Peacekeeping in the Anthropocene: the Effects of Climate Change and Positive Human Rights Obligations in 'Protection of Civilians' Mandates

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Abstract

This contribution argues for a climate-sensitive reading of the mandate of peacekeeping operations. In recent years, the recognition has taken hold that climate change constitutes both one of the greatest current threats to human rights as well as a significant amplifier of conflict. In a number of host countries to peacekeeping operations, the magnitude of the effects of climate change and their impact on the physical well-being of local populations became increasingly clear. Against that background, the contribution argues that 'protection of civilians' ('POC') mandates may translate into certain positive human rights obligations of international organizations ('IOS') and Troop Contributing Countries ('TCCS') in the context of climate change effects. The contribution highlights several legal questions arising against the background of a quickly developing policy framework, including on attribution and the extraterritorial applicability of human rights. The argument is developed in regard to the United Nations Mission in South Sudan ('UNMISS'), which in late 2022 has seen large-scale flooding threatening the largest UNMISS protection of civilians site in Bentiu, hosting over 100,000 internally displaced persons (IDPS). It concludes by setting out what a climate-sensitive reading of UNMISS' POC mandate might entail from a human rights perspective.

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Keywords

peacekeeping operations – United Nations – protection of civilians – human rights – climate change – climate security – UNMISS – positive obligations

1 Introduction*

In recent years, the recognition that climate change constitutes one of the greatest current threats to human rights has taken hold. In 2022, the United Nations General Assembly ('UNGA') affirmed at the universal level that climate change was one of the 'most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights',[1] echoing the consensus of the international community. More particularly, several (quasi-) judicial (human rights) bodies at the international and domestic levels have found human rights violations in the context of the effects of climate change owing to the failure of States to take adequate measures.

In *Torres Strait Islanders*, the United Nations Human Rights Committee ('HRCttee') found that Australia had failed to take 'to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family'[2] and '[failed] to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life',[3] violating their right to enjoy culture and family life. In *Urgenda*, the Dutch Supreme Court emphasized that the protection afforded by human rights in the context of climate effects 'is not limited to specific

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1 UNGA Res 76/300, 'The Human Right to a Clean, Healthy and Sustainable Environment' (1 August 2022).

2 HRCttee, 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning Communication No. 3624/2019' (22 September 2022) UN Doc. CCPR/C/135/D/3624/2019, at para. 8.12.

3 Ibid., at para. 8.14.

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persons, but to society or the population as a whole'[4] and 'also encompasses the duty of the State to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain'.[5] Similar judgments have been issued in a range of different jurisdictions, including Brazil, Colombia, Germany, South Africa and the United States of America.[6] It is thus firmly established that the nature of climate change and its effects evokes positive human rights obligations of States.

The effects of climate change not only endanger human rights but have a 'multiplier effect' by constituting 'an aggravating factor for instability, conflict and terrorism'.[7] Climate change, therefore, has significant security implications. It deepens an already existing interconnection, as armed conflict is prone to lead to environmental degradation,[8] which in turn can amplify the issues underlying the conflict. In particular, climate change constitutes an 'amplifier of conflict' by, e.g., contributing to food or water scarcity, the loss of livelihoods or changing mobility patterns.[9]

In many ways, the nature of climate change as a 'dual threat' to security and human rights leads to particular challenges and responsibilities for peacekeeping operations. This follows from their geographical area of operation:[10] in December 2020, the vast majority (80 %) of personnel deployed in UN peace

4 *The State of the Netherlands v Stichting Urgenda* [2020] Supreme Court of the Netherlands 19/00135, at para. 5.3.1.

5 Ibid., at para. 5.3.2.

6 For an overview see Climate Case Chart, available at <http://climatecasechart.com> (accessed 28 September 2023).

7 UN Secretary General, 'Climate Change "a Multiplier Effect", Aggravating Instability, Conflict, Terrorism, Secretary-General Warns Security Council' (9 December 2021) UN Doc. SG/SM/21074.

8 See already UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc. A/CONF. 151/26/Rev.1 (Vol. I), at 3, Principle 24.

9 See the interview with UN Environment Executive Director Erik Solheim at Jimena Leiva Roesch, J.L. Roesch, 'Making the Environment an Ally for Peace: Q&A with Erik Solheim' (26 May 2017) IPI Global Observatory, available at <https://theglobalobservatory.org/2017/05/environment-peace-sustainable-development/> (accessed 2 February 2023); UNSC, 'Protection of Civilians in Armed Conflict: Report of the Secretary-General' (10 May 2022) UN Doc. S/2022/381, at para. 4.

10 Studies have shown that more than 23% of conflict outbreaks in ethnically highly fractionalized countries occur in the context of climate disasters. See C.-F. Schleussner et al., 'Armed-Conflict Risks Enhanced by Climate-Related Disasters in Ethnically Fractionalized Countries' (2016) 113(33) Proceedings of the National Academy of Sciences of the United States of America 9216.

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operations were deployed in countries most exposed to climate change,[11] and the effects of climate change in host countries have continuously become more evident. In the last years, several host States have experienced large-scale climate-related disasters. For instance, South Sudan – host of the United Nations Mission in South Sudan ('UNMISS') – faced droughts and severe flooding, leading to the displacement of almost 85,000 people and changing livestock migration patterns, creating new conflicts with host populations.[12] Starting in 2021, this reality has also found reflection in the underlying UN Security Council ('UNSC') resolutions, which now recognize 'the adverse effects of climate change, ecological changes, and natural disasters […] on the humanitarian situation and stability in South Sudan'.[13]

Against this background, this contribution argues for a climate-sensitive reading of the mandate of peacekeeping operations. This argument will be developed with a particular view of UNMISS – as one of the first peacekeeping missions receiving an express mandate with regard to climate change effects – and includes the claim that the 'protection of civilians' ('POC') mandate translates into certain positive human rights obligation of international organizations ('IOs') – particularly the United Nations ('UN') – and Troop Contributing Countries ('TCCs') in the context of climate change effects. While by no means intended as a comprehensive exercise regarding the intersection of peacekeeping operations, human rights and the effects of climate change, the following highlights several legal questions arising against the background of a quickly developing policy framework. It concludes by setting out what a climate-sensitive reading of UNMISS' POC mandate might entail from a human rights perspective.

11 F. Krampe, 'Why United Nations Peace Operations Cannot Ignore Climate Change' (22 February 2021) Stockholm International Peace Research Institute, available at <www.sipri.org/commentary/topical-backgrounder/2021/why-united-nations-peace-operations-cannot-ignore-climate-change> (accessed 27 March 2023).

12 A.E. Yaw Tchie and K. Tarif, 'Climate, Peace and Security: The Case of South Sudan' (24 March 2021) Accord, available at <www.accord.org.za/analysis/climate-peace-and-security-the-case-of-south-sudan/> (accessed 27 March 2023); see also Nonviolent Peaceforce, 'Responding to Crisis Multiplied: Climate, Conflict, and Unarmed Civilian Protection' (April 2022), available at <https://nonviolentpeaceforce.org/wp-content/uploads/2022/04/Climate_Crisis_UCP.pdf> (accessed 27 March 2023).

13 UNSC Res 2567, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2022' (12 March 2021), at 4.

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2 Human Rights Obligations of the UNMISS Operation

2.1 *Overview*

In 2011, in parallel to South Sudan gaining independence, the UN Security Council established UNMISS under Chapter VII to 'consolidate peace and security, and to help establish the conditions for development in the Republic of South Sudan'.[14] UNMISS was the follow-up mission to the United Nations Mission in Sudan ('UNMIS', 2005–2011) and operates with and among a variety of actors, including the African Union ('AU'), the African Intergovernmental Authority on Development ('IGAD'), the European Union ('EU') and the World Bank. Following the eruption of violence in late 2013, including targeted ethnic killings, the UN compounds were opened, and several 'Protection of Civilians sites' were set up to provide a sanctuary for those fleeing.[15] In consequence, the Security Council strengthened the mandate of UNMISS and reprioritized from State-building 'towards the protection of civilians, human rights monitoring and support for the delivery of humanitarian assistance'.[16] The area of operation of UNMISS remains notably complex and after decades of war, the World Bank describes South Sudan as heavily 'impacted by fragility, economic stagnation, and instability. Poverty is ubiquitous and is exacerbated by conflict, displacement, and external shocks'.[17] Particularly following the outbreak of the 2013 civil war, UNMISS has documented continuous human rights violations by State and non-State groups[18] and remains entangled in a 'fractured regional process'.[19]

The current mandate of UNMISS is laid down in UNSC Resolution 2677 (2023), which authorizes the mission 'to use all necessary means' for its

14 UNSC Res 1996, 'On Establishment of the UN Mission in South Sudan (UNMISS)', (8 July 2011), at para. 3.

15 A. Day et al., *Assessing the Effectiveness of the UN Mission in South Sudan* (*UNMISS*) (Norwegian Institute of International Affairs 2019) EPON Report 2/2019, at 47–48 and 58–66.

16 R. Murphy, 'The United Nations Mission in South Sudan and the Protection of Civilians' (2017) 22 Journal of Conflict & Security Law 367, at 368–369.

17 World Bank, 'The World Bank in South Sudan', available at <www.worldbank.org/en/country/southsudan/overview> (accessed 27 March 2023).

18 For the most recent brief see Human Rights Division UNMISS, 'Brief on Violence Affecting Civilians' (October–December 2022), available at <https://unmiss.unmissions.org/sites/default/files/hrd_q4_brief_2022_civcas_final_final_16feb_1.pdf> (accessed 27 March 2023).

19 Day et al., *Assessing the Effectiveness of the UN Mission in South Sudan*, at 43.

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implementation. The most pertinent aspect for the present purposes constitutes the POC mandate.[20] In line with the UN's overall policy on such POC mandates,[21] the UNSC resolution directs UNMISS 'to ensure effective, timely, and dynamic protection of civilians under threat of physical violence, irrespective of the source or location of such violence'.[22] This in particular includes that the mission shall,

> identify and deter threats and attacks against civilians, including through strengthened implementation of a mission-wide early warning and response system that draws upon robust conflict-sensitive analysis, regular interaction with civilians including with Community Liaison Assistants, and close consultations with humanitarian, human rights, civil society, and development organizations, in areas at high risk of conflict, in particular when the [Government of South Sudan] is unable, or fails, to provide such security,[23]

as well as

> maintain public safety and security of and within UNMISS protection of civilians sites, and where protection of civilian sites have been re-designated, to protect civilians in those re-designated sites, irrespective of the source of violence, to maintain a flexible posture linked to threat analysis, to rapidly respond to threats in other locations, to promptly develop contingency plans for protecting civilians in both the protecting of civilian and re-designated sites in a crisis, and ensure the ability

20 In addition, UNMISS is mandated to create conditions conducive to the delivery of humanitarian assistance, to support the implementation of the political peace process, as well as to monitor, investigate and report violations of international humanitarian law and international human rights law, see UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024', (15 March 2023), at para. 3.

21 The UN Department for Peace Operations defines POC as 'without prejudice to the primary responsibility of the host State, integrated and coordinated activities by all civilian and uniformed mission components to prevent, deter or respond to threats of physical violence against civilians, within the mission's capabilities and areas of deployment, through the use of all necessary means, up to and including deadly force', see UN Department of Peace Operations, *Policy: The Protection of Civilians in United Nations Peacekeeping* (revised edn, United Nations 2022), at para. 18.

22 UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024', at para. 3(a)(i).

23 Ibid., at para. 3(a)(i), Point 3.

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> to scale up presence and protection of re-designated sites if the security situation deteriorates,[24]

and

> foster a secure environment for the safe […] return, relocation, resettlement or integration into host communities for IDPs and refugees […] including through monitoring of and promoting respect for human rights.[25]

While UNMISS, therefore, has the legal authority to use force to protect civilians, there is little clarity on 'what personnel *should* or *must* do to prevent, deter or respond to threats of physical violence'.[26] While its earlier mandate contained a number of caveats and spoke of 'imminent'[27] threats, the current policy allows and pushes for long-term preventive action through the three tiers of POC action, i.e. protection through dialogue and engagement (Tier 1), the provision of physical protection (Tier 2), and the establishment of a protective environment (Tier 3).[28] Hence, all three of these tiers are 'interwoven into the mission strategy'[29] of UNMISS. However, the lack of any express link to international humanitarian or international human rights law has led to uncertainties on whether any specific obligation to act can be deduced from this concept or whether it remains a discretionary right of peacekeepers.[30]

On a general level, Clapham explains the resistance to including a more express human rights perspective or human rights law into UN peacekeeping mandates by both political hesitation and the possibility that 'we may be faced with considerable ignorance or prejudice among diplomats and members of the UN Secretariat concerning what are "human rights" and what are the obligations that surround them'.[31] Yet, as reaffirmed in the *Leuven Manual on the*

24 Ibid., at para. 3(a)(i), Point 4.
25 Ibid., at para. 3(a)(v).
26 A. Gilder, 'The UN and the Protection of Civilians: Sustaining the Momentum' (2023) 28 Journal of Conflict and Security Law 1, at 2 (emphasis in original).
27 UNSC Res 1966, 'On Establishment of the International Residual Mechanism for Criminal Tribunals with Two Branches and the Adoption of the Statute of the Mechanism', (22 December 2010), at para. 3(b).
28 UN Department of Peace Operations, *Policy*, at para. 40.
29 Gilder, 'The UN and the Protection of Civilians', at 13.
30 E. Paddon Rhoads and J. Welsh, 'Close Cousins in Protection: The Evolution of Two Norms' (2019) 95(3) International Affairs 597, at 601.
31 A. Clapham, 'Protection of Civilians under International Human Rights Law' in H. Willmot et al. (eds), *Protection of Civilians* (Oxford University Press 2016) 141, at 142.

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International Law Applicable to Peace Operations, international human rights law 'is, in principle, applicable at all times [...] [and] is, consequently, a legal regime that is, in principle, applicable to all Peace Operations'.[32] As the double use of the qualifier 'in principle' shows, the application of human rights obligations to the field of peacekeeping is not straightforward, though.

In the context of UN peacekeeping operations,[33] a series of issues remain subject to heated discourse. This includes, in particular, the question of whether the UN is bound directly – or at least indirectly – by international human rights law, which forms such obligations could take (and in particular whether or how far they encompass positive obligations), when the conduct of deployed peacekeeping forces is attributable to the UN, to the respective TCC or potentially both, and to what extent human rights obligations of TCCs apply in an extraterritorial context. The following highlights some of these issues from the viewpoint of UNMISS and against the background of current case law and doctrine. However, it also seeks to contribute to existing debates by making normative arguments. In particular, the argument is advanced that case law on the extent of extraterritorial human rights obligations of States may be utilized to develop an appropriate level of obligations incumbent upon international organizations.

2.2 *UN Peacekeeping Operations and Human Rights – Normative Expectations in Light of the Exercise of Authority*

International legal practice has long struggled with extending concepts of international obligations and questions of responsibility beyond State actors.[34] Even though there is an increasing awareness and growing account of human rights violations by international organizations – particularly in the context of peace operations[35] – uncertainty prevails when it comes to identifying the legal basis of obligations. This, however, constitutes an essential prerequisite

32 T. Gill et al., *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press 2017), at 76. The *Leuven Manual on the International Law Applicable to Peace Operations* has to date compiled the most comprehensive restatement of law in the field of peace operations (consisting of 145 black-letter rules), as well as provided best practice guidance for future operations.

33 Additional difficulties arise given the wide range of international organizations involved, with varying legal frameworks on the issue. However, this article only explores this question with regard to the UN.

34 For an overview of the range of non-State actors to consider in this context see especially J. Summers and A. Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill 2018).

35 Particularly widely discussed are the allegations of human rights violations which surfaced in connection with the UN peacekeeping operation in Haiti (United Nations Stabilization Mission in Haiti, 2004–2017). See most recently R. Freedman, N. Lemay-Hébert and

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for applying the general principle of international legal responsibility to international organizations (see especially also Art. 4(b) of the Articles on the Responsibility of International Organizations ('ARIO')).[36] While this question raises a series of questions also on a general level,[37] the level of difficulty increases when it comes to the particular case of human rights obligations of UN peacekeeping operations.[38]

Given that the UN is not party to any human rights treaty, and in light of the principle of *pacta tertiis nec nocent nec prosunt*,[39] the applicability of human rights obligations must be established by some other means. It has been suggested that the UN Charter in itself might serve as a basis of such obligations – by either constituting a human rights treaty,[40] enshrining human rights

S. Wills, *The Law and Practice of Peacekeeping. Foregrounding Human Rights* (Cambridge University Press 2021).

36 UN ILC, 'Draft Articles on Responsibility of International Organizations' in *Yearbook of the International Law Commission, 2011, Vol. II, Part Two* (United Nations 2018) 40 ('ARIO').

37 For a recent detailed overview, see S. Bayani, *International Legal Personality of International Organizations in the ILC Draft Articles and Beyond* (Göttingen University Press 2022), at Chapter Two (43–126).

38 In contrast to UN peacekeeping operations, it is widely recognized that EU operations are bound by EU fundamental rights law. See, e.g., A. Sari and R.A. Wessel (eds), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* (CLEER Working Papers 2012/6), at 7; Art. 21 Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) [1992] OJ C191/1, notes (less explicitly) that '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

39 See, however, arguments such as by Schermers and Blokker that posit that since international treaties have been drafted 'by representatives of nearly all States with the intention of creating universal law' and international organizations cannot advance similar grounds as States for not ratifying such treaties '[t]hey will have to apply the main substantive provisions of general law-making treaties such as the Red Cross Conventions', see H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (Brill 2018), at 1043. For an investigation into a number of arguments on whether the UN might nevertheless be bound by human rights through means of treaty law see N. Quénivet, 'Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties' (2010) 42 George Washington International Law Review 587, at 620, concluding that while 'the United Nations *should* be bound by human rights norms […] the current State of the law is unsatisfactory to say the least' (emphasis in original).

40 Focus is placed on the fact that the UN Charter mentions human rights in the Preamble as well as Arts 1(3), 13 and especially 55(c). See, e.g., R. Wolfrum and E. Riedel, 'Article 55(c)' in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1565, at para. 8: '[T]here is a wide consensus today that the Article

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as (secondary) goals of the UN that curtail and shape the powers of its organs (particularly the UNSC)[41] or by serving as a 'constitution' and thereby being a 'living instrument'[42] which has evolved to include also core human rights treaties which have been promoted by the UN. However, these Charter 'obligations' – if they in fact may be interpreted as such – primarily bestow on the UN an obligation to *promote* and *encourage respect* for human rights;[43] beyond that, they remain rather vague. Hence, and even though institutional and operational practice has increasingly recognized the role of human rights in peace operations,[44] it remains unanswered whether human rights are enshrined into mission-specific and strategic guidance 'solely' because they support the overall objectives of these missions, or whether they translate into actual human rights obligations and thus may serve as yardsticks for accountability.

Unlike with regard to international humanitarian law ('IHL'),[45] the UN has so far refrained from adopting clear guidance on applicable human rights

legally obligates not only the world Organization itself (e.g., during UN peace keeping missions), but also the member States to respect and protect human rights'.

41 See E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004), at 192 ff., with the specific example of Art. 24(2) UN Charter: 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.

42 B. Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter* (UN Office of Legal Affairs 2006), at Part 8, 24–27.

43 F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 Human Rights Quarterly 314, at 318–319, quoting Schwarzenberger's early observation that 'in the Charter, a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The one is entrusted to the United Nations. The other remains the prerogative of each Member State', see ibid., at 320; see also C. Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 Journal of Conflict and Security Law 451, at 453.

44 For an overview of the historical evolvement of the role of human rights in institutional practice see S. Maus, *United Nations Peace Operations and Human Rights: Normativity and Compliance* (Brill 2020), at 38–61.

45 UN Secretary-General, 'Bulletin on the Observance by United Nations Forces of International Humanitarian Law' (1999) UN Doc. ST/SGB/1999/13. As detailed in C. Binder and J.A. Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization: An International Law Perspective' in F.L. Bordin, A.T. Müller and F. Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022) 7, at 26 ff., the UN was initially also reluctant to confirm this with regard to IHL.

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obligations (with the notable exception of the case of sexual exploitation and sexual abuse[46]). As indicated above, this may be for political reasons, but also might be owed to practical concerns.[47] However, it is hard to conceive why organs that are established through international law instruments should escape the rules of international law more easily than even (newly emerging) States.[48] Arguments therefore frequently relate to how international organizations might be bound by general international law, particularly customary international law and general principles of law,[49] and that human rights law – in principle,[50] but more certainly the right to life[51] – qualifies as such.[52] Even

46 UN Secretary-General, 'Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (2003) UN Doc. ST/SGB/2003/13.

47 As argued, e.g., by A. Aust, 'The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioners' View' in E. de Wet and A. Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 31.

48 Binder and Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization', at 14–15.

49 See especially K. Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325, at 359 ff., arguing that international organizations should be seen as 'peers' in relation to States and thus be bound by *jus cogens* rules and general international law.

50 Scholars (and international courts/tribunals) only seldomly have engaged with the methodological task of establishing the customary basis of specific human rights. It is at times assumed that the Universal Declaration of Human Rights and the two human rights covenants together constitute the core basis of the international human rights catalogue. See, e.g., the overview provided by H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287.

51 While it has been noted that there remain 'methodological difficulties and deficiencies in the process of identification', see M. Beham, 'Customary International Law' in C. Binder et al. (eds), *Elgar Encyclopedia of Human Rights. Vol. 1* (Edward Elgar 2022) 428, at para. 57, it seems undisputed that the right to life is recognized as customary international law. See especially S. Casey-Maslen, *The Right to Life under International Law: An Interpretative Manual* (Cambridge University Press 2021), at 735. In more detail, see below Part 3.

52 *Prosecutor v Rwamakuba* (*Decision on Appropriate Remedy*) [2007] Case No. ICTR-98-44C-T, at para. 48: '[T]he Tribunal, as a special kind of subsidiary organ of the UN Security Council, is bound to respect and ensure respect for generally accepted human rights norms. Indeed, the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights. This result is in keeping with the United Nations' stated purposes as well as its internal practices. According to its constitutional instrument, one of the purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all'. [footnotes omitted]; for the argument that human rights – at least in their core as enshrined in the Universal Declaration of Human Rights – constitute customary international law see O. De Schutter, 'Human Rights and the Rise of International Organizations: The Logic

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though this claim seems to adhere to our (moral) expectations, it often fails to convince in conceptual terms. While the overwhelming majority would agree that international organizations are bound at least in principle by customary international law,[53] most international organizations – including the UN – lack the capacity to uphold all duties linked to human rights. This follows from the nature of *de jure* or *de facto* authority exercised by international organizations over individuals, which depends on specific competences transferred to them by (member) States. It is therefore generally limited in scope,[54] even though there have been isolated instances where such transferral essentially functionally replaced State authorities (such as UNMIK in Kosovo[55] and UNTAC in Cambodia). Yet, even here, the UN – through the Special Representative of the Secretary-General – has argued that it should 'not be held subject to the same standard as a properly operational State with functional institutions'.[56]

Against this background, Besson, for example, argues for a more differentiated account of human rights duty bearers, distinguishing between those actors who owe human rights *obligations* (primary human rights duty-bearers, including States and international organizations such as the EU which exercise jurisdiction over the respective individuals) and others that have human rights *responsibilities* (secondary duty-bearers, including the UN).[57] This still affirms

of Sliding Scales in the Law of International Responsibility' in J. Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 51. For general principles of law see N. Kaufman Hevener and S.A. Mosher, 'General Principles of Law and the UN Covenant on Civil and Political Rights' (1978) 27(3) International & Comparative Law Quarterly 596.

53 Largely resting on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (*Advisory Opinion*) [1980] ICJ Rep 73, at 89, para. 37: '[I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'. See, e.g., E. Benvenisti, *The Law of Global Governance* (Brill 2014) 99. See, however, J. Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organizations Law Review 151, at 165, noting that 'the discipline may claim, following the ICJ in 1980, that international organizations are subjects of international law, and thus also subject to international law but it remains unclear which international law and why: there is no plausible theory of obligation'.

54 See, e.g., A. Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131, at 137, discussing the possibility of 'functional' treaty succession in cases where certain 'governance' tasks are transferred to international organizations.

55 UNMIK, 'Regulation No. 1999/24' (1999) UN Doc. UNMIK/REG/1999/24.

56 As summarized and discussed by C.M. Chinkin, 'United Nations Accountability for Violations of International Human Rights Law' (2019) 395 *Recueil des Cours* 205, at 247–248.

57 S. Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution' (2015) 32 Social Philosophy & Policy 244, at especially 253–265.

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the applicability of human rights *in principle* – and therefore answers to the underlying concern that Member States should not be allowed to circumvent their own obligations by transferring certain competences, e.g., in the field of peace and security, to the UN.[58] Moreover, it provides sufficient basis for overcoming the long-held assumption that the conduct of international organizations is beyond scrutiny and always serves the noble causes as laid out in their founding documents. While this makes a convincing normative argument, it also does not detract from the primary obligation of (host) States to ensure human rights.

In the context of peacekeeping operations, legal disputes have often arisen regarding the duties of TCCs, whose responsibility is rather exceptional in light of rules on attribution (as discussed in the following). On the normative level, the question arises of how to construct reasonable human rights responsibilities of international organizations in light of their limited authority. This paper argues that finding an answer to this may be informed by another type of situation – namely the issue of extraterritorial application of human rights treaties. While the two situations are not comparable in their entirety, there are important similarities: both are characterized by individuals being subject to the (primary) responsibility of the territorial State, while being affected by the exercise of (limited) legal or factual authority by another actor. In that context, case law on extraterritorial applicability has managed to 'divide and tailor'[59] human rights obligations of States to fit the specific situation. The following touches upon that case law as exemplifying an additional hurdle of the responsibility of TCCs, as well as highlighting when responsibilities of the UN might be appropriate.

2.3 *Attribution of Conduct*

UNMISS is exemplary of a multi-layered peacekeeping operation consisting of a wide variety of different actors and exercising some public authority in a conflict-ridden environment. The question of attribution of conduct therefore arises as a preliminary issue to the determination of potential responsibility

58 See, e.g., de Wet, *The Chapter VII Powers of the United Nations Security Council*, at 195 ff., making the argument on the basis of good faith arising out of Art. 2(2) UN Charter, in connection with the UN's focus on promoting human rights: 'By promoting human rights in this manner, the United Nations created the expectation of respect for these rights on the part of the organisation itself', see ibid., at 199–200; see also G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011), at 55–90.

59 See *Al-Skeini and Others v the United Kingdom* [2011] ECtHR App 55721/07 ('*Al-Skeini*'), at para. 137.

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for the failure to ensure adequate adaptation or mitigation measures to protect civilians from harm arising from climate change-related effects.

The allocation of responsibility between the international organization(s) which established and/or implemented the operation and the TCCs remains a complex matter and is very much dependent on the specific institutional framework of authorization, the command structure as well as the actual exercise of influence surrounding particular conduct. Particularly in the context of POC mandates, it has been observed that '[a]ttributing responsibility to a specific actor for a POC shortcoming is challenging due to the UN's multidimensional, integrated approach to POC – an approach made necessary by the multilayer and complex nature of threats to civilians'.[60] Bearing this in mind, the commentary on Art. 7 ARIO likewise notes that the standard of effective control required for attributing the conduct of State organs placed at the disposal of an international organization to this entity very much relies on the 'factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'.[61]

As an UN-led peacekeeping operation, UNMISS is classified as a subsidiary organ of the UNSC,[62] with the UN itself contending that there is a presumption that it generally exercises effective control over such missions, given that the troops operate under the authority of the UNSC and the military commander who is appointed by a Special Representative of the Secretary-General.[63] Yet, even if the UN will bear (at least some degree of) responsibility for the conduct of UN-led peacekeeping operations in most instances, in practice this results in a notable gap[64] when it comes to access to justice for potential human rights

60 N. Di Razza, *The Accountability System for the Protection of Civilians in UN Peacekeeping* (International Peace Institute 2020), at 9.

61 UN ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' in *Yearbook of the International Law Commission 2011, Vol. II, Part Two* (United Nations 2018), at commentary to Art. 7, para. 4.

62 Art. 15 Status of Forces Agreement between the UN and the Governmental of the Republic of South Sudan concerning the United Nations Mission in South Sudan (8 August 2011). See also *Certain Expenses of the United Nations* (*Advisory Opinion*) [1962] ICJ Rep 151, at 176.

63 'Memorandum of 3 February 2004 by the UN Legal Counsel to the Director of the Codification Division', as compiled in UN ILC, *Yearbook of the International Law Commission 2004, Vol II, Part One* (United Nations 2010), at 28; Binder and Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization', at 35.

64 On the accountability gap when it comes to UN human rights violations see, e.g., T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51

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victims. The UN is neither subject to review by any international human rights monitoring body nor is it possible to hold the UN accountable at the domestic level due to its immunity. Despite certain recent efforts on a policy level aimed at improving accountability,[65] the UN has so far also failed to establish effective alternative complaint mechanisms for affected individuals in cases of failures to prevent gross human rights violations, even when aware of the risk or having specific knowledge of a particular threat.[66] This is particularly pronounced when it comes to questions of *legal accountability*, with the UN only possessing limited legal authority over deployed personnel, and so far also strongly reluctant to acknowledge legal responsibility, e.g., when claims relate to questions of operational policy.[67] While authors have more recently emphasized the growing importance of non-judicial or quasi-judicial grievance mechanisms

Harvard International Law Journal 113; H. Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?' (2015) 62 Netherlands International Law Review 259; Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations*; C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017); S.Ø. Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge University Press 2020); M. Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations* (Edward Elgar 2020); J. Klabbers, 'Responsibility as Opportunism: The Responsibility of International Organizations' in S. Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press 2022), at 119.

65 See, e.g., UNSC Res 2436, 'On Developing a Comprehensive and Integrated Performance Policy Framework for UN Peacekeeping Operations' (21 September 2018).

66 A recent paper by the International Peace Institute shows how the majority of investigations which have been initiated in the context of failures to adequately perform POC mandates have remained confidential or limited in approach, see Di Razza, *The Accountability System for the Protection of Civilians in UN Peacekeeping*.

67 For an overview see especially C. Foley, *UN Peacekeeping Operations and the Protection of Civilians* (Cambridge University Press 2017), at 223–224. See also the UN Standard of Conduct in relation to UN Field Missions, United Nations, 'Conduct in UN Field Missions', available at <https://conduct.unmissions.org/documents-standards>. While several hundreds of complaints have been filed with regard to UNMISS, there are no complaints possible when it comes to questions of human rights (outside of claims relating to sexual exploitation/abuse) or operational policy. As Schmalenbach has observed, 'international organizations are often very generous in terms of their willingness to pay compensation, but they remain vague about their legal obligation to do so in order to avoid setting a precedent', see K. Schmalenbach, 'Third Party Liability of International Organizations: A Study on Claim Settlement in the Course of Military Operations and international Administrations' (2006) 10 International Peacekeeping: The Yearbook of International Peace Operations 33, at 40.

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in the context of international financial institutions or transnational corporations[68] and suggested that such an approach may also prove beneficial when it comes to UN peacekeeping operations,[69] this does not alleviate the concerns arising in connection with the prevailing (legal) uncertainty, particularly at the intersection of POC and positive human rights obligations.

For this reason, it remains of crucial importance under which circumstances the responsibility of TCCs may be established, either on their own or in parallel with the United Nations. The multitude of actors involved in peacekeeping operations has raised the question of whether one might also argue for a 'dual or even multiple attribution of conduct'[70] or focus on other forms of derived responsibility (such as aiding and abetting or complicity)[71] to more accurately reflect their interactions and close any accountability gaps. The argument cuts in both ways: on the one hand, acknowledging that both the organization and the involved States (whether host State or TCCs) can simultaneously bear (shared) responsibility responds to the concern that international organizations – wanting to appear as 'guardians of peace and human rights'[72] – often fail to do so and either contribute to or are complicit in human rights violations. On the other hand, it ensures that States cannot relegate their own responsibility by hiding behind the accountability shield of the organization.

68 See, e.g., K.I. Bhatt, *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transitional Development Projects* (Cambridge University Press 2020).

69 N. Samata, 'Reconsidering Access to Justice within the Broad Range of Accountability of International Organizations' (2020) 23 Journal of International Peacekeeping 149.

70 UN ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries', at Chapter II, 54, at para. 4. For the argument that this would address the accountability gap in peacekeeping, see C.F. Tsega, 'The Responsibility of International Organizations for Wrongful Acts in Peacekeeping Operations: The Case for Dual Attribution' (2021) 59 Indian Journal of International Law 301; S.Ø. Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State' (2019) 6 Oslo Law Review 178 (though concluding that true dual attribution is a rare phenomenon). However, other scholars have noted that the 'effective control' standard as applied in the case of peacekeeping operations is an exclusive rather than cumulative notion. See P. d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 Questions of International Law 17, at 31.

71 See, e.g., H.P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20 Journal of Conflict and Security Law 61, at 62; Verdirame, *The UN and Human Rights*, at 201–202; see also E. de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press 2020), at 125–152.

72 Aust, 'The UN Human Rights Due Diligence Policy', at 62.

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More generally, doubts have been raised on whether 'ARIO's attempt to prescribe a single test of attribution applicable to all types of Peace Operations in the form of Article 7 ARIO reflects the law as it currently stands'[73] and that there remains 'legal uncertainty surrounding the ARIO, which are buttressed by only limited practice'.[74] The existing case law also acknowledges the possibility of attribution to a given TCC, insofar as it exercised 'effective control' over particular conduct – while courts varied in how exactly to apply that test, they have generally resorted to a high threshold. The most restrictive position in this context was taken by the Brussels Court of Appeal in *Mukeshimana-Ngulinzira and Others v Belgium*, which denied attribution on the basis that the UN had retained 'ultimate control' over the conduct in question, which was not based on 'direct and precise instructions' of the State.[75] In contrast, according to the Dutch Supreme Court in *Nuhanović*, it was 'not necessary for the State to have countermanded the command structure of the United Nations by giving instructions […] or to have exercised operational command independently'.[76] In the subsequent judgment in *Mothers of Srebrenica*, the Dutch Supreme Court confirmed that the conduct of Dutchbat, the Dutch contingent to the United Nations Protection Force (UNPROFOR), was attributable to the Netherlands as it had assumed effective (factual) control over the conduct once 'Srebrenica had been conquered and after it was decided to evacuate the Bosnian Muslims who had fled to the mini safe area'.[77]

Such a factual assessment necessarily also has to take into account the reason for the attribution of State organs' conduct (normally covered by Arts 4 and 7 ARSIWA) to the UN in the first place: the existence and functioning of

73 See Gill et al., *Leuven Manual on the International Law Applicable to Peace Operations*, at Rule 19.4, para. 3, noting that domestic case law and TCCs have at times applied or argued for also different standards.

74 C. Ryngaert, 'Attributing Conduct in the Law of State Responsibility: Lessons from Dutch Courts Applying the Control Standard in the Context of International Military Operations' (2021) 36(2) Utrecht Journal of International and European Law 170, at 172, noting that this might have been the reason for the Dutch Supreme Court in 2019 to base their argument in *Mothers of Srebrenica* on Art. 8 ARSIWA rather than Art. 7 ARIO.

75 *Mukeshimana-Ngulinzira and others v Belgium and others* (*Appellate Judgment*) [2018] Brussels Court of Appeal, 2011/AR/292, 2011/AR/294, at para. 65; for a critical discussion, see T. Ruys, 'Mukeshimana-Ngulinzira and Others v Belgium and Others' (2020) 114 American Journal of International Law 268.

76 *Netherlands* (*Ministry of Defence and Ministry of Foreign Affairs*) *v Nuhanović* (*Final Appeal Judgment*) [2013] Supreme Court of the Netherlands ECLI:NL:HR:2013:BZ9225, at para. 3.11.3 (English translation).

77 *Mothers of Srebrenica Association et al. v The Netherlands* (*Judgment*) [2019] Supreme Court of the Netherlands ECLI:NL:HR:2019:1284, at para 5.1 (English translation).

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a command and control structure, which foresees that 'operational authority' and 'operational command and control' lies with UN organs.[78] However, past experiences show that this structure might be confronted with certain deviations in practice, e.g., through the incorporation of certain national policy caveats into the transfer of command,[79] or fail to operate or even collapse in the specific instance under investigation, raising the question to what extent the UN truly exercises 'effective control' in a given situation. For example, in the case of UNMISS, a report on its failure to counteract an outbreak of 'unrestrained violence' in the capital, Juba, in mid-2016 observed that 'a lack of leadership on the part of key senior Mission personnel had culminated in a chaotic and ineffective response to the violence',[80] and that 'the Force did not operate under a unified command, resulting in multiple and sometimes conflicting orders to the four troop contingents'.[81] This demonstrates well that while generally, the UN exercises operational authority over the deployed peacekeepers in South Sudan through the Secretary-General and the appointed Head of Mission/Force Commander, the national authorities retain 'command' of their contingents.[82] The specific circumstances of the case are therefore decisive

78 The UN Department of Peace Operations defines operational authority as '[t]he authority transferred by the Member States to the United Nations to use the operational capabilities of their national military contingents [...] to undertake mandated missions and tasks. United Nations Operational Authority over such forces and personnel is vested in the Secretary-General [...] under the authority of the Security Council', see UN Department of Peace Operations, 'Authority, Command and Control in United Nations Peacekeeping Operations' (25 October 2019), at para. 100.

79 See, e.g., T. Dannenbaum, 'Dual Attribution in the Context of Military Operations' (2015) 12 International Organizations Law Review 401, at 422, discussing the UK's national policy caveat in the ISAF command structure in Afghanistan, which led the Court of Appeal in England and Wales in *Mohammed v Secretary of Defence* [2015] EWCA Civ 843 to attribute the relevant conduct in question to the UK.

80 UNSC, 'Letter dated 1 November 2016 from the Secretary-General addressed to the President: Executive Summary of the Independent Special Investigation into the Violence in Juba in 2016 and the Response by the United Nations Mission in South Sudan' (1 November 2016) UN Doc. S/2016/924, at para. 7.

81 Ibid., at para. 9.

82 See also the 2008 *Capstone Doctrine*, which sets out the guiding principles of UN peace operations: 'In the case of military personnel provided by Member States, these personnel are placed under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command. However, once assigned under United Nations operational control, contingent commanders and their personnel report to the Force Commander and they should not act on national direction, particularly if those actions might adversely affect implementation of the mission mandate or run contrary to United Nations policies applicable to the mission'. UN DPKO, 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008), at

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for the determination to whom the alleged actions or omissions should be attributed.

2.4 *Principles of Extraterritorial Application*

As of the end of 2022, the troops in UNMISS were largely contributed by three African States (namely Rwanda, Ethiopia and Ghana), as well as a number of Asian States.[83] With the sole exception of China,[84] all of these TCCs are in principle bound by the International Covenant on Civil and Political Rights ('ICCPR'),[85] with the African countries additionally being parties to the African Charter of Human and Peoples' Rights. However, even in the event that particular conduct is attributable to a TCC (in light of the discussions above), the question arises to what extent such treaties apply outside of the State territory in the context of peacekeeping operations.

The general threshold test for the extraterritorial application of human rights treaties is typically whether affected individuals fall under the 'jurisdiction' of States. This requires a sufficient level of control over either a certain area (the 'spatial model') or over specific individuals (the 'personal model').[86] While human rights obligations of TCCs may in practice rarely be based on the former, the relevance of the latter in the context of peacekeeping operations has been confirmed in the case law of (quasi-)judicial bodies. For instance, the Human Rights Committee considers that the ICCPR

68, available at <https://police.un.org/sites/default/files/capstone_eng.pdf> (accessed 27 March 2023); see also C. Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 346, at 353–354.

83 These include (in descending order of troops) India, Nepal, Bangladesh, China, Mongolia, Pakistan, Thailand, the Republic of Korea, Cambodia, Sri Lanka and Vietnam. For the specific numbers see UN Peacekeeping, 'Troop and Police Contributors', available at <https://peacekeeping.un.org/en/troop-and-police-contributors> (accessed 27 March 2023).

84 China signed the ICCPR on 5 October 1998, but has so far not ratified it. See OHCHR, 'Ratification Status for China', available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=36&Lang=EN> (accessed 27 March 2023).

85 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

86 This was also explicitly confirmed by the African Commission on Human and Peoples' Rights, despite the absence of a jurisdictional clause in the African Charter, see ACHPR 'Mohammed Abdullah Saleh Al-Asad v Djibouti' (4 October 2014) Communication No. 383/10, at para. 134. See in more detail P. Janig, 'Extraterritorial Application of Human Rights' in C. Binder et al. (eds), *Elgar Encyclopedia of Human Rights, Vol. II* (Edward Elgar 2022) 180.

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> applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[87]

Whether a State exercises 'power or effective control' is context-specific, taking into account legal and factual elements. For instance, individuals are under the 'jurisdiction' of a State if they are under the physical control of State organs. In addition, extraterritorial human rights obligations may arise if civilian or military forces of a State exercise certain public powers in the territory of another State, based on the conferral of those powers by agreement with the host State or by virtue of a UNSC resolution.[88] In *Jaloud v the Netherlands*, the European Court of Human Rights ('ECtHR') was concerned with the death of an individual, who was shot at a checkpoint in Iraq operated by the Dutch contingent to the Stabilization Force in Iraq ('SFIR'). The Grand Chamber considered that:

> Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 […] to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its 'jurisdiction' within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the 'jurisdiction' of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention.[89]

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87 HRCttee, 'General Comment No. 31: The Nature of General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add13, at para. 10. The HRCttee confirmed the standard also in the context of subsequent individual complaints, see, e.g., HRCttee, 'Yassin and Others v Canada' (26 October 2017) UN Doc. CCPR/C/120/D/2285/2013, at para. 6.4.

88 Janig, 'Extraterritorial Application of Human Rights', at para. 32; *Al-Skeini*, at paras 135, 149 (in which the UK 'assumed authority and responsibility for the maintenance of security in south-east Iraq').

89 *Jaloud v the Netherlands* [2014] ECtHR App 47708/08, at para. 152.

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The ECtHR confirmed that line of reasoning in *Pisari v Moldova and Russia*, concerning the lethal use of force at a checkpoint in a 'security zone manned by soldiers from the peacekeeping forces'.[90]

More specifically, these cases gave rise to the *negative* obligation to respect the right to life, as well as the *positive procedural* obligation to undertake effective investigations into an (allegedly) unlawful deprivation of life.[91] As the ECtHR has repeatedly emphasized, these obligations continue to apply, also in 'difficult security conditions, including in the context of armed conflict'.[92] The question of the extent to which peacekeeping forces may have *positive substantive* obligations was so far not clarified by the ECtHR itself. It was concerned with such a claim in *Behrami*, in which the applicants argued a violation of the right to life due to the failure of French KFOR troops to mark and/or defuse undetonated ordinance, and contended that KFOR was responsible for demining on the basis of a UNSC resolution.[93] However, the Court ultimately did not address the issue as the applications were inadmissible on other grounds.[94]

The existence of such positive substantive obligations was, however, confirmed by the Dutch Supreme Court in *Mothers of Srebrenica*. It considered that individuals present in a 'compound' controlled by a national contingent were under the 'jurisdiction' of the State within the meaning of Art. 2 ICCPR and Art. 1 ECHR,[95] which entailed the State's obligation to protect their right to

90 *Pisari v the Republic of Moldova and Russia* [2015] ECtHR App 42139/12, at paras 30–31, 33 (based on a bilateral agreement between Moldova and Russia).

91 See also the more recent judgments, in which the ECtHR has expanded on the circumstances under which a pertinent 'jurisdictional link' is present in the context of extraterritorial military activities, see *Hanan v Germany* [2021] ECtHR App 4871/16, at paras 137–138; *Güzelyurtlu and Others v Cyprus and Turkey* [2019] ECtHR App 36925/07, at paras 191–196; *Georgia v Russia* (*II*) [2021] ECtHR App 38263/08, at paras 329–332.

92 *Al-Skeini*, at para. 164, continuing that: 'It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed […] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed […] Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life' (references omitted).

93 *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* [2007] ECtHR App 71412/01 and 78166/01, at paras 61, 73.

94 Ibid., at para. 153.

95 COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('European Convention on Human Rights (ECHR)').

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life.[96] On a more general level, the African Commission on Human and Peoples' Rights also considered that the existence of negative and positive obligations regarding the right to life 'depends [...] on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over [...] the victim'.[97] Thus, whether positive obligations are owed is not a conceptual question, but depends on the specific circumstances of the case.

2.5 *Developing Positive Obligations of UN Peacekeepers?*

While a clear judicial confirmation of positive substantive obligations of UN peacekeepers is still lacking, recent case studies have argued that even 'the UN now appears to accept that it has a positive obligation to take reasonable measures, within its capability, to protect the lives of civilians sheltering on its mission bases, at least as a matter of policy if not law'.[98] However, the specific circumstances under which the UN *should* bear a human rights responsibility may be clarified through the case law on the extraterritorial application of human rights treaties. As noted above, (quasi-)judicial bodies take account of both legal as well as factual elements to assess whether a State exercises 'power or effective control' over an individual. When transferred to the UN in a peacekeeping context, such an assessment may take into consideration the legal limitations and authorities of a PKO (on the basis of the underlying UN resolution and other legal frameworks) and considerations of the exercise of factual control over individuals (e.g. in the context of detention). This may both mitigate concerns over imposing 'unrealistic' obligations that could not be met in light of legal or factual constraints, as well as acknowledge the very real and direct influence of PKOs on the human rights situation of individuals. In addition, the actual substance of positive obligations would be shaped by due diligence standards – regardless of whether the duty bearer is a State or an international organization. The following discussions will address what such obligations might require in the context of the effects of climate change.

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96 See *Mothers of Srebrenica et al. v State of the Netherlands* [2017] Court of Appeal of the Netherlands (Den Haag) Case No. 200.158.313/01 and 200.160.317/01, at paras 38.1–38.6; *Mothers of Srebrenica Association et al. v The Netherlands* (*Judgment*) [2019], at paras 4.2.2–4.2.3. The Dutch courts are not explicit on whether they applied the 'personal model' or the 'spatial model', however in the context of control over smaller spaces, a clear distinction between these two tests is no longer possible.

97 ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (Pretoria University Law Press 2015), at para. 14.

98 Foley, *UN Peacekeeping Operations and the Protection of Civilians*, at 334, arguing that this is implicit in the UN's policy guidance on POC.

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3 The Mandate of UNMISS: a Climate-Sensitive Reading

Since 2021, the mandate of UNMISS has recognized the role of climate change in driving the conflict in South Sudan. Nonetheless, as with all climate-related peacekeeping mandates,[99] specific obligations largely remain lacking, and are often dependent on *ad hoc* assessments by field officers. At the same time, UNMISS is equipped with a particularly strong POC mandate.[100] However, neither UNSC Resolution 2677 (2023) nor the UN system more generally[101] specify in authoritative terms what types of 'threats of physical violence' civilians should be protected against. In light of the reference to *physical* violence, as well as the background of specific intra-and inter-State conflicts against which such mandates are drafted, this is primarily meant to refer to the threat of violence emanating from other humans.[102]

That said, from a *functional* perspective, one might argue that such mandates must be read to likewise refer to non-human threats to civilians. The Inter-Agency Standing Committee – a forum for the coordination of humanitarian assistance within the UN system – defined protection as:

99 C.M. Scartozzi, 'Climate-Sensitive Programming in International Security: An Analysis of UN Peacekeeping Operations and Special Political Missions' (2022) 29 International Peacekeeping 488.

100 UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024', notably dropping the caveat of the protection of civilians being owed 'within its capacity and areas of deployment', as was still mentioned in UNSC Res 2625, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2023', (15 March 2022), at para. 3(a)(i).

101 S. Casey-Maslen and T. Vestner, *International Law and Policy on the Protection of Civilians* (Cambridge University Press 2022), at 6–10.

102 The UN Department for Peace Operations describes 'threats of physical violence against civilians' as encompassing 'all hostile acts or situations which are likely to lead to death or serious bodily injury of civilians, including sexual violence, regardless of the source of the threat. This includes, inter alia, threats posed by non-State armed groups, self-defence groups, domestic and foreign State defence and security forces and other State agents and State-sponsored armed actors, as well as extremist groups and communities. It includes both direct and indiscriminate attacks, and attempts to kill, torture, maim, rape or sexually exploit, forcibly displace, starve, pillage, abduct or arbitrarily detain, kidnap, disappear or traffic persons or recruit and use children. It also includes harm associated with the presence of explosive ordnance including mines, explosive remnants of war and improvised explosive devices. "Threat" includes both violence against civilians which has materialised and is ongoing and violence which has the realistic potential to occur. The threat need not be imminent, unless the specific Security Council mandate requires this', see UN Department of Peace Operations, *Policy*, at para. 23.

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> [A]ll activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. International Human Rights Law (IHRL), International Humanitarian Law, International Refugee law (IRL)).[103]

While that definition is admittedly comparatively broad and has attracted some criticism, it is generally accepted that the notion primarily serves to ensure the human *right to life*.[104] Moreover, the 2019 POC policy underscores that it envisions the protection of civilians as a 'comprehensive and integrated approach', considering 'the range of factors which influence and underpin threats to civilians in both the short-and long-term' by combining efforts of all mission components and coordinating with other UN actors.[105] Thus, the notion of 'protection' (as well as what constitutes 'violence', 'threats' or 'a secure environment') is open to a climate-sensitive reading. In the context of UNMISS, this is reinforced by the recognition of 'the adverse effects of climate change, ecological changes, and natural disasters' in the Preambular paragraphs of UNSC Resolution 2677 (2023).[106]

As set out in the introduction, the right to life – from a human rights perspective – entails positive obligations in the context of the effects of climate change. These obligations constitute part of the customary – if not peremptory – content of the right to life.[107] In this vein, the Human Rights Committee emphasized that,

103 IASC, 'Inter-Agency Standing Committee Policy on Protection in Humanitarian Action' (October 2016), at 2, available at <https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Policy%20on%20Protection%20in%20Humanitarian%20Action%2C%202016.pdf> (accessed 1 March 2023).

104 Casey-Maslen and Vestner, *International Law and Policy on the Protection of Civilians*, at 6–10.

105 UN Department of Peace Operations, *Policy*, at paras 7–8.

106 Although it must be acknowledged that there is a notable absence of references to the issue of climate change in the particular context of its mandate to protect civilians.

107 Casey-Maslen, *The Right to Life under International Law*, at 735, noting as part of the customary content that this entails: 'Every person without distinction has the right to protection of their life. A duty of special protection applies to individuals facing foreseeable threats to life whether they emanate from governmental or private actors'. See also *Hasan Nuhanović v the State of the Netherlands* [2011] Court of Appeal of the Netherlands (The Hague), ECLI:NL:GHSGR:2011:BR5388, at para. 6.3: 'Additionally, the Court will test the alleged conduct against the legal principles contained in Articles 2 and 3 ECHR and Articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound. The Court assumes that,

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> [e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of Article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[108]

Also the African Commission on Human and Peoples' Rights considered that the 'right to life should be interpreted broadly'[109] and that positive obligations to protect the right to life may require States to take 'preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters'.[110] The ECtHR likewise affirmed that States have 'to take appropriate steps to safeguard the lives of those within their jurisdiction', which 'also applies where the right to life is threatened by a natural disaster'.[111] Thus, a State has a positive obligation 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[112] For instance, in *Budayeva and Others v Russia*, the Court was concerned with mudslides that killed several individuals. While it found that mudslides were a regular occurrence in the summer season, it considered that the government had advance knowledge that the season in 2000 would be significantly more devastating than usual. The Court acknowledged that the State had a wide margin of appreciation in the choice of particular means to respond to such disasters, to prevent that 'an impossible or disproportionate burden'

by advancing the argument in its defense that these conventions are not applicable, the State did not mean to assert that it does not need to comply with the standards that are laid down in Art. 2 and 3 ECHR and Art. 6 and 7 ICCPR in peacekeeping missions like the present one'.

108 HRCttee, 'General Comment No. 36 on Article 6: Right to Life' (3 September 2019) UN Doc. CCPR/C/GC/36, at para. 62.

109 See also HRCttee, 'Ione Teitiota v New Zealand' (7 January 2021) UN Doc. CCPR/C/127/D/2728/2016, at para. 9.4: 'The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures'.

110 ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', at para. 41.

111 *M. Özel and Others v Turkey* [2015] ECtHR App 14350/05, 15245/05 and 16051/05, at para. 170 (in the context of an earthquake).

112 *Budayeva and Others v Russia* [2008] ECtHR App 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, at para. 129 ('*Budayeva and Others v Russia*'); see also *Öneryıldız v Turkey* [2004] ECtHR App 48939/99, at para. 89.

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is placed on the State.[113] However, it found that Russia failed to dispense its due diligence obligation, by failing (1) to invest in defence infrastructure, (2) to alert the local population about the risk and (3) to ensure the functioning of an early warning system (e.g., through setting up temporary observation posts).[114]

In relation to the effects of climate change, the determination of what might be considered reasonable and appropriate is dependent on the specific risk setting and in line with the expected 'standard of conduct'[115] arising under the climate change regime. In addition, as shown in *Torres Strait Islanders*, the expected standard of conduct will be even more stringent in relation to 'those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts'.[116] Thus, even though it is undisputed that in the context of peacekeeping operations the primary obligation to ensure the full protection of human rights remains with the territorial State, this does not exclude the possibility of concurrent human rights obligations of the international organization(s) or the TCCs (under the restraints outlined above). This fundamentally stems from the fact that oftentimes peacekeepers exercise 'public power in a State-like manner' and – in relation to the concerned population – in part 'assume State-like functions'.[117] As acknowledged in the ECtHR's case law referenced above, the responsibility and authority to provide security for civilians constitute a 'public power' otherwise incumbent on a territorial State. Such powers are likewise exercised by UNMISS, as most clearly shown with regard to its mandate '[t]o maintain public safety and security of and within UNMISS protection of civilians sites'.[118] The effects of natural disasters may be seen with regard to the largest protection site in Bentiu, hosting over 100,000 IDPs. Following several years of unusually heavy rainfall, the site was faced with massive and unprecedented flooding in late 2022.[119]

113 *Budayeva and Others v Russia*, at paras 134–135; see also *Kolyadenko and Others v Russia* [2012] ECtHR App 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, at para. 160.

114 *Budayeva and Others v Russia*, at paras 147–160.

115 C. Voigt, 'The Climate Change Dimension of Human Rights: Due Diligence and States' Positive Obligations' (2022) 13 Journal of Human Rights and the Environment 152, at 162.

116 HRCTTEE, 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning Communication No. 3624/2019', at para. 7.10.

117 S.F. van den Driest, 'Tracing the Human Rights Obligations of UN Peacekeeping Operations' in J. Summers and A. Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill 2018) 179, at 183.

118 UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024', at para. 3(a)(i), Point 4.

119 UN Peacekeeping, 'UNMISS and Humanitarian Partners Battling Floods in Bentiu, South Sudan, to Protect IDPs' (12 October 2022), available at <https://unmiss.unmissions.org

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The acknowledgment of the existence of human rights obligations *in principle* does not necessitate that the *extent* of these obligations is identical to those of the host State. In the context of positive obligations, (quasi-)judicial human rights bodies employ considerations of appropriateness and reasonableness to determine whether a State fails to act with due diligence. These tests may likewise be employed to ensure that the human rights obligations of peacekeepers remain workable in light of existing operational restraints in the field.[120] Though any caveats incorporated into UNMISS' mandate serve to manage expectations, particularly of the local population, the UNSC has stressed in the most recent mandate of UNMISS that 'the protection of civilians shall be given priority in decisions about the use of available capacity and resources'.[121] Moreover, as the UN acknowledges, 'missions must always prevent and respond, if possible, to threats of physical violence against civilians where they have the capability to do so effectively'.[122] The due diligence[123] character of such obligations is thus reaffirmed in the official POC policy.

This raises the question of what specific measures could be incumbent on UNMISS when faced with the effects of climate change from a human rights perspective. Similar to what the ECtHR discussed in *Budayeva and Others*, this might include setting up a functioning early warning system and, to the extent that specific risks become foreseeable, ensuring that local populations are alerted to that risk. In this vein, also the preambular paragraphs of UNSC Resolution 2677 (2023) generally emphasize 'the need for comprehensive risk assessments and risk management strategies', in light of the 'adverse effects of climate change […] on the humanitarian situation and stability'.[124] This risk assessment should, to a certain extent, occur on the mission-level, as part of the mandate to create 'conditions conducive to the delivery of humanitarian assistance' (and thus not as a part of the POC mandate).[125] In addition, since

/sites/default/files/unmiss_and_humanitarian_partners_battling_floods_in_bentiu_to_protect_idps.pdf> (accessed 7 March 2023).

120 K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press 2012), at 388, 390–391.

121 UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024', at para. 3.

122 UN Department of Peace Operations, *Policy*, at paras 24–25.

123 On how due diligence as arising through positive human rights obligations constitutes the ideal standard by which to measure UN in the context of peacekeeping operations, see N.D. White, 'In Search of Due Diligence Obligations in UN Peacekeeping Operations' (2020) 23 Journal of International Peacekeeping 203.

124 UNSC Res 2677, 'On Extension of the Mandate of the UN Mission in South Sudan (UNMISS) until 15 Mar. 2024'.

125 Ibid., at para. 3(b)(i).

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the latest extension of UNMISS, the Secretary-General is requested to submit regular reports (every 90 days) that include an '[a]nalysis of risks associated with climate change that may adversely impact peace and security in South Sudan, and implementation of the UNMISS mandate', based on 'integrated, evidence-based and data-driven analysis'.[126] The information thus provided should enable the operation to take better account of situational changes and, as a result, also to ensure the protection of the right to life to a greater extent. However, from a human rights perspective, the foreseeability of particular risks will lead to the *requirement* that UNMISS undertakes specific measures to adapt to the effects of climate change. The clearest example would be the construction and maintenance of defence infrastructure for the protection of civilians in protection sites. In fact, UNMISS engineers were already involved in repairing and maintaining dykes that served to protect the largest protection site in Bentiu.[127]

These discussions should not distract from shortcomings on the political level that hamper the ability of UNMISS to face these challenges. Thus, in order for UNMISS to be able to meaningfully contribute to the mitigation of (human rights) risks arising from climate change effects, it must be equipped with sufficient capabilities in terms of knowledge, skills and equipment. The precise formulation of obligations arising in the context of climate change – particularly whether UNMISS should assist South Sudan 'in developing mitigation measures against increasingly frequent and extreme weather, which may exacerbate communal violence'[128] – was subject to heated debate in 2022. The inclusion of stronger language on climate issues ultimately failed in light of opposition by Brazil, China and Russia. However, UN bodies – particularly the United Nations Development Programme ('UNDP') with the appointment of a climate and security advisor in South Sudan since August 2022 – have attempted to complement this framework. The climate and security advisor

126 Ibid., at para. 32, Point 5.

127 R. Nzelle Nkwelle, 'In Bentiu, UNMISS Continues to Help Alleviate the Impact of Severe Climate Shocks' (27 March 2023), available at <https://unmiss.unmissions.org/bentiu-unmiss-continues-help-alleviate-impact-severe-climate-shocks> (accessed 28 March 2023); as argued elsewhere, the obligations of peacekeeping operations as arising from the POC mandate may also extend so far as to guarantee the access to basic services such as safe routes to water supply sources. See on this M. Tignino and Ö. Irmakkesen, 'Water in Peace Operations: The Case of Haiti' (2020) 29 Review of European, Comparative & International Environmental Law 33, at 36.

128 Security Council Report, 'March 2023 Monthly Forecast: South Sudan' (28 February 2023), available at <https://www.securitycouncilreport.org/monthly-forecast/2023-03/south-sudan-22.php> (accessed 27 March 2023).

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should serve as a key figure in mainstreaming climate-related security risks into UNMISS planning and operations (as well as into the work of other international actors on the ground), as arising from both long-term climate change and short-term extreme weather events.[129] Alongside awareness-raising, this should also contribute to capacity-building throughout the mission.

4 Conclusions and Outlook – towards a Climate-Sensitive Reading of the Human Rights Obligations of Peacekeeping Operations

The effects of climate change constitute the core non-traditional security challenge of this century.[130] This raises a plethora of new questions when it comes to peacekeeping operations, both on the strategic as well as the operational level, and requires that all conflict prevention and response mechanisms are attuned to the impact of climate change on peace and security. They also relate to the peacekeepers' responsibilities towards local populations, as it becomes increasingly clear that the various effects of climate change will create new threats to the physical well-being of civilians and/or amplify existing threat patterns. In this context, it is both helpful and necessary to take account of the growing understanding of what international human rights law requires of mitigation and adaptation strategies in light of climate change.

In bringing these different threads together, this contribution has advanced the argument that POC mandates – a core part of modern peacekeeping operations – are open to a climate-sensitive reading. In addition, such a reading becomes necessary from a (functional) human rights perspective. Any such exercise of course has to be cognizant of the differences between peacekeeping operations and territorial States in terms of their role and capabilities. However, while the primary responsibility to adapt to the effects of climate change will remain with the State – potentially assisted by (international) humanitarian partners – peacekeepers should have a clear role to play when these effects pose a direct, immediate and foreseeable threat to the life of civilians.

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129 See also Norsk Utenrikspolitisk Institutt and Stockholm International Peace Research Institute, 'Climate, Peace and Security Fact Sheet: South Sudan' (March 2022), available at <https://sipri.org/sites/default/files/220422%20NUPI%20Fact%20Sheet%20South%20Sudan_FactChange%20LR2.pdf>.

130 Cf. O. Brown, 'Peace Operations and The Challenges of Environmental Degradation and Resource Scarcity' (December 2021) SIPRI Background Paper, available at <www.sipri.org/sites/default/files/2021-12/bp_2112_ngp_iii.pdf> (accessed 27 March 2023).

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