

# Sexual Exploitation and Abuse in Peacekeeping Operations

Improving Victims' Access to Reparation, Support and Assistance



UN Photo/Sylvain Liechti, 14 March 2014, Beni, Democratic Republic of the Congo

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### Contents

Executive Summary.....	3
Acknowledgments.....	6
I. Introduction .....	7
II. The nature and scale of victimisation.....	12
III. Victims' rights – what they mean .....	14
III.1 Applicability of victims' rights standards to international organizations, including the United Nations .....	14
III.2 Victims' rights standards applicable to sexual exploitation and abuse occurring in the context of peacekeeping operations .....	15
III.2.1 Status as victim .....	16
III.2.2 Respect for dignity and protection.....	17
III.2.3 Access to assistance and support .....	17
III.2.4 Informing, and engaging victims.....	18
III.2.5 Victims' rights to engage with criminal investigations and the need for such investigations to be independent, thorough and capable of leading to the identification and prosecution of those responsible .....	20
III.2.6 The right to reparation.....	21
IV. Victims' Rights as they have been applied to sexual exploitation and abuse.....	23
IV.1 The criminal accountability process from the lens of victims' rights .....	23
IV.1.1 Lack of effectiveness .....	23
IV.1.2 Lack of independence and impartiality.....	26
IV.1.3 Evidentiary barriers .....	26
IV.2.4 Victim sensitive procedures.....	28
IV.2 Victims' Access to Support and Assistance .....	31
IV.2.1 The need for substantiation .....	31
IV.2.2 Victims' assistance strategies, protocols and guides .....	33

IV.2.3 Cooperation and service delivery on the ground .....	34
IV.2.4 Funding for support and assistance .....	36
<b>V. Victims' Access to Reparation, including compensation.....</b>	<b>37</b>
V.1 A fundamental problem – the failure to acknowledge and provide an independent vehicle to assess, institutional liability .....	37
V.2 The viability of pursuing extraterritorial claims .....	38
V.3 Claims in the host state.....	39
V.4 Paternity claims .....	39
<b>VI. Improving the prospects for victim redress: some concluding remarks .....</b>	<b>42</b>

## Executive Summary

**REDRESS** is an international human rights organization with a mandate to support survivors of torture and related international crimes in their search for justice and other forms of reparation. REDRESS takes legal challenges on behalf of survivors before domestic and international courts and other adjudicative bodies; it seeks the investigation and prosecution of alleged perpetrators and, works with organizations in countries where torture is endemic to advocate for stronger laws and institutions to combat torture and support survivors. Additionally, REDRESS carries out cross-cutting research on barriers to justice and supports regional and international standard-setting in those areas. REDRESS was established in 1992 and is headquartered in London, United Kingdom and The Hague, The Netherlands. It works with survivors, civil society organizations and other partners in all parts of the world to advance its mission.

**This is a report about** the widespread and enduring problem of sexual exploitation and abuse by peacekeepers and other personnel associated with peace operations. The focus of the report is directed at answering one question: *‘what happens to the victims’?* The report does not focus on why this phenomenon continues to happen despite the introduction of zero-tolerance policies, induction and training programmes and relatively robust codes of conduct.<sup>1</sup> Nor does it place emphasis on why the reams of international bureaucrats, officials from troop-contributing countries and others have failed to come up with fail safe ways to investigate and prosecute the persons responsible for the crimes. These failings, while far from solved, have been analysed in some detail by others.<sup>2</sup>

In contrast, our focus on ‘what happens to the victims’ is a subject often overlooked, marginalised in the debates on accountability just as the victims of these acts of violence and abuse of power, themselves, continue to be marginalised.

There is a sense that the horror of what happened to them is so all-encompassing and so impossible to fix that it defies logic and understanding; the enormity of the task leads some policymakers to recoil from it rather than to pull up their shirt-sleeves and find and implement solutions. There is a tendency to try to plug the small holes rather than to address the failings of the system as a whole. And, going against all best practice and international standards in the area of victims’ rights, the victims are rarely consulted or engaged in the process of finding suitable solutions. They are treated as the lucky recipients of benevolence as opposed to active subjects with bona fide and inalienable rights that need to be respected. This lack of agency is a further act

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<sup>1</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and sexual abuse’, UN Doc ST/SGB/2003/13, 9 October 2003; Prince Zeid Ra’ad Zeid Al-Husseini, ‘A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations’, UN Doc A/59/710, 24 March 2005; Machiko Kanetake, ‘Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers’ (2010) 17 *International Peacekeeping* 200

<sup>2</sup> UN General Assembly, ‘Report of the group of legal experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations’, UN Doc A/60/980, 16 August 2006; Róisín Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International law* (Brill/Nijhoff, 2014); Code Blue, ‘A Practical Plan to End Impunity for Peacekeeper Sexual Abuse’, 13 October 2016, <http://www.codebluecampaign.com/fact-sheets-materials/2016/10/13>; Carla Ferstman, ‘Criminalizing Sexual Exploitation and Abuse by Peacekeepers’ USIP Special Report 335, September 2013; Elizabeth Defeis, ‘U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity’ (2008) 7 *Wash U Global Stud L Rev* 185

of disempowerment which can compound suffering and impede their recovery. Active participation in defining and implementing solutions is a necessary precondition to eradicate marginalisation.

There is also a problem when those that come up with the ‘solutions’ are not neutral arbiters. The decision-makers in this area are a restricted club of actors who arguably bear some responsibility (and consequently, liability) for the harm caused. Thus, the structures they put in place to address that harm tend to be tainted by their lack of objectivity. In the area of redress, as will be discussed there are two main tendencies evidenced both by the public rhetoric and in the development and implementation of policies:

**First**, there is an attempt to situate liability solely with the individual peacekeepers and/or civilians who carried out the acts as opposed or in addition to the international and regional organizations and troop-contributing countries under whose mandates those individuals were engaged.

**Second**, there is a tendency to ignore victims’ legal rights to redress and adequate and effective reparation and to focus simply on charity and benevolence.

These two tendencies when analysed in combination deflect attention and blame away from those with a real capacity to solve the problems and conspire to help avoid the kind of impartial scrutiny, institutional acknowledgment and accountability required to guarantee non-recurrence. These tendencies also result in a denial of dignity and personhood to the victims.

**REDRESS decided to write this report because** the infliction of deliberate and extreme violence causing severe pain and suffering on vulnerable persons by those in positions of, and abusing their, power and authority, is a sine qua non of our mandate as an anti-torture organization. It is well established that rape and other forms of sexual violence can amount to torture and ill-treatment, not only in a detention-setting, and not only when perpetrated by State actors. Sexual exploitation and abuse by peacekeepers and/or by civilians working under the wider auspices of peacekeeping missions is a crime of the highest order; it is an extreme form of abuse of power against vulnerable and marginalised individuals carried out by those brought in to protect those very populations. The absence of legal redress and adequate and effective reparation for the significant and long-term harm is thus not only an affront to the dignity of the victims but a violation of their rights and a negation of the international framework of the rule of law under which peace operations operate and gain their legitimacy. The failure to address the problem is a concern of the highest magnitude and is urgent and pressing.

In this report, we analyse the various steps to address victims’ rights and needs that have been taken or are being contemplated, by specialist bodies, organs and agencies of the United Nations (UN) as well as other international organizations engaged in peacekeeping like the African Union. We place particular emphasis on the findings of recent commissions of inquiry and investigations carried out by the UN’s Office of Internal Oversight Services, as well as on the UN Secretary-General’s most recent report ‘Special measures for protection from sexual exploitation and abuse:

a new approach'.<sup>3</sup> We also assess the steps taken by troop-contributing countries, host states, civil society groups, lawyers and victims themselves. These various steps are analysed from the lens of victims' rights, a growing body of law and international standards which are applicable to the situation of victims of sexual exploitation and abuse. In particular, we focus our inquiry on victims' access to support and assistance, and access to reparation, including, but not limited to compensation. We end with several reflections on how the prospects for redress and reparation may be improved.

Numerous individuals were interviewed or provided information to us and/or commented on particular sections of the report. Interviews were used to clarify information obtained by other public sources or to provide anecdotal narrative information to give context to the findings.

The report is not intended to be an exercise in shaming particular authorities or institutions for their past failings but instead is a call to action. It is also recognised that steps are being taken in some areas. We do not pretend that solutions are easy to implement; it is recognised that these are complex, multi-faceted problems with cost implications that require a range of responses from a number of different actors. These are difficult problems but they are crucial to resolve. What is hoped is that this report will highlight the urgency to resolve the extant problems, contribute to the deepening of discussions amongst policy-makers, result in greater and more serious attempts to involve victims and those that support them in the search for solutions, infuse these processes with greater transparency and institutional accountability and move the goalposts for what should be considered adequate and appropriate responses.

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<sup>3</sup> UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach' UN Doc A/71/818, 28 February 2017



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# I. Introduction

Sexual exploitation and abuse in the context of peacekeeping is a much publicised problem affecting a range of peacekeeping missions established by the United Nations and African Union among others. Military contingents assigned to such missions, as well as police and other civilian personnel have perpetrated such abuses, as have other humanitarian personnel working in post conflict contexts (including UN agency personnel and staff of humanitarian organisations). Troops operating outside an international institutional mandate have also perpetrated abuses.

The phrase ‘sexual exploitation and abuse’ is a catch all phrase which encompasses a wide spectrum of misconduct much of which amounts to serious criminal behaviour, including rape and sexual abuse of women and children, prostitution, trafficking, exploitative sexual relationships include sex in exchange for money, food or medicine and/or with the promise of security.<sup>4</sup> One media outlet reported that peacekeepers were ‘said to have offered abandoned orphans small gifts - as little as two eggs from their rations, says the report – for sexual encounters.’<sup>5</sup> In the Central African Republic, some children and women were given the leftovers of soldiers’ food. In Haiti, some of the victims were reportedly as young as seven years old.<sup>6</sup>

This abusive and exploitative behaviour is fostered by an overriding dynamic of gender-based discrimination as well as a context in which local populations are struggling; they are in situations of humanitarian crises and conflicts, insecurity, displacement and poorly functioning local legal systems. As a Human Rights Watch researcher noted in relation to sexual exploitation and abuse allegations in Somalia,

‘[t]he survivors were all internally displaced people. These are communities that are not traditionally from Mogadishu. They come from clans which are not particularly well-represented and powerful in Mogadishu, so they are not protected... poor, vulnerable and easy to exploit.’<sup>7</sup>

In contrast this vulnerability is coupled with significant wealth and power disparities, the transience of troop movements, lack of knowledge of the local situation and weak peacekeeper accountability structures. Prince Zeid Ra’ad Zeid Al-Hussein, then Permanent Representative of Jordan, wrote in his 2005 report, ‘it is this inability on the part of many peacekeepers to discern the extent to which the society is traumatized and vulnerable that is at the root of many of the problems’.<sup>8</sup> But others will argue that the root of the problem is that peacekeepers are fully aware

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<sup>4</sup> Marie Deschamps, Hassan Jallow, and Yasmin Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, 17 December 2015, p 6

<sup>5</sup> Owen Bowcott, ‘Report Reveals Shame of UN Peacekeepers’, *The Guardian*, 24 March 2005, <https://www.theguardian.com/world/2005/mar/25/unitednations>

<sup>6</sup> Athena Kolbe, ‘It’s Not a Gift When It Comes with Price: A Qualitative Study of Transactional Sex between UN Peacekeepers and Haitian Citizens’, (2015) 4(1) *Stability: International Journal of Security and Development*.

<sup>7</sup> Interview with Human Rights Watch researcher by the International Human Rights Law Clinic University of California, Berkeley, School of Law (on file)

<sup>8</sup> Prince Zeid Ra’ad Zeid Al-Hussein, ‘A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations,’ UN Doc A/59/710, 24 March 2005, para 2



of the power disparities, and use these disparities and their relative positions of power over vulnerable local populations to their advantage to perpetrate the abuses.

Sexual exploitation and abuse results in immense suffering for the victims – both for the direct victims of the abuse, their families and the children borne out of these relationships.

It is also a stain on the reputation of peacekeeping missions. The irony is not lost on local populations that some of the persons brought in to help are responsible for further victimising the poorest, weakest and most vulnerable segments of those societies. Sexual and other forms of gender based violence are prevalent in most conflict and post-conflict societies; instead of serving as positive role models to build mutual respect and enshrine the inherent dignity and equality of each individual, the abusive actions of peacekeepers and civilians working alongside them can have the opposite result of validating prevalent narratives that women and children are just there to be exploited.

Among the recommendations made by Prince Zeid Ra’ad Zeid Al-Hussein in his 2005 report, he underscored the need for victims of sexual exploitation and abuse to be assisted – emergency and practical assistance, he argued was ‘morally incumbent on the Organization to provide’.<sup>9</sup> He referred to the need for basic first-aid medical treatment, follow-up support, including psycho-social assistance and indicated that such support should be coordinated with relief agencies that are able to provide such assistance.<sup>10</sup> Further, he called for a voluntary trust fund to be established to help with financing assistance.<sup>11</sup> Prince Zeid also indicated that ‘there is a need to provide basic advice to alleged victims... if there is a functioning legal system, the peacekeeping operation should refer victims to organizations that may enable the victim to seek civil or criminal redress against alleged perpetrators.’<sup>12</sup> He also recommended that victims be provided with feedback about their complaints.<sup>13</sup>

In some respects, Prince Zeid’s report served as a turning point. Sexual exploitation and abuse was recognised to be a serious problem requiring a comprehensive and multi-tiered strategy encompassing measures of prevention, investigations and accountability, and victim assistance. But at the same time, the comprehensive and multi-tiered strategy that Prince Zeid called for was carefully and narrowly framed – his blueprint for action, which has served as a basis for the adoption of a range of strategies, guidelines and protocols ever since, was too narrow to be capable of having the much needed transformative effect. And unsurprisingly, as will be described, the transformation has not happened, despite the range of measures that have been adopted in the last fifteen to twenty years. Years later, we are grappling with the same issues.

In the area of victim assistance, the narrow framing of Prince Zeid’s report continues to be felt. His report has foreshadowed the UN’s 2008 ‘Comprehensive Strategy on Assistance and Support to

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<sup>9</sup> Ibid, para 52

<sup>10</sup> Ibid, paras 53, 54

<sup>11</sup> Ibid, paras 55, 56

<sup>12</sup> Ibid, para 54

<sup>13</sup> Ibid, para 55

Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel'<sup>14</sup> and later texts as well as the successive reports of the UN Secretary-General, in several important ways:

- 1) It is recognised that victims of sexual exploitation and abuse should receive support and assistance. However, **precisely who is a victim remains unclear**. This is a problem foreshadowed in Prince Zeid's report (he refers to 'alleged victims'<sup>15</sup>) and carried over in the 2008 'Comprehensive Strategy on Assistance and Support' (which distinguishes between complainants and victims, providing the latter with more assistance and support<sup>16</sup>). Invariably, this is an artificial distinction. The process to determine who is a victim eligible for assistance is much the same process that is employed for criminal accountability (and thus is infected by the same problems which plague the criminal accountability process). The bureaucracy of proof and the trauma of being forced to explain and to be judged by those the victims perceive as aligned with the perpetrators, can mean that many individuals who were victimised are never recognised as victims. Also, these failings can turn the seeking of assistance and support into an additional degrading act.
  
- 2) Support and assistance is to be provided through relief agencies or humanitarian groups operating in the host state. But too little consideration is given to **what should happen if there are no agencies willing or able to provide support in the areas where victims (or complainants) are located, or if support services are inadequate or too short-lived to address the needs**. The 'Comprehensive Strategy' simply indicates that 'where necessary, the United Nations should consider supporting the development of new services, while not developing duplicative structures'.<sup>17</sup> Nor is there a clear pathway to fund the support and assistance. Prince Zeid highlights that '[a] peacekeeping operation usually has neither the resources nor the mandate to provide comprehensive assistance to victims of sexual exploitation and abuse.'<sup>18</sup> This is set out as a simple fact, a fait accompli, even though the peacekeeping operation has fostered the conditions for the abuses to occur and arguably is obligated to ensure that victims can access adequate support. It has been proposed that funding for assistance is secured through voluntary contributions to a trust fund,<sup>19</sup> and through unallocated mission budgets and voluntary staff contributions.<sup>20</sup> These routes are voluntary and thus contingent; **if there are no voluntary donations, there will not be support**. Additional suggestions have been made to impose fines on the personnel found to be responsible,<sup>21</sup> to recover payments made to contingent commanders who failed to cooperate with UN Department of Peacekeeping Operations sexual exploitation and abuse

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<sup>14</sup> UN Doc A/Res/62/214, Annex, 7 March 2008

<sup>15</sup> Prince Zeid Ra'ad Zeid Al-Hussein, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations,' UN Doc A/59/710, 24 March 2005, paras 53-56

<sup>16</sup> UN Doc A/Res/62/214, Annex, 7 March 2008, paras 6, 7

<sup>17</sup> Ibid, para 10

<sup>18</sup> Prince Zeid Ra'ad Zeid Al-Hussein, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations,' UN Doc A/59/710, 24 March 2005, para 52

<sup>19</sup> Ibid, para 56

<sup>20</sup> Prince Zeid proposes that 'Staff might be encouraged to make a donation to the fund each year.' Ibid, para 56

<sup>21</sup> Ibid, para 73

investigations,<sup>22</sup> to appropriate from the daily allowance of soldiers found guilty of acts of sexual exploitation and abuse through recovery from future payments to the troop-contributing country,<sup>23</sup> though as will be described, these are difficult to implement and of only limited potential help. An inordinately small percentage of claims have led to findings of responsibility. Furthermore, the framework for deducting funds from soldier allowances does not tackle the civilian components of the problem.

- 3) There is no admission that, **in the case of the UN, it bears some legal responsibility for the occurrence of sexual exploitation and abuse in those peacekeeping missions that operate as subsidiary bodies of the Organization** and elsewhere where it can be said that the Organization exercised effective control. As will be described, this position does not align with the international law framing of the responsibility of international organizations.<sup>24</sup> Prince Zeid's report suggests that it is '*morally incumbent* on the Organization [as opposed to legally required] to provide *some* emergency and practical assistance to victims'.<sup>25</sup> The 2008 comprehensive strategy proposed to respond to sexual exploitation and abuse is clearer in its glaring omission - it 'does not deal with compensation';<sup>26</sup> '[t]he Strategy shall in no way diminish or replace the individual responsibility for acts of sexual exploitation and abuse, which rests with the perpetrators'.<sup>27</sup>
- 4) A **focus on individual responsibility**, even if it were accompanied by other forms of accountability, belies the fact that it is **almost impossible to implement in practice**. Invariably, individual perpetrators are well shielded by a combination of apathy and secrecy. Regardless of whether the alleged perpetrator is formally immune from legal proceedings or not (which will depend on where a claim is lodged and the nature of the individual's contract of employment, amongst other factors), the barriers to bring a successful civil claim and to have that judgment implemented are so great that this cannot constitute an even notionally effective remedy for victims to pursue. As will be described, some of the main barriers include:
  - the inaccessibility of the perpetrators after they leave the jurisdiction of the host state and the inaccessibility of the jurisdiction of the troop-contributing country to the majority of victims;
  - the failure of most States to recognize extraterritorial criminal or civil jurisdiction, particularly for alleged civilian perpetrators;
  - the lack of a clear and effective route to pursue claims against civilian perpetrators;

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<sup>22</sup> Ibid para 61

<sup>23</sup> Ibid para 75

<sup>24</sup> See generally, ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10. The obligation on an international organization who bears responsibility for an internationally wrongful act to afford reparations to victims (which may include rehabilitation and practical assistance) is canvassed in Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP, 2017)

<sup>25</sup> Prince Zeid Ra'ad Zeid Al-Hussein, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations,' UN Doc A/59/710, 24 March 2005, para 52 (emphasis added)

<sup>26</sup> UN Doc A/Res/62/214, Annex, 7 March 2008, para 3

<sup>27</sup> Ibid, Para 3

- the lack of access to investigative records and other data held by the peacekeeping mission, withheld or delayed on the basis of data protection or the institutional immunities of the Organization; as well as
- the difficulty to enforce, extraterritorially, court orders for support issued by the host state. Despite Prince Zeid's recommendation that the UN 'should assist the mothers to make a claim that could be forwarded to the troop-contributing country for consideration',<sup>28</sup> assistance in such particular efforts has been piecemeal at best.

These narrow framings stemming from Prince Zeid's report continue through to the Secretary-General's most recent report<sup>29</sup> and are constant themes throughout our analysis in this report. They help to explain why the solutions have been limited and inadequate to date.

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<sup>28</sup> Prince Zeid Ra'ad Zeid Al-Hussein, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations,' UN Doc A/59/710, 24 March 2005, para 77

<sup>29</sup> UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach', UN Doc A/71/818, 28 February 2017

## II. The nature and scale of victimisation

There are no precise figures of the number of persons who have been subjected to sexual exploitation and abuse, though the UN has recorded over 2,000 allegations of sexual abuse and exploitation by UN peacekeeping and other personnel around the world over a thirteen year period.<sup>30</sup> It is known that allegations have been reported in many peacekeeping operations since the early 1990s, the most notorious cases having been reported in countries including Bosnia and Herzegovina, Cambodia, Central African Republic, Democratic Republic of the Congo, Haiti, Kosovo, Lebanon, Liberia, Sierra Leone, Somalia, South Sudan and Timor-Leste. Allegations became more known following the media publicity associated with several abuse scandals<sup>31</sup> and better recording and tracking of such complaints. However, figures of reported cases do not present an accurate picture because the tracking of cases is not comprehensive<sup>32</sup> and the majority of victims do not report the abuse, for a range of reasons.<sup>33</sup> In addition, one “allegation” could represent multiple incidents of sexual exploitation or abuse over time, or involve more than one alleged perpetrator and/or victim.

The impact on the victims can be extreme and can have both physical and psychological manifestations. The victims are already vulnerable given the conflict or post conflict context in which peacekeeping missions operate. The added abuse by persons who are there to protect can compound the suffering. While there has been very little scientific study of the long-term psychological impact of peacekeeper sexual exploitation and abuse on victims, much can be gleaned from the many studies that have been carried out on the psychological impact of sexual violence and other forms of torture when perpetrated by persons in positions of authority. There are ‘clusters of symptoms and psychological reactions that have been observed and documented in torture victims with some regularity’, such as post-traumatic stress disorder and depression.<sup>34</sup> These, and other symptoms such as feelings of vulnerability, hopelessness, lack of self-worth, spiritual degradation, heightened suspicion, and persistent confusion and fear, are recognised as being present in cases of sexual violence.<sup>35</sup> In addition to physical trauma, the mental pain and

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<sup>30</sup> Calculations compiled by the Code Blue Campaign, based on the annual SG’s Special Measures’ Reports and Conduct and Discipline Unit Website, 2004-2016 (on file). See also, Paisley Dodds, ‘AP Exclusive: UN child sex ring left victims but no arrests’ Associated Press, 12 April 2017

<sup>31</sup> UN Secretary-General, ‘Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo’, UN Doc S/2004/60, 16 August 2004, para 32

<sup>32</sup> This problem was reported in Dr Thelma Awori, Dr Catherine Lutz and General Paban J. Thapa, ‘Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO and UNMISS’, 3 November 2013, <http://aidsfreeworld.org/Newsroom/Press-Releases/2015/~media/Files/Peacekeeping/2013%20Expert%20Team%20Report%20FINAL.pdf>, p. 14 where the experts note that ‘the UN does not know how serious the problem of SEA is because the official numbers mask what appears to be significant amounts of underreporting of SEA. There are a number of reasons why, and these include: (1) Fear of reporting inside and outside the UN/stigmatizing of whistleblowers within the UN and sometimes outside/culture of silence particularly within military and police, (2) a sense of futility about reporting because of long delays in the enforcement process in NY and in mission and the rarity of remedial outcomes including rarity of victim assistance, and (3) record keeping problems, with numbers not matching from one source to another.’

<sup>33</sup> UN Office of Internal Oversight Services (OIOS), ‘Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations’, UN Doc IED-15-001, 15 May 2015, paras 47-53; Corinna Csáky, ‘No one to turn to: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers’, Save the Children UK, 2008, pp 10, 11. See generally, Section IV.2.3.1, below.

<sup>34</sup> Office of the UN High Commissioner for Human Rights, ‘Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, Professional training series No. 8/Rev.1, 2004, paras 234, 236

<sup>35</sup> Human Rights in Trauma Mental Health Laboratory, ‘Mental Health Outcomes of Rape, Mass Rape and other forms of Sexual Violence’, Dept of Psychiatry and Behavioral Sciences, Stanford University School of Medicine, submitted in ICC, *Prosecutor v Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3417-AnxA-Red, 22 September 2016

suffering inflicted on victims of rape and other forms of sexual violence is often long-lasting due to subsequent stigmatisation and isolation. This is particularly true in cases where the victim is shunned or formally banished from the family or community. Victims can also face difficulties in establishing or maintaining intimate relationships and there can be a variety of other consequences, including sexually transmitted diseases, inability to bear children, unwanted pregnancy and forced or denial of abortion.<sup>36</sup> Children of rape and the mothers who bear them are often stigmatised and socially punished within their own communities. Sometimes the children are rejected by their mothers or their communities, particularly the mixed-race children.<sup>37</sup> There is also a wider impact on the immediate victims' families and communities.<sup>38</sup>

When the harm caused is not appropriately addressed, the sense of injustice can intensify the suffering. Without adequate, effective, and meaningful access to redress, it is difficult for victims of sexual exploitation and abuse to contend with the consequences of their exploitation and abuse, in country settings where discrimination against women, poverty, instability, lack of infrastructure, governance and rule of law, and violence exacerbate the hardships already experienced.

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<sup>36</sup> Some of these consequences are detailed in UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' UN Doc A/HRC/7/3, 15 January 2008

<sup>37</sup> See, 'To Serve with Pride', December 2006, <https://www.youtube.com/watch?v=e62UExSxxZE>

<sup>38</sup> Human Rights in Trauma Mental Health Laboratory, 'Mental Health Outcomes of Rape...'



### III. Victims' rights – what they mean

'Improving the assistance provided to victims, who are at the heart of our response, is fundamental.'<sup>39</sup> The new Secretary-General appears to have embraced this challenge in his February 2017 report,<sup>40</sup> writing that,

'the dignity of victims must remain sacrosanct and we will work to ensure that their rights are respected as investigations and accountability processes unfold,'<sup>41</sup>

however to achieve it will be an uphill battle. The shortcomings of the policies now in place to provide redress to victims of sexual exploitation and abuse, as discussed throughout this report, stand in contrast to the international norms establishing the right to justice, truth and reparation for victims of crime and victims of human rights violations stemming from an abuse of power that are the foundation upon which policies for redress and remedy should be built, having been adopted and promoted by the United Nations and its Member States.<sup>42</sup>

#### III.1 Applicability of victims' rights standards to international organizations, including the United Nations

While the bulk of applicable standards have been conceived to address the obligations of States towards individuals within their jurisdiction or control, these standards should apply equally to other actors under international law including international organizations. This is particularly so when the actions taken by such organisations have the capacity to impact individuals' rights or freedoms, and where it is within the organizations' capacity to apply such standards.<sup>43</sup> In the context of peacekeeping this would include the United Nations, African Union and also European Union and NATO missions depending on their mandates.

The UN General Assembly, in its Declaration of the High-level Meeting on the Rule of Law at the National and International Levels, specified that 'the rule of law applies to all states equally, and to international organisations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities.'<sup>44</sup> The

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<sup>39</sup> Paisley Dodds, 'AP Exclusive: UN child sex ring left victims but no arrests' Associated Press, 12 April 2017, quote attributed to Atul Khare, UN Under-Secretary-General for Field Support

<sup>40</sup> António Guterres, the UN Secretary-General has pleaded that 'We must seek to restore our personal connections with and empathy towards victims of these heinous crimes in meaningful ways and give visibility to those who have suffered the most,' and has set out several strategies aimed to achieve this. See, UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach' UN Doc A/71/818, 28 February 2017, para 20

<sup>41</sup> Ibid, para 28

<sup>42</sup> See e.g., *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res'n 40/34, 29 November 1985; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res'n 60/147, 16 December 2005

<sup>43</sup> See generally, C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press, 2017)

<sup>44</sup> UNGA, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (19 September 2012) UN Doc A/67/L.1, para 2

international responsibility of the UN for the activities of UN peacekeeping forces has been recognised by the Secretary-General as ‘an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility — widely accepted to be applicable to international organizations — that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation.’<sup>45</sup>

Thus, when an international organization engages with victims of sexual exploitation and abuse, undertakes administrative investigations and affords assistance or other forms of service, those engagements should be carried out in accordance with applicable human rights standards relevant to the forms of victimisation. In addition, where it can be said that an international organization bears responsibility for breaching the rights of such victims (for instance, by failing to protect the individuals concerned from foreseeable violence and abuse), the way in which such liability should be remedied, should comply with applicable international standards relating to access to justice, and reparations for internationally wrongful acts.<sup>46</sup>

### III.2 Victims’ rights standards applicable to sexual exploitation and abuse occurring in the context of peacekeeping operations

Victims’ rights are increasingly recognised to be fundamental aspects of human rights protection. A core of these rights is reflected in binding treaties and this core has been subsequently interpreted in the jurisprudence of courts and treaty bodies, as summarised below. Additional rights are reflected in declarations adopted by United Nations and regional bodies, and/or have been further articulated by independent experts such as Special Rapporteurs, by relevant agencies and committees and are reflected in many thematic reports issued by the UN Secretary-General. Victims’ rights cover an array of procedural and substantive areas which are set out below.

As a general principle, the approaches taken by the UN, the troop-contributing country, the host state and any other actors engaged with victims, should reflect the full spectrum of rights that victims’ possess. Several studies also point to how victims are treated in the aftermath of a crime, on their well-being and psychological recovery.<sup>47</sup>

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<sup>45</sup> See, UN Secretary-General, ‘Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters’, UN Doc A/51/389, 20 September 1996, para 6

<sup>46</sup> ILC, Draft articles on the responsibility of international organizations, ‘Report of the International Law Commission on the Work of its 63rd Session’ (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10

<sup>47</sup> I. Elliott, S. Thomas and J. Ogloff, ‘Procedural justice in victim-police interactions and victims’ recovery from victimisation experiences’ (2014) 24(5) *Policing & Society* 588; J.A. Wemmers, ‘Victims’ experiences in the criminal justice system and their recovery from crime’ (2013) 19(3) *International Review of Victimology* 221; M. Kunst, L. Popelier and E. Varekamp, ‘Victim satisfaction with the criminal justice system and emotional recovery: A systematic and critical review of the literature’ (2015) 16(3) *Trauma, Violence, & Abuse* 336.

### III.2.1 Status as victim

An individual's status as a victim is not contingent on the apprehension of a perpetrator. As the African Commission's Committee for the Prevention of Torture recently articulated in its General Comment on Torture Victims' Right to Redress, 'An individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim.'<sup>48</sup> This language is taken directly from Section V, Paragraph 9 of the UN *Basic Principles and Guidelines*, as well as Paragraph 2 of the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

This principle is important in that it recognises that the term 'victim' and the rights flowing from it are not contingent on the variables of a legal process over which the victim has little control. Whether an individual will be investigated and found guilty of a crime will depend on factors such as the existence of sufficient proof that he or she committed the act and had the requisite intent. There may be doubt as to whether one or several persons is culpable for a particular act (which may result in an acquittal), or a known perpetrator may have died or be incapable of prosecution for reasons such as mental incapacity.

None of these factors are relevant to the status of a person as a 'victim', which depends on whether they suffered harm as a result of a crime (regardless as to whether the crime is prosecuted or not). This distinction is recognised in the successive principles and declaratory instruments referred to earlier, as well as in the European Union Victims' Directive, which requires states to provide support to victims, regardless of whether they play a role in the proceedings, whether proceedings ever take place or even whether the perpetrator is identified.<sup>49</sup> This notion that the status of a person as a 'victim' is not contingent on the recognition of a particular individual as culpable for the crime, has also been incorporated at the national level into criminal injury compensation schemes which afford victims access to support and assistance, as well as certain lump sum payments, regardless of whether a perpetrator is fully investigated or prosecuted. Similar approaches have been taken by truth commissions and administrative claims processes, and by victim trust funds such as the assistance mandate of three one in operation at the International Criminal Court.

Depending on the administrative scheme and the operative context, evidence such as proof of identity, proof that the individual suffered harm in connection with the alleged criminal act, will be required. However, it is recognised that the harm that victims suffer can be the very reason why they themselves are unable to procure evidence; consequently mechanisms have found ways to lessen the burden on victims by lowering the standard of proof, using presumptions or taking

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<sup>48</sup> African Commission, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)', Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, para 17

<sup>49</sup> Directive 2012/29/EU, Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 [EU Victims' Directive], Art. 8(5) and Recitals 19 and 40.

judicial notice of certain facts, and by reducing the information the victims must themselves provide.<sup>50</sup>

### III.2.2 Respect for dignity and protection

Victims are entitled to be treated with compassion and respect for their dignity, taking into account individual victims' personal situations and immediate and special needs, age and gender. There is a positive obligation to ensure that interactions with victims are carried out in a safe environment; every care should be taken to avoid re-victimisation and re-traumatisation, to ensure privacy is respected and to minimise inconvenience.<sup>51</sup> It is recognised that particularly vulnerable individuals such as child victims must have access to procedures and forms of support that have been adapted specifically to their needs.<sup>52</sup>

Victims also have the right to be protected from threats to their security and reprisals. The right to protection has been recognised by numerous courts and treaty body mechanisms,<sup>53</sup> and has been incorporated into a number of treaties<sup>54</sup> as well as national legislation in many countries around the world.<sup>55</sup> All these aspects can prove particularly important in regards to a victim's decision to ultimately report a crime and to cooperate with police investigations and trials.

### III.2.3 Access to assistance and support

Victims should also be provided access to relevant assistance and support services,<sup>56</sup> including health, psychological, protection, social and other relevant services and the means of accessing such services,<sup>57</sup> as well as legal or other advice or representation and emergency financial support, where relevant or appropriate. Support should be available from the moment the competent

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<sup>50</sup> See, Heike Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes', in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman, Mariana Goetz and Alan Stephens (eds), (Martinus Nijhoff, 2009)

<sup>51</sup> UN Basic Principles and Guidelines (n 42), para 12(b); CEDAW, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations', UN Doc CEDAW/C/GC/30, 18 October 2013 para 81(h); (k). See also, the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher\*, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 of 8 Feb. 2005. Principle 32 and the EU Victims' Directive (n 49), Art. 21 and Recital 54.

<sup>52</sup> See, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Res'n 2005/20

<sup>53</sup> See for example, *Rajapakse v. Sri Lanka*, UN Doc. CCPR/C/87/D/1250/2004, 5 Sept. 2006; *Delgado Paez v. Colombia*, UN Doc. CCPR/C/39/D/195/1985 (23 Aug. 1990); *Kiliç v. Turkey* (App. No. 22492/93), ECHR 128 (2000); *Kurt v. Turkey* (Application No. 15/1997/799/1002), 25 May 1998; *Case of the Rochela Massacre v. Colombia* (Merits, Reparations, and Costs), Inter-Am. Ct. H.R. (ser. C) No. 163, 11 May 2007, paras. 155, 171.

<sup>54</sup> See e.g., Art. 13 of the UN Convention Against Torture; Art. 14(1) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 24 of the Convention against Transnational Organized Crime; Arts. 2(b), 6, 9(b) and 10(2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol); Art. 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol). The need to protect victims and witnesses is a well-established feature of international criminal law. See in this respect, Rules 17, 19, 74(5), 76, 87 and 88 of the Rules of Procedure and Evidence of the ICC and Arts. 54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) of the ICC Statute; Rules 69, 75 and 81(B) of the Rules of Procedure and Evidence of the ICTY; Rules 34, 65(C), 69, 75, 77 of the Rules of Procedure and Evidence of the ICTR.

<sup>55</sup> See, REDRESS and ISS, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions', September 2015, pp. 87 – 90. See also, REDRESS, 'Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action' December 2009; UNODC, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, Feb. 2008.

<sup>56</sup> UN Basic Principles and Guidelines (n 42), para 12(c)

<sup>57</sup> CEDAW, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations', UN Doc CEDAW/C/GC/30, 18 October 2013, para 38 (e) and (f)

authorities become aware of the victim, and from the earliest possible moment after the commission of a crime, irrespective of whether it has been reported formally.<sup>58</sup>

Victim support has become a standard feature of many domestic legal systems.<sup>59</sup> Section 11(1) of the Kenyan Victim Protection Act provides that any person dealing with a victim shall ensure that the victim is *immediately* secured from further harm before any other action is taken in relation to the victim. These shall include placing the victim in a place of safety, in case of a vulnerable victim; securing food and shelter until the safety of the victim is guaranteed; securing urgent medical treatment for the victim; immediate psychosocial support for victim and police protection for the victim where appropriate.<sup>60</sup> The Vienna Declaration on Crime and Justice committed Member States 'to introduce, where appropriate, national, regional and international action plans in support of victims of crime, such as mechanisms for mediation and restorative justice, and we establish 2002 as a target date for States to review their relevant practices, to develop further victim support services and awareness campaigns on the rights of victims and to consider the establishment of funds for victims, in addition to developing and implementing witness protection policies.'<sup>61</sup>

Also, it has been recognised that '[w]omen victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.'<sup>62</sup>

### III.2.4 Informing, and engaging victims

Victims have the right to be informed of, and to be engaged in, the development of measures intended to assist them and/or designed to afford reparations to them.<sup>63</sup> It has been recognised that victims should be treated as rights holders and engaged meaningfully, in the conceptualisation and implementation of measures of assistance and support, as well as in measures for reparations.<sup>64</sup> In order for this to happen, victims need to be provided on an ongoing basis with information, and channels for two way information-flow need to be created and fostered. That victims may be vulnerable, disenfranchised and hard to reach should serve as a challenge to find the most suitable modalities for information-sharing and participation; these factors should not serve to justify top-down policies of non-engagement.

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<sup>58</sup> See, EU Victims' Directive (n 49), para 37

<sup>59</sup> See, e.g., European Union Agency for Fundamental Human Rights, 'Victims of crime in the EU: the extent and nature of support for victims' (2014) [http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf)

<sup>60</sup> Section 11 of the Kenyan Victim Protection Act, Act no. 17 of 2014

<sup>61</sup> *Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century*, (A/CONF.187/4).

<sup>62</sup> EU Victims' Directive (n 49), para 17

<sup>63</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 21 March 2007, Reparation (D), available at: <http://www.redress.org/downloads/publications/nairobi-principles-on-women-and-girls.pdf>; CEDAW, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations', UN Doc CEDAW/C/GC/30, 18 October 2013, para 81(e); 'Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity', UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; UN Secretary-General, 'Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence', June 2014, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

<sup>64</sup> However as will be described, there are no measures of administrative reparations that have been developed. Individual victims who wish to seek reparations are expected to do so through the competent courts. This is discussed in Section V, below.

Access to information including how to make a complaint, how to obtain protection and support as well as the circumstances in which they may be eligible for compensation, have all been incorporated into Article 4 of the EU Victims' Directive,<sup>65</sup> and must be applied – proactively and ex officio – in all cases even without the request of the victim. Similar rights of access to information have been incorporated into national legislation in countries in Asia, Latin America and Europe.<sup>66</sup>

Equally, the right to information about the progress of criminal complaints - understood as vital in and of itself but also as a precondition for victims to be in a position to exercise active participation rights – is reflected in the EU Victims' Directive,<sup>67</sup> as well as in human rights jurisprudence. Victims have the right to receive information about their rights and the progress of cases that concern them, such as the progress and disposition of their specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case.<sup>68</sup> Information should be communicated in a manner in which it can best be understood by victims.<sup>69</sup> The European Court of Human Rights has regularly found violations of the European Convention when States have failed to keep victims informed about the progress of criminal investigations.<sup>70</sup> Similar rulings have been made by the Inter-American Court of Human Rights<sup>71</sup> and the UN Committee Against Torture.<sup>72</sup>

The right to information is particularly important in that it may bear strongly upon the ability of victims to exercise rights to participate; courts have also found that the right to information is closely tied to the right to an effective remedy.<sup>73</sup> In the case of gross violations of international human rights law, this is recognised to require a judicial remedy,<sup>74</sup> though administrative mechanisms are often the most realistic way to deliver prompt, adequate and effective reparation to victims in cases of large scale violations and/or where other barriers prevent the majority of victims from effective access to court.<sup>75</sup>

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<sup>65</sup> EU Victims' Directive (n 49), Article 4(1), Recital 22; Victim Support Europe (2013), Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe ('VSE Handbook for Implementation'), p. 9.

<sup>66</sup> These are discussed in REDRESS and ISS, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions', September 2015, p. 79

<sup>67</sup> EU Victims' Directive (n 49), Art. 6 and Recitals 26-27 and 30-33.

<sup>68</sup> UN Basic Principles and Guidelines (n. 42), para 12(a)

<sup>69</sup> EU Victims' Directive (n 49), paras 21-33

<sup>70</sup> ECtHR, *Zontul v Greece* (2012), App. No. 12294/07, 17 January 2012, para. 71; *Ognyanova and Choban v Bulgaria* (2006), App. No. 46317/99, 23 February 2006, paras. 43, 136-137.

<sup>71</sup> Caracazo Case, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002)

<sup>72</sup> See, *Dimitrijevic v Serbia and Montenegro*, Comm. No. 207/2002, CAT, A/60/44, 24 November 2004, para. 5.4; *Hajrizi Dzemajl et al. v Serbia and Montenegro*, Comm. No. 161/2000, CAT, A/58/44, 21 November 2002, 85 CAT/C/29/D/161/2000, para. 9.5-9.6.

<sup>73</sup> See e.g., *Zontul v Greece*, ECtHR, App. No. 12294/07, 17 January 2012, in which it was held that by ignoring Zontul's request for information on the progress of his case, the Greek authorities had deprived him of his right to seek compensation and to participate in proceedings following his complaint regarding torture at the hands of state actors while in immigration detention. See also *Ognyanova and Choban v Bulgaria*, ECtHR, App. No. 46317/99, 23 February 2006.

<sup>74</sup> UN Basic Principles and Guidelines (n 42), para 12

<sup>75</sup> UN, 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo', UN Doc A/HRC/14/22, 23 April 2010, p 35ff



### III.2.5 Victims' rights to engage with criminal investigations and the need for such investigations to be independent, thorough and capable of leading to the identification and prosecution of those responsible

It is well-established that an effective remedy for serious violations of human rights requires a thorough investigation capable of leading to the identification and punishment of those responsible for any ill-treatment.<sup>76</sup> Victims have a general right to access justice. As will be described, this right comprises both substantive and procedural components.

The justice process must be *effective, impartial and transparent – and capable of leading to the identification and prosecution of those responsible*. Investigations must be sufficiently independent of the alleged perpetrators and be seen to be so, from those alleged to be responsible for the abuses. Partiality may relate to any suspicion of, or apparent bias, that may arise from conflicts of interest. Independence means not only a lack of hierarchical or institutional connection, but also practical independence.<sup>77</sup> Victims and their families also have the right to know the truth about the abuses they have suffered, including the identity of perpetrators and the circumstances that gave rise to the violations.<sup>78</sup> A remedy must be “effective” in practice as well as in law - its exercise must not be unjustifiably hindered by the acts or omissions of authorities.<sup>79</sup> It is important to underscore the positive obligation to act; a failure to take the necessary measures (which will be specific to the context and the nature of the crimes) to carry out a full and effective investigation will violate the victims' right to justice.

Just as important, the *process* of accessing justice must be inclusive and affirming of victims' inherent dignity and personhood. For instance, gender-sensitive investigative procedures are always relevant, and particularly necessary to address sexual and other forms of gender-based violence.<sup>80</sup> Examples of gender-sensitive investigative procedures include: ensuring that investigators reflect different genders, are trained in interview techniques and the support needs of victims of sexual and other forms of gender-based violence, that support structures are in place at the moment of the interview, to ensure that those that require it can benefit immediately from support and/or be referred for specialist assistance. Investigating crimes involving sexual or other forms of gender based violence requires a special skills set, not only to ensure that the victims are not re-traumatised through the process, but to be able to identify the evidence to demonstrate the crime. Without training, crucial evidence may be missed and/or gender stereotypes may impede progress or lead investigators to be driven about false assumptions about how a victim may behave or what are the sequelae of the harm.

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<sup>76</sup> See *Ilhan v Turkey*, ECtHR, App. No. 22277/93, 27 June 2000, para 92; *Mikheyev v The Russian Federation*, ECtHR, App. No. 77617/01, 26 January 2006, para. 106-121

<sup>77</sup> *Finucane v. United Kingdom* (2003) 22 E.H.R.R. 29, para. 68; Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Sweden, from 27 January to 5 February 2003, CPT/Inf (2003) 27, p.5

<sup>78</sup> See, e.g., UN Human Rights Commission, Human Rights Resolution 9/11, 'Right to the truth', UN Doc A/HRC/RES/9/11, 24 September 2008; *Velásquez Rodríguez v Honduras*, IACtHR, Ser C, No. 4, 29 July 1988; *Al Nashiri v Poland*, ECtHR, App No 28761/2011, 24 July 2014, paras 94-95; See the Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, *El-Masri v the Former Yugoslav Republic of Macedonia, El-Masri v the Former Yugoslav Republic of Macedonia*, ECtHR, App. No. 39630/09, 13 December 2012.

<sup>79</sup> *Aksoy v Turkey*, ECtHR, App. No. 21987/93, 18 December 1996, para 95

<sup>80</sup> CEDAW, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations', UN Doc CEDAW/C/GC/30, 18 October 2013, para 38(c)

Victims are also entitled to engage with the legal process. They have the right to lodge a complaint and to have that complaint considered in accordance with applicable legal standards and to be informed in good time about the outcome. They have the right to be afforded effective access to the investigatory procedure.<sup>81</sup> Victims also have the right to participate in legal proceedings and to have effective access to the justice process. While the manner in which victims may participate in proceedings varies depending upon the legal jurisdiction, international standards are clear that at the least, victims should be able to express views throughout the proceedings regarding those aspects of the procedure that concern them. This includes the right to be heard, to have access to an interpreter if needed, to be kept informed about developments and to be represented. In an increasing number of jurisdictions, victims are also entitled to express concerns about a decision to end an investigation or prosecution, and are often afforded the right to appeal or seek review of such a decision.<sup>82</sup> Victims' engagement in legal proceedings is a way in which to recognise and acknowledge their suffering, foster their agency and empowerment, and contribute to the process of accountability for perpetrators of crime.

### III.2.6 The right to reparation

Additionally, victims have the right to adequate, appropriate and effective forms of reparation,<sup>83</sup> which are generally understood to entail restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>84</sup> It is recognised that reparations should not be arbitrary; they should be adequate, effective and prompt,<sup>85</sup> proportional to the gravity of the violations and the harm suffered,<sup>86</sup> and the gender dimensions of the harm should be addressed.<sup>87</sup>

There is a distinction between reparation, humanitarian assistance and social services; they serve different purposes and the obligation to afford reparation is not mitigated by the provision of humanitarian assistance or social services.<sup>88</sup> This has been underscored by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who has described:

the tendency on the part of many Governments to pass development programmes as transitional justice programme, a tendency that takes both mild and extreme forms; the latter consists in the assertion that justice can be reduced to development, that violations do not really call for justice but for development. The milder form consists in pretending that development programmes are reparation programmes. Both forms of the tendency

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<sup>81</sup> See *Grigoryev v Russia*, ECtHR, App. No 22663/06, 23 October 2012, para 66.

<sup>82</sup> EU Victims' Directive (n 49), paras 43-45

<sup>83</sup> UN Basic Principles and Guidelines (n 42), para 18

<sup>84</sup> See, eg. UN Basic Principles and Guidelines (n 42), paras 12, 18, 23; UN CAT, 'General Comment No. 3: Implementation of Article 14 by States Parties', UN Doc. CAT/C/GC/3, 13 December 2012, paras. 2, 6, 18

<sup>85</sup> UN Basic Principles and Guidelines (n 42), para 11 (b)

<sup>86</sup> UN Basic Principles and Guidelines (n 42), para 15

<sup>87</sup> CEDAW, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc CEDAW/C/GC/30, 18 October 2013, para 79

<sup>88</sup> *Gonzalez et al v. Mexico 'Cottonfields Case'* (Preliminary Objection, Merits, Reparations and Costs) IACtHR, series C no 215, 16 November 2009, para 558

constitute a failure to satisfy abiding obligations that include both justice and development initiatives.<sup>89</sup>

This description applies equally to the tendency of the UN to privilege humanitarian assistance and support for victims of sexual exploitation and abuse, to the exclusion of other remedies such as compensation, access to the truth and guarantees of non-repetition.

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<sup>89</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', UN Doc. A/68/345, 23 August 2013, para 59

## IV. Victims' Rights as they have been applied to sexual exploitation and abuse

Victims' rights are relevant for criminal accountability in several ways. Firstly, victims have the right to access justice and to a justice process that respects their humanity and dignity. Secondly, though this should not necessarily be the case, in practise the results of criminal investigations have determined the degree to which victims can access support and assistance, as well as reparations.

### IV.1 The criminal accountability process from the lens of victims' rights

There has been virtually no criminal accountability. Thus from the lens of victims' rights (as from any other lens) it is hard to describe the system as it stands as anything other than in need of significant reform. The reporting structure is opaque. There is a lack of trained investigators on the scene. Multiple layers of bureaucracy and, given the different interests and conflicts of interest involved (including the mission and the troop-contributing country), investigations lack impartiality and can be prolonged, lessening their effectiveness. Frequent redeployments mean that there will be less opportunity for investigators to identify and confront alleged perpetrators following a complaint, particularly when there is a delay in the start of investigations. Decisions whether to progress an investigation to a prosecution are not transparently taken nor communicated as of route to victims.

Three main problem areas are summarised below.

#### IV.1.1 Lack of effectiveness

Victims have a right to have their complaints taken seriously, and for investigations to be serious, professional and capable of leading to a finding of what happened and who was responsible. But, in most instances in which complaints have been filed, the follow-up has been weak. One of the respondents interviewed for this report called the process 'a maze'; another noted that when complaints were made, the information was taken and reports were written, but there was no further action.<sup>90</sup> Concerns have been expressed that regular complaints are not followed-up and action follows only after extreme media pressure.<sup>91</sup>

The institutional structure for investigations depends on the status of the alleged perpetrator. If the alleged perpetrator is a member of a formed troop contingent, the troop-contributing country has sole competence to pursue a prosecution, though in accordance with the Memorandum of Understanding signed with the United Nations (in the case of a UN mandated operation)<sup>92</sup> the UN

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<sup>90</sup> Interviews on file.

<sup>91</sup> See, e.g., Sandra Laville, 'UN aid worker suspended for leaking report on child abuse by French troops', The Guardian, 29 April 2015

<sup>92</sup> Memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation], UN Doc A/C.5/66/8, chap. 9

will have authority to carry out a preliminary administrative investigation. If the alleged perpetrator is a UN civilian staff person or an expert on mission such as a member of a police unit or a police officer, his or her country of nationality has no priority of jurisdiction as such; such individuals do not have personal immunity from the host state unlike members of military contingents. However, this does not provide necessarily an easier route for accountability. To the contrary, such alleged perpetrators often fall through the cracks, due to the delays for the UN to affirm whether the individual benefits from any immunity, only weak commitments by states of nationality to investigate and prosecute or gaps in their domestic legislation to enable extraterritorial prosecutions and the challenges for the host state to assume such responsibilities, in light of the ongoing or post-conflict context. In some cases, the host state will not be notified by the UN about a particular allegation, even though the host state has jurisdiction to investigate and prosecute.<sup>93</sup>

Sexual exploitation and abuse can in theory be reported through a variety of channels, including the UN's Office of Internal Oversight Services (if present in the country), its Conduct and Discipline Teams, or directly to the troop-contributing country that is responsible for investigations concerning military troop contingents. Reporting an incident should trigger the allegations' transfer to the appropriate section which has disciplinary authority over the accused, however this is not without problems. The typical reporting procedure for allegations concerning a member of a troop contingent requires the head of UN command to notify the head of a contingent as soon as any prohibited conduct occurs. But the structure for reporting is not always clear to those researching and working on the issue. And as indicated, there is no clear reporting structure for cases involving civilian perpetrators.

Victims are often unaware to whom to report an allegation and there is further confusion about who and how an allegation will be followed up. One interviewee noted that in his experience, the UN's many agencies are usually not coordinated, which can lead to a victim being interviewed 4-5 times which can be re-traumatising. This has become such a problem that some NGOs will no longer share information with the UN.<sup>94</sup> Poor coordination was also raised as a problem by a group of experts that had been contracted to evaluate risks to sexual exploitation and abuse prevention efforts in four peacekeeping missions. They noted that 'there seems to be a lack of coordination between offices that handle personnel in New York and those in the mission. The predisposition towards confidentiality and the respect for the rights of staff appear to [be] out of balance with the need to take decisive action in the judgment of offenders.'<sup>95</sup>

Once a troop-contributing country is informed about an allegation, under UN procedures, the country is required to inform the UN whether it intends to conduct an investigation. If the contingent refuses, the UN can step in and conduct a preliminary administrative investigation. This preliminary administrative investigation may be carried out by the Office of Internal Oversight

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<sup>93</sup> See, Carla Ferstman, 'Criminalizing Sexual Exploitation and Abuse by Peacekeepers' USIP Special Report 335, September 2013

<sup>94</sup> Interview with Lewis Mudge, researcher in the African division at Human Rights Watch (on file).

<sup>95</sup> Dr Thelma Awori, Dr Catherine Lutz and General Paban J. Thapa, 'Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO and UNMISS', 3 November 2013, [http://aidsfreeworld.org/Newsroom/Press-Releases/2015/~/\\_/media/Files/Peacekeeping/2013%20Expert%20Team%20Report%20FINAL.pdf](http://aidsfreeworld.org/Newsroom/Press-Releases/2015/~/_/media/Files/Peacekeeping/2013%20Expert%20Team%20Report%20FINAL.pdf), p. 14

Services, the Conduct and Discipline Teams, OHCHR and/or other units of agencies, funds of programmes, in coordination with the troop-contributing country. Often delays will occur. The troop-contributing country may signal its intention to carry out an investigation but may fail to initiate it in good time. Similarly, it may take time for the UN to commence an administrative investigation. The problem tends to be that when the alleged perpetrator is under the sole jurisdiction of the troop-contributing country, it can take a long time for the national investigators to arrive in situ, and their involvement in the earliest investigations is the best way to ensure that the evidence collected satisfies the standards required by the troop-contributing country's legal system. The majority of troop-contributing countries do not have an investigator on-site or the ability to carry out a court martial on-site. In the UN Secretary-General's latest report, he underscores the importance for troop-contributing countries to have national investigators deployed with troops or on standby in order to avoid delays,<sup>96</sup> and has given examples of the positive impact of such practice [which is developing] on investigations and prosecutions.<sup>97</sup> However, this may not always be feasible, particularly when the size of the contingent is limited.

When there is a civilian perpetrator, in principle a UN body could carry out a preliminary administrative investigation but it is not clear from the practice whether this is done as of routine and if so, to whom such information is forwarded afterwards – the host state (because there is no immunity) and/or the state of nationality (even though that state may not have laws which allow it to prosecute alleged perpetrators of sexual exploitation and abuse which occur outside of their territory)? This lack of clear policy about civilian perpetrators contributes to confusion on the ground and the lack of accountability has a negative impact on the willingness for victims to come forward.

As was clear in the allegations in the Central African Republic, there were no written policies or mechanisms in place when the alleged perpetrators were not under UN command, as in the case of EU police or French soldiers. This was among the factors that contributed to the lengthy delays in initiating investigations and bringing the matter to the attention of the troop-contributing country.<sup>98</sup>

In some missions such as the African Union's AMISOM mission in Somalia, troop-contributing countries have failed to diligently follow up allegations reported to them, which can and has undermined the collection of evidence and accountability of perpetrators.<sup>99</sup>

The confusion and need for coordination among multiple actors can delay support to victims, because in accordance with current procedures the investigation is the principal way in which to 'substantiate' the allegation, which is a pre-requisite for much of the support and assistance. This

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<sup>96</sup> UNSG, 'Combating sexual exploitation and abuse', UN Doc A/71/97, 23 June 2016, para 21

<sup>97</sup> Ibid, paras 19-21

<sup>98</sup> Marie Deschamps, Hassan Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015)

<sup>99</sup> Human Rights Watch, "'The Power These Men Have Over Us': Sexual Exploitation and Abuse by African Union Forces in Somalia', 8 September 2014, Annex 3D, Question 13. See also, African Union, Press Release, 'The African Union releases the key findings and recommendations of the report of investigations on Sexual Exploitation and Abuse in Somalia', 21 April 2015, <http://www.peaceau.org/en/article/the-african-union-releases-the-key-findings-and-recommendations-of-the-report-of-investigations-on-sexual-exploitation-and-abuse-in-somalia>



in itself is a problem. Additionally and as further described in later sections, should victims decide to pursue a civil claim, they will be heavily reliant on the evidentiary findings of the preliminary administrative investigation and the criminal investigation instituted by the troop-contributing or theoretically, the host country.

#### **IV.1.2 Lack of independence and impartiality**

The organization AIDS-Free World has challenged the role of the UN in the conduct of investigations because of the existence of both actual and perceived bias.<sup>100</sup> Arguably, this problem has to do, not only with the UN body which carries out the preliminary administrative investigation – there will be a number of bodies which might be tasked to do so, some are arguably modestly more impartial than others, though the perception of bias remains with each of these, regardless.

The problem of bias also enters into the equation long before there is any investigation, and continues after the investigation ends. Prior to an investigation, the perception of bias will lead to fewer victims to report what happened, particularly when they must report to the same UN mission office where the alleged perpetrators were stationed. Bias may also enter into the decision-making as to whether to send a victims' initial complaint to be fully investigated. And, bias may also impact how such preliminary administrative investigations are followed up and dealt with internally, who gets to see the results of them and how decisions about follow up are taken and by whom – who takes the decision as to if, when and how the data is communicated to the troop contributing country, host state or state of nationality.

#### **IV.1.3 Evidentiary barriers**

There are also barriers which impede national prosecutors, victims and their lawyers seeking to pursue their own investigations from accessing evidence collected by the UN during preliminary administrative investigations.

The independent panel of experts report on the Central African Republic found that UN agencies 'failed to adequately support legal proceedings initiated by the French government as a result of the Allegations.'<sup>101</sup> One of the reasons cited for this failure was that the UN initially did not waive the relevant human rights officer's immunity to allow her to participate in the French legal proceedings. It took about a year for the UN to agree to supply the officer's unredacted notes, a timeline the panel described as 'unnecessarily prolonged and bureaucratic':<sup>102</sup> 'Neither the SRSG nor the head of HRJS appear to have considered the UN to have any duty or responsibility to pursue the accountability of the perpetrators, nor did the Africa Branch of OHCHR in Geneva take any steps in that respect'.<sup>103</sup> The panel recommended that 'The Office of Legal Affairs should adopt

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<sup>100</sup> Code Blue, 'A Practical Plan to End Impunity for Peacekeeper Sexual Abuse', 13 October 2016, <http://www.codebluecampaign.com/factsheets-materials/2016/10/13>

<sup>101</sup> Marie Deschamps, Hassan Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) p 7

<sup>102</sup> Ibid, p vi; See also pp 45-47

<sup>103</sup> Ibid, p 45

an approach to immunity that presumes cooperation and active participation of UN staff in accountability processes; immunity should stand only in circumstances where the UN has determined that disclosure of information by staff members could result in a security threat to the victims or witnesses, or where the victim did not provide his or her informed consent to the disclosure of the information.<sup>104</sup> In the UN Secretary-General's response to the panel recommendations, it has been explained that 'work is under way to formulate a single, coherent policy, with criteria for disclosure and procedures for the treatment and processing of confidential information in order to ensure accountability, to be applied system-wide.'<sup>105</sup>

One interviewee recounted by way of anecdote that a Haitian victim who alleged that she was raped by a peacekeeper and became pregnant as a result, went to the UN mission and provided details about the perpetrator and even pointed him out in a computer line up. However, 'the UN personnel she met with refused to provide her with his identifying information. In this case, the victim managed to take a cell phone photo while the personnel were out of the room and is now pursuing litigation.'<sup>106</sup>

In his latest report, the UN Secretary-General has urged Member States to consider to 'Agree to obtain DNA, on a voluntary basis, from all deployed personnel for purposes of exoneration or conviction of individuals accused of sexual exploitation and abuse, where such evidence would be indispensable.'<sup>107</sup> However even if agreed – which is improbable, - this is unlikely to deal with recalcitrant troop-contributing countries nor does it necessarily imply that evidence obtained will be shared with the victims or their counsel, to pursue independently reparations claims including those concerning paternity and child support. The Special Coordinator on Improving UN Response to Sexual Exploitation and Abuse has affirmed that 'the UN works with *the Member States* to facilitate the pursuit of claims relating to paternity and child support' [emphasis added], and developed a DNA protocol to help Member States to collect samples.<sup>108</sup> However what seems to be clear is that the UN does not see itself as being obligated to help *the victims or their representatives* to obtain the DNA evidence they need to support claims, either because the victims do not have direct access to the troop-contributing country or in the case of civilians, the home state, or when that country is unresponsive.

One interviewee noted that 'there was no DNA testing done for our clients; we filed a notice with the UN that we intended to file paternity claims and asked them to assist in obtaining the DNA. We submitted the request to the Head of Mission but she didn't respond at all.'<sup>109</sup> Obtaining DNA evidence to support paternity claims is inordinately difficult for the victims and their representatives. As another interviewee explained, there are many hurdles to overcome. In the rare instance when the woman realises that she and her child have rights, and she manages to get to the capital city to take her child for DNA testing, she must still make a request for the alleged

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<sup>104</sup> Ibid, p, xii; See also p. 91

<sup>105</sup> UNSG, 'Combating sexual exploitation and abuse', UN Doc A/71/97, 23 June 2016, Recommendation 6, para 5

<sup>106</sup> Interview with Mark Snyder (on file)

<sup>107</sup> UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach' UN Doc A/71/818, 28 February 2017, para 59(b)(xiii)

<sup>108</sup> Jane Holl Lute, Response to letter from C. Ferstman (on file), 6 January 2017

<sup>109</sup> Interview with Nicole Phillips, Institute for Justice and Democracy in Haiti (on file)

father's DNA from the troop-contributing country, alternatively she can go to the soldier who has been implicated to provide a sample for DNA testing, assuming he is still in the country. 'The soldier may say no, he may already have a family, the soldier can say no.'<sup>110</sup>

#### IV.2.4 Victim sensitive procedures

Victim sensitive procedures are important in and of themselves. Victims have already suffered horrific experiences through the sexual exploitation and abuse; there is a need to ensure that interactions with victims avoid subjecting them to additional trauma. Putting victims at ease also encourages the necessary trust for them to convey what happened and helps to empower them. It also encourages others to come forward. But carrying out interviews and providing support services requires patience, specialised skills and training and a supportive environment.

Despite the obvious benefits, there is an entrenched practise which ignores victims' procedural rights. According to one interviewee, victims aren't taken seriously when they report. Basic good practice interview techniques when dealing with vulnerable victims are not followed. For example we have had sight of a photograph of an interview in which a young female victim in Central African Republic is being interrogated in a room filled only with men, including men from the troop-contributing country. The investigative follow up by AMISOM in Somalia has reportedly not met basic good practice standards either and was described overall by an interviewee as poor, without any measures for victim protection: 'When AMISOM went down to investigate, they had a male translator, they had several people in the room when interviewing the victim. They had someone from the troop-contributing country in the room—all of these basic things are not conducive.'<sup>111</sup>

Complicating this is the fact that the system seems like a "black box," and the UN has not made an effort to explain this system to the victims.<sup>112</sup> In some cases, the victims and those that assist them in filing complaints, have heard nothing further after complaints were lodged.<sup>113</sup> The independent panel of experts report on the Central African Republic documented serious deficiencies in the way allegations were followed up and reported.<sup>114</sup>

These gaps stand in contrast to public guidance resources regarding OIOS investigations<sup>115</sup> which set out "due process" rights for UN staff suspected of misconduct. Little mention is made, on the contrary, to rights afforded to victims in relation to the investigations concerning alleged misconduct by UN staff. This contrasts with the "victim centered approach" advocated for peacekeeper sexual exploitation and abuse.

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<sup>110</sup> Interview on file.

<sup>111</sup> Interview with a Human Rights Watch researcher (on file).

<sup>112</sup> Interview with Sharanya Kanikkannan, AIDS-Free World (on file).

<sup>113</sup> Interview with Paula Lecarpentier and Mark Snyder (both on file)

<sup>114</sup> Marie Deschamps, Hassan Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) pp 32-58

<sup>115</sup> OIOS, Uniform Principles and Guidelines for Investigations, OIOS Investigations Manual, January 2015.

#### *IV.2.3.1 Failure to instil confidence in victims to report abuses*

There is a natural tendency for victims to avoid reporting what they experienced. Part of the reluctance stems from the shame, the significant social stigma and trauma associated with the violence. This is the case for most victims of sexual exploitation and abuse, both male and female. Cultural barriers to reporting can be particularly strong. For example in Somalia, ‘the women were not telling their families. And the few cases where the family had found out, [the victims] were basically kicked out. The taboo involved, [ ] whether it was rape or exploitation, was absolutely enormous. ... ’<sup>116</sup> ‘We’re talking about a very small number of women that actually have the patience, and the courage and the temerity to go knock on those UN gates and to sit through the initial questioning.’<sup>117</sup>

One interviewee working in Haiti noted that of the forty-two persons he had interviewed about sexual exploitation and abuse, only four had reported the abuse to the mission authorities.<sup>118</sup> Similarly, following research conducted by Human Rights Watch on sexual exploitation and abuse carried out by troops participating in the African Union mission in Somalia, the organization noted that only two of the twenty-one women interviewed by Human Rights Watch had filed reports with authorities; ‘they feared stigma, reprisals from family, police, and the Islamist insurgent group Al-Shabaab. Others did not believe authorities would be able or willing to take any effective action. They said they felt powerless.’<sup>119</sup> One Somali woman, who alleged that she was raped at the Burundian contingent base in Somalia, explained that she did not report the rape because she ‘feared reprisals from the soldier.’<sup>120</sup> Another woman stated that she was “ashamed” to report the crime and go to the police without proof. She said “‘It’s my word against theirs. The police will only tell more people and arrest no one. There’s no point”.’<sup>121</sup>

It should be incumbent on the mission to put in place measures to increase the confidence of victims so that they can report in full dignity and without fear. This requires proactive steps.

Part of this is about ensuring that the persons to whom the victims report, the place and conditions of that reporting are conducive. One interview respondent involved in the assessment of abuse allegations in the Central African Republic found victims could not report at the mission because it is based in Bangui, and most victims do not usually live nearby. Similar concerns were expressed in respect of Haiti. Victims also could not report to the bases of their local contingent because it would be the one containing the perpetrators and victims could suffer reprisal attacks.<sup>122</sup> This underscores that the level of distrust between the local community and the peacekeeping mission and the real or perceived conflicts of interests can be a significant bar to reporting.

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<sup>116</sup> Interview with a Human Rights Watch researcher (on file).

<sup>117</sup> Interview with Sharanya Kanikkannan, AIDS-Free World (on file).

<sup>118</sup> Interview with Mark Snyder (on file).

<sup>119</sup> Human Rights Watch, “‘The Power These Men Have Over Us’: Sexual Exploitation and Abuse by African Union Forces in Somalia”, 8 September 2014

<sup>120</sup> Ibid

<sup>121</sup> Ibid

<sup>122</sup> Interview (on file).

Many victims may feel more comfortable to report allegations to civil society organizations, which might be perceived as more accessible and neutral. However, structures would need to be in place to ensure that allegations are capable of being quickly forwarded on for investigations, so that no valuable time and evidence is lost. In some countries, civil society organizations may be weak, and there will not always be organizations focused on these issues or sufficiently informed about how to receive complaints on these sensitive issues. In Somalia, a hotline was set up to record allegations, through a local human rights group. In principle, this was a useful strategy however there has been little take up by victims; it was explained that ‘the NGO is basically on the AMISOM base ... and the women were just not going to come forward to an NGO, which is more or less on the base.’<sup>123</sup> In some missions, the UN has begun to put in place a Community-Based Complaint Mechanism, in which select community and/or religious leaders have been given training on sexual exploitation and abuse procedures, with the view to encouraging members to better assist victims and make referrals. In his 2015 report, the Secretary-General noted that he ‘intends to develop a model complaint reception mechanism that can be adapted by duty stations and that will allow victims of sexual exploitation and abuse access to confidential, effective and efficient means of reporting within their communities. Victims will thus be provided with additional community-based reporting options, rather than having to report to the United Nations.’<sup>124</sup> This methodology was further explained in his 2016 report.<sup>125</sup> In his 2017 report, the Secretary-General repeated the call to ‘develop stronger outreach to local communities and support the strengthening of community-based complaint mechanisms’.<sup>126</sup>

Another part is to give clear public information about how to report. In some countries, there are no structures in place to deal with other [domestic] types of sexual assault, victims are not aware that there are even ways that they can report sexual exploitation and abuse by peacekeepers. Raising-awareness is therefore of critical importance. According to the UN’s Office of Internal Oversight Services, only 7 of the 231 interviewees in one independent study knew about that UN policy prohibited sexual exploitation and abuse and none knew about MINUSTAH’s reporting mechanisms or hotlines.<sup>127</sup>

Victims should also be given confidence that their reporting will have impact. This should involve sharing information about the steps that will be taken, when they will be taken, and giving information on outcomes of reporting from other cases. Of course, for this to have real impact there needs to be a positive track-record of reported allegations leading to concrete results. One interviewee opined that victims are more likely to report to the UN if they feel like accountability will be attempted.<sup>128</sup> Another sought to explain victims’ exasperation:

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<sup>123</sup> Interview with Human Rights Watch researcher (on file)

<sup>124</sup> UNSG, ‘Special measures for protection from sexual exploitation and sexual abuse’, UN Doc A/69/779, 13 February 2015, para 43

<sup>125</sup> UNSG, ‘Combating sexual exploitation and abuse’, UN Doc A/71/97, 23 June 2016, paras. 38-39

<sup>126</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, Annex 1, proposal 34

<sup>127</sup> UN Office of Internal Oversight Services (OIOS), ‘Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations’, UN Doc IED-15-001, 15 May 2015, para 47

<sup>128</sup> Interview with Lewis Mudge, researcher in the African division at Human Rights Watch (on file).

Do they go to the UN, to police - and to what end? Will there be anything that comes out of it? There are not many success stories to encourage reporting. And the average preliminary UN 'investigation' can take 6 months - during which time the woman is told she has no right to get updates on the cases, it's at the UN's discretion. If she reports to police, it may just get passed to the UN anyway, since the police are not trained by the UN in the contours of immunity, etc. and may not know when they can investigate.<sup>129</sup>

## IV.2 Victims' Access to Support and Assistance

### IV.2.1 The need for substantiation

*Q: there is a word that I've heard you say several times. I want to understand it from the context of the women on the ground, the victims. "unsubstantiated".*

*AK: Yes*

*Q: that doesn't mean that they weren't attacked, they weren't raped, what does it mean?*

*AK: what it means is that there is not sufficient evidence to prosecute in a court of law.*

*Q: so what happens to them?*

*AK: [He shrugs] an unsubstantiated case*

*Q: nothing happens for them*

Interview with Atul Khare, UN Under-Secretary General for Field Support<sup>130</sup>

What kind of evidence should be necessary for victims of peacekeeper sexual exploitation and abuse to be eligible for financial or other forms of assistance? As described in preceding sections, victim support structures should take as a given that victims will have very little tangible proof and should devise ways in which to overcome those evidentiary hurdles, which stem from the nature of the crimes they suffered. Invariably, victims will have little tangible proof of what happened to them. This is not because of any lack of diligence on their part, but because of many of the same reasons that plague domestic sexual violence cases: fear that they will not be believed or will be ridiculed or suffer negative consequences inhibits victims from coming forward straight away if at all. When they do come forward, there are often delays in the initiation of forensic investigations.

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<sup>129</sup> Interview with Sharanya Kanikkannan, AIDS-Free World (on file).

<sup>130</sup> Al Jazeera, 'Haiti by Force: Fault Lines investigates the legacy and impact of sex abuse by UN peacekeepers in Haiti' 22 March 2017, at 23.10 min, <http://www.aljazeera.com/programmes/faultlines/2017/03/haiti-force-170321091555170.html>

Support and assistance for a victim of crime should not necessarily be linked to the lodging of a formal complaint.<sup>131</sup> Yet, only complaints which are ‘substantiated’ will result in action by the peacekeeping mission, and the degree of assistance and support on offer will depend on the degree of substantiation. This can present a problem of circularity. Victims require assistance and support in order to feel confident in the system and to lodge a formal complaint. However they are only eligible for the bulk of support which might exist in theory,<sup>132</sup> after a formal complaint is substantiated.

The UN Secretary-General explained in 2017 that the trend in the proportion of substantiated allegations in recent years is ‘two substantiated allegations for three unsubstantiated allegations’. He has clarified that ‘allegations may be found to be unsubstantiated for a variety of reasons, including insufficiency of evidence and unavailability of witnesses, and not because allegations were falsely made. An allegation is considered substantiated once an investigation has been completed and facts established that a form of sexual exploitation or abuse took place.’<sup>133</sup> Given the delays in the conduct and completion of investigations, this can and often results in victims not receiving the support they need.

As explained by Awori, Lutz and Thapa,

The conceptualization of remediation needs to be aligned with the fundamental principle of the United Nations to respect the dignity of all human beings and *to protect the most vulnerable*. Yet the preoccupation of all systems put in place for sexual exploitation and abuse is more focused on UN personnel than on victims. The weaknesses noted in the system such as the underreporting of abuse, appearance of impunity, low levels of accountability, and low investigative capacity, all put at risk victims’ access to justice and protection. Furthermore the victim assistance program has the appearance of being an afterthought, dependent on the goodwill of the agencies and TCCs [troop-contributing countries] and member states more generally, neither of whom see victims as a priority. The team noticed an attitude of caution on the part of staff, anxious to discourage too much assistance to victims beyond minimum immediate humanitarian needs for fear of passing on to the UN responsibilities that should be borne by member states.<sup>134</sup>

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<sup>131</sup> See, e.g., Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision, 2001/220/JHA, 25 October 2012, para 8(5); UN CAT, ‘General Comment No. 3: Implementation of Article 14 by States Parties’, UN Doc. CAT/C/GC/3, 13 December 2012, para 15: ‘...Access to rehabilitation programmes should not depend on the victim pursuing judicial remedies.’

<sup>132</sup> The types of support which are outlined in various UN policy reports are not uniformly available to victims in all countries with peacekeeping missions.

<sup>133</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, p. 71, para 17.

<sup>134</sup> Dr Thelma Awori, Dr Catherine Lutz and General Paban J. Thapa, ‘Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO and UNMISS’, 3 November 2013, <http://aidsfreeworld.org/Newsroom/Press-Releases/2015/~media/Files/Peacekeeping/2013%20Expert%20Team%20Report%20FINAL.pdf>, p 15



‘Substantiation’ has been referred to in the context of criminal investigations and prosecutions.<sup>135</sup> There does not appear to be a separate route for substantiation in the context of applications for support and assistance (though perhaps this is included in the non-public draft victims’ assistance protocol of 2016), and thus it would appear that anything other than basic assistance would need to be predicated upon the satisfactory conclusion of a criminal investigation. Given what is known about the delays and poor quality of criminal investigations and the impunity which has resulted, and given that under human rights law, a victim’s status and entitlements are understood to exist independent of the results of a criminal investigation or prosecution,<sup>136</sup> this approach taken to ‘substantiation’ seems to be an unusual and unhelpful barrier which simply impedes access to services.

While it is recognised that some level of substantiation is needed to militate against false claims (which can be a reality in poverty-stricken countries where the benefits on offer or anticipated by victims may be so desirable that they lead to some false claims), counteracting false claims should not require substantiation to a criminal law standard.

#### **IV.2.2 Victims’ assistance strategies, protocols and guides**

A victims’ assistance protocol developed by UNICEF and the UN Department of Field Support in consultation with other members of an Inter-Agency Standing Committee Task Team, which is supposed to outline the roles and responsibilities of key actors for the effective referral, scaled-up provision and regular monitoring of the quality of victim services,<sup>137</sup> has been in preparation for some time, though the draft has not been made public and it does not appear to have been finalised. In 2016, the UNSG indicated that the Protocol was ‘expected to be issued in the third quarter of 2016.’<sup>138</sup> In 2017, the new Secretary-General indicated that the 2016 draft victims’ protocol ‘has been collaboratively developed to guide all United Nations entities in the field in providing sensitive, respectful assistance to victims in a coordinated manner, with special attention paid to the needs and circumstances of child victims. Following a pilot period, where the protocol will be tested in the field, and based on a careful review of the results and existing best practices, I will instruct its use globally across the United Nations system.’<sup>139</sup> It is important for the purposes of transparency that the protocol is shared publicly.

The victims’ assistance protocol is intended to build on the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, adopted by the General Assembly in December 2007,<sup>140</sup> and should

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<sup>135</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, p 71

<sup>136</sup> UN Basic Principles and Guidelines (n 42), para 12(c); African Commission, ‘General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’, para 17

<sup>137</sup> UNSG, ‘Combating sexual exploitation and abuse’, UN Doc A/71/97, 23 June 2016, para 59

<sup>138</sup> UNSG, ‘Combating sexual exploitation and abuse’, UN Doc A/71/97, 23 June 2016, para 59

<sup>139</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, para 33

<sup>140</sup> UNGA, ‘United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel’ UNGA Res’n 62/214, Annex, A/RES/62/214, 7 March 2008

also clarify and consolidate working approaches adopted to give effect to the 2007 Comprehensive Strategy, such as the inter-agency task force Victim Assistance Guide, produced in 2009.<sup>141</sup>

The 2007 strategy specified that *'complainants'* should receive basic assistance and support in accordance with their individual needs directly arising from the alleged sexual exploitation and abuse. This assistance and support should comprise medical care, legal services, support to deal with the psychological and social effects of the experience and immediate material care, such as food, clothing, emergency and safe shelter, as necessary.<sup>142</sup> Further to basic assistance, *'victims'* should receive additional assistance and support in accordance with their individual needs directly arising from sexual exploitation and abuse. This assistance and support will comprise medical care, legal services, support to deal with the psychological and social effects of the experience and immediate material care, as necessary.<sup>143</sup> Also, the 2007 strategy specified measures of assistance and support for children born as a result of sexual exploitation and abuse.<sup>144</sup>

The inter-agency task force Victim Assistance Guide clarified this distinction between *'complainants'* and *'victims'* and what each category of persons can receive, the former focusing on urgent basic assistance that cannot await the substantiation of claims, like emergency medical care or HIV/AIDS Post Exposure Prophylaxis kits and access to psychological counselling.<sup>145</sup> However the Guide does not specify what *'access'* to services might entail. The expanded assistance and support available for *'victims'* once their claims have been substantiated is understood to be much broader forms of assistance, such as educational or vocational programmes on income-generating skills and help to pursue paternity and child support claims for victims, where desirable.<sup>146</sup> However, as already indicated, there is little information on exactly how claims of sexual exploitation and abuse are *'substantiated,'* who bears the burden of proof, and what standard of proof is used to substantiate a claim.

### IV.2.3 Cooperation and service delivery on the ground

Cooperation is encouraged between the peacekeeping operation, UN agencies and other actors on the ground to best assist those requiring assistance and support, though there is less emphasis on consultation with victim communities about what their needs are and how these may be best addressed; victims may have different priorities and it is important that these are factored into the orientation of assistance programmes.<sup>147</sup> The 2007 policy indicates that *'assistance and support should be provided through existing services, programmes and their networks.* However, where necessary, the United Nations should consider supporting the development of new

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<sup>141</sup> ECHA/ECPS UN and NGO Task Force on Protection from Sexual Exploitation and Abuse, *'SEA Victim Assistance Guide: Establishing Country-Based Mechanisms for Assisting Victims of Sexual Exploitation and Abuse by UN/NGO/IGO Staff and Related Personnel'*, April 2009

<sup>142</sup> UNGA, *'United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel'*, para 6

<sup>143</sup> *Ibid*, para 7

<sup>144</sup> *Ibid*, para 8

<sup>145</sup> ECHA/ECPS UN and NGO Task Force on Protection from Sexual Exploitation and Abuse, *'SEA Victim Assistance Guide: Establishing Country-Based Mechanisms for Assisting Victims of Sexual Exploitation and Abuse by UN/NGO/IGO Staff and Related Personnel'*, April 2009, p. 7

<sup>146</sup> *Ibid*

<sup>147</sup> Interview with Sharanya Kanikkannan, AIDS-Free World (on file).

services, while not developing duplicative structures.<sup>148</sup> This is also underscored in the 2009 inter-agency task force Victim Assistance Guide.

According to recent reporting, field missions have established standing task forces and focal points on sexual exploitation and abuse to help ensure that victims are receiving immediate assistance, appropriate responses to allegations are initiated without delay, the relevant offices are informed and activities to preserve evidence are undertaken.<sup>149</sup> This inter-agency cooperation is important, though as the independent panel of experts on the Central African Republic have noted, cooperation is not the norm – it is a ‘fragmented approach that appears to be endemic to the UN.’<sup>150</sup> Under the existing guidance, access to basic support is facilitated once an affected person reports the abuse to a victim support facilitator, or otherwise comes in contact with an NGO or complaints body that then refers the individual to the victim support facilitator.<sup>151</sup>

But access to support is an area in which many problems have been noted. The UN Office of Internal Oversight Services wrote as recently as 2015 that:

‘[t]he Organization’s lack of success in assisting victims of sexual exploitation and abuse is of serious concern as very few have been assisted. Details of the assistance provided are scant, suggesting that the Organization has been unable to devise structures that are sufficiently dynamic to compensate for victims’ powerlessness. Additionally, it is apparent that there are pressing unmet financial issues underlying victim assistance that must be addressed within policy frameworks rather than alleviated depending on staff members’ generosity.’<sup>152</sup>

This challenge was also noted by researchers from AIDS-Free World, following recent field work in the Central African Republic and Haiti. Often, officers resort to paying out of pocket as they do not have access to petty cash for basic support for victims, for example, to buy them a phone or phone credit so they can keep in touch, or travel funds so they can return for follow-up appointments.<sup>153</sup>

The Independent Panel of Experts report on Central African Republic singled out UNICEF for what it termed as ‘appalling’ delays in the provision of services to vulnerable affected children.<sup>154</sup> However, a UNICEF representative has told REDRESS that assistance to child victims has improved after the publication of the Panel of Experts report; ‘as of March 2017, victims were receiving weekly home visits, vocational training for those who wished so, support for schooling, medical aid

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<sup>148</sup> UN Doc A/Res/62/214, Annex, 7 March 2008, para 10

<sup>149</sup> UNSG, ‘Combating sexual exploitation and abuse’, UN Doc A/71/97, 23 June 2016, para 69

<sup>150</sup> Marie Deschamps, Hassan Jallow, and Yasmin Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, 17 December 2015, p 45

<sup>151</sup> ECHA/ECPS UN and NGO Task Force on Protection from Sexual Exploitation and Abuse, ‘SEA Victim Assistance Guide: Establishing Country-Based Mechanisms for Assisting Victims of Sexual Exploitation and Abuse by UN/NGO/IGO Staff and Related Personnel’, April 2009, pp. 8-9

<sup>152</sup> UN OIOS, ‘Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations’ UN Doc IED-15-001 (15 May 2015, reissued 12 June 2015 for technical reasons), para 72.

<sup>153</sup> Interview with Kaila Mintz, AIDS-Free World (on file)

<sup>154</sup> Marie Deschamps, Hassan Jallow, and Yasmin Sooka, *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, 17 December 2015, pp 41-45

if needed and had received other material support,<sup>155</sup> though a continuing weakness is inadequate legal assistance (none in the country of the perpetrator, or not coordinated with the lawyer in the country where the victim is located). Another interviewee noted that with respect to women, not nearly enough has been done to address the immediate needs of victims, particularly initial care for trauma, socio-economic support while women are recovering and a mechanism so that victims can know if their perpetrator has been held accountable.<sup>156</sup> The UN tends to sub-contract the provision of services to local civil society groups, but nonetheless services are 'extremely limited', owing to resource constraints, difficulty for NGOs to access some areas where large numbers of victims are located and a lack of know how. Additionally, it is not clear that the local services providers on the ground have the tools and resources to provide the kind of long-term assistance and care many survivors may need.

#### IV.2.4 Funding for support and assistance

Funding for support and assistance is not specifically provided for though all peacekeeping missions are under instructions to utilise existing funds within their budgets to respond to the immediate needs of victims.<sup>157</sup> In addition, the Secretary-General has established a dedicated trust fund which apparently became operational in March 2016,<sup>158</sup> though the regulations or terms of reference setting out how it operates have not been made public. The trust fund operates mainly on the basis of voluntary contributions, with Norway providing the first in May 2016, with other contributions coming from India, Bhutan, Cyprus and Japan.<sup>159</sup> In addition, the General Assembly approved the transfer to the Trust Fund of payments withheld from peacekeepers in 'substantiated cases' of sexual exploitation and abuse by any United Nations personnel.<sup>160</sup> However, as indicated, the number of substantiated cases remains low, and it is unclear whether this has led to any measurable impact on the trust fund's resources. In his 2017 report, the Secretary-General requested Member States 'to consider a variety of mechanisms, such as ... to withhold reimbursement payments in the event that investigations are not undertaken, reported on and concluded in a timely manner and to transfer the amounts withheld to the Trust Fund.'<sup>161</sup>

The reliance on mainly voluntary resources to afford support and assistance to those affected by sexual exploitation and abuse by peacekeepers is problematic and at odds with the institutional obligation to ensure that adequate support and assistance is provided.

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<sup>155</sup> Interview on file.

<sup>156</sup> Interview with Lewis Mudge, researcher in the African division at Human Rights Watch (on file).

<sup>157</sup> UNSG, 'Combating sexual exploitation and abuse', UN Doc A/71/97, 23 June 2016, para 60

<sup>158</sup> *Ibid*, para 60

<sup>159</sup> Lee Berthiaume, 'Canada considers donation to UN fund for victims of sex abuse by peacekeepers' *The Globe and Mail*, 24 May 2017

<sup>160</sup> UNGA, 'Cross-cutting issues', Resolution 70/286, UN Doc A/Res/70/286, 8 July 2016, para 75

<sup>161</sup> UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach' UN Doc A/71/818, 28 February 2017, para 34

## V. Victims' Access to Reparation, including compensation

### V.1 A fundamental problem – the failure to acknowledge and provide an independent vehicle to assess, institutional liability

To date, the UN has distinguished between what it sees as its role – helping persons affected by sexual exploitation and abuse to receive support and assistance, and providing reparation, including compensation to the victims - which it sees as the role of the individual perpetrators.

In REDRESS' view, this distinction does not accord with the framework for the responsibility of international organizations for internationally wrongful acts.<sup>162</sup> In an unrelated context, the UN Office of the Legal Counsel has indicated that 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the organization and its liability in compensation.'<sup>163</sup> While the troop-contributing country retains sole responsibility for prosecuting offences carried out by members of the troop contingent, this does not negate the due diligence obligation of the organization to ensure that civilians in the host State are protected from criminal acts perpetrated by troop-contributing countries, and its responsibility when that due diligence obligation is breached.

But the responsibility of the organization arguably goes even beyond one of due diligence; the presence of peacekeepers is an inherent danger to the civilian population in respect of sexual exploitation and abuse; it is an ultra-hazardous activity when viewed from the perspective of vulnerable women and children in the host state. The UN has on occasion compensated persons and entities for petty claims related to personal injuries and property damages caused by its presence and has set up local claims review boards staffed by internal, UN personnel, to assess such claims; there is no justifiable reason for it to refuse to contemplate responsibility in the case of criminal acts perpetrated by troop contingents where the organization exercises effective control, experts on mission or other civilians employed by a peacekeeping operation. While an internal claims review board would not be an adequate or appropriate forum to address such claims, the principle that the UN can be liable for acts which occur on its watch, must guide the response.

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<sup>162</sup> ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10

<sup>163</sup> Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G, cited in ILC, Draft articles on the responsibility of international organizations, 'Report of the International Law Commission on the Work of its 63rd Session', *ibid*, Commentaries to Article 7.

## V.2 The viability of pursuing extraterritorial claims

In theory, victims can also pursue claims in the courts of the troop-contributing or home country of the offender. This would appear to be a more sensible option, particularly if the competent authorities in such countries have prosecuted the offenders (which will not necessarily be the case). The courts in the home country will have greater control over the defendant to secure his testimony and DNA evidence and a more direct route to enforce a positive judgment.

In his most recent report, the Secretary-General has requested ‘that Member States receive claims from victims and call upon Member States to establish the mechanisms to do so.’<sup>164</sup> But, most victims will not be in a position to pursue claims against the perpetrators, unless specialised claims processes are developed specifically for that purpose. Access of victims to that jurisdiction may pose the biggest obstacle. The victims would need to find and instruct lawyers, and be prepared to travel to the jurisdiction to present evidence before the foreign court, both of which are costly and cumbersome prospects. Also, not all countries where the offenders are located will recognise the ability for foreign persons to lodge claims about events which occurred outside of the territory.

The majority of sexual exploitation and abuse victims are extremely marginalised within their own post-conflict communities. The idea that they would be able to navigate a complex legal process involving multiple legal systems, immunities, and overcome the gaps in evidence derived from faulty investigations, even with the most zealous legal counsel is simply an illusion. Furthermore, many legal systems do not recognise claims which relate to conduct which took place outside the country (extraterritorial claims). A young victim in Central African Republic, Somalia or Haiti would have little chance of pursuing successfully a civil claim in the Democratic Republic of the Congo or Sri Lanka when justice for crimes perpetrated against domestic victims by individuals from those (and many other) countries remains elusive. This is simply not a realistic option for the majority of victims.

There are anecdotal examples of ex gratia payments being made to victims however the amounts have no bearing to the harm suffered and the number of instances in which such payments have been made is negligible. One interviewee recounted a MINUSTAH case of a victim who reported receiving \$200 USD that someone in a UN vehicle delivered to her home without any further explanation.<sup>165</sup> A Guardian news report recounted that ‘Martha’, a victim from the Central African Republic, ‘said the UN had given her 10,000 CFA (approximately £13), a bag of rice, and some milk and sugar.’<sup>166</sup> The Secretary-General has reported that Ecuadorian courts have recognised paternity, issued a birth certificate and made an order for child support,<sup>167</sup> and the Government of Sri Lanka ‘made a one-time ex gratia payment to a victim of sexual exploitation and abuse and her child in a case in which the alleged father was no longer traceable’.<sup>168</sup>

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<sup>164</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, para 35

<sup>165</sup> Interview with Mark Snyder (on file)

<sup>166</sup> Inna Lazareva, ‘Broken promises for the children of Bangui abused by peacekeepers’ The Guardian, 28 March 2017

<sup>167</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, p 30

<sup>168</sup> Ibid, p 31

## V.3 Claims in the host state

There are a small number of instances in which civil claims are being pursued by victims in the host state, where the victims are located, yet it is difficult to see how such claims will succeed without significant assistance and support by the peacekeeping mission and the troop-contributing country, particularly to help trace the suspect, order and secure the procurement of DNA and other evidence from the defendant and enable the enforcement of an eventual positive civil judgment. If the alleged perpetrator has already left the jurisdiction of the host state, the court in the host state may have difficulty on its own to serve the defendant extraterritorially, to order an absent defendant to provide a DNA sample and without bilateral or multilateral arrangements in place, the victims may find it difficult to seek and obtain extraterritorial enforcement of the judgment. Some countries will have the possibility to serve notice of an impending civil claim to a defendant outside the jurisdiction, to issue a summons for defendants who are outside the country as well as to enter a default judgment should those defendants fail to appear.<sup>169</sup> However, all these measures will not remove the challenge to enforce extraterritorially a default judgment in favour of the victims.

## V.4 Paternity claims

Sexual exploitation and abuse cases which have resulted in the birth of a child are theoretically easier to navigate given the incontrovertible evidence of the birth, however as described earlier in this report, it may be difficult to secure the necessary DNA evidence from the father to show a match, and in the majority of countries, the domestic law is silent on whether DNA evidence of a child which was procured in a different country, can be admitted by the courts. There are thus a lot of unknowns.

At present, DNA protocols are voluntary and while an increasing number of troop-contributing countries have agreed to collaborate, there has been only limited actual progress on cases to date, though there is hope that this in future may become an important avenue for victims. In some countries like India, an application can be made to a civil or family court to order a defendant to supply DNA evidence, where the applicant has shown a strong prima facie case,<sup>170</sup> and doing so would not unreasonably infringe upon the constitutional right to privacy.<sup>171</sup> In criminal rape cases, courts can be *required* to order DNA tests,<sup>172</sup> however it is unclear whether this requirement even extends to civil proceedings concerning rape which are lodged privately by the victim and separately from the criminal prosecution (which would be the typical approach taken in a common

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<sup>169</sup> See, e.g., DRC, Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétence des cours art. 147.

<sup>170</sup> *Rajli v. Kapoor Singh*, 2014(1) L.A.R. 22 (P&H), (discussing *Goutam Kundu v. State of W. Bengal*, 1993 3 S.C.C. 418 (S.C.)).

<sup>171</sup> See *Dipanwita Roy v. Ronobroto Roy*, 2015 1 A.I.R. 365 (S.C.) (acknowledging that forced DNA testing risks infringing on the constitutional right to privacy and, as such, the court must balance the interests of the parties against the need “for a just decision in the matter”); *Thogorani Alias K. Damayanti v. State of Orissa*, 2004 Crim.L.J. 4003 (Ori) (discussing the need to balance privacy and self-incrimination concerns against the evidentiary possibilities created by DNA and similar testing methods). See also *Kamalanantha v. State of Tamil*, 2005 A.I.R. 2132 (S.C.).

<sup>172</sup> This is the case in Pakistan. See: *Salman Akram Raja v. Gov't of Punjab*, (2013) S.C.M.R. (SC) 203 (citing *Muhammad Shahid Sahil v. State*, (2010) PLD 2010 (FSC) 215 (Pak.)). It is also the case in the Democratic Republic of the Congo. According to Article 26 of the *Code de Procédure Pénale* the Public Prosecutor's Office can obtain a “physical examination” of an alleged perpetrator. The Public Prosecutor's Office requires a “reasoned order” of a judge in order to get a physical examination of an alleged perpetrator, unless the alleged perpetrator consents to the examination or “is caught *in flagrante delicto*.” CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] art. 26 (1959).



law country). Usually, civil or family codes do not contemplate compulsory paternity testing.<sup>173</sup> Also, DNA evidence is not considered conclusive evidence of paternity in all countries. Such is the case in Pakistan, for instance.<sup>174</sup>

Without the support of the troop-contributing country, DNA testing can be inaccessible and expensive to procure in some countries.<sup>175</sup> Many countries do not have explicit laws or procedures to enable cross-border recognition of paternity and/or provisions to enforce foreign judgments concerning child maintenance awards. While there are international conventions covering some of these matters,<sup>176</sup> few of the countries supplying the largest numbers of troops to peacekeeping operations are party to these conventions.<sup>177</sup> Thus, recognition of foreign judgments will depend on how the jurisdiction approaches such matters. Some countries may simply require certification of the foreign judgment to presume that it is genuine and accurate,<sup>178</sup> whereas in other countries recognition may depend on whether the foreign jurisdiction is a reciprocating country that recognizes foreign proceedings and gives comity to their outcomes,<sup>179</sup> or, specific arrangements would need to be made on an ad hoc basis.

The Secretary-General in his most recent report indicates that ‘I will ask the Controller to explore the possible use of ex gratia payments to victims in exceptional cases and where the aforementioned Member States’ designated mechanisms do not lead to an appropriate outcome.’<sup>180</sup> But what might constitute an ‘exceptional case’? The statement is misleading because it will be the exception rather than the rule for a victim to receive an appropriate outcome from the non-existent designated mechanisms of Member States. Thus, either there is a verifiable mandatory process whereby adequate and mechanisms are established as a condition precedent for troop deployment and in the case of civilians – for employment, or there should be a multilateral structure in place to deal with the typical (as opposed to exceptional) circumstance of an absence of an effective domestic remedy.

In principle, any child of a UN staff member (which should include those borne as a result of sexual exploitation and abuse) should be entitled to a range of benefits including schooling and housing.

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<sup>173</sup> This is the case in the Democratic Republic of the Congo. See: CODE FAMILLE (1987) art. 637.

<sup>174</sup> See Sohail Akbar Warraich, *Access to Justice for Survivors of Sexual Assault—A Pilot Study*, USAID, at \*15–17 (14 December 2015)

<sup>175</sup> For example, in the Democratic Republic of the Congo, although paternity testing, through blood and other medical tests, is contemplated in the Family Code, the extent of resources that are available to conduct the tests is limited. In 2014, a forensic pathologist noted that it was only in the previous few months that laboratories in Kinshasa, had the capacity to do DNA testing. An advocate for expanding DNA testing to other areas to help victims of rape, the pathologist asserted that, even with the capacity to do testing in Kinshasa, the nearly \$500 dollars it cost to conduct the DNA test for use in legal proceedings was prohibitively high for victims. See, *Forensic Physician Believes DNA Testing Equipment Can Help Victims*, RADIO OKAPI (Aug. 8, 2015, 1:17PM), <http://www.radiookapi.net/actualite/2014/06/27/medecin-legiste-reclame-des-laboratoires-pour-le-test-adn-bunia>

<sup>176</sup> See, for instance, Hague Conference on Private International Law, Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. TREATY DOC. 110-21 (governing the extraterritorial enforcement of judicial decisions concerning child and other forms of family support); Hague Conference on Private International Law, Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, S. TREATY DOC. 110-21 (setting international rules on determining the applicable law to govern in suits for maintenance obligations); Hague Conference on Private International Law, Convention on Parental Responsibility and Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391 (1996) (improving international cooperation regarding child protection, including custody, access, guardianship, among others).

<sup>177</sup> See, <https://www.hcch.net/en/states/other-connected-states>

<sup>178</sup> Qanun-e-Shahadat Order, Order No. 10 of 1984, PAK. CODE (1984) art. 96.

<sup>179</sup> E.g., India, The Code of Civil Procedure, Act No. 5 of 1908, CODE CIV. PROC. (1908) § 44A.

<sup>180</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’ UN Doc A/71/818, 28 February 2017, paras 34, 35

The former UN Secretary-General Kofi Annan has recognised the obligation of all staff members to comply with court-ordered maintenance payments, and recognised the ability of the Secretary-General to authorize deductions from staff members' salaries, wages and other emoluments for indebtedness to third parties, including dependent children.<sup>181</sup> The then Secretary-General went on to affirm that '[t]o facilitate the legal or judicial resolution of claims against staff members in spouse or child support cases, the Organization will continue to cooperate with the appropriate authorities and may provide, at their request, relevant information to persons or organizations outside the United Nations, when and in the manner it deems appropriate, even without the consent of the staff member.'<sup>182</sup> It is crucial that the current Secretary-General affirms the relevance of this policy to child borne as a result of sexual exploitation and abuse, and that the immunity of the organisation will not prevent it from handing over documents or other information that would assist with the enforcement of an award.

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<sup>181</sup> UNSG, Secretary-General's bulletin: Family and child support obligations of staff members, ST/SGB/1999/4, 20 May 1999, para. 2.1.

<sup>182</sup> Ibid, para 2.4

## VI. Improving the prospects for victim redress: some concluding remarks

The independent panel of experts report on the Central African Republic report emphasised the need for a victim centred response, seen through a human rights lens.<sup>183</sup> As has been recognised by the African Commission,

'A victim-centred approach to redress requires an analysis and full understanding of the harm suffered and of the victims' wishes. It needs to reflect their experiences and realities, so that the provided redress is responsive to their needs. States should ensure that victims have ownership of the redress process, and relevant actors providing redress are expected to work with the victims, and not on the victims. Victims should be enabled to play active and participatory roles in the process of obtaining redress, without fear of stigma and reprisals.'<sup>184</sup>

The need for a victim-centred approach was endorsed by both the former and current UN Secretary-General as a matter of principle, though there are differences in understandings as to what this entails. In the independent panel of experts report on the Central African Republic, 'victim-centred' is understood as an all-embracing concept which includes protection, but also calls for empowerment and participation.<sup>185</sup> For former Secretary-General Ban Ki-moon, it appeared to comprise a more limited concept linked to ensuring that victims are adequately protected<sup>186</sup> and victim assistance is well-coordinated.<sup>187</sup>

Secretary-General Guterres appears to be taking a somewhat wider approach, recommending a system of victims' rights advocates among other measures.<sup>188</sup> However, the emphasis of these advocates appears to be on sharing information with victims. While this is important in and of itself, a victims' rights advocate should give direct voice to victims' concerns. This would require that victims' voices are not only heard; they must be listened to, and taken into account in the development and implementation of policies that concern them. The victims' advocates would need to operate with significant independence and would need to have sufficient staff, resources and ability to report findings publicly. While the structure is as yet unclear, it is hoped that it could ideally operate as an internal ombudsperson system which victims could use to raise concerns and have these taken up with the UN. The problem of course is what happens with the advocacy carried out by these victims' advocates. Victims also want results; for this there is a need for a

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<sup>183</sup> Marie Deschamps, Hassan Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) p 79, <<http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf>>

<sup>184</sup> African Commission, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)', para 18

<sup>185</sup> However, the report does not describe what is meant by empowerment and participation, nor what steps should be taken to achieve those goals.

<sup>186</sup> UNSG, 'Combating sexual exploitation and abuse', UN Doc A/71/97, 23 June 2016, para 58

<sup>187</sup> Ibid paras 59; 62

<sup>188</sup> UN Secretary-General, 'Special measures for protection from sexual exploitation and abuse: a new approach' UN Doc A/71/818, 28 February 2017, paras. 20-38

change of policy – there is a need for a forum for victims to bring claims and there is a need for a commitment to accountability and reparations, not only support. As of yet, this commitment is not evidenced.

Secretary-General Guterres has outlined that in each of the four peacekeeping operations where the highest numbers of cases of sexual exploitation and abuse are reported, a position at the mid-to-senior level should be identified to perform the functions of the victims' rights advocate on the ground. Yet, it is difficult to see how a single advocate in a peacekeeping operation would be capable of having the necessary transformative effect. In the Central African Republic alone, there are at least 278 child victims of sexual exploitation and abuse involving alleged perpetrators from a range of troop-contributing countries, according to UNICEF statistics. The Victims' Rights Advocates operating at mission level have been assigned the task on top of functions they already held. For example, the advocate appointed within MONUSCO is the Chief of Civil Affairs, the one in MINUSTAH is the Deputy Director of Human Rights.

It is important that all victims can seek and obtain support and assistance, and reparation for the harm suffered. This is not only a requirement for new cases; there are reportedly at least 2,000 victims of sexual exploitation and abuse,<sup>189</sup> and likely to be many more. All these victims continue to live with the effects of their experiences. There is no time limit on their need for support or their right to justice. This is not simply a moral obligation on the UN and others setting up and running peacekeeping operations; legal responsibility is engaged also, by their exercise of effective control over the mission.

There is a need to make public the 2016 draft victims' assistance protocol as well as the terms of reference of the trust fund, the funds at its disposal and the number of victims it has helped so far and in what ways. This is important for the purposes of transparency and public accountability. It is also important if victims and those trying to assist them are to know their rights and the available procedures to exercise them. It is important that all aspects of victim support and assistance are service-oriented, outward-facing and fully engage the beneficiaries and would-be beneficiaries in the identification and implementation of needs and priorities.

The standards to substantiate claims should be clarified, and eligibility for assistance and support should not be contingent on the results of a criminal law investigation. A prima facie case of victimisation should be sufficient for victims to be eligible for support and assistance and it should be made clear to all, what this means. This should be determined flexibly taking into account the local constraints on access to evidence and the prevailing operating context.

Resources for victim support and assistance should be factored into the regular budgets of international organizations that lead peacekeeping operations and not be made contingent on voluntary contributions. Specific funds and budget lines should be incorporated into mission budgets however this alone will be insufficient, given that the needs for support and assistance

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<sup>189</sup> Paisley Dodds, 'AP Exclusive: UN child sex ring left victims but no arrests' Associated Press, 12 April 2017

are likely to outlive the peacekeeping mission. There must be a long-term commitment to supporting the victims of peacekeeper sexual exploitation and abuse.

The UN and other international organizations leading peacekeeping missions should be committed to supporting victims and their representatives to access information about their abusers and to pursue and enforce claims against them. This must be more than a paper commitment; there is a clear and specific need for victims and their representatives to be helped to be in contact with focal points in troop-contributing countries, to have access to evidence collected by UN or other investigators during preliminary administrative investigations or later criminal investigations, and to secure DNA evidence where relevant.

But even with such support, it is unrealistic for the majority of victims to pursue civil claims against the individual perpetrators of sexual exploitation and abuse whether in the host state or in the courts of the troop-contributing country. Thus some other structure should be established to ensure that victims can access justice and receive adequate and effective reparation for the harm they suffered. The precise contours of such a mechanism would need to be determined but arguably, a specialised administrative claims commission should be established to enable the victims to pursue reparations claims in the simplest and most efficient way. In order to operate effectively, transparently and with impartiality, it would be appropriate for such a mechanism to involve decision-makers who are independent of the UN and of troop-contributing countries. It must be possible for victims to initiate claims in the places where they are located; requiring them to file a civil claim in the troop-contributing country, and/or passing the burden onto a court in the host state to adjudicate a claim against an absent defendant, ignores the transnational nature of the problem and the vulnerable situation of the victims. The only persons who win in such circumstances are the perpetrators; it will be simply too difficult to reach them.

Reparations awards issued through such a commission should be paid by the troop-contributing countries or in the case of UN staff, by the UN regular budget. Should the countries or UN (as appropriate) wish to reclaim the funds paid from the individual perpetrators, they will be best placed to do so; placing that burden on the individual victims is inappropriate and simply constitutes a barrier to their ability to recover.

The Secretary-General has also recommended Member States to enter into a voluntary compact to implement a series of recommendations. This unfortunately is not sufficient and will not produce the needed changes. There is a need for all troop-contributing countries to subscribe to and comply with the recommendations prior to deployment; there is a need for the Memorandum of Understanding between troop-contributing countries and the UN to be amended. In particular, troop-contributing countries should be required to subscribe to adequate and effective accountability and reparations mechanisms as a condition precedent to their being able to deploy troops.

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