

Tailoring Protection of Civilians to State Capacity

The Role of Regional Human Rights Protection Measures

The 2016 UN Agenda for Humanity states that minimizing human suffering and protecting civilians requires strengthening compliance with international law. In response to this call, this policy brief offers a complementary vision of protection of civilians (PoC) as a spectrum of possibilities that includes local self-protection efforts, legal strategies, and the practice of judicial and quasi-judicial bodies. The approach is illustrated by the life-cycle of the protection measures ordered for the Colombian Kankuamo by the Inter-American human rights system.

Brief Points

- PoC should be imagined as a spectrum of possibilities: When tailoring PoC to state capacity, international and national legal bodies are central to state accountability for civilian protection.
- The Inter-American protection measures for the Kankuamo of Colombia show the impact of legal protection measures on the ground.
- This bottom-up perspective makes visible how grassroots actors strategically use legal protection as part of their self-protection efforts.
- State accountability for civilian protection dovetails with the expansion of the rule of law to disputed territories.

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PoC as a Spectrum of Possibilities: Legal Obligations and State Capacity

Today, many contemporary armed conflicts and threats to civilians coexist *with* existing state bureaucracies and civil societies, however fragile. Hence there is a more general need for a better understanding of legal protection measures in relation to the goal of protecting civilians in armed conflicts and the goal of strengthening state capacity to abide by the rule of law.

The Protection of Civilians (PoC) agenda arrived at the scene of international politics as a central normative ambition only at the end of the Cold War. When picked up in reaction to the civilian suffering in civil wars and genocide throughout the 1990s, PoC was transformed from a set of limited legal regulations and a doctrine pertaining to the conduct of the military into an organizing principle for international engagement in conflict-ridden countries.

Historically, PoC was understood as a legal principle, within the application of international humanitarian law, as promoted by the International Committee of the Red Cross. From the 1990s, PoC has evolved into a guideline for the intervention of humanitarian organizations. Despite a high international profile, the realization of the PoC agenda has been hampered by conceptual confusion, operational difficulties, and insufficient understanding of how normative developments and the self-protection efforts of civilians can best be aligned. Moreover, the ‘humanitarian imperative’ to protect has involved an increasing militarization of PoC, whereby PoC has become identified with increasingly robust UN peacekeeping activities.

In the 2016 Agenda for Humanity, the Secretary General calls for a concerted global effort to

prevent the erosion of international humanitarian and human rights law, demand greater compliance with them and uncompromisingly pursue the protection of civilians.

Agenda for Humanity,
Core responsibility 2. E.

Uphold the rules: a global campaign to affirm
the norms that safeguard humanity

Responding to this call for a recentring of law in the struggle to protect civilians, this policy brief

argues that PoC should be imagined as a spectrum of possibilities, with an emphasis on subsidiarity and state capacity. When tailoring PoC to state capacity, international and national legal bodies are the means for holding states with the capacity to protect civilians accountable for their security. PoC is then operationalized through state action and civil society efforts to shape and monitor implementation. This requires an expansion of territorial control by the state, especially by a state bound by the rule of law, and not just the extension of control by state armed forces and paramilitary allies acting outside the rule of law.

Taking a bottom-up approach to this process makes visible how grassroots actors strategically use legal protection as part of their self-protection efforts, and how state response is entangled in its own interests.

PoC and Legal Protection Measures: A Missing Conversation on Tailoring Protection to State Capacity

Limited policy attention has been given to the role of international law and legal actors, and in particular, to the role of judicial and semi-judicial bodies in the protection of civilians in armed conflict. More broadly, this speaks to a lack of attention to PoC efforts in functioning states with protection capacity but who need to expand this capacity to reach territories that are either a) under the control of insurgent armies, b) disputed with insurgent armies or c) under the control of state military units that operate outside the rule of law and disregard human rights and humanitarian law.

There has been little focus on the potential means of furthering PoC through legal protection orders (usually known as provisional measures, precautionary measures or interim measures) ordered by the national and international human rights system in the context of conflict. This despite the fact that these actors issue specific orders for the state to take or refrain from taking action to prevent ‘irreparable harm’ to an individual or to persons due to their association with an organization, a group, or a community with identified or identifiable members. Protection measures have been adopted in different conflict scenarios involving forced disappearances, selective murders, death threats, and harassment and forced displacement due to actions by insurgents and by state forces operating

outside the rule of law. Protection measures call on states with the capacity to do so to increase efforts to protect civilians threatened by insurgent armies, or by state forces acting outside the rule of law, or by paramilitary allies. They assume the state has the physical capacity to do so, which is often the case with states whose force and presence is concentrated in some areas of the country, or in urban areas, to the detriment of other areas where civilians experience a severely deteriorated security. Threats to civilians in these areas may come from insurgents, rogue army units and paramilitary allies, or even criminal outfits.

Legal protection measures are aimed at states that implicitly have the capacity to follow court orders. The Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR) have been at the forefront of protecting civilians in conflict and civil unrest through legal protection measures for decades, using the measures first to protect individual civilians threatened by state armed forces acting outside the rule of law. Today, however, they are used with respect to a wide variety of threats, and for the protection of both individuals and collectivities.

Several United Nations and regional semi-judicial bodies also adopt formal protection measures, signalling the rising importance of such measures in international law. Some national courts, notably the Colombian Constitutional Court, also issue protection measures in the style of an international judicial or semi-judicial body, underlining the impact and importance of these measures.

The Inter-American System as a PoC Actor

The IACtHR and the IACHR were created by the Organization of American States with the mandate to promote and protect human rights in the region, responding to alleged violations of the 1969 American Convention of Human Rights. The IACtHR issues ‘binding and mandatory’ orders for individual and collective ‘provisional’ measures based on Article 63 (2) of the American Convention of Human Rights. The precautionary measures from the IACHR however are non-binding, and not based on a treaty but on its own rules of procedure.

The requirements for protection measures concern the ‘gravity, urgency, and irreparability’ in relation to categories such as threats to life and the physical integrity of persons, and threats to the environment that may result in harm to the life or health of the population or the way of life of indigenous peoples in their ancestral territories.

Neither type of protection measure (precautionary or provisional) has a predetermined content; the specific content of the measures is to be negotiated between the state and the beneficiaries. Most cases concern orders that the state provide for the protection of life and personal integrity. Tailoring protection measures to the actual needs of beneficiaries can be challenging: Protection measures are often designated to protect homes and properties, assuming that beneficiaries have homes and properties to protect. Moreover, this protection is often to be carried out through police protection, which may be problematic in situations where the imminent risk that led beneficiaries to request the measure derived from threats from police forces or other state agents linked to them, or in territories under the control of insurgent armies, paramilitary units or criminal outfits.

The follow-up by the Commission and the Court is carried out by means of written communications between these bodies, the beneficiaries and the state concerned, and through hearings. Measures can be lifted at the request of the state or in the case of non-compliance by beneficiaries.

In Colombia as in other parts of Latin America, these measures have a special standing in internal armed conflict. Since the 1980s, the Inter-American human rights system, as well as domestic courts and human rights ombudsmen, has used human rights law to denounce torture, extrajudicial executions and forced disappearances in the context of state’s counterinsurgency operations. More recently, these measures have also addressed other conflict-related issues, such as forced internal displacement and the massive violence emerging from the War on Drugs. The IACHR has also expanded its mandate to include the reports of non-state actors’ violations of humanitarian law, and to demand state protection for civilians at risk from the actions of non-state armed actors.

How do protection measures work on the ground? How do they help states expand the rule of law and curb abuses by their own armed

forces as well as threats from insurgents, paramilitary armies and criminal outfits? This brief makes reference to the successful experience of the Kankuamo people in Colombia, and the complex relation between protection measures and actions taken by both the state and Kankuamo authorities to curb violence against civilians.

Case study: The Kankuamo of Colombia

Since 1964, Colombia has been engaged in a protracted civil conflict that has entailed the presence of guerrillas, counterinsurgency operations, paramilitary death squads, and the devastating effects of the militarization of the so-called “War on Drugs”. In the early 2000s, the United Nations Rapporteur on Indigenous Rights warned that the violence perpetrated against the Kankuamo by the paramilitary, the FARC and the Colombian armed forces amounted to ‘ethnic cleansing, genocide and ethnocide’. In 2003, the Kankuamo obtained collective precautionary measures from IACHR. In 2004, the Kankuamo were given collective provisional measures by the IACtHR. The Kankuamo went through processes of negotiating the content of both measures with the government.

The negotiation of the content of the protection measures forced the government to engage with Kankuamo demands for a fuller spectrum of rights protection, as the Kankuamo demands fleshed out a definition of protection which included a substantial enjoyment of socioeconomic rights. These included more and better social and ethnic education programmes for Kankuamo youth (to preempt recruitment into armed groups); the strengthening of indigenous authorities and self-government; a larger collective territory (known as *resguardo*), and the free flow of food and medicines into the territory.

They also included demands directly related to the practice of selective murders, such as compensation for victims and their families, investigation of past crimes, the withdrawal of all military personnel from Kankuamo territory, and that the government take specific actions to counter the view that Kankuamo were insurgent sympathizers and collaborators (*guerrilleros*). The Kankuamo also asked for measures that included the protection of the environment from harmful development programmes, which were seen as altering a delicate cosmic balance.

The measures actually agreed did not include

all Kankuamo demands, but did include an increased presence of the armed forces in Kankuamo territories, better communications between Kankuamo authorities and state officials, better communications between the *resguardo* and the nearby urban centre, as well as food aid, and increased education and health care services under culturally sensitive models. The negotiation process also had the effect of strengthening Kankuamo traditional leadership as well as links between the Kankuamo and other indigenous and civil society organizations, especially human rights NGOs.

From 2005, following the adoption of the measures, there was a dramatic decrease in selective murders of Kankuamo, and forced displacement slowly subsided. This decline however also coincided with the peace agreement with the paramilitary and the subsequent demobilization process (the 2005 Justice and Peace Law), and investigation into the links between the local army unit and paramilitary armies.

Shortly thereafter the Colombian state began efforts to have the measures lifted. In 2011, the IACtHR lifted the measures with reference to the improved security situation for the Kankuamo.

Protection Measures as Expansion of State Presence

The Kankuamo territory that had been disputed between insurgent armies and the joint actions of the Colombian army and the paramilitary fell under full state control during the period in which the Kankuamo had protection measures. In significant ways, the measures strengthened this process. In the Kankuamo case, state expansion and control can be found in:

Increased presence of the Colombian Army, but under the vigilance of NGO and state human rights bodies in communication with the Kankuamo. This meant more rule of law controls for the state armed forces.

Increased contact between the Kankuamo and state officials, including meetings at the highest levels of governments, and informal and romantic liaisons at the very local level.

Increased presence of the state in the mode of providing social and economic rights to Kankuamo (such as food, healthcare and education).

Increased legitimacy of civilian authorities, in this case Kankuamo traditional authorities, through state respect for local authorities and through channelling social and economic rights enjoyment through Kankuamo traditional authorities.

Decreased illegal actions by state armed forces, especially the demobilization of its paramilitary allies.

Self-Protection Efforts: Local Specificity but Global Relevance

To properly imagine PoC as a spectrum of possibilities also requires a careful assessment of how external PoC efforts intersect with the specific self-protection efforts of civilians. The practices of the Kankuamo illustrate the importance of properly understanding and analytically incorporating such efforts. For the Kankuamo, violence among humans is directly linked to a lack of respect for their ancestral territory of the Sierra Nevada. For self-protection, the Kankuamo relied on a programme of cosmic rebalancing and active neutrality operating in tandem with a quest for international protection measures and other legal actions such as the courting of human rights NGOs and international bodies.

For the Kankuamo, the objective of cosmic rebalancing is a key part of a religious or spiritual dimension of security. The proper type of behavior and offerings in specific sacred sites ensure harmony between humans and nature and among humans.

The adoption of a self-protection programme had the goal of curtailing the civil war dynamics that led to selective murders of supposed guerrilla collaborators through active neutrality. This 'active neutrality' can be grouped in three categories:

Relying only on traditional indigenous authorities to solve disputes and to lead collective decision-making processes limits the influence of insurgent and paramilitary armies whose claim to local authority is often first established through dispute-resolution for local problems.

'Active' non-collaboration with armed actors entails many actions designed to keep all armed actors at arm's length from communities, including not sharing thoughts, feelings or wor-

ries of any sort with armed actors, no socializing with them, not gossiping about fellow Kankuamo with armed actors, or not asking them for help of any kind.

Insistence on the right to civilian neutrality includes demanding respect for the rules of international humanitarian law from all armed actors, including armed actors that are part of the Colombian state such as the Police and the Army.

Conclusion

This brief has expanded upon Agenda for Humanity's call for greater compliance with international law as a means towards PoC.

The elaboration and implementation of legal protection measures often involve wide power disparities between negotiating partners. Nevertheless, legal protection measures also have both a reactive and preventive quality; in the case of the Kankuamo, they operated in tandem with self-protection efforts to increase resilience against incursions from armed actors. Finally, we argue that in states with some capacity to protect, PoC can be imagined as the extension of the rule of law to peripheries disputed with insurgent and paramilitary armies as well as criminal outfits. ■

The Kankuamo Perception of the Measures as 'Protection'

The Kankuamo perceived that the measures brought increased respect from the state, and recognition of indigenous authorities. Most importantly, they brought the plight of the Kankuamo to the attention of national and international authorities, and enabled the negotiation of what Kankuamo leadership describe as 'integral' measures, of socio-economic character. This included food aid and ethnically appropriate health care and education.

The Kankuamo also identified a set of negative effects resulting from the measures including militarization; police presence; the recruitment of Kankuamo informers for the Army; and romantic liaisons between young Kankuamo women and soldiers/policemen which sometimes resulted in pregnancies.

The lifting of measures was not seen as a serious blow to the Kankuamo struggle for security or cultural survival. The Kankuamo leadership noted that the protection measures were only 'part of the tool box', and had to be seen in the context of other self-protection strategies.

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THE PROJECT

Protection of Civilians: From Principle to Practice aims to ascertain the role and impact of contemporary policies and practices of PoC. The project is organized under the auspices of PRIO and the Norwegian Centre for Humanitarian Studies. We are grateful to the Kankuamo leadership and to Benjamin De Carvalho.

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