.)p37. Retrieved December 10, 2023, from <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf>

<sup>274</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Common article 1, Aug. 12, 1949, 6 U.S.T. 3516; 75 UN UNTS. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 80(2) June 8, 1977 1125 UN UNTS. 3.

<sup>275</sup> Customary International Humanitarian Law rule 142.

because there are serious potential consequences for non-compliance. These includes, sanctions from other upstanding states, prosecution for war crimes and crimes against humanity, and bruised international reputation due to naming and shaming. All these forms of sanctions compel states to comply with International Humanitarian Law standards.

However, these factors do not always provide a solid deterrent to the state military on the ground. The government forces and private militia hired by the Mozambican government have reportedly committed indiscriminate attacks killing hundreds of civilians in the northeastern part of Mozambique.<sup>276</sup> One of the challenges that this enforcement mechanism overlooks is the dynamic nature, of parties in the conflict. In the Mozambique conflict, several external forces have been called by the government to support their efforts in reclaiming Cabo Delgado.<sup>277</sup> In these efforts little is mentioned about the instructions and military orders given. The reported case of massive indiscriminate attacks on civilians suggests there is no well-coordinated adherence to and respect for International Humanitarian Law rules. Even if acts of hired militia are attributed to a State, they focus more on delivering security outcomes with limited political scrutiny.<sup>278</sup> The private military contractors lack oversight and accountability measures as required by International Humanitarian Law enforcement.<sup>279</sup> More effort is on the intended objective of eliminating the Islamist group's intensification in Mozambique. These bilateral engagements launched by the Mozambican government as a mechanism to combat armed groups have proven to be less effective in ensuring the protection of civilians due to the nature of these reported attacks.

Apart from looking at the dissemination of International Humanitarian Law instructions and military advice by the military, non-state actors have disregarded the notion of ensuring respect for the law. Unlike the legal persona of Mozambique as a sovereign government with an international legal personality, the Islamist group Al-Shabaab's mode of operation suggests that they have no concern about complying

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<sup>276</sup> Jazeera, A. (2021, March 2). Army, private firm, fighters accused of Mozambique war crimes. *Al Jazeera*. <https://www.aljazeera.com/news/2021/3/2/mozambique-forces-armed-fighters-committing-war-crimes-amnesty>

<sup>277</sup> Ibid; *Russia's Wagner Group in Africa: Influence, commercial concessions, rights violations, and counterinsurgency failure* | Brookings. (2022, March 9). Brookings. <https://www.brookings.edu/articles/russias-wagner-group-in-africa-influence-commercial-concessions-rights-violations-and-counterinsurgency-failure/>

<sup>278</sup> Responsibility of States for Internationally Wrongful Acts, Article 1,2,6,8. December (2001). *Can't do with, can't do without: the use of private military*. (2022, July 25). Political Science. <https://www.colorado.edu/polisci/2020/03/02/cant-do-cant-do-without-use-private-military-contractors-us-war-efforts>

with International Humanitarian Law. The nature of the parties in the conflict in this enforcement mechanism determines heavily how it's going to act in accordance with the law. This is highly problematic as lack of compliance and disregard of the law by an armed group should not dictate how International Humanitarian Law enforcement ought to be in practice. As much as this enforcement mechanism has been crystalized into customary International Humanitarian Law, it lacks the comprehension of operating in a space where there are radical armed groups with no fear of lack of compliance ramifications.<sup>280</sup> In the end, International Humanitarian Law violations will continue despite the existence of the standards set by the law of non-international armed conflict.

### **c) Training and dissemination**

Adequate training is a prerequisite for comprehensive International Humanitarian Law application and enforcement. States have an obligation to include International Humanitarian Law training in their military manuals and programmes.<sup>281</sup> The intended objective is to ensure that there is an environment of awareness of International Humanitarian Law rules, and to hold the actors accountable. Creating a social environment, which is conducive to enforcing the law.<sup>282</sup> The Mozambican government has been forging training partnerships to consolidate its efforts in Cabo Delgado. The European Union Military Training Mission in Mozambique is a capacity-building initiative with the objective of conducting operational preparation, training, and education on the protection of civilians, especially women and children.<sup>283</sup> The training has been made to induce compliance with International Humanitarian Law and human rights during military operations.

Several issues that make comprehensive protection a difficult task can be summarized by the table below:

#### ***Diagram 2***

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<sup>280</sup> Customary International Humanitarian Law rule 142.

<sup>281</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 83 June 8, 1977 1125 UN UNTS. 3.

<sup>282</sup> Melzer, N., & Kuster, E. (2016). International Humanitarian Law. *A Comprehensive Introduction* p271.

<sup>283</sup> *EU Military Training Mission in Mozambique set to start its operations.* (2021, October 15). European Council. <https://www.consilium.europa.eu/en/press/press-releases/2021/10/15/eu-military-training-mission-in-mozambique-set-to-start-its-operations/>

Application	IHL	IHRL
Lack of exhaustive statutes on civilian protection	✓	
The provisions often not authoritative in their application	✓	
Enforcement		
Highly politicized enforcement machinery	✓	✓
Massive centralization of enforcement tools on States	✓	✓
Lack of judicial guarantees	✓	✓
Optional supervisory mechanism		✓
The chronic time frame for legal prosecution	✓	✓

## Recommendations

### 1. Propose a legitimate Political solution

It is important to highlight that it is not the first time that a political solution has been proposed and implemented as a long-lasting peace solution to the conflict in Mozambique. The Rome General peace accord in 1992 and Maputo peace deal in 2019 are previous peace initiatives.<sup>284</sup> What has been central in all these negotiations is the proposed commitment of both the Mozambican government and RENAMO to cease hostilities; implement legislative action towards decentralization of power by the State; disarmament initiatives and reintegration of RENAMO forces; and free and fair election guarantees.<sup>285</sup> The present political situation in Mozambique contradicts the aforementioned agreed commitments. There is no accountability of the RENAMO

<sup>284</sup> *Maputo Accord*. (n.d.). Retrieved January 4, 2024, from <http://maputoaccord.org/en/home/>

<sup>285</sup> Faleg, G. (2019). *CONFLICT PREVENTION IN MOZAMBIQUE: Can there be peace after the storm?* <https://www.jstor.org/stable/resrep21127>

forces that are still in the bush; the Mozambican government has not conceded power to ensure decentralization in provinces; the recent elections have been characterized by State-sanctioned violence against RENAMO supporters, arbitrary arrests, and tainted by fraud.<sup>286</sup> In order to cease the conflict and the dissatisfaction that is experienced in Mozambique, it is imperative to offer strong political guarantees through electoral reform in order to build trust among the parties; the Frelimo government in Mozambique needs to concede some power to ensure transparent decentralization; and RENAMO needs to fully account for all its forces who have not disarmed. A political solution will eliminate the instability that has been exploited by insurgent groups and unify the people who have generally been disgruntled by the government. A legitimate political solution will ensure the cessation of armed conflict between RENAMO and the Government and establish a united front to combat insurgent groups' activity intensifying in Cabo Delgado.

## 2. Invoke responsibility to protect

According to paragraph 139 of the resolution,

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter of the United Nations, to help protect populations from war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter”<sup>287</sup>

The *responsibility to protect* mechanism has been commended for its diplomatic approach to human rights protection and respect for International Humanitarian Law, as it first offers the State in question pragmatic solutions to prevent continued violation of civilian rights during the conflict.<sup>288</sup> It is essential to establish that as much as the doctrine of responsibility to protect encompasses a solution to the

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<sup>286</sup> Ibid; Machado, Z. (2023, October 13). Mozambique Police crack down on opposition before election results. *Human Rights Watch*. <https://www.hrw.org/news/2023/10/13/mozambique-police-crack-down-opposition-election-results>; Mozambican authorities must investigate lethal use of force against protesters. (2023, November 23). Amnesty International. <https://www.amnesty.org/en/latest/news/2023/11/mozambique-local-elections/>

<sup>287</sup> Ibid.

<sup>288</sup> Wood, M. (2013). International Law and the Use of Force: What Happens in Practice? *Indian journal of international law*, 53, 345-367.

violations of rights in a conflict environment, it is not legally binding.<sup>289</sup> It has not been crystallized as customary international law even when there are a number of States that have acted under this doctrine.

Responsibility to protect is regarded as a collective norm that is exercised as a ‘last resort’.<sup>290</sup> It is a mechanism that can be relied on to ensure the protection of civilians in a conflict environment, as it is likely to be invoked as a last resort or when crimes amount to gross crimes against humanity. This does not fit well with the plight of civilians on the ground. The case of Mozambique is an example of the continued suffering of civilians with limited intervention because the violations have not accumulated to a degree that satisfies the Security Council to invoke responsibility to protect. In an armed conflict, no violations of International Humanitarian Law are insignificant; any action against the law should be met with an active legal response. Despite the limitations of the Security Council’s responsibility to protect, it is still a viable enforcement option in Mozambique to end civilian suffering and continued human rights violations.

### **3. Establish a Mozambique-tailored tribunal**

The Security Council played a crucial role in setting up an International Criminal Tribunal for crimes committed in the Rwandan civil war. Security Council Resolution 995 marked an unprecedented development, as it particularly focused on developing a tribunal that addressed non-international armed conflict and the seriousness of crimes committed in Rwanda with the potential of them affecting neighboring countries.<sup>291</sup> The establishment of the tribunal had a deterrent effect on perpetrators of International Humanitarian Law violations, as the tribunal encompassed the notion of individual criminal responsibility.<sup>292</sup> By establishing the tribunal the Security Council has been able to deter the continued violation of International Humanitarian Law even in non-international armed conflicts.<sup>293</sup>

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<sup>289</sup> Ibid p364.

<sup>290</sup> General Assembly. Resolution. A/60/L.1, U.N. Doc. A/60/L.1 (Sept. 15, 2005), para. 203.

<sup>291</sup> United Nations Security Council. Resolution 955, U.N. Doc S/RES/955 (1994) (8 November 1994); Sadat, L. N. (2000). *The International Criminal Tribunal for Rwanda* (2 vols.). By Virginia Morris And Michael P. Scharf. Irvington-on-Hudson NY: Transnational Publishers, 1998. *American Journal of International Law*, 94(2), 430–433; Perna, L. (2006). *The formation of the treaty law of non-international armed conflicts*. M. Nijhoff Publishers.p 146-147.

<sup>292</sup> Ibid.

<sup>293</sup> The tribunal was solely established for non-international armed conflict. At the time of the establishment of the tribunal the international community had not regarded international crimes violations of IHL emanating from non-international armed

The same enforcement architecture can be established to address the crimes against humanity and gross violations of human rights witnessed in Mozambique. Establishing a tribunal whose jurisdiction extends beyond Article 3 of the Geneva Conventions and concurrently applies as the national courts, bypasses judicial irregularities currently experienced in Mozambique. The tribunal will propel state accountability and compliance with International Humanitarian Law norms. Like the ICTR, the mechanisms of the tribunal will need full comprehension of the shortcomings of national courts in the prosecution of perpetrators against the law of non-international armed conflict violations. This will ensure judicial guarantees to all stakeholders. The establishment of a tribunal tailored for Mozambique will provide a deterrent effect to all parties and ensure appropriate sanctions against perpetrators of human rights violations.

## **Conclusion**

The human rights violations endured by civilians in Mozambique have highlighted the much-needed dialogue on the comprehensiveness of international human rights and International Humanitarian Law application and enforcement in ensuring the protection of civilians. There has been a complementary relationship between the two aforementioned legal regimes, with International Human Rights Law filling in the gaps left by International Humanitarian Law and vice versa.

This is made apparent as the rules governing non-international armed conflicts do not have exhaustive regulations ensuring the protection of vulnerable groups in detail, specifically tailored to women and children's reality during non-international armed conflict. The International Humanitarian Law application is often not authoritative and clear on the protection offered to civilians in non-international armed conflict. Some of the rules are ambiguous in their application, especially towards special protection offered to women and children.

International Human Rights Law provides oversight to specific human rights needs of vulnerable civilians in non-international armed conflict, International Humanitarian

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conflict; Perna, L. (2006). *The formation of the treaty rules applicable in non-international armed conflicts*. Martinus Nijhoff Publishers.p147.

Law can also utilize certain International Human Rights Law supervisory mechanisms and fill in the gaps on International Humanitarian Law limitations in a non-international armed conflict. In addition, the enforcement of International Humanitarian Law and International Human Rights Law in the Mozambican conflict has proven to be limited to only providing a deterrent effect against violation of civilian rights. However, despite the efforts by the two legal regimes to ensure the protection of civilians, International Humanitarian Law and International Human Rights Law does not ensure comprehensive protection of civilians during non-international armed conflict due to the lack of effective enforcement tools that ensure the protection of civilians. This is demonstrated by:

- selective action by international bodies because of highly politicized enforcement machinery;
- massive centralization of the international courts on State participation;
- unrealistic expectation of International Humanitarian Law treaty-based mechanisms of mutual consent of parties for enforcement;
- lack of judicial guarantees to ensure fair due process propels the International Humanitarian Law violations; and
- lack of direct obligations to all actors in a non-international armed conflict besides States.

The deterrent effect provided by the enforcement mechanisms is not enough to ensure comprehensive protection of civilians in a non-international armed conflict as there is a need to ensure accountability and justice to human rights violators during the conflict through other fundamental tools such as sanctioning wrongdoing. As a way to ensure the protection of civilians in Mozambique, there is a need to pursue a legitimate political solution that will guarantee fair and functional state parastatals to address the insecurity crisis from Islamist groups; establish a tribunal in Mozambique to ensure accountability, justice, and judicial guarantees.

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