
RESEARCH ARTICLE

Protection of Civilians: A NATO Perspective

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On the occasion of the 2016 Warsaw Summit, the North Atlantic Treaty Organization (NATO) Allied Nations endorsed the NATO Policy on the Protection of Civilians, which was developed with NATO Partners and in consultation with the United Nations and other international organisations. This Policy is further bolstered by Allies' pledge to implement a concrete Action Plan, which will be reviewed regularly by the Council. The added value of the Policy does not lie in the novelty of any particular aspect of its content as such, rather, in its overarching and comprehensive character. Its guiding principles include that all NATO and NATO-led operations, missions and activities are conducted in accordance with applicable international law, which may include international humanitarian law (IHL) and international human rights law (IHRL). The Policy is not limited to either the law of armed conflict or times of peace alone: this promises to facilitate its application to peace-time activities as well, and leaves sufficient room for a context-sensitive approach. More so, it recognises that long-term, self-sustained peace, security and stability is best achieved in cooperation with, among other actors, civil society, such as relevant human rights organisations. This article seeks to describe this landmark achievement from a number of perspectives, focusing primarily on legal aspects relating to the Policy. It will review (i) its scope and extent in terms of operational aspects, (ii) possible measures, (iii) beneficiaries and context and, finally, (iv) several aspects pertaining to its human rights dimension that will continue to be integrated in NATO's current and future operations, missions and activities, including the on-going Resolute Support Mission in Afghanistan.

Keywords: Protection of Civilians; Human Rights; NATO; Afghanistan; Resolute Support

I. Introduction

The North Atlantic Treaty Organization (NATO)'s mandate is anchored in collective self-defence, as first set forth in the North Atlantic Treaty of 1949 and as evolved over the years in response to different challenges. NATO's fundamental and enduring purpose is to safeguard the freedom and security of all its members by political and military means. As an organisation committed to peace and security through collective self-defence and the rule of law, NATO and its 29 Allies are fundamentally concerned with the application of international law, including rules pertaining to IHL and IHRL. This holds true for both the planning and conduct of all missions, operations and activities. The protection of civilians has been the subject of much recent attention within the Organisation.

With this in mind, NATO has affirmed on numerous occasions that good-faith compliance with international law, including IHL and IHRL, is at the heart of all NATO activities. NATO has also strived through consistent efforts to promote the protection of human rights, when possible and applicable. Children and armed conflict, women, peace and security and conflict-related sexual and gender-based violence have been areas where, for the last decade, NATO has developed a diverse body of policies and guidelines concerning the planning and conduct of operations and missions.

In 2016, these policies were brought together under one single overarching aegis: 'The Policy on Protection of Civilians' (PoC). Its guiding principles include that all NATO and NATO-led operations, missions and other Council-mandated activities are conducted in accordance with applicable international law, which may

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include, *inter alia*, IHL and IHRL. The Policy, which was developed with NATO partners and in consultation with the UN and other international organisations, is further bolstered by the pledge of the Nations to implement a concrete Action Plan, which will be reviewed regularly by the Council. The added value of the Policy is not so much the novelty of any particular aspect of its content, but rather its overarching and comprehensive character. Moreover, NATO's policy is the only comparable document to date developed for use in the context of multilateral military operations, making NATO's framework a significant potential source of information regarding State practice in this field.

The purpose of the present work is to look at how NATO implements aspects of the protection of civilians through the lens of this landmark Policy, with a focus on legal considerations related to the Policy, its scope and relevant IHRL provisions. It will also consider how civilian protection is factored into the IHRL aspects of the policy, particularly within the Resolute Support Mission (RSM) in Afghanistan, and with specific reference to the training activities of local forces. While RSM began prior to the Policy's enactment, it will continue to unfold under the auspices of the Policy, which will only serve to strengthen civilian protection efforts within the Mission. Part I will focus on the process which led to the Policy coming into being and its adoption. Part II will note some of the principal legal considerations that arise through a close reading of the Policy. Part III will look at the scope of the Policy in light of the definition of PoC within the NATO framework, the four main principles that are intended to guide the application of the Policy in practice, and some of the elements that are to form the basis of NATO's approach to PoC. Part IV proposes to highlight several aspects relating to IHRL in connection to PoC within the NATO framework and integrates several examples from NATO's most recent mission in Afghanistan, namely Resolute Support. Taken together, these four parts will hopefully serve in shaping a better, more complete understanding of NATO's role in promoting respect for IHL and IHRL, not only within the Alliance itself, but also beyond. Finally, the concluding part will highlight relevant challenges for the future.

II. The PoC Policy – Coming into Being

PoC has been a fundamental NATO priority since its operations began in the Western Balkans in the early 1990s, either as the main objective of operations, or, more commonly as one of several key objectives in larger operations.¹ As the Organisation's missions and activities began to diversify in the post 9/11 context, particularly with the takeover of the International Security Assistance Force (ISAF) mandate, an imperative emerged for NATO to further enhance the Alliance's engagement and capabilities in the area of PoC.

Among others, ISAF's lead role in Afghanistan, provided the Alliance with important lessons learned in areas such as civilian harm mitigation. Indeed, as it has been previously pointed out, protecting the civilian population 'was one of the most important military-strategic goals of the mission'.² In Afghanistan, from October 2006, NATO found itself conducting high-intensity ground combat operations for the first time in its history. It was and still remains to this date NATO's most challenging mission for a variety of reasons, including the fact that classic counter insurgency operations were being conducted in an environment found to be 'uniquely complex'.³ As the conflict in Afghanistan intensified, the number of civilian casualty incidents concerning ISAF increased, bringing with it concerns from civil society organisations, the International Committee for the Red Cross (ICRC) and the United Nations Assistance Mission in Afghanistan.⁴ As pointed out on at least one occasion, at the time, NATO lacked 'the necessary procedures or a coherent system to address civilian casualties'.⁵ However, by gradually introducing concrete measures to successfully mitigate civilian casualties in its operations in Afghanistan, the Organisation succeeded in reducing the proportion

¹ Marla B. Keenan and Alexander W. Beadle, 'Operationalizing Protection of Civilians in NATO Operations' (2015) 4(1) *Stability: International Journal of Security and Development* 2 <<https://www.stabilityjournal.org/articles/10.5334/sta.gr/>> accessed 12 February 2018. In Kosovo, for example, in March 1999, NATO launched Operation Allied Force, an air campaign aimed at ending the repression of Kosovo's non-Serb population by Milosević government forces and paramilitary groups, which the then-NATO Secretary-General, Javier Solana catalogued as a humanitarian catastrophe. For more information, see <https://www.nato.int/cps/en/natohq/topics_49602.htm> accessed 14 February 2018.

² Keenan and Beadle (n 1) 2.

³ NATO, 'ISAF's Mission Afghanistan (2001–2014) (Archived)' <https://www.nato.int/cps/en/natohq/topics_69366.htm> accessed 12 July 2018; see also ISAF, 'COMISAF's Initial Assessment' (30 August 2009) 1.

⁴ Sahr Muhammedally, 'Minimizing Civilian Harm in Populated Areas: Lessons from examining ISAF and AMISOM Policies' (2016) 98(1) *International Review of the Red Cross* 225, 232–233.

⁵ Center for Civilians in Conflict *Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan* (2014) 3 <https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf> accessed 12 July 2018.

of such casualties for which it was responsible for from 40% in 2006 to around 1% by the end of 2013.⁶ In addition, following the release of the Joint Analysis Lessons Learned Centre (JALLC) report titled 'Protection of Civilians, How ISAF Reduced Civilian Casualties', the Alliance introduced further measures to successfully mitigate civilian casualties in its operations in Afghanistan. Therefore, to say that the protection of the civilian population became a 'centrepiece' of the Organisation's strategy in the area is no overstatement.⁷

Moreover, gradually and in line with United Nations (UN) guidance and approaches, NATO developed a diverse and robust body of policies and guidelines concerning the planning and conduct of operations and missions in areas such as Children and Armed Conflict, Women, Peace and Security and Conflict-related Sexual and Gender Based Violence. The Section on Protection of Civilians was established in the Operations Division of the International Staff in order to develop and implement PoC-related policies, with NATO Allies and Partners driving discussions.

Yet despite these noteworthy efforts, a single, overarching policy on the topic of PoC was still considered a goal. Being aware of this, on 19 October 2015, the Heads of Mission and Permanent Representatives from 15 Allied and partner nations, who made up the so-called 'Tiger Team on Protection of Civilians,' recommended that NATO develop a comprehensive policy with a view to the Warsaw Summit.⁸ As a follow-up to this initiative, in November 2015, both the Operations Policy Committee (OPC) and NATO Military Authorities were tasked with discussing and possibly developing a comprehensive NATO policy on the Protection of Civilians.⁹ Work by both bodies followed, including mapping of existing NATO material on the topic of PoC, such as policies, doctrines, procedures and training.

The North Atlantic Council also requested that the OPC consult with the UN, and other international organisations, as appropriate, during the course of the discussions. Here it should be noted that in the process of developing the policy, the expertise of the UN, the European Union (EU) and the ICRC in the field of PoC was appropriately considered and integrated.

Following negotiations, the Policy was ready for NATO Heads of State and Government to endorse. During the Warsaw Summit, on 9 July 2016, NATO Allied Nations endorsed the NATO Policy on the Protection of Civilians and with this NATO's PoC discourse thus became a NATO-wide Policy.¹⁰ This was hailed as a great achievement not only from Allies within the Organisation but also from notable outside actors. For example, two days later, the Centre for Civilians in Conflict (CIVIC) noted that: 'NATO's new policy sets a strong foundation for the protection of civilians in future operations. [...] The policy, once implemented will standardise and strengthen NATO's capabilities on civilian protection and harm mitigation, including capabilities to learn from those operations that have harmed civilians and adjust tactics to avoid harm'.¹¹ On 28 November 2016, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator noted that the adoption of the Policy 'reaffirmed NATO's commitment to respect and uphold international humanitarian law and international human rights law'.¹²

Following its endorsement, the Policy was further strengthened by way of prompt steps to ensure its implementation. The Operations Policy Committee was tasked to develop, in consultation with ISAF, the NATO-led Kosovo Force (KFOR), RSM Non-NATO Contributing Nations and NATO Military Authorities, an Action Plan to facilitate the implementation of the PoC policy and ensure, among other aspects, oversight and reporting of progress. In accordance with the principles of the Political-Military Framework, ISAF, RSM, KFOR Contributing Nations and Interoperability Platform Partners were formally asked to associate

⁶ For an in-depth overview of the various measures taken, including policies, tactics and procedures, see, for example, Muhammedally (n 4) 232–238.

⁷ Stan Kjeksrud, Jacob Aasland Ravndal, Andreas Øien Stensland, Cedric de Coning, Walter Lotze and Erin A. Weir, 'Protection of Civilians in Armed Conflict – Comparing Organisational Approaches' (Norwegian Defence Research Establishment 2011) 15.

⁸ The creation of the team dates back to 2013 and is owed to the common efforts conducted by Austria and Norway. Austria's efforts in this regard were note-worthy as it was responsible for the 'Food for thought paper' which later became the back-bone of the Policy itself. Furthermore, Austria assumed a leading role in guiding the political process that made it possible for the PoC to be endorsed, see <<https://www.bmeia.gv.at/en/oev-nato-brussels/austria-and-nato/protection-of-civilians-poc/>> accessed 1 September 2017.

⁹ NATO Secretary-General, Protection of Civilians (POC) – Letter Sent by a Group of 15 Nations Requesting the Operations Policy Committee to Begin Discussion on a Comprehensive NATO Policy for POC (6 November 2015) PO (2015).

¹⁰ *ibid.*

¹¹ Center for Civilians in Conflict, 'NATO's New Protection of Civilians Policy: "A Strong Foundation"' (11 July 2016) <<https://civiliansinconflict.org/press-releases/4729-2/>> accessed 29 March 2018.

¹² UN Office for the Coordination of Humanitarian Affairs, 'Under-Secretary-General for Humanitarian Affairs, and Emergency Relief Coordinator Stephen O'Brien remarks to NATO Deputies Committee' (28 November 2016) <<https://docs.unocha.org/sites/dms/Documents/USGNatoDeputiesCommitteeAsDelivered.pdf>> accessed 29 March 2018).

themselves with the document, which was adopted in February 2017. With that in mind, it is important to note that NATO-led Operations and Missions have been tasked with ensuring familiarity with PoC within strategic and operational level planning and execution of operations. Moreover, current and planned NATO education and training activities are to be reviewed to ensure they comply with the PoC policy.

The fact that NATO is committed to a policy on PoC and aims to take steps further through the implementation of an Action Plan, kept under regular review of the Nations, only serves to demonstrate the fundamental weight of PoC within the Organisation. Furthermore, it demonstrates that civilian protection will endure as a critical aspect that the Organisation strives to implement in all NATO operations, missions and Council-mandated activities. Successfully doing so ensures the credibility of the Organisation and strengthens its legitimacy.

III. Principal Legal Considerations Related to the Policy

This part aims to provide readers with a sense of some of the legal considerations that are suggested by a close review of the Policy. It helps shed light on the legal nature of the Policy and its significance from a legal perspective. They also illustrate certain dynamics that relate to the treatment of legal considerations in the consensus-based Alliance atmosphere of NATO.

Before proceeding, it is useful to recall certain features of NATO decision making. In line with long-standing Alliance practice, decisions in the North Atlantic Council, whether it meets at the level of ambassadors, ministers, or Heads of State and Government, and the Council's subsidiary bodies, are made by consensus. Partners who participate in such discussions associate themselves with consensus. Thus the Policy was a document decided by consensus. While the Policy is not a legal document, it can nevertheless be presumed that Nations and Partners (most if not all) conducted a 'legal scrub' of the text in order to ensure consistency (or at least avoid inconsistency) with their legal positions on a wide range of issues, including positions taken in other international fora.

One important legal consideration that was factored in from the outset was that of ensuring consistency between the Policy and international law. The Policy adopts as one of its guiding principles the proviso that 'NATO's approach to PoC is consistent with applicable legal frameworks. All NATO and NATO-led operations, missions and other Council-mandated activities are conducted in accordance with international law'.¹³ This is standard language in NATO operational documents. Its linguistic formulation emphasises that while the Policy is based on legal imperatives, it does not contain any expression that could be understood to create new legal obligations.¹⁴ Not does it change existing legal obligations of States in any regard. As the Policy provides, 'NATO's fulfilment of its responsibilities under this policy is subject to the legal basis for the specific NATO operation, mission or activity, and to the specific Council-approved mandate, without prejudice to force protection and collective defence obligations'.¹⁵ For example – at the extreme end of the PoC spectrum – the Policy would not provide an independent legal basis for the use of force. Such a basis would have to exist externally in international law.

Secondly, another issue was consistency between the Policy and other relevant documents. These included, among others, EU and UN documents (including Security Council resolutions) related to the protection of civilians.¹⁶ On this point, it should likewise be recalled that the very concept of the 'protection of civilians' itself is construed in various ways by different Organisations – and, for that matter, humanitarian actors. The factors that can influence this include the mission of each specific Organisation, be it inter-governmental or non-governmental, their capabilities and areas of operation.¹⁷ While there are no apparent conflicts between

¹³ NATO, Policy for the Protection of Civilians (NATO PoC Policy) (Press Release (2016)135) (9 July 2016) para 5.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ See, for example, UN Department of Peacekeeping Operations, 'The Protection of Civilians in United Nations Peacekeeping' (1 April 2015) <<http://www.futurepeaceops.org/wp-content/uploads/2016/01/2015-07-Policy-on-PoC-in-Peacekeeping-Operations.pdf>> accessed 29 March 2018; UNSC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict S/2016/447* (13 May 2016) <https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/s_2016_447.pdf> accessed 20 March 2018; EU Military Committee, 'Concept on Protection of Civilians (PoC) in EU-led Military Operations' EEAS 00351/6/14 (2 March 2015).

¹⁷ Keenan and Beadle (n 1) 1; Victoria Metcalfe, 'Protecting Civilians? The Interaction Between International Military and Humanitarian Actors' (HPG Working Paper, August 2012) 1 <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7768.pdf>> accessed 14 February 2018; Jim Rolfe, 'Partnering to Protect: Conceptualizing Civil-Military Partnerships for the Protection of Civilians' (2011) 18(5) *International Peacekeeping* 561, 564; Scott Sheeran and Catherine Kent, 'Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interaction', in Haidi Willmot, Ralph Mamiya, Scott Sheeran and Marc Weller (eds), *Protection of Civilians* (OUP 2016) 42–43; Humanitarian Policy Group (HPG) and ICRC

these documents and the Policy, the scope of the concept as used in the Policy may vary from that used in other contexts. For example, for some actors 'protection' of civilians is conceptualised with an emphasis on a rights-based approach.¹⁸ With this in mind, the ICRC, the UN Office for the Coordination of Humanitarian Affairs and the Inter-Agency Standing Committee note that the concept of 'protection' encompasses 'all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law; *i.e.* human rights law, international humanitarian law and refugee law'.¹⁹ While NATO's PoC Policy includes aspects related to rights, as will be shown in a future section, the concept of PoC within the NATO framework is focused primarily on other aspects. Be that as it may, any variance that might exist between the Policy on the one hand, and other relevant documents would not as such raise legal concerns as each document is developed within the specific context of the forum in which it is adopted.

With that in mind, perhaps the most significant legal consideration that arises when examining the Policy concerns the applicable law. As noted above, the Policy provides that NATO's PoC approach is 'consistent with applicable legal frameworks'.²⁰ This brief text is the only reference to applicable law in the Policy. Despite its brevity, it is of crucial importance in the context of NATO, where decisions must be made on the basis of consensus and where Allies and Partners are often subject to different international legal frameworks.

In the area of PoC, there are potentially a variety of 'applicable legal frameworks'. This broad reference could refer to a wide range of bodies of law, so long as they are applicable in a given context. This could include both international law and domestic law. International law potentially applicable in a PoC context could include the public international law governing the use of force and IHL, IHRL, and international refugee law. For example, for many NATO Allies and Partners, the European Convention on Human Rights is an important source of law, while for others it is not applicable. Conversely, while all NATO Allies are party to the International Covenant on Civil and Political Rights, its extraterritorial applicability is not universally accepted within the Alliance. For example, the United States has argued before United Nations treaty bodies that the Covenant is not applicable extraterritorially. In addition to different international law obligations, applicable domestic law will differ among Allies undertaking a PoC-related action, those with which that State is cooperating and the law of the State in which the PoC action is taking place.

In terms of evaluating implementation of the Policy, a question that might arise relates to who exactly identifies what are 'applicable legal frameworks'. NATO as an international organisation is, evidently, not a party to the principal legal instruments in the relevant fields. The North Atlantic Council does not have a practice of rendering legal opinions on the implementation of these instruments by States. Under long-standing NATO practice, it is for each Ally or Partner, acting individually or collectively, to interpret its obligations under the specific treaties to which it is a party. When called upon to interpret their obligations under a particular instrument, each Ally or Partner might do so against a background of different international legal obligations. The formulation used in the Policy is, therefore, not merely a shorthand way of referring to a potentially complicated legal landscape. It is a practical solution that enables the Policy to be adopted in the NATO context without getting bogged down in legal debates that might become contentious among Allies and Partners.

In NATO, considerable attention is paid to the need to promote 'legal interoperability' despite the differing legal frameworks that apply to Allies and Partners. In general terms, 'interoperability' is a concept that refers to the ability of the contributions of different States to work together. By way of illustration, the NATO definition of 'force interoperability' refers to the 'ability of the forces of two or more nations to train, exercise and operate effectively together in the execution of assigned missions and tasks'.²¹ In turn, the concept of legal interoperability ensures that within a military alliance, military operations can be conducted in an effectively consistent manner in accordance with the legal obligations of each country. For example,

Roundtable on Civil-Military Coordination (HPG and ICRC Roundtable), 'The Concept of Protection: Towards a Mutual Understanding' (12 December 2011) 3 <<https://www.icrc.org/eng/assets/files/2012/hpg-icrc-roundtable-summary-note-2011-12-12.pdf>> accessed 14 February 2018.

¹⁸ Sheeran and Kent (n 17) 43; ICRC, 'Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence' (ICRC 2009) 8 <https://www.icrc.org/eng/assets/files/other/icrc_002_0999.pdf> accessed 22 February 2018.

¹⁹ See, for example, Inter-Agency Standing Committee Emergency Directors Group (EDG), 'Protection and Accountability to Affected Populations in the Humanitarian Programme Cycle' (2016) 8 <http://www.interagencystandingcommittee.org/system/files/edg_aap_protection_guidance_note_2016.pdf> accessed 22 February 2018; Sylvie Giossi Caverzasio (ed), 'Strengthening Protection in War: A Search for Professional Standards: Summary of Discussions among Human Rights and Humanitarian Organisations' (ICRC 2001) 19.

²⁰ NATO PoC Policy (n 13) para 5.

²¹ NATO Glossary of Terms and Definitions (NATO Standardization Organization, AAP-06(2014)).

the deployment of troops must conform to the domestic legal requirements of troop-contributing states and the international obligations into which each country has entered. Some of these requirements might relate to PoC. For example, individual nations may have restrictions on targeting, use of particular weapons or weapons systems or different reporting obligations. Since these authorisations and limitations may vary amongst the Contributing Nations, Allies have to facilitate mutual awareness and, to the extent possible, operational harmonisation of the mission-specific legal framework applicable to the various Contributing Nations. This can be a challenge given the wide range of actions the Alliance is conducting. At the same time, the Alliance has demonstrated a high standard in complying with international law in the course of its military operations. Moreover, there is great potential benefit in using national requirements to promote PoC-related aims. For example, Allies have shown willingness to use national reporting requirements already in place for certain types of conduct observed on the battlefield in order to report on PoC-related issues. This same spirit of cooperation can be expected as the Policy is implemented in all of its aspects, a number of which are described in the next part.

IV. The Scope of the Policy

NATO's Policy on PoC acknowledges that civilian protection is a cross-cutting concept, equally relevant to the Organisation's overarching core tasks, namely defence of the Alliance, enhancement of security through capacity building and partnerships and the engagement in crisis management by way of operations, missions or other Council-mandated activities.²² With this in mind, four overarching principles form the basis on which the Policy was built, namely: (1) NATO's approach to the protection of civilians is grounded on legal, moral and political imperatives; (2) NATO's approach to PoC is to be consistent with and conducted in accordance with applicable legal frameworks, including IHL and IHRL; (3) NATO's fulfilment of its responsibilities under this policy is subject to the legal basis for the specific NATO operation, mission or activity, and to the specific Council-approved mandate, without prejudice to force protection and collective defence obligations and; (4) NATO recognises that all feasible measures must be taken to avoid, minimise and mitigate harm to civilians and that when planning and implementing such measures, NATO should give consideration to those groups most vulnerable to violence within the local context. As will be showcased in the following paragraphs, these principles, taken in the aggregate, underscore the scope and extent of the Policy and its various dimensions.

PoC within the NATO framework is defined as including all efforts taken to avoid, minimise and mitigate the negative effects that might arise from NATO and NATO-led military operations on the civilian population and, when applicable, to undertake military or police action to protect civilians from conflict-related physical violence or threats of physical violence by other actors.²³

The definition appears to focus primarily on two types of harm that the Policy seeks to address. Firstly, it speaks of the negative effects that might arise from NATO's own actions. Secondly, it addresses the protection from physical harm that may arise from others' action. On a plain reading, with regard to the first prong of the definition, civilian protection is brought to the forefront not only in NATO military operations that have as the main objective the protection of the civilian population, such as was the case with Operation Unified Protector in Libya, but to all NATO and NATO-led military operations.²⁴ Yet it is important to underline that due to the principles which govern the Policy, as outlined previously, particularly the third and fourth principles, the statement should be read as qualified. For example, while in practice, at a first glance, a wide set of measures may be taken to ensure civilian protection, the reference to 'all efforts' should be read as encompassing only those measures that are deemed to be 'feasible', which is a case-by-case estimation that will ultimately rest with the North Atlantic Council.²⁵

In addition, three other significant qualifiers will determine which measures are chosen and their extent, including the need for force protection and collective defence obligations, and, most importantly, the legal basis that underpins the operation itself. For example, where a UN Security Council Resolution calls on the international community to ensure civilian protection by any means necessary, including use of force, the measures that NATO may decide to employ include the use of force, where this is deemed feasible and subject to considerations relating to, for example, force protection. On the other hand, based on the definition

²² NATO PoC Policy (n 13) para 3.

²³ *ibid.*

²⁴ Keenan and Beadle (n 1) 2.

²⁵ Sten Rynning, 'Rethinking NATO Policy on the Protection of Civilians' (2017) 47(3) *Parameters* 41, 45 <http://ssi.armywarcollege.edu/pubs/Parameters/issues/Autumn_2017/7_Rynning.pdf> accessed 21 February 2018.

of PoC read in conjunction with the principles that lie at the basis of the Policy, NATO military operations only include the use of force where this is consistent with the law, even when such measures might otherwise be feasible and would generate no risk to force protection.

Furthermore, with regard to the first branch of the definition, it is important to note that while it refers to 'military operations', the definition itself makes no reference to missions or other Council-mandated activities. Nevertheless, owing to the fact that the Policy makes use of the term 'includes', this definition should not be construed as exhaustive and as excluding PoC and the applicability of the Policy from NATO missions and other Council-mandated activities. An indication of this can likewise be found within the Policy itself, which notes that all of the overarching ten PoC elements that the document focuses on, such as civilian harm mitigation from own actions, protection of civilians from others' actions, training of local forces 'should be considered in NATO's current and future operations, *missions* and *other Council-mandated activities*'.²⁶ The argument is further substantiated by the fact that, according to the Policy, its aim is that of instilling a coherent, consistent and integrated approach to PoC in NATO and NATO-led operations, missions and other Council-mandated activities, which includes the planning and conducting of operations and missions, training, education and exercises, lessons learned, as well as defence and security-related capacity building activities.²⁷ The Policy's views of civilian protection thus go far beyond just high-intensity military operations and its aim is to integrate aspects of civilian protection also in an array of missions and activities that the Organisation is or will become involved in, be it in a lead, participatory or supportive role, and, moreover, to do so from the early stages of any given activity.²⁸

Here, it should be noted that this latter aspect, relating to the need of factoring in PoC from the early stages of any operation, mission, and activity has been likewise highlighted as a recommendation by NATO's JALLC, which underscores that in order to be achieved operationally, civilian protection needs to be factored in starting from the initiating mandate.²⁹ Similarly, the Policy notes that NATO and its Partner Nations shall, as appropriate, integrate PoC from the outset of NATO and NATO-led operations, missions and other Council-mandated activities.³⁰ However, while the JALLC recommendation notes that PoC, alongside others, needs to be considered a strategic goal, the Policy itself does not purport to frame civilian protection as a strategic goal for every operation, mission and activity, an aspect which, again, will be most likely determined on a case-by-case basis by the North Atlantic Council.³¹

Moreover, both the definition and the Policy overall clearly also take into account the need to protect civilians from the actions of others. In the past, this element may have been less apparent in NATO policy and doctrine, but the Policy clearly raises this to an objective in itself.³² This aspect was highlighted as a component of PoC not only out of moral, legal and political considerations, but also very practical ones. Naturally, the facet is important as it takes into account the actions of actors beyond the Member States of the Organisations and its Partner Nations. It was introduced from the practical reality that in spite of the obligation to protect civilians during armed conflict, certain parties to armed conflict have, and continue to put civilians at risk, or even to target them deliberately in order to achieve their specific aims. Here, the recognition of three facts may have played an important role: namely, that while some parties to armed conflict may disregard obligations under international law, NATO-led forces cannot; that NATO's willingness to take action to enhance protection of civilians could increase public trust and underscore the legitimacy of the Alliance's endeavours; and, finally, that such a stance could be liable to weaken the abilities of others to use incidents in order to justify actions against the Alliance, its Allies or Partners. However, the Policy should not be understood as detracting from the traditional understanding that it is the parties to an armed conflict that bear the primary responsibility to take all feasible measures in order to ensure the protection of civilians.³³

²⁶ NATO PoC Policy (n 13) para. 14 [emphasis added].

²⁷ *ibid.*

²⁸ For an alternative view, albeit issued before the launch of the Policy as such, see Sarah Sewall, 'Civilian Protection', in Mary Kaldor and Iavor Rangelov (eds) *Handbook of Global Policy Series* (Wiley Blackwell 2014) 220.

²⁹ NATO Joint Analysis and Lessons Learned Center, 'Protection of Civilians' (JALLC PoC Factsheet) (15 November 2017) <http://www.jallc.nato.int/products/docs/20180209_Factsheet_PoC.pdf> accessed 22 February 2018.

³⁰ NATO PoC Policy (n 13) para 14.

³¹ JALLC PoC Factsheet (n 29).

³² Keenan and Beadle (n 1) 2.

³³ UNSC, 'Security Council Issues Presidential Statement Reaffirming Commitment to Protection of Civilians in Armed Conflict' SC/11274 (12 February 2014) <<https://www.un.org/press/en/2014/sc11274.doc.htm>> accessed 23 February 2018; Paul D. Williams, 'The R2P, Protection of Civilians and UN Peacekeeping Operations', in Alex J. Bellamy and Tim Dune (eds), *The Oxford*

This aspect should be kept in mind in situations where NATO is active but does not consider itself a party to an armed conflict. For example, while NATO is currently active in Afghanistan, the Organisation has consistently held that it is not a party to the armed conflict. The issue of whether an international organisation such as NATO can become a party to an armed conflict is a controversial one that has been the subject of considerable discussion. The Organisation's position is based on a number of considerations, namely: (1) that under RSM, NATO is not undertaking actions related to the conduct of hostilities; (2) that RSM is not a combat operation and the Organisation does not provide any equipment to Afghanistan; (3) that while RSM's mandate is to train, advise and assist the Afghan security institutions and forces, such duties do not amount to military operations carried out in support of a party to the pre-existing conflict- in this case the Afghans; and (4) within this vein of activities, NATO's train, advise and assistance package does not have a direct impact on the opposing party's ability to carry out military operations. On the other hand, the International Committee of the Red Cross considers that NATO is a party to an armed conflict, especially by virtue of the support it provides to States that are engaged in such conflict.³⁴ While this debate regarding the classification of parties to a conflict may be an important one, the fact is that NATO's traditional position that it is not a party to the conflict does not affect the implementation of the PoC policy. As will be explained below, RSM includes a significant civilian protection component, particularly with reference to the prevention of civilian casualties.

On the issue of protection of civilians from the actions of others, the Policy notes that understanding the nature of the threat against civilians is critical for identifying if the use of military force, including a Stability Policing dimension, can protect the civilian population.³⁵ Aspects such as the identification of threats, including the varying types of perpetrators, their motivation, strategies and tactics as well as their capabilities and the outcomes of these variables for civilians – including through a gender-sensitive approach – are seen as elements that would enable NATO planners at all levels to recommend military response options for NATO and NATO-led operations, missions and other Council-mandated activities.³⁶ The Policy also advises that political guidance for the protection of civilians should be developed, in line with the mandate of a given mission and in accordance with NATO operations planning procedures.³⁷ The Policy further advises that this should be fully integrated into the NATO and NATO-led operations, missions and other Council-mandated activities.³⁸ The Policy thus acknowledges the important role of the protection of civilian populations from the actions of other actors while maintaining at the same time a strong level of protection from NATO's own operations, missions or other Council-mandated activities.

On this note, it is likewise important to observe that the concept of 'others' action' is not circumscribed by any parameters. It follows that the notion of the harm that might accrue due to such action is left open-ended in the Policy. Traditionally, commentators have indicated that the protective purpose of PoC encompasses protection from various types of harm or threats and violations, such as mass atrocities, war crimes and genocide, but also what has been termed as 'less extreme' threats such as deliberate, isolated or wide-spread targeting, sexual assault, exploitation, forced displacement and the blocking of humanitarian aid, to name but a few.³⁹ NATO's definition on PoC and the Policy overall allows sufficient flexibility to include protection from all of these various types of threats that may occur owing to the actions of other actors. Nevertheless, exactly what actors may fall within the notion of 'others' may be subject to some debate. Based on the wording in the relevant section of the Policy itself as set out in the previous paragraphs, the reference to 'others', in this specific context, can be read as including state and non-state actors who are adversaries in a given NATO operation, mission or other council-mandated activity. For example, it might stand to reason that NATO would protect civilians against actors that are hostile to NATO, such as the Taliban in Afghanistan.

Handbook of the Responsibility to Protect (OUP 2016) 529; Raphaël van Steenberghe 'The Notions of Responsibility to Protect and the Protection of Civilians in Armed Conflict: Detecting Their Association and Its Impact Upon International Law' (2014) 6(1) *Goettingen Journal of International Law* 81, 103.

³⁴ Tristan Ferraro 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) 97(900) *International Review of the Red Cross*, 1227.

³⁵ NATO PoC Policy (n 13) para 16.

³⁶ *ibid.* para 22.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Hugh Breakey, 'The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and contrast', in Angus Francis, Vesselin Popovski and Charles Sampford (eds) *Norms of Protection Responsibility to Protect, Protection of Civilians and Their Interaction* (United Nations University Press 2012) 64; van Steenberghe (n 33) 103; Stuart Gordon 'The Protection of Civilians: An Evolving Paradigm?' (2013) 2(2) *Stability: International Journal of Security and Development* <<https://www.stabilityjournal.org/articles/10.5334/sta.cb/>> accessed 22 February 2018.

However, whether this protection extends to actions potentially committed by NATO-friendly local forces is less certain. The Policy itself is vague on this point, and it may well be that more clarity would have been beneficial in this regard in order to avoid any semblance of *lacunae* in the Policy concerning the source of potential harm to civilians. Be that as it may, it is submitted that while protection of civilians from the action of NATO-friendly local forces is not distinctly addressed, it can nevertheless be read as part of the structure of the Policy regarding PoC from 'others' action'. A strong indication of this is the fact that concepts such as 'threats', 'types of perpetrators', 'local authorities' are referred to without being connected to NATO-hostile elements.⁴⁰

Having established these aspects, the notion of physical protection plays an important and integral part of the Policy, which sets out expressly that civilian protection 'where applicable, includes a range of activities up to and including the use of force, as appropriate, to prevent, deter, pre-empt, and respond to situations in which civilians suffer physical violence or are under threat of physical violence'.⁴¹ The same transpires from the definition itself, particularly with regard to protection from others' actions, with the Policy referring to the protection of civilian from 'conflict-related *physical* violence or threats of *physical* violence by other actors'.⁴² Yet, commentators have signalled that PoC is a concept which expands beyond physical protection from immediate threat.⁴³ This broader conception of protection may be found in the Policy, which refers to civilian protection 'through the establishment of a safe and secure environment'.⁴⁴ The Policy does not define this concept. However, NATO's experience with similar mandates shows that the term 'safe and secure environment' can and should be interpreted broadly. For example, in Kosovo, where the UN Security Council mandate for NATO's Kosovo Force includes this language, NATO has been involved in a range of actions, including capacity building. Commentators have noted that PoC, in general, includes environment and capacity building actions and there is nothing in the Policy itself to exclude it. Nevertheless, in practice, the guiding principles underscoring the Policy will come into play in order to determine, for example, the feasibility of such measures, which will ultimately bear an impact on their extent.⁴⁵

Viewed from this perspective, the Policy encompasses responsive but also environment building actions, both of which have been highlighted by commentators and various humanitarian actors alike as part and parcel of the protection framework.⁴⁶ However, a shortcoming of the Policy could be flagged as the lack of references to remedial action, such as compensation, with regard to the negative effects that might arise from NATO's own actions. In the past, the matter has been dealt with in the case of Afghanistan during ISAF, to a certain extent, through the adoption in August 2010 of a set of Non-Binding Guidelines on Monetary Payments to Civilian Casualties in Afghanistan, intended to offer a set of uniform guidelines to NATO parties when dealing with combat-related civilian casualties from the perspective of monetary compensation.⁴⁷ However, while the approach has been found effective by commentators, it has not been standardised for

⁴⁰ NATO PoC Policy (n 13) para 16.

⁴¹ Ibid. para 22.

⁴² Ibid. para 9 [two emphases added].

⁴³ Sheeran and Kent (n 17) 48; John Harald and Benjamin de Carvalho, 'Conceptual Uncertainty and Competition: The Protection of Civilians and the Responsibility to Protect', in Benjamin de Carvalho and Ole Jacob Sending (eds), *The Protection of Civilians in UN Peacekeeping* (Nomos 2013) 52; van Steenberghe (n 33) 103.

⁴⁴ NATO PoC Policy (n 13) para. 9, where it is stated that 'In this policy, in accordance with paragraphs 5 and 6 above, Protection of Civilians (persons, objects and services) includes all efforts taken to avoid, minimise and mitigate the negative effects that might arise from NATO and NATO-led military operations on the civilian population and, when applicable, to protect civilians from conflict-related *physical violence or threats of physical violence* by other actors, *including through the establishment of a safe and secure environment*' [emphasis added].

⁴⁵ Metcalfe (n 17) 1; Williams (n 33) 527–528.

⁴⁶ The protection framework, referred to as the 'egg framework' was developed within the circle of humanitarian actors and made popular by the ICRC, while at the same time being adopted by a number of commentators and other actors. Specifically, it is comprised of three types of activities, namely: (1) responsive action, defined as 'any activity undertaken in connection with an emerging or established pattern of abuse and aimed at preventing its recurrence, putting a stop to it, and/or alleviating its immediate effects'; (2) remedial action construed as 'any activity aimed at restoring people's dignity and ensuring adequate living conditions, subsequent to a pattern of abuse, through rehabilitation, restitution, compensation and reparation'; and (3) environment-building action defined as 'any activity at creating and/or consolidating an environment – political, social, cultural, institutional, economic and legal – conducive to full respect for the rights of the individual', see Caverzasio (n 19) 21–22. See also Inter-Agency Standing Committee, 'Growing the Sheltering Tree Protecting Rights Through Humanitarian Actions' (UNICEF 2002) 11–12 <http://www.globalprotectioncluster.org/_assets/files/tools_and_guidance/IASC_Growing_Sheltering_Tree_2002_EN.pdf> accessed 23 February 2018; Humanitarian Policy Group, 'Better Protected? Stabilisation Strategies and the Protection of Civilians Round Table Summary' (25 March 2011) <<http://www.refworld.org/pdfid/4e4b798d2.pdf>> accessed 23 February 2018.

⁴⁷ NATO, 'NATO Nations Approve Civilian Casualty Guidelines' (6 August 2010) <https://www.nato.int/cps/en/natohq/official_texts_65114.htm?selectedLocale=en> accessed 23 February 2018.

every operation, mission and activity and has been noted as singular when looking at NATO practice.⁴⁸ Indeed, similar Guidelines were not adopted nor applied in the case of Libya, despite the fact that the International Commission of Inquiry on Libya, an independent mechanism dispatched by the UN Human Rights Council, expressly called on NATO to apply the Guidelines to civilian casualties in Libya.⁴⁹ As such, while it can be stated that the Policy does not exclude remedial action from its ambit, in practice, compensation to civilians, particularly where civilians suffer negative effects from the Organisation's actions in a given operation, mission or activity, remains under question. While the Policy highlights two types of action that have traditionally been included in the protection framework, namely responsive action and, to a certain extent, environment-building action, it does not address other aspects such as remedial action.

Having established this, in terms of beneficiaries, the Policy sets out that within the NATO framework, PoC covers not only persons but also civilian objects and services. While these terms are not explained in more detail, the term 'persons', for the purpose of civilian protection, should be understood to cover all persons, indifferent of race, ethnicity, nationality, social status, political affiliation or any other personal characteristics so long as such individuals maintain their status as non-combatants. The policy further stresses that NATO should give consideration to those groups most vulnerable to violence within the local context and that this aspect represents one of the core guiding principles of the Policy. Women, the elderly, children, persons with disabilities, the wounded and the sick have been traditionally identified as the most vulnerable groups within a given context where armed conflict is ongoing.⁵⁰ This holds true also for contexts characterised by internal instability. For example, given that the Organisation recognises that children constitute a particularly vulnerable group during conflict and women are often disproportionately affected by violence, a positive development has been the integration of Children and Armed Conflict into the planning of RSM to train, advise and assist the Afghan forces, and the inclusion, for the first time, of a Child Protection Advisor as part of this mission.⁵¹

It should also not be overlooked that the PoC Policy notes that 'NATO will give consideration to those groups most vulnerable to violence within *the local context*'.⁵² This appears to suggest that the Policy leaves open the possibility for NATO to operationally take into account a series of specific elements that might make up a given local context, in addition to gender, age and disabilities such as race or political, social, cultural and religious affiliations. This would allow the Organisation to adopt an approach which would cater to each specific environment. In some contexts, for example, infants born of rape in armed conflict may be particularly vulnerable to infanticide, even after the armed conflict has come to an end. Such aspects could be taken into account when planning missions, operations or other Council-mandated activities.⁵³ Adopting a Policy that takes note of such specific aspects would allow NATO to act with increased awareness of the reality on the ground. How far this 'local context' element will extend is still, however, unclear.

The remaining two elements comprising PoC are 'civilian objects' and 'civilian services'. Civilian objects can be understood using the traditional definition that is given to the concept under IHL. On the other hand, the term 'civilian services' is not defined as such in IHL, and the Policy does not provide a definition of this term.

This raises the question of how far the term 'civilian services' should extend in practice, specifically where restoration activities of such services would be at issue in order to establish a safe and secure environment for the civilian population. The answer is most likely that NATO PoC activities relating to restoration of civilian services, as part of efforts which seek to ensure a safe and secure environment, where this is feasible and

⁴⁸ Keenan and Beadle (n 1) 6.

⁴⁹ *ibid.* Also see Human Rights Council 'Report of the International Commission of Inquiry on Libya', A/HRC/19/68 (8 March 2012) para 130.

⁵⁰ On this note, see for example ICRC, 'Keynote address Ms. Christine Beerli, ICRC vice-president "Vulnerabilities in armed conflicts"' (4 November 2013) <<https://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm>> accessed 3 March 2018; Mubika Augustine Kudakwashe and Bukaliya Richard 'Causes of Armed Conflicts and Their Effects on Women' (2015) 2(4) *International Journal of Research in Humanities and Social Studies* 77, 81; UNSC, 'In Security Council Debate on Civilian Protection, Speakers Voice Deep Concern over Alarming Reports of Violence against Women, Mass Displacement' (30 January 2015) <<https://www.un.org/press/en/2015/sc11760.doc.htm>> accessed 29 March 2018.

⁵¹ NATO, 'Intervention by Ambassador Stephen Evans, NATO Assistant Secretary General for Operations at the United Nations Security Council' (27 March 2015) <https://www.nato.int/cps/en/natohq/opinions_118555.htm> accessed 29 March 2018.

⁵² NATO PoC Policy (n 13) para 7 [emphasis added].

⁵³ The vulnerability of children born of rape during armed conflict has been noted by the ICRC on several occasions. See, ICRC, 'Keynote address Ms. Christine Beerli, ICRC vice-president "Vulnerabilities in armed conflicts"' (4 November 2013) available at: <<https://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm>> accessed 3 March 2018; ICRC, 'Q&A: sexual violence in armed conflict' (19 August 2016) <<https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers>> accessed 29 March 2018; Charli Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond* (Columbia University Press 2010) 26.

within the means available, will only be limited to those services which are deemed as 'essential' for civilian protection. The statement is based on the 2013 Allied Joint Doctrine for Civil-Military Cooperation (2013 AJD-CMC) where it was noted that NATO may reasonably be expected to contribute to the restoration of services in certain situations such as following a conflict, a catastrophic incident or natural disaster when civil agencies are unable to act promptly or operate safely.⁵⁴ However, the Doctrine refers only to 'essential services' such as medical care, transportation systems, the provision of drinkable water, electrical power and other utilities.⁵⁵ Indeed, medical care services could fall squarely within the examples to which the term 'services' as used in the Policy may refer, particularly as the restoration of such services is undoubtedly able to 'protect civilians from conflict-related physical violence'. However, other services such as those referred to in the 2013 AJD-CMC could likewise represent an area of focus, should restoration activities be implemented, owing again to the fact that the definition of PoC is not exhaustive.

Lastly, when referring to the scope of the Policy itself, it is likewise important to note that it imposes no limitation as to its application in terms of context. PoC is a framework applicable not only in situations of armed conflict, be it international or internal, but also to any situation characterised by violence, and indeed, the Policy itself appears to allow for this.⁵⁶ Thus, bearing in mind that the Policy envisions the integration of PoC aspects in, for example, the training of local forces (which may occur either during or subsequent to an armed conflict), its applicability expands beyond just armed conflict, such as in situations of internal instability characterised by violence against civilians even in times of peace.

V. The Human Rights Facets of the Policy

Having outlined the scope of the Policy, in accordance with the necessary terms and conditions, one notable facet of the Policy relates to its inclusion of IHRL, when the framework is applicable, in relation to civilian protection. Here it is recalled that one of the four basic principles that the Policy enshrines with regard to civilian protection is that NATO's approach to PoC is to be consistent with, and conducted in accordance with applicable legal frameworks, including IHL and, most notably, IHRL.⁵⁷

Given the different human rights treaty obligations applicable to different Allies, the question arises as to what human rights aspects are the most relevant for implementation of the Policy. Perhaps not surprisingly for an Alliance focused on military operations, there is a specific focus in the Policy on the rights to life and physical integrity. For example, the Policy notes that when activities relating to training of local forces and defence and security capacity building fall within the Council-agreed mandate, 'NATO should share best practices and experiences on PoC, particularly civilian harm mitigation [...] as well as on the implementation of *international human rights law* and international humanitarian law, as applicable'.⁵⁸ Such efforts are currently underway in Afghanistan, where as of January 2015 a new NATO-led mission to train, advise and assist the Afghan security forces and institutions was launched, under the heading of RSM. A closer look into how aspects relating to human rights have been integrated within a NATO mission might help to showcase how this facet will, most likely, be dealt with in the future under the aegis of the Policy, particularly as RSM will itself continue to unfold under the letter of this development.

Compared to its predecessor, RSM, which began in 2014, is a much smaller endeavour, focusing on advice, education and training and yet including aspects relating to the protection of the civilian populations, particularly relating to groups that have been identified as especially vulnerable were integrated early on in the mission. The desired end-state is that the Government of Afghanistan will be able to execute its security responsibilities in an increasingly sustainable manner, while fully respecting human rights and operating in accordance with the rule of law – including IHRL. With this in mind, Resolute Support trains, advises and assists with a continuous focus at the ministerial level and national institution level. At the end of this phase, the desired effect is that the relevant Afghan security institutions will be capable of planning and executing increasingly self-sustainable military and civil operations in line with the objectives of UNSC Resolution 1325.

Training in RSM entails developing programmes and institutions to educate, instruct and prepare Afghan security institutions in order to enable them to generate and train the force to provide and maintain effective and enduring security capabilities. Within this mandate, the focus is placed, for instance, on avoiding

⁵⁴ NATO Allied Joint Publication, 'AJP-3.4.9 Allied Joint Doctrine for Civil-Military Cooperation' (Ed. A, Version 1) (NATO Standardization Office, February 2013) 1–8 <<https://www.cimic-coe.org/wp-content/uploads/2014/06/AJP-3.4.9-EDA-V1-E1.pdf>> accessed 22 February 2018.

⁵⁵ *ibid.*

⁵⁶ van Steenberghe (n 33) 103; Metcalfe (n 17) 1.

⁵⁷ NATO PoC Policy (n 13) para 5.

⁵⁸ *ibid.* para 22 [emphasis added].

and investigating civilian casualties and following UNSC resolutions 1325 for protecting and respecting women and children. This training aims to incorporate the performance of military or policing duties in accordance with Afghanistan's Constitution, domestic laws and international obligations.

This training includes two important facets. The first is consolidating efforts to mainstream a focus on avoiding civilian casualties in the training of Afghan Security Forces. The second includes the efficient and sustainable implementation of UNSC Res 1325 on Women, Peace and Security and UNSC Res 1612 on Children Affected by Armed Conflict and related resolutions.

Lastly, it should be noted that RSM's mandate is characterised by a reasonable degree of flexibility in that it provides for the possibility of the operation's force structure to evolve and adapt throughout the mission to align with the progress and development of Afghan Security Institutions. Therefore, the approach is malleable and can cater to the needs and progress of NATO's Partners.

As exemplified in Afghanistan, in its interactions with its Partners, NATO's role in IHRL, and in particular with regard to the protection of civilians, is to help implement the core human rights tenants into the day-to-day activities of our partners at all functional levels. By training local forces with a strong emphasis on respect for IHRL and the need to protect civilians in times of conflict, NATO is enabling its partners to become self-sustainable and to become so with full awareness and with respect to both the spirit and the letter of IHRL and also IHL. In addition, NATO's efforts are targeted at raising awareness and attempting to instil a culture of investigation and mitigation of civilian casualty incidents and redressing civilian harm. Thus, by training local forces, including by way of sharing best practices and experiences on PoC and the implementation of IHRL, NATO can be said to promote IHRL beyond the Organisation itself.

In addition, the Policy's emphasis on human rights is also underscored, for example, when it comes to the importance of actively engaging notable human rights actors such as civil society organisations, who have an accurate understanding of the situation on the ground in certain locations, built through their interactions with the local population.

It should be noted that PoC practitioners have, at times, underscored the need for more exchanges between military and humanitarian actors regarding the activities each type of actor can or should undertake in order to reduce threats to civilians.⁵⁹ The draw-backs of this is that, in some cases, it can create either a duplication of efforts which can compromise the ability of all of the actors involved to adequately leverage available resources and capacities, or, at the opposite end of the spectrum, it can unwillingly generate harm prevention and mitigation vacuums. Each of these extremes risks exposing the civilian population to harm and various threats, or unnecessarily prolonging this exposure. However, the conceptual framework of the Policy itself is based, *inter alia*, on the premise that promoting long-term, self-sustained peace, security and stability is best achieved in cooperation with a series of actors, including local authorities, population and civil society Organisations such as relevant organisations working for human rights, including gender equality.⁶⁰ More so, when it comes to civilian harm mitigation from own actions, the Policy emphasises a strong population-centric approach by recalling NATO's commitment of continuing to engage local actors, including relevant organisations working for human rights as to the most suitable and effective harm mitigation activities in a given context.⁶¹

Thus, a core tenet of NATO's PoC policy would appear to be that the policy enshrines the willingness of the Organisation to reach out and work closely with NGOs and local civil society Organisations. This engagement, along with that of the local communities may be essential for PoC, enabling rapid assessment where a NATO operation, mission or activity takes place in order to synergise all efforts, exploit all relevant knowledge and maximise the outcome of civilian protection. Furthermore, such a process also helps improve NATO PoC by enabling an external lessons learnt process. This was precisely the case while ISAF was active in Afghanistan where, in 2011, the Civilian Casualty Mitigation Team – which has been described as an example of effective NATO policy in the area of operationalising physical protection of civilians⁶² – began a monthly working group to facilitate information sharing with local civil society organisations and NGOs who were active

⁵⁹ HPG and ICRC Roundtable (n 17) 2.

⁶⁰ NATO PoC Policy (n 13) para. 22.

⁶¹ *ibid.* The Policy itself, however, does not define what 'harm' actually entails. In UN peacekeeping lingo, this term is defined as 'potential negative consequences to the dignity, safety and security of civilians, in particular of women and children, or civilian objects associated with or resulting from the actions and consequences of those actions by armed forces, be they national or international, or the mission itself', see UN Department of Peacekeeping Operations, 'The Protection of Civilians in UN Peacekeeping' (1 April 2015) 11 <<http://providingforpeacekeeping.org/wp-content/uploads/2017/08/2015-07-Policy-on-PoC-in-Peacekeeping-Operations.pdf>> accessed 17 August 2018.

⁶² Keenan and Beadle (n 1) 6.

in the area (such as the UN Assistance Mission in Afghanistan, Human Rights Watch and CIVIC, as well as International Organisations) and to solicit their recommendations for reducing civilian casualties.⁶³

Among the most significant recommendations that ISAF received and took into consideration the following could be included: (1) establishing a civilian casualty tracking mechanism equipped with robust analytical capability; (2) ensure ongoing review of Tactical Directives and operational procedures for establishing positive identification, particularly in the context of offensive aerial operations; and (3) ensure that best practices for civilian casualty reduction and mitigation were fully transferred to the Afghan National Security Forces.⁶⁴ The Policy is thus geared towards seeking and including guidance on how to effectively protect the civilian population during the operations, missions and other Council-mandated activities that the Organisation is, and will continue to, engage in. Here it should be noted that, in practice, information-sharing, subject to certain terms and conditions, may be expected to function as a facet of this type of cooperation. However, it should not be overlooked that information-sharing between international organisations active in PoC on the one hand and humanitarian actors on the other has been perceived as an obstacle within the framework of civilian protection. In practice, concerning NATO, notwithstanding the Organisation's commitment to engage with civil society, it is to be expected that information sharing and its extent will continue to be a decision that hinges on practical considerations and obligations that the Organisation is subject to, including those relating to the principle of originator control.

In light of the above, the Policy can be said to set out a series of ambitious aims that should be met with regard to each dimension of the Policy, including IHRL. This could raise questions on the feasibility of the Organisation actually meeting these aims in areas where it operates or takes action, the Policy was conceptualised with realistic expectations in mind and notes that NATO's efforts need to take into account the roles and activities of other international actors.⁶⁵ Interaction with other actors and understanding how they perform their mission is expressly referred to as elements, which can ensure complementarity and boost objectives in NATO's endeavours.⁶⁶ This should also be taken to mean that NATO's activities need to be driven by the question of where the Organisation can bring added value, so as to avoid the duplication of efforts.

VI. Conclusion

Overall, the Policy can be viewed as an important example of NATO's commitment to civilian protection, even if some issues still remain. The momentum maintained by the Organisation throughout the development of the policy highlights the fact that, driven by its values and international law, NATO recognises the imperative of protecting civilians. In turn, as NATO's decisions are the reflection of consensus of all 29 Member States, the PoC Policy can be seen as the expression of the shared commitment of all Allies to strengthen the Organisation's efforts concerning the protection of civilian populations.

On its face, the Policy does not create new obligations or propose to go beyond IHL rules such as those relating to targeting in armed conflict. Be that as it may, it is recalled that the added value of the Policy as such is not so much the novelty of any particular aspect of its content, but rather its overarching and comprehensive character. Due to this, it is perhaps of no surprise that the main characteristic of the Policy, appears to be its flexibility. This allows for the Policy to be relevant in a number of various scenarios, including beyond armed conflicts, such as when training local forces in times of peace but also for NATO to translate the Organisation's commitment to PoC through a variety of protective measures towards the civilian population. Yet the Policy must also be viewed as a pragmatic example of the Organisation's commitment to civilian protection, in that, generally, how far NATO will be able to go under the aegis of the Policy will hinge in each and every case on four core elements: (1) the legal basis for the specific NATO operation, mission or activity; (2) the specific Council-approved mandate; (3) force protection considerations; and (4) collective defence obligations. Subject to these four elements, NATO may contribute amply to the protection of civilian populations.

Nevertheless, this role – and its potential for significant practical contribution to the international community's efforts to protect civilians, as the Alliance's work in Afghanistan shows – could always benefit from greater awareness raising efforts in the broader community outside of NATO and security circles. In this

⁶³ For a very broad overview of the comprehensive study on the strategic lessons learned from ISAF, see NATO JALLC, 'Comprehensive Study on the Strategic Lessons Learned for ISAF' (9 October 2015) <http://www.jallc.nato.int/products/docs/20160603_Comprehensive_Study_on_the_Strategic_Lessons_Learned_from_ISAF.pdf> accessed 3 March 2018.

⁶⁴ *ibid.* para 60.

⁶⁵ *ibid.* para 13.

⁶⁶ *ibid.*

regard, NATO is a potentially useful repository of State practice in the field of PoC. This includes the practice of many States who are advocates in the international community on these issues.

At this point, the focus in the area of PoC in NATO will be on implementing the Policy and its numerous components. Part of this work involves building up an institutional capacity to follow up on this work, including through staffing.⁶⁷ The vast majority of this work will not necessarily entail any particular legal issues. Nevertheless, given the potential for legal interoperability challenges within NATO, it will be important to focus on how to promote this concept despite differing legal frameworks. Observing how States working under the Policy interpret the reference to 'applicable legal frameworks' will be an interesting element of the Policy's implementation. At the same time, lawyers within the Alliance have a role in promoting discussion and exchange about the legal positions of States and other relevant actors. This should include dialogue with PoC advocates and scholars. While the Alliance has been relatively successful in finding practical solutions to avoid direct legal conflicts, this is an area that will certainly require attention in the future.

Acknowledgements

The authors would like to express their gratitude to Mr. Justin Suni and Ms. Antoaneta Boeva for the valuable comments and input that they provided with regard to the present article.

Competing Interests

Andreea Manea was an Executive Editor of the Utrecht Journal of International and European Law between April 2013 and April 2015. The views expressed in this article are of the authors alone and do not necessarily reflect the views of NATO.

⁶⁷ Rynning (n 25) 40.

How to cite this article: Steven Hill and Andreea Manea, 'Protection of Civilians: A NATO Perspective' (2018) 34(2) *Utrecht Journal of International and European Law* pp. 146–160, DOI: <https://doi.org/10.5334/ujiel.461>

Submitted: 02 April 2018 **Accepted:** 31 October 2018 **Published:** 22 November 2018

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