

Policies That Protect: The African Union and the Protection of Civilians

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Protection of Civilians in Armed Conflict (PoC): Evolution of the Concept

PoC, or the protection of civilians in armed conflict, 'refers to the protection of civilians from widespread threats of violence, coercion, and the deliberate deprivation of aid'. The concept is rooted in International Humanitarian Law (IHL, also known as the Law of Armed Conflict), a body of law which 'calls on belligerent actors to minimize harm to civilians and civilian property in the conduct of hostilities ... It also calls for the protection of civilians from violence'.¹ As such, PoC is a long-standing principle, a non-negotiable obligation that applies to all armed actors when engaged in armed conflict.

From its IHL origins, however, protection has taken on a new tone and a new kind of political relevance in the past 20 years. The horrific attacks on civilians in Srebrenica and the genocide in Rwanda were both witnessed by UN Peacekeeping contingents that had neither the mandate nor the capacity to put a halt to them. These experiences led the UN to question its responsibility, authority, and the limits of its capacity to protect civilians under threat. In 1999 the UNAMSIL mandate – authorizing the deployment of a peacekeeping operation in Sierra Leone – became the first to incorporate language authorizing peacekeepers to use force in order to protect civilians under 'imminent threat' of violence.

In a statement that captures the spirit of the PoC discussion at the time, the Argentinian representative on the UN Security Council stated:

We believe that the protection of civilians under Chapter VII is a pertinent development in the context of the mandate of a peacekeeping operation. This draft resolution is significant in that it introduces a new, fundamental political, legal and moral dimension. This bears on the credibility of the Security Council and shows that the Council has learned from its own experience and that it will not remain indifferent to indiscriminate attacks against the civilian population.²

The United Nations Mission in South Sudan (UNMISS) was established on 8 July 2011 by UN Security Council Resolution 1996 under a Chapter VII mandate to assist the Government of the Republic of South Sudan (GoRSS) 'to consolidate peace and security' and to extend and strengthen state authority. In line with its mandate, UNMISS is a decentralized mission with most of its staff planned to be deployed at state and county levels.

OCHA–DPKO Report on PoC

In the wake of these same events, the international community began to discuss protection as the responsibility of sovereign states – and, more importantly, to question the concept of sovereign inviolability when states failed to do so. In 2005 the unanimously adopted *World Summit Outcome* document affirmed that states have responsibility to protect the populations within their territories, and that the 'international community' – through UN Security Council authorization – is 'prepared to take collective action'– includ-

¹ Oxfam International Website, <http://www.oxfam.org/en/campaigns/conflict/protection-of-civilians>

² As quoted in V. Holt et al., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: United Nations, 2009), p. 39.

ing militarily action – to protect civilians if the host state is ‘manifestly failing’ to do so.³

In 2011 NATO forces mounted an intervention in Libya, to protect the civilian population from the violent threats of the government. The intervention was initiated under the terms of UN Security Council Resolution 1973 (2011). This was a landmark resolution: as the first to authorize military intervention without the consent of the host-state government, it pushed the boundaries of the most contentious aspect of the responsibility-to-protect (R2P) debate. In the aftermath, it also highlighted some important gaps in the practical capacity and preparation of the international community to mount responsible military interventions aimed at providing protection.

In many ways, this experience brought PoC back full circle, restoring IHL to its position as the centre of gravity of the international protection debate. In Libya, 72 civilians⁴ were killed by NATO airstrikes that had been authorized in the name of R2P. This was a reminder to policy-makers and activists alike that the use of force always creates a risk for civilians, and it catalysed a discussion that reaffirmed the point that all military operations – however ‘just’ their cause – have an obligation to uphold IHL.⁵

In the course of the past 20 years, the ‘protection’ dialogue has come to encompass issues of IHL observance, the role and responsibility of states, regional actors and multinational bodies, as well as the practical challenges of protection at the operational and tactical levels.

AU Draft Guidelines for the Protection of Civilians

Many UN peacekeeping mandates have included ‘protection language’ since 1999, but implementation – in operational and tactical terms – continues to vary depending on the interpretation of individual commanders. At the field level, UN peace operations have increasingly been required to produce mission-wide PoC strategies to reduce this confusion, and in 2010 the *DPKO–DFS Operational Concept for the Protection of Civilians in UN Peace Operations*⁶ became the first concrete articulation of what ‘protection’ means for UN peacekeeping across the board. In 2011, the Under-Secretary-General for Peacekeeping established a new set of training modules, based on the structure of the

Operational Concept and designed to reach military, police and civilian staff at the operational (or management) level.

The African Union (AU) has taken steps that mirror and, in some cases, anticipate UN developments with regard to the protection of civilians. In practical terms, there has been a particular focus on the military, ‘physical’ aspect of protection:

Recognizing the distinct threats faced by civilian populations in conflict zones in Africa, and the central role of AU-mandated peace support operations in contributing to the protection of civilian populations in conflict zones, as well as the importance of effective protection with regards to the effective conduct and legitimacy of peace support operations, the Commission (on the Development of Guidelines for the Protection of Civilians in African Peace Support Operations) has, since 2009, prioritized the development of a protection of civilians approach for AU-mandated peace support operations.⁷

In 2009, work began on developing a framework for a consolidated protection response.⁸ The result is been the *Draft Guidelines for the Protection of Civilians in AU Peace Support Operations*.

The Draft Guidelines are organized into four ‘tiers’ or dimensions of protection: protection through political process;⁹ physical protection; rights-based protection; and establishing a secure environment. These ‘tiers’ are similar to the UN’s *Operational Concept* (which emphasizes protection through political processes, protection from physical violence, and the establishment of a secure environment), but with one important difference. In the UN *Operational Concept*, the ‘tiers’ are described as outcomes rather than *approaches*, and each tier *includes* civilian, police and military dimensions.

In contrast, the AU concept – as well as the practical approach taken by the AU in Somalia and in Sudan – separates political, human rights and stabilization approaches from physical protection. As explained by Appiah-Mensah and Eklou-Assogbavi, ‘while responsibilities in UN peacekeeping operations for the protection of civilians rest with the military, police and civilian components, these responsibilities are predominantly a military undertaking in AU peace support operations. This is because the AU civilian capacity in the field is embryonic.’¹⁰ As the AU develops its capacity, an increase in non-mili-

3 United Nations, *World Summit Outcomes Document* (A/RES/60/1), 2005, Para. 139. <http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30>

4 Human Rights Watch, ‘Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya’, (May 2012) p. 4. Available at: http://www.hrw.org/sites/default/files/reports/libya0512webwcover_o.pdf

5 ‘The essence of RWP (Responsibility While Protecting) was that military force must be a last resort, that any response must be proportional to the threat posed and that no R2P intervention should cause more harm than it seeks to prevent.’ In Simon Adams, *Emergent Powers: India, Brazil, South Africa and the Responsibility to Protect* (GCR2P: New York, 14 September 2012), p. 4. (<http://www.globalr2p.org/media/files/adams-r2p-ibsa-1.pdf>)

6 United Nations, ‘DPKO–DFS Operational Concept for the Protection of Civilians in UN Peace Operations’ (New York, 2010).

7 African Union, *Progress Report of the Chairperson of the Commission on the Development of Guidelines for the Protection of Civilians in African Union Peace Support Operations* (PSC/PR/2 - CCLXX-IX) (May 2011), Para. 5. Available at: <http://www.peaceau.org/uploads/progress-report-protection-of-civilians-eng-.pdf>

8 P.D. Williams, ‘The African Union Mission in Somalia and Civilian Protection Challenges’, *Stability: International Journal of Security and Development*, Vol.2, forthcoming 2013, p. 3.

9 For example, ceasefire agreements, negotiated settlements, etc.
10 S. Appiah-Mensah and R. Eklou-Assogbavi, ‘The Protection of Civilians: A Comparison Between United Nations and African Union Peace Operations’, *Conflict Trends*, No. 2 (South Africa: ACCORD, 2012).

tary protection inputs can be expected; but at present, the word 'protection' should be understood as encompassing primarily the military dimension of the concept.

AU Policy Documents and Statements

Beyond the *Draft Guidelines*, other AU statements and documents have highlighted a growing AU commitment to PoC, albeit in an inconsistent way. The AMISOM experience is a good illustration of this. As Williams has argued, AU and AMISOM 'senior leadership have been at best ambiguous and at worst contradictory in their formulation of relevant documents and concepts for the mission', sending mixed signals with regard to the nature of the AU's commitment to protection, and what the organization expects of AMISOM soldiers.¹¹

- In 2010 the AU Peace and Security Council made a commitment to adherence to IHL in all peace operations, and the 2011 AMISOM *Mission Implementation Plan* mentioned PoC in terms of a commitment to adhere to and implement IHL.¹²
- AMISOM's 2007 and 2010 iterations of Rules of Engagement (ROEs) included 'imminent threat'¹³ language, and the Pocket Card explaining the AMISOM ROEs specified that soldiers were 'authorized to use force, up to and including deadly force ... To protect civilians, including humanitarian workers, under imminent threat of physical violence.'¹⁴ This formulation parallels the language used in UN Chapter VII PoC mandates, and indicates a far more a *proactive* protection stance.
- Finally, almost from the outset, AMISOM forces became 'entangled in the fighting' in Somalia and have taken a clear offensive 'peace enforcement' posture for the most of the mission's engagement in Somalia.¹⁵ This illustrates the view of protection as a by-product of stabilization, of winning the war and establishing a 'stable', 'peaceful' environment.

These are three very different approaches to 'protection' underpinned by different assumptions and legal frameworks, and requiring very different capabilities, resources and preparations.¹⁶

Types of Protection

The AU rhetoric conflates IHL observance with proactive protection. This is problematic in that it confuses IHL *obligations*¹⁷ with the specific, additional *authorities*

conferred by UN Security Council protection mandates.¹⁸

AMISOM was understood to be a peace *enforcement mission* – and thus a party to the conflict – almost from the very start.¹⁹ However, the mission was not equipped with capacity to monitor and investigate harm caused to civilians or civilian property, and guidance regarding the use of indirect fire weapons was late in coming and failed to evolve with the tempo and combat capabilities of the mission.

Within Mogadishu, the Somalian capital, combat between AMISOM and rebel groups often took place in densely populated neighbourhoods, resulting in considerable²⁰ civilian casualties. IHL does not prohibit combat in urban areas, but it does place greater obligations on combatants, who are required to take steps to minimize the harm caused to civilians residing in these areas. 'Weapons, such as heavy artillery with a large blast radius, may be considered indiscriminate when used in populated areas.'²¹

AMISOM developed an indirect fire policy designed to constrain the use of indirect fire weapons with a view to reducing the harm to civilians. However, the policy was not implemented until 2011 and not incorporated into the revised Rules of Engagement until a full year later.²²

Furthermore, the implementation of the IFP did not result in the provision of 'additional resources for training, mentoring and equipping.' In other words, the expectations increased, but not the necessary support to help AMISOM soldiers meet those expectations.²³ Furthermore, policy was not modified to reflect the absorption of elements of the Kenyan Defence Forces and the new aerial bombardment capabilities associated with their contribution.

Similarly, the Civilian Casualty Tracking, Analysis and Response Cell (CCTARC) was designed in order to improve AMISOM's ability to track and investigate harm to civilians in a responsible way. After an extensive development process and the declared support of AMISOM leadership, however, donor funding for the implementation of the CCTARC was withdrawn. Recently several

11 Williams, p. 2.

12 Ibid. p. 3.

13 Ibid. pp. 2–3.

14 As quoted in Williams, p. 3.

15 W. Lotze and Y. Kasumba, 'AMISOM and the Protection of Civilians in Somalia', *Conflict Trends*, No. 2 (South Africa: ACCORD, 2012), p. 19.

16 It should also be noted that AMISOM was deployed in 2007, but the protection debate did not get underway in the AU until 2009. The institutional debate has shifted considerably from the first deployment of AMISOM forces, to the present day, and the term 'protection' has taken on varying institutional connotations as the discussion and context have evolved.

17 International Humanitarian Law – the law of armed conflict – is not a voluntary standard, but a non-negotiable minimum obligation for any and all parties to armed conflict. Customary IHL is binding on state and non-state actors alike.

18 As noted by the ICRC, 'The application of IHL is not dependent on a declaration or formal recognition of war. As the law in effect during armed conflict (known in Latin as the *jus in bello*), IHL is distinct from the legal regime enshrined in Article 2(4) of the *UN Charter* governing the resort to force (known in Latin as the *jus ad bellum*). The distinction is important. That is because compliance with IHL may be significantly *diminished* if parties complied with it only when they deemed that the other party's resort to war was lawful.' (<http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>)

19 This is an approach very different from the UN operations which – as in North Kivu – tend not to take offensive action against rebel or other armed forces except in the direct defence of civilians under 'imminent threat.'

20 CIVIC, 'Civilian Harm in Somalia: Creating an Appropriate Response', (2011).

21 Human Rights Watch Website, <http://www.hrw.org/news/2012/08/23/somalia-protect-civilians-kismayo>.

22 Lotze and Kasumba, p. 23.

23 Ibid.

donors have expressed interest in funding the mechanism, and the CCTARC plan is in the process of being formally adopted by the AU at the time of writing. However, unreliable funding streams and shifts in donor interest and attention have seriously delayed the implementation of this important mechanism, and seriously undermined AMISOM's capacity to fulfil IHL obligations.

The gaps and challenges confronting today's multidimensional peace operations – UN, AU or otherwise – go far beyond the 'protection' debate as such.²⁴ However, the protection of civilians is a singularly critical and challenging objective, and is central to the purpose and legitimacy of AU peace operations. The AMISOM experience has highlighted three clear gaps that demand urgent attention:

- 1) IHL must be re-affirmed as the non-negotiable bedrock of all AU peace operations, and the foundation of the AU PoC debate.
- 2) In addition to fulfilling basic obligations under IHL, the AU needs to finalize the *Draft Guidelines*, and ensure that institutional expectations to AU troops are articulated clearly and consistently with regard to the proactive protection of civilians.
- 3) AU commanders and troops should be better trained and equipped, to ensure that they have the appropriate capabilities and support to uphold their IHL obligations and – where the mandate calls for it – to take more proactive steps to protect.

The Way Forward

The PoC discussion within the AU – as everywhere else – has been somewhat disjointed and unclear. The word 'protection' has been used to refer to IHL observance and 'force protection' as well as to proactive protective activities. AMISOM 'protection' activities exhibited a similarly disjointed approach to the concept. The AU

needs to proceed step by step, and continue to benefit from the lessons that protection failures and successes have afforded the UN.

First, IHL must be the firm base that all protection activities – and, indeed, all use of force – are built upon. IHL must be entrenched in all AU peace-operation policies, mission plans and training initiatives.

Secondly, the AMISOM experience – and over a decade of UN peacekeeping experience – has shown the importance of clear, consistent articulation of institutional expectations with regard to the proactive protection of civilians. MOUs, ROEs, FC directives and all other directions and explanations provided to AU commanders and their troops must give a clear picture of the authority and obligations that AU troops are expected to observe with regard to the complex and often politically difficult objective of the protection of civilians.

Finally, protection efforts – for basic IHL observance and more forward-leaning protection efforts – are technically demanding, resource-intensive endeavours. 'Getting it right' requires the right tools and capabilities, as well as political support. Concrete policies and guidance – such as the indirect fire policy and CCTARC capacities – must be developed and deployed as a routine part of all peace operations.

While the international community has made considerable contributions – financial, technical and material – to AU operations, these contributions have often been slow to arrive and have proven unpredictable over time. Long-term planning has been difficult, exposing civilians and AU troops to extremely high levels of risk.

International donors, in coordination with the UN, must establish a reliable, predictable funding mechanism that can ensure that AU peace operations have the appropriate tools to conduct the increasingly dangerous work with which they have been tasked.

²⁴ See, for example, *A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping* (<http://www.un.org/en/peacekeeping/documents/newhorizon.pdf>)

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