

# *Reparation for Sexual Exploitation and Abuse in the (Post) Conflict Context: The Need to Address Abuses by Peacekeepers and Humanitarian Aid Workers*

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## *A. Introduction*

This chapter focuses on remedies and reparation for sexual exploitation and abuse perpetrated in conflict and post-conflict settings by those with a specific mandate to help: peacekeepers and associated personnel and the staff of humanitarian aid agencies.

For many years, the phenomenon was known but not often considered. The victims - often the most marginalised in their communities and further isolated and stigmatised by their experiences of sexual exploitation and abuse - had little voice and limited opportunity, incentive or trust to complain about their ill-treatment and to seek to hold their abusers accountable. Most agencies aware of abuses did little to publicly address the problem. Owing to concerns about negative publicity which could potentially affect donor funding, supply of troop contingents or other types of support and also the fears about subjecting their employees or experts on mission to the whims of local justice systems, typically local police were not even informed by agencies of the wrongdoing. Simply and quietly, suspect individuals tended to be dismissed and, in the case of expatriates, repatriated. Virtually nothing was done to address the harm suffered by victims.

Over time, this practice evolved. The phenomenon of sexual exploitation and abuse has received more attention, owing to strong, though sporadic, media attention. Inquiries have been

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instituted to better understand the problems and which have resulted in commitments to impose “zero tolerance”. Intergovernmental and nongovernmental organisations have acknowledged the problem and developed codes of conduct and frameworks to help deter further abuses. More limited progress has been made to improve the prospects for criminal accountability as well as to afford support and assistance to victims.

By contrast, very little has been done to recognise victims’ rights to a remedy and reparation, or to ensure procedures to enforce such rights. As will be elaborated in this chapter, there is resistance to recognising the beneficiaries of protection or assistance as rights holders, particularly vis-a-vis the peacekeeping operations and humanitarian aid agencies mandated to provide that protection and assistance.

There has been only limited consideration of the absence of reparation for sexual exploitation and abuse, both in policy circles and in academia. With respect to peacekeeping and UN agencies, the bulk of policy reports have focused on the challenges to advance criminal investigations and prosecutions whereas academic literature has similarly focused on investigations and prosecutions,<sup>1</sup> or on discrete issues such as the immunity of peacekeepers and associated personnel,<sup>2</sup> the responsibility of troop contributing countries (TCCs) for the actions of their troops,<sup>3</sup> or the attribution of responsibility to the United Nations.<sup>4</sup> Reparations for sexual exploitation and abuse has

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<sup>1</sup> See e.g., Marco Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’, (2010) 15 *J Conflict & Security L* 347.

<sup>2</sup> Gabrielle Simm, ‘International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers’, (2011) 16 *J Conflict & Security L* 473; Françoise Hampson and Ai Kihara-Hunt, ‘The Accountability of Personnel Associated with Peacekeeping Operations’ in Chikuyi Aoi, Cedric de Coning and Ramesh Thakur (eds), *Unintended Consequences of Peacekeeping Operations* (Tokyo: UN University Press 2007) 195, 207; Micaela Frulli, ‘Immunity for Private Military Contractors: Legal Hurdles or Political Snags’ in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford: OUP 2011) 448, 455-59.

<sup>3</sup> Simm, *ibid*, 487 – 95.

<sup>4</sup> *Ibid*, 490 et seq. See also Frederic Mégret, ‘The Vicarious Responsibility of the United Nations’ in Aoi, de Coning and Thakur (n 2), 250.

been considered only exceptionally, for example by Simm, who explains the challenges to implement principles of responsibility in order to afford reparations to victims;<sup>5</sup> by REDRESS<sup>6</sup> as well as Sweetser<sup>7</sup> and Mompontet,<sup>8</sup> who have called on the UN to establish a framework for compensation, and Simić and O'Brien,<sup>9</sup> as well as Blau, who consider the particular context of “peacekeeper babies”, calling for the strengthening of frameworks to force individual peacekeepers to support financially the babies born from sexual exploitation and abuse,<sup>10</sup> and for peacekeeping forces to ensure child support payments.<sup>11</sup>

The role of humanitarian organisations has received less attention in the literature when compared to peacekeeping abuses. Policy and academic studies and reports have considered the extent to which humanitarian organisations have included in their programming the care and support of survivors of conflict-related sexual violence, including reproductive health,<sup>12</sup> the incidence of transactional sex and related exploitation in post-conflict contexts<sup>13</sup> and the challenge of reporting allegations.<sup>14</sup> More recent studies have focused on safeguarding and wider prevention measures, and broader-based studies have begun to consider what might be required to promote

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<sup>5</sup> Simm (n 2) 496.

<sup>6</sup> REDRESS, ‘Sexual Exploitation and Abuse in Peacekeeping Operations: Improving Victims’ Access to Reparation, Support and Assistance’, September 2017.

<sup>7</sup> Catherine E. Sweetser, ‘Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel’, (2008) 83 *NYU L Rev* 1643, 1661 et seq.

<sup>8</sup> Marion Mompontet, (2017). ‘*La responsabilité civile de l’Organisation des Nations Unies : Effectivité et efficacité des mécanismes de réparation offerts pour les personnes privées - le cas des exactions sexuelles commises par les casques bleus*’, (2017) 30(1) *Rev québécoise de droit international* 41–63, 63.

<sup>9</sup> Olivera Simić and Melanie O'Brien, “‘Peacekeeper Babies’: An Unintended Legacy of United Nations Peace Support Operations”, (2014) 21(3) *Intl Peacekeeping* 345.

<sup>10</sup> Lauren Gabrielle Blau, ‘Victimizing Those They Were Sent to Protect: Enhancing Accountability for Children Born of Sexual Abuse and Exploitation by UN Peacekeepers’, (2016) 44 *Syracuse J Intl Law & Commerce* 121, 146 et seq.

<sup>11</sup> *Ibid*, 147.

<sup>12</sup> See e.g., Marsha Marsh, Susan Purdin and Sanjay Navani, ‘Addressing sexual violence in humanitarian emergencies’ (2006) 1(2) *Global Public Health* 133.

<sup>13</sup> Save the Children UK, ‘From Camp to Community: Liberia study on exploitation of children’, 2006.

<sup>14</sup> 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; Kirsti Lattu, ‘To Complain or Not to Complain: Still the Question’, Humanitarian Accountability Partnership, 2008.

NGO transparency and public accountability, also to donors.<sup>15</sup> Some studies have considered the existence of a duty of care owed by humanitarian agencies to their employees, largely as a result of recent litigation brought by employees and their families raising mainly health and safety concerns.<sup>16</sup>

Until very recently, much less attention has been given to NGO duties owed towards the beneficiaries of aid, to criminal accountability of the perpetrators and even less still to the reparation owed to victims. This stands in contrast with the growing number of studies that have been carried out to consider the need for, and the adequacy of, reparations measures for sexual exploitation and abuse carried out under the guise of other institutions such as the Catholic Church,<sup>17</sup> or historical sexual abuse allegations engaging the responsibility of government agencies.<sup>18</sup> Chamallas, for example, charts the use of tort concepts of vicarious liability, foreseeability and negligence to bring claims against third-party defendants for the failure to take the necessary precautions to prevent sexual assaults.<sup>19</sup>

This chapter attempts to fill some of those gaps. It considers the frameworks for understanding legal responsibility for sexual exploitation and abuse involving peacekeepers and humanitarian actors - who is responsible, for which acts and with what

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<sup>15</sup> UK Department for International Development, 'Enhanced Due Diligence: Safeguarding for external partners' 2018.

<sup>16</sup> Edward Kemp and Maarten Merkelbach, 'Can you get sued? Legal liability of international humanitarian aid organisations towards their staff', Security Management Initiative, 2011.

<sup>17</sup> Kate Gleeson, 'The Money Problem: Reparation and Restorative Justice in the Catholic Church's towards Healing Program', (2015) 26 *Current Issues Crim Justice* 317.

<sup>18</sup> See for example, the work of the Independent Inquiry into Child Sexual Abuse, set up by the UK Parliament 'in the wake of some serious high profile instances of non-recent child sexual abuse and because the government had some very grave concerns that some organisations were failing and were continuing to fail to protect children from sexual abuse', <https://www.iicsa.org.uk/about-us>, (accessed 20 April 2019). The Inquiry is assessing among other things, 'the extent to which existing support services and legal processes effectively deliver reparations to victims and survivors of child sexual abuse and exploitation' [<https://www.iicsa.org.uk/investigations/reparations-for-victims-and-survivors-of-child-sexual-abuse?tab=scope>]. See also, Antonio Buti, 'Canadian Residential Schools - The Demands for Reparations', (2001) 5 *Flinders J Law Reform* 225; Andrea Smith, 'Boarding School Abuses, Human Rights, and Reparations' (2006) 8(2) *J Religion & Abuse* 5.

<sup>19</sup> Martha Chamallas, 'Vicarious Liability in Torts: The Sex Exception' (2013) 48(1) *Valparaiso Univ L Rev* 133. See also, Martha Chamallas, 'Will Tort Law have its #Me Too Moment?' (2018) 11(1) *J Tort Law* 39.

consequences. It analyses the conceptual, legal, institutional and practical barriers to reparation and puts forward several recommendations as to how these barriers can be overcome.

Many steps are being taken to address the scourge of sexual exploitation and abuse however for transformational change to take hold some fundamental precepts need to be confronted and challenged. The recognition and effective implementation of victims' rights is crucial to this transformation. Despite the use of approaches termed as "victim-centred", there is much vested interest in the status quo which tends to relegate victims to the sidelines – as the passive recipients of aid and assistance. Until now, this has meant that corrective actions have been modest, and they are likely to continue to fail to bring about the needed transformation. Much more must be done.

#### *B. The Context of Exploitation and Abuse*

The phrase "sexual exploitation and abuse" covers a wide array of acts and scenarios which are centrally about abuse of power. The phenomenon may involve instances of actual, attempted or threatened rape or other sexual violence in which, often predatory, perpetrators seek to impose their will on a victim to carry out sexual acts under duress or fear of further violence. At other times sexual exploitation and abuse will appear more transactional, either as a form of organised crime or where an individual or group seeks to take advantage of the power imbalance to coerce or manipulate vulnerable persons into sexual activity in exchange for something those persons

need or want, and/or for the financial advantage or increased status of the perpetrator.<sup>20</sup> The vulnerability of the persons and sometimes the grooming process employed by perpetrators can render the victims powerless to recognise the exploitative nature of the relationship and unable to give informed consent. However, there can be shades of grey; at times, the poverty or other difficult circumstances of persons may lead them willingly towards ‘exploitative’ but seemingly consensual relationships with a view to improving status or position, even on a temporary basis.

Sexual exploitation and abuse is a gendered phenomenon, which disproportionately affects women and girls; structural aspects of discrimination and inequality between women and men have historically placed women and girls at a disadvantage. However, boys and young men are often targeted as well, and ‘in fact, when men and boys are subjected to sexual violence the intent is gendered in nature, that is, it seeks to emasculate.’<sup>21</sup>

The phenomenon takes place in all societies. It is fuelled by the demand for sexual services on the one hand and vulnerability and unequal power relations on the other. Victims tend to come from circumstances in which they are marginalised and have less economic or social protections. This might include but is not limited to, children separated from their parents, in care or residential school settings; persons living under severe economic hardship and helplessness; homeless persons; migrants and displaced persons; people living in conflict or natural disaster zones or in the aftermath of same. Displacement related to armed conflict often leads to the types of breakdown of social networks and other forms of personal and community support that can fuel sexual exploitation and abuse.<sup>22</sup>

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<sup>20</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse’, UN Doc ST/SGB/2003/13, 9 October 2003, 1. See also, UN Secretary-General, ‘Special Measures for Protection from Sexual Exploitation and Abuse: a new approach’, UN Doc A/71/818, 28 February 2017, p 41.

<sup>21</sup> Marsh, Purdin and Navani (n 12), 134.

<sup>22</sup> Ibid, 138-9.

Peacekeepers, including military contingents, police and other civilian personnel, as well as humanitarian aid workers (including UN agency personnel and staff of humanitarian organisations) working in post conflict or disaster zones are not immune from these abuses, regardless of the type of work they are engaged in or their role within the organisation, ‘from guards and drivers to senior managers’, and ‘a mix of local, national and international personnel.’<sup>23</sup>

In addition to the abuse of vulnerable members of the local population who these organisations are mandated to protect or afford support, there is also evidence of cases of sexual harassment and abuse within and between organisations. For the foreign recruits, they tend to be enmeshed in a “macho”, male dominated culture with the sense that the day-to-day context they are facing – sometimes, though not always, a hostile, volatile or insecure environment - is “unreal.” Personnel are away from their families, sometimes living in security bunkers in a “camp” mentality; the moral codes from back home can seem distant and inapplicable. The national staff are equally affected by the power imbalances which can foster sexual exploitation and abuse. They may be vulnerable to abuse by “more powerful” colleagues within their organisations, for fear of losing their typically insecure jobs or other benefits. But, at the same time national staff are also engaged in abusive conduct vis-à-vis more vulnerable members of the local population.

According to a recent United Kingdom Parliamentary Inquiry, the ‘[e]vidence ... suggests that sexual exploitation and abuse is endemic across the international aid sector.’<sup>24</sup> Similarly, in respect of abuse by peacekeepers and associated personnel, it has been stated that ‘the problem remains a substantial one’;<sup>25</sup> ‘[t]he UN has recorded over 2,000 allegations of sexual abuse and

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<sup>23</sup> Csáky (n 14), 9.

<sup>24</sup> UK House of Commons, International Development Committee, ‘Sexual Exploitation and Abuse in the Aid Sector’, HC 840, 31 July 2018, para. 28.

<sup>25</sup> Thelma Awori, Catherine Lutz, Paban Thapa, ‘Final Report: Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS’, 3 November 2013, p. 5.

exploitation by UN peacekeeping and other personnel around the world over a thirteen year period',<sup>26</sup> and the cases keep coming. These framings of the scale of the problem persist despite evidence of underreporting.<sup>27</sup>

When these groups engage in acts of sexual exploitation and abuse they not only take advantage of unequal power relations within the society but also breach the duty of care they have towards local populations on account of their protective mandates.

The consequences for victims can be severe. Sexual exploitation and abuse can damage victims' health, produce high rates of trauma, anxiety and depression, impede welfare and development and lead to lost educational and skills training as well as employment opportunities. It can also increase victims' vulnerability to further violence. Many of the harms arising from sexual exploitation and abuse are gender-specific, including vaginal injuries, increased risk of sexually transmitted diseases and HIV, forced pregnancies, abortions and teenage motherhood. In addition to the severe psychological consequences often experienced by victims of sexual exploitation and abuse, these victims are often also subjected to external pressures in the form of social, community and family stigma embedded in the cultural notions of female chastity, purity and feminine gender roles. Men and boys are also stigmatised; the experience of sexual exploitation and abuse is shameful to them and their families; it is inconsistent with the male stereotypes they must embody.<sup>28</sup> Victims often face social exclusion and isolation, as well as, in extreme cases, revictimisation, physical and sexual violence as forms of gender-based persecution and punishment. The abuse can also impact families, and communities.

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<sup>26</sup> REDRESS (n 6) 12, and fn 30 ['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)'].

<sup>27</sup> Awori and others (n 25), 14; Csáky (n 14), 10, 11; Marsh, Purdin & Navani (n 12) 135.

<sup>28</sup> Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict' (2010) 92(877) *Intl Rev Red Cross* 259.



## C. Key narratives and policy responses

### 1. Some underlying narratives

#### a. Preservation of image and damage control

The UN has refrained from accepting characterisations such as ‘widescale’, ‘widespread’, ‘endemic’ when referring to sexual exploitation and abuse perpetrated by peacekeepers and associated personnel as well as the staff of UN agencies. The UN Security Council has referred to ‘the serious and continuous allegations’,<sup>29</sup> and the General Assembly’s Special Committee on Peacekeeping Operations has recognised ‘the gravity of the problem.’<sup>30</sup> However, both the Security Council and General Assembly have underscored repeatedly that ‘the United Nations should not let the performance failures of a few tarnish the achievements of the whole’.<sup>31</sup> But, sexual exploitation and abuse is hardly a problem of the few. And, as Grady notes, when one endeavours to ‘paint the perpetrators of sexual exploitation and abuse as a few “bad apples”, it is no longer necessary to scrutinise the structural features of this issue or of UN policy, and particularly the role that law plays.’<sup>32</sup> The supposed absence of systematicity obviates the need for such scrutiny. The touchiness to words like ‘widespread’ or ‘systemic’ can be seen in the UN’s Office of Internal Oversight Services (OIOS) response to a report concerning sexual exploitation of refugees by aid workers in West Africa, in which the independent investigators characterised

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<sup>29</sup> See e.g., UN Security Council, Resolution 2436 (2018), UN Doc S/RES/2436, 21 September 2018, preamble; Resolution 2272, UN Doc S/RES/2272, 11 March 2016, preamble.

<sup>30</sup> UN General Assembly, ‘Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2005 resumed session\*’, UN Doc A/59/19/Add.1, 11 April 2005, para. 5.

<sup>31</sup> UN Security Council, Resolution 2436, UN Doc. S/RES/2436, 21 September 2018, preamble; Resolution 2272, UN Doc S/RES/2272, 11 March 2016, preamble. See also, UN General Assembly, Resolution 71/278, UN Doc A/RES/71/278, 20 March 2017, preamble.

<sup>32</sup> Kate Grady, ‘Sex, Statistics, Peacekeepers and Power: UN Data on Sexual Exploitation and Abuse and the Quest for Legal Reform’, (2016) 79(6) *Modern L Rev* 931, 955.

the level of abuse as ‘widespread’.<sup>33</sup> The OIOS which carried out a subsequent investigation – the conclusions of which have been criticised<sup>34</sup> -, affirmed that ‘the impression given in the consultants’ report that sexual exploitation by aid workers, in particular sex for services, was widespread is misleading and untrue.’<sup>35</sup> Grady, who analysed the annual UN reporting of statistics on new cases and the inferences drawn by the UN therefrom, is highly critical:

So, first, the increase in allegations is in part a consequence of better UN reporting and other mechanisms, and second, but for the UN policy the level of allegations would be even higher. Leaving aside the apparent contradiction in the argument, it is difficult to find any evidence in the report to support this view. The use of this ‘UN speak’ in the annual reports seems emblematic of the fact that, as the 2015 Deschamps Review into sexual exploitation and abuse by international peacekeeping forces in the Central African Republic identified, ‘the UN is more concerned with rhetoric than action.’ It also gives the impression that the zero tolerance policy will be deemed a success regardless of what happens to the numbers of allegations. Heads I win, tails you lose.<sup>36</sup>

Somewhat similar criticisms of underplaying the seriousness and systematicity have been levied at the aid sector. The UK Parliament has accused the humanitarian aid community of responding to allegations of sexual exploitation and abuse with ‘a reactive, cyclical approach, driven by concern for reputational management.’<sup>37</sup> It reported, in relation to revelations about Oxfam’s response to allegations in Haiti, ‘the accusations that Oxfam failed to report the matter to the Charity Commission, DFID, or any other authority in clear terms, for fear of reputational damage.

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<sup>33</sup> UNHCR and Save the Children UK, ‘Sexual Violence and Exploitation – The experience of refugee children in Guinea, Liberia and Sierra Leone’, January 2002. In the summary advance report, certain allegations of exploitation were referred to as ‘widespread’ [p. 3], whereas in the full report it was stated that there ‘was compelling evidence of a chronic and entrenched pattern of this type of abuse’ [p. 9] One of the authors of the report Ms Asmita Naik, clarified in evidence to a UK Parliamentary inquiry that ‘in addition to establishing the overall pattern of endemic exploitation, the assessment team, documented 67 specific allegations implicating 40 aid agencies and 9 peacekeeping battalions on the basis of 80 separate sources.’ [Asmita Naik – Second Written Submission to International Development Select Committee on Sexual Exploitation in the Aid Sector provided to Main Evidence Session commencing on 18 April 2018].

<sup>34</sup> Naik, *ibid.*

<sup>35</sup> UN OIOS, ‘Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa’, UN Doc A/57/465, 11 October 2002, para. 42.

<sup>36</sup> Grady (n 32), 943.

<sup>37</sup> International Development Committee (n 24), p. 4.

In doing so, the organisation exacerbated the risk of allowing the perpetrators to be re-employed within the sector and prevented the issue from being aired and tackled effectively.’<sup>38</sup> In respect of the scale of the problem, it determined that ‘[t]he sector as a whole needs to confront the fact that, although the exact scale remains unknown, sexual exploitation and abuse is happening and it is happening across organisations, countries and institutions. It is endemic, and it has been for a long time. Outrage is appropriate, but surprise is not.’<sup>39</sup>

*b. Limitation of liability; refocusing blame*

Sexual exploitation and abuse during peacekeeping can entail both individual responsibility (criminal and civil) as well as institutional responsibility - to the extent that the institution or body to whom the individual perpetrator reports was negligent or otherwise failed to exercise due diligence to protect the local population from the foreseeable acts of those under its charge.<sup>40</sup> The acceptance of one form of responsibility does not preclude other forms of responsibility; they can both exist at the same time.

In general terms the UN has accepted that, when it exercises effective control (which would typically be the case in peacekeeping missions operating under a UN mandate), any wrongful conduct would be attributable to the organization for the purposes of assessing institutional responsibility.<sup>41</sup> Nevertheless, in its policy documents concerning sexual exploitation and abuse, it has articulated the position that others alone (and not it) are responsible for the various harms connected to sexual exploitation and abuse; its sole role is ‘supporting efforts of troop contributing

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<sup>38</sup> Ibid, 8.

<sup>39</sup> Ibid, 22, para. 37.

<sup>40</sup> See further, Section D of this chapter.

<sup>41</sup> UNGA, ‘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’ (20 September 1996) UN Doc A/51/389, para. 16.

countries to investigate and prosecute criminal allegations and encouraging states to address paternity and child support claims, and to ‘explore the possible use of ex gratia payments to victims’.<sup>42</sup> Yet, while it is correct that under status of forces agreements, troop contributing countries have sole jurisdiction to prosecute the members of military contingents who are accused of a crime while on mission,<sup>43</sup> this fact should have no bearing on any potential institutional liability in the case of a breach of a duty of care or related wrongful conduct concerning sexual exploitation and abuse.<sup>44</sup> Multiple allocations of responsibility are possible, and depending on the causal relationship of the responsibility with the ensuing damage, this may give rise to multiple obligations to afford reparation, depending on the circumstances.<sup>45</sup>

In contrast, the humanitarian aid community has tended to ignore the issue of liability altogether.<sup>46</sup> It has focused on the protection of and support to vulnerable people as opposed to recognising and putting in place measures to address the rights of individuals who have already suffered harm. Naturally there is a conflict of interest; charities will not necessarily be interested to expose themselves to liability if they can help it. But therein lies the problem; the charities are

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<sup>42</sup> Carla Ferstman, ‘Reparations for Mass Torts Involving the United Nations Misguided Exceptionalism in Peacekeeping Operations’ (2019) 16 *Intl Org Law Rev* 42, 58-59

<sup>43</sup> See, e.g., UNGA, ‘Model Status-of-forces Agreement for Peace-Keeping Operations’ (9 October 1990) UN Doc A/45/594; ‘The Status of Forces Agreement between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan, 8 August 2011, paras 44-47, 50-51 (on criminal jurisdiction), 52 (civil liability).

<sup>44</sup> See generally, Ferstman (n 42).

<sup>45</sup> See on shared responsibility and the potential impact on the obligation to afford reparation, Pierre d’Argent, ‘Reparation, cessation, assurances and guarantees of non-repetition’ in André Nollkaemper and Ilias Plakokefalos (eds) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press 2014).

<sup>46</sup> Note however the recommendations on reparations and accountability structures made by the Independent Commission on Sexual Misconduct, Accountability and Culture – a Commission set up under the auspices of Oxfam following the public scandal about their response to multiple abuse allegations which erupted in 2018 [Independent Commission on Sexual Misconduct, Accountability and Culture, ‘Committing to Change, Protecting People: Toward a more accountable Oxfam’, Final Report, June 2019, pp. 48 - 50]. At the time of writing, Oxfam had not committed itself to implementing the specific recommendations on reparations.

the route by which victims can exercise their agency; but the space given to them for that purpose is limited.

## *2. Public narratives and policy responses*

The main public narratives and policy responses that have been used to explain and address the problem are summarised below. These tend to overlap both in time as well as in emphasis.

### *a. Prevention and safeguarding*

Prevention was an important aspect of the 2003 special measures bulletin aimed at staff of the United Nations, and focused on clarifying impermissible conduct and what managers should be doing when that conduct comes to light.<sup>47</sup> It also featured in the Zeid report,<sup>48</sup> and became the focus of many of the first UN policy responses to sexual exploitation and abuse, particularly, training, backed up with awareness raising and risk assessment.<sup>49</sup> Pre-deployment training has become routine for international civilian staff. Troop- and police-contributing countries are responsible for, and have committed to, providing mandatory pre-deployment training for their contingents. Pre-deployment training is followed up with induction and refresher training sessions. Awareness raising includes information sharing on standards of acceptable behaviour and how the local population can make a complaint or alert to potential problems. Risk assessments are intended to identify problem areas and to take mitigation actions, and in addition screening is

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<sup>47</sup> UN Secretary-General, 'Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse', UN Doc ST/SGB/2003/13, 9 October 2003.

<sup>48</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.

<sup>49</sup> Awori and others (n 25), 8-11.

aimed at avoiding the hiring onto new missions of individuals who have carried out sexual exploitation and abuse in other locations. None of these measures work seamlessly, however there is a sense of progressive improvements.

In the humanitarian aid context, the buzzword is ‘safeguarding’, but essentially it refers to the same thing – preventing the abuses from happening in the first place, putting in place robust standards of conduct and training staff. An inter-agency standing committee,<sup>50</sup> made up of UN agencies and several large humanitarian NGOs, has provided advice to the UN, produced codes of conduct and other practical guidance and tools for agencies. In 2009, it commissioned a review of actions taken to combat sexual exploitation and abuse and reported on its findings in 2010.<sup>51</sup> It noted the progress with the adoption of policies but underscored the challenges for these to be implemented on the ground.<sup>52</sup> The UK Parliamentary inquiry recommended several measures to improve prevention such as stronger safeguarding measures, which is already having an effect. Some government agencies and larger humanitarian organizations are now requiring grantees and sub-grantees to demonstrate adequate internal safeguarding policies as a condition to receive grants. Other recommendations include a global register of aid workers, a “passport” for aid workers to provide background information and vetting status as well as a new disclosure of misconduct scheme across the NGO sector to prevent known perpetrators from moving around undetected.<sup>53</sup> While important, as there has been so few formal investigations and very little criminal accountability, many of these latter measures are difficult to implement as the information

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<sup>50</sup> See its website: <http://www.pseataaskforce.org/> (last accessed 20 April 2019).

<sup>51</sup> Inter-Agency Standing Committee, ‘Global Review of Protection from Sexual Exploitation and Abuse by UN, NGO, IOM and IFRC Personnel’, July 2010.

<sup>52</sup> *Ibid*, 3.

<sup>53</sup> International Development Committee (n 24).

upon which aid workers would be vetted (allegations of criminal and abusive or exploitative conduct which has not necessarily been subject to any testing) would be so speculative.

*b. Criminal accountability*

The need to investigate allegations – to better understand the nature and scale of the issues and to ensure criminal accountability of perpetrators, is essential. In the context of peacekeeping operations, status of forces agreements specify that troop contributing countries are solely responsible for prosecuting their formed troop contingents. All other accused persons – whether they are police contingents, civilian personnel or experts on mission, can be prosecuted by the host state under its domestic law, but are more likely to be repatriated to their countries of origin. Whether they will face prosecution back home will depend on a confluence of factors, including the nature of the allegations (some of which will not be criminalised), whether the criminal law allows for extraterritorial prosecutions of sexual exploitation and abuse (in many countries this will only apply to cases involving children), or political will, which is often dependent on media and civil society pressure.<sup>54</sup> Already in 2006, a number of significant recommendations were made to address the legal lacunae, including recommending a much greater role for the host state and a proposal for a draft convention,<sup>55</sup> however debates stalled. Instead, there has been piecemeal progress with investigations as a result of revisions to the memorandum of understanding between troop contributing countries and the UN and other small adjustments, and greater scrutiny of the follow up of allegations.

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<sup>54</sup> The array of challenges to secure criminal prosecutions are explained in Carla Ferstman, ‘Criminalizing Sexual Exploitation and Abuse by Peacekeepers’, USIP Special Report 335, 2013.

<sup>55</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, Annex.

The staff of humanitarian NGOs are subject to the jurisdiction of the criminal law of the host state (and potentially also, their home state), but as was found by the UK Parliamentary Inquiry, often the humanitarian NGOs fail to inform the local authorities when allegations arise. Consequently, impunity and weak vetting processes mean that perpetrators can end up being transferred to other locales and the problem simply repeats itself. As a result of recent public scandals, the obligation for staff to report any abuse they suspect or witness, whether within their own organisation or outside, has been incorporated into standard-setting texts.<sup>56</sup>

*c. Victim support*

The importance of victim support was highlighted in the Zeid report<sup>57</sup> but took on a more central policy focus in 2008, with the adoption of the UN Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel.<sup>58</sup> This policy sets in motion a framework for assistance and support to be provided with the aid of a trust fund ‘through existing services, programmes and their networks’, and ‘where necessary, [...] new services.’<sup>59</sup> This was followed in 2009 with the inter-agency task force Victim Assistance Guide,<sup>60</sup> and extended and further clarified in the annual reports of the Secretary-General on the topic.

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<sup>56</sup> ‘Core Humanitarian Standard Guidance Notes and Indicators’, CHS Alliance The Sphere Project and Groupe URD, 2015, 13.

<sup>57</sup> Prince Zeid (n 48), paras. 52-56.

<sup>58</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, UN Doc. A/RES/62/214, 7 March 2008.

<sup>59</sup> UN Doc A/Res/62/214, Annex, 7 March 2008, para. 10.

<sup>60</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.



But crucially, support provided by the UN was not understood as a reparative element stemming from any wrong committed. There was never any sense of a requirement to afford assistance; it was simply something that was seen as appropriate, a useful humanitarian policy to pursue. The 2008 comprehensive strategy makes this clear - it ‘does not deal with compensation’; ‘[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>61</sup> A similar statement has been incorporated into the 2009 Victim Assistance Guide:

The SEA [Sexual Exploitation and Abuse] Victim Assistance Mechanism does not replace or negate the responsibility of perpetrators of acts of sexual exploitation and abuse, who should be held accountable for their actions both legally and financially. The assistance provided by the United Nations or any other organization does not in any way diminish or replace individual responsibility. Likewise, the provision of assistance does not serve as an acknowledgment of the validity of the claims, a form of compensation nor an indication of acceptance of responsibility by the alleged perpetrator.<sup>62</sup>

Of note, trust funds are often implemented as a means to afford a measure of reparations, given the difficulties for victims to pursue compensation or other remedies through a court process, particularly in the context of mass violence. However, these do not displace the reparations obligation. The independent panel of investigators in relation to the Central African Republic incidents have made this clear, when they qualify their support for the creation of the UN’s trust fund for sexual exploitation and abuse: ‘As a matter of principle, victims of conflict related sexual violence should be compensated. . . . In recognition of the difficulty faced by victims in accessing a remedy in such circumstances, victims should have access to the common trust fund proposed by the Secretary-General. The trust fund is not intended to compensate individual victims in the

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<sup>61</sup> UN Doc A/Res/62/214, Annex, 7 March 2008, para. 3.

<sup>62</sup> Victim Assistance Guide (n 60) 4.

form of reparations, but it would assist in the provision of the specialized services victims of sexual violence require.’<sup>63</sup>

Nonetheless, even the limited support on offer was difficult to access because of the need to demonstrate proof of the abuse – which, due to the deficient investigations, was often lacking.<sup>64</sup> Also, inter-agency cooperation to arrange support has been difficult and cumbersome.<sup>65</sup> The UN Office of Internal Oversight Services noted in a 2015 report 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>66</sup>

Similar criticisms were made by the independent investigators who reviewed the UN response to the 2014 allegations against French peacekeepers in the Central African Republic. Victims’ welfare ‘appeared to be an afterthought, if considered at all.’<sup>67</sup>

Efforts to refine and strengthen victim assistance have continued, ultimately resulting in the release of the Secretary-General’s new approach in 2017, which was designed to ‘dramatically improve how the United Nations addresses this problem.’<sup>68</sup> As part of this new approach, a system of victim rights advocates was unleashed to strengthen victims’ voices and agency,<sup>69</sup> though in

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<sup>63</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, 84.

<sup>64</sup> REDRESS (n 6), 31-33. See also, Victim Assistance Guide (n 60) 8-9.

<sup>65</sup> Deschamps and others (n 63), 45.

<sup>66</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>67</sup> Deschamps and others (n 63), i.

<sup>68</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. 13.

<sup>69</sup> Ibid, paras. 27-35.

practice it has served mainly as a vehicle to communicate the UN's established policies. Instead of being empowered through a reparations process, the victims await 'support' which is piecemeal.

Similarly, humanitarian NGOs have not set up mechanisms for victims to claim reparations.<sup>70</sup> Standard-setting texts refer to the importance of victim assistance as part of effective community based complaints mechanisms,<sup>71</sup> and is understood to entail – at least in principle – 'medical, legal, psychosocial and immediate material care as well as the facilitation of the pursuit of paternity and child support claims. Direct financial assistance should not be provided under the SEA/VAM. The nature and scope of the assistance to be provided is determined on a case-by-case basis and depends on the services which are locally available to other GBV survivors.'<sup>72</sup>

#### *D. Legal obligations to afford reparation (what they are and who has them)*

##### *1. Human rights framework*

States are bound to respect, protect and fulfil those human rights obligations that form part of their treaty obligations, their domestic law as well as applicable customary international law binding on all states. In certain contexts, international organizations with "international legal personality" may similarly take on human rights obligations, to the extent that they have agreed to be bound and/or the obligations are required to fulfill their mandates.<sup>73</sup> There are multiple actors involved in

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<sup>70</sup> Victim Assistance Guide (n 60) 4.

<sup>71</sup> See, e.g., Corinne Davey and Lucy Heaven Taylor, 'PSEA Implementation Quick Reference Handbook', CHS Alliance, 2017, 4; BOND, 'Our commitment to change in safeguarding', pp. 7.

<sup>72</sup> Victim Assistance Guide (n 59) 6. See also, OXFAM GB, 'Protection from Sexual Exploitation and Abuse (PSEA) Policy', May 2018, 4.

<sup>73</sup> Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford: OUP 2017).

peacekeeping and humanitarian missions and “effective control”<sup>74</sup> – the criterion for determining obligations under international law - may be difficult to ascertain. The commission of sexual exploitation and abuse may engage the responsibility of several actors: the troop contributing country, the host state and/or the United Nations in the case of a peacekeeping mission operating under the auspices of the UN.

A human rights framework necessarily takes account of the rights of victims and potential victims and in particular, protecting them from harm. Adopting a human rights-based approach to sexual exploitation and abuse requires that those with the human rights obligation act with due diligence towards the prevention of sexual exploitation and abuse, the protection of victims and the prosecution of perpetrators. The UN Committee on the Elimination of Discrimination against Women has made clear that the failure ‘to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.’<sup>75</sup> The African Commission articulated this as ensuring that agents acting on their behalf or under their effective control refrain from committing any acts of sexual violence. States must adopt the necessary legislative and regulatory measures to act with due diligence to prevent and investigate acts of sexual violence committed by state and non-state actors, prosecute and punish perpetrators, and

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<sup>74</sup> When an organ or agent is seconded to an international organization, but still acts as an agent or organ of the body that seconded it, attribution of conduct will be determined by who exercised ‘effective control’ over the organ or agent that carried out the act. See, Art 7, 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>75</sup> CEDAW, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’, UN Doc CEDAW/C/GC/35, 14 July 2017, para. 24(b).

provide remedies to victims.’<sup>76</sup> The due diligence standard, should be triggered as soon as the relevant authorities know or ought to have known about sexual exploitation and abuse taking place within its territory or jurisdiction, by either state or non-state actors.

It follows that there will be an obligation to provide reparation if there has been a failure to take reasonable steps to prevent the prohibited behaviour and protect potential or actual victims of such exploitation and abuse, to the required standard of due diligence.<sup>77</sup> What would constitute appropriate forms of reparation would depend on the circumstances, but would usually include measures such as restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.<sup>78</sup>

The importance and relevance of reparations to address aspects of gender-based violence including sexual abuse has been underscored repeatedly. For instance, the UN Committee on the Elimination of Discrimination against Women has made clear that reparations should include different measures, such as monetary compensation and the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery, and satisfaction and guarantees of non-repetition.<sup>79</sup> It recommended that states provide effective and timely

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<sup>76</sup> African Commission on Human and Peoples’ Rights, ‘Guidelines on Combating Sexual Violence and its Consequences in Africa’, 60th Ordinary Session, 8-22 May 2017, principle 6.

<sup>77</sup> This point is underscored by Rashida Manjoo in her seminal 2010 report. See, Human Rights Council, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo\*’, UN Doc A/HRC/14/22, 19 April 2010, para. 16 [‘States are responsible for their failures to meet their international obligations even when substantive breaches originate in the conduct of private persons, as States have to exercise due diligence to eliminate, reduce and mitigate the incidence of private discrimination. In cases where a person or other entity is found liable for reparation to a victim, such party should provide reparation’]. In the trafficking context, see, *Rantsev v. Cyprus and Russia*, ECtHR, Applic no. 25965/04, 7 January 2010.

<sup>78</sup> ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on the work of its 53rd session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1; 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; 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, UNGA Res 60/147 (16 December 2005).

<sup>79</sup> CEDAW, General recommendation No. 35 (n 75), para. 46.

remedies for all gender-based violations, including sexual and reproductive rights violations, domestic and sexual enslavement, forced marriage and forced displacement, sexual violence and violations of economic, social and cultural rights.<sup>80</sup> The UN Special Rapporteur on trafficking in persons, especially women and children, developed with the Office of the High Commissioner for Human Rights a set of basic principles on the right to an effective remedy for trafficked persons.<sup>81</sup> These basic principles underscore that ‘Victims of trafficking in persons, as victims of human rights violations, have the right to an effective remedy for any harm committed against them’.<sup>82</sup> Further it recognises that all states shall provide adequate, effective and prompt remedies to victims when the state is legally responsible for any harm committed against them; ‘this includes when harm is attributable to the state or when the state has failed to exercise due diligence to prevent trafficking, to investigate and prosecute traffickers, and to assist and protect victims of trafficking in persons’.<sup>83</sup> Also, it sets out particular remedies for child victims, taking into account their best interests.<sup>84</sup> Access to reparations for conflict-related sexual violence is understood to be so seminal that the UN Secretary-General has indicated that ‘The UN cannot endorse peace agreements which preclude either access to judicial remedies or administrative reparations programmes for victims of conflict-related sexual violence and other gross violations of international human rights law, as well as serious violations of international humanitarian law.’<sup>85</sup>

In the *Cotton Fields case* – which concerned the abduction, killing and sexual violence of two minors and a young woman by non-state actors in Mexico and the subsequent failure of the

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<sup>80</sup> CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’, UN Doc CEDAW/C/GC/30, 1 November 2013, para. 81 (g).

<sup>81</sup> UN General Assembly, ‘Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons’, UN Doc A/HRC/26/18, 2 May 2014, Annex.

<sup>82</sup> *Ibid*, I(1).

<sup>83</sup> *Ibid*, I(2).

<sup>84</sup> *Ibid*, IV.

<sup>85</sup> UN Secretary-General, ‘Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’, 2014, p. 7.

state to diligently investigate, prosecute and punish the perpetrators, the Inter-American Court of Human Rights determined that Mexico's failure to exercise due diligence violated the women's rights and required it to provide a variety of reparation measures to the victims, which should among other factors, have a direct connection with the violations, should repair in a proportional manner pecuniary and non-pecuniary damages, and should be oriented to identify and eliminate the structural factors of discrimination.<sup>86</sup>

Recommendations have been made by UN treaty bodies to the Holy See in respect of its failure to exercise due diligence to address child sexual exploitation and abuse in the Catholic Church. For instance, the Committee on the Rights of the Child urged the Holy See to:

- (a) Conduct an internal investigation into the conduct of religious personnel working in the Magdalene laundries in Ireland as well as in all countries where this system was in place, and ensure that all those responsible for the offences be sanctioned and reported to national judicial authorities for prosecution purposes;
- (b) Ensure that full compensation be paid to the victims and their families either through the congregations themselves or through the Holy See as supreme power of the Church and legally responsible for its subordinates in Catholic religious orders placed under its authority;
- (c) Take all appropriate measures to ensure the physical and psychological recovery and social reintegration of the victims of these offences; and
- (d) Assess the circumstances and reasons which have led to such practices and take all necessary measures to ensure that no women and children can be arbitrarily confined for whatever reason in Catholic institutions in the future.<sup>87</sup>

Similarly, the Committee Against Torture has recommended the Holy See to:

- (a) In accordance with article 14 of the Convention and General Comment No. 3, take steps to ensure that victims of sexual abuse committed by or with the acquiescence of the State party's officials receive redress, including fair, adequate and enforceable right to compensation and as full rehabilitation as possible, regardless of whether perpetrators of such acts have been brought to justice. Appropriate measures should be taken to ensure the physical and psychological recovery and social reintegration of the victims of abuse;

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<sup>86</sup> *González et al. ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Ser. C No 205, 16 November 2009.

<sup>87</sup> Committee on the Rights of the Child, 'Concluding observations on the second periodic report of the Holy See\*', UN Doc. CRC/C/VAT/CO/2, 31 January 2014, para. 38.

(b) Encourage the provision of redress by individual religious orders to victims of violations of the Convention carried out by them and take additional steps to ensure that victims obtain redress as needed, including in the case of the Magdalene Laundries.<sup>88</sup>

In addition to the reparations measures themselves, human rights policy frameworks have underscored the importance for victims to be involved in the design, implementation and monitoring of reparation programmes, bearing in mind local contexts and the transformative potential of reparations.<sup>89</sup>

Despite the plethora of policies and standard-setting texts which have clarified in human rights terms, the obligations to afford effective remedies and reparations for different forms of gender-based violence, these were not incorporated into the UN policy frameworks for addressing sexual exploitation and abuse on the context of peacekeeping, even in the latest iterations of such frameworks which are said to promote a so-called “victim-centred” approach.<sup>90</sup> Westendorp and Searle make this point, ‘While the Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly in 1985 clearly established norms of access to justice and fair treatment, restitution, compensation and assistance, these were not applied by the UN or member states to peacekeeper SEA, highlighting the way in which issues relating to SEA have been isolated from other relevant policy frameworks.’<sup>91</sup> They later go on to explain, in the context of significant incidents in the Central African Republic, that ‘the Secretary-General declared to the UNSC that the Secretariat alone could not adequately address the ‘global scourge’ of SEA by troops in peace operations, and placed responsibility for ensuring justice for victims ‘squarely’ on

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<sup>88</sup> Committee Against Torture, ‘Concluding observations on the initial report of the Holy See \*’, UN Doc. CAT/C/VAT/CO/1, 17 June 2014, para. 18.

<sup>89</sup> See, e.g., Nairobi Declaration on Women’s and Girls’ Rights to a Remedy and Reparation, International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, 2007.

<sup>90</sup> UN Secretary-General, ‘Special measures for protection from sexual exploitation and abuse: a new approach’, UN Doc A/71/818, 28 February 2017.

<sup>91</sup> Jasmine-Kim Westendorp and Louise Searle, ‘Sexual exploitation and abuse in peace operations: trends, policy responses and future directions’, (2017) 93(2) *Intl Affairs* 365, 379.



TCCs.’<sup>92</sup> Presumably, they refer to the laudable efforts by the UN Secretariat to get troop contributing countries to acknowledge greater responsibility. However, my view is that there is an additional purpose – which is to remove the gaze away from the UN. In fact, the UN retains responsibility for any due diligence failing attributable to it in respect of acts which occurred on missions over which it had effective control, any responsibility of troop contributing countries notwithstanding.

The findings of the independent panel of investigators of the UN response to incidents in the Central African Republic go even further. Sexual exploitation and abuse should be understood as a violation of basic human rights and as a form of conflict related sexual violence, triggering the UN’s protection responsibilities:

Whereas the SEA policies are centred on the perpetrator, the human rights policies look at the victim first. The human rights policy framework becomes operative where the UN receives a report of a victim who has suffered a human rights violation, regardless of the affiliation of the perpetrator. In such cases, the UN has an obligation to investigate the incident, report on any violation, protect the victim, and to promote accountability. When viewed through the lens of the human rights policy framework, conflict related sexual violence by peacekeepers is not merely a disciplinary matter, but a serious human rights violation.<sup>93</sup>

## *2. Tort law framework*

The law of torts provides a private remedy (usually in the form of civil damages) for any personal injury, loss or harm suffered by a person as a direct result of a breach of a duty. It is a common law principle; the equivalent in the civil law or Napoleonic legal tradition is the notion of delict – which consists of an intentional or negligent breach of duty of care that inflicts loss or harm and triggers legal liability for the wrongdoer.

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<sup>92</sup> Ibid, 380.

<sup>93</sup> Deschamps and others (n 63), ii.

Under the concept of tort or delict, there is a need to show that the wrongdoer owed a duty of care to the claimant. A duty of care is a legal obligation which requires a person to adhere to a standard of reasonable behaviour when carrying out any act or providing a product or service that could foreseeably cause harm to others. It will usually involve a relationship of trust (e.g. – doctor and patient; school and student; restaurant chef and diner; manufacturer and consumer). Agencies and organisations that work with vulnerable populations and have an explicit or implicit mandate to protect those populations from harm, are clearly involved in a relationship of trust with the beneficiaries of that protection. There is a need to show that the duty of care was breached, and that any harm that was produced was caused by the breach.

In some contexts, a person, company or other actor might be vicariously liable for the tortious acts or omissions of their employee or other person who acts under them. So, a government may be liable for damages for the tortious actions of a prison guard when falsely imprisoning or abusing an inmate, or a company may be responsible for the actions of its employee for improperly labelling the ingredients on food packaging which led to the death of a consumer.

In principle, an employer may be vicariously liable for the employee who commits sexual exploitation and abuse in the course of their employment. The employer may owe a duty of care to their staff to ensure a safe work environment, whatever and wherever that may be and to take practical steps to protect them against any reasonably foreseeable risks they face. Somewhat less clear is the circumstances in which an employer owes a duty of care too persons other than employees – e.g., to the purchasers of services or the beneficiaries of aid. Chamallis, who has studied such tort actions mainly in the United States, has determined that many courts are reluctant to impose vicarious liability in cases of sexual abuse.<sup>94</sup> She determines that cases have had more

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<sup>94</sup> Martha Chamallas, ‘Will Tort Law have its #Me Too Moment?’ (n 19).

chance of success when they have been framed as negligence claims, pointing ‘to some fault on the part of the third-party defendant, usually meaning some failure to take the necessary precautions to prevent the plaintiff’s sexual assault,’ for example ‘church officials were negligent in hiring, supervising, and retaining priests with a record of sexual abuse and in failing to report the abuse to the local authorities. The practice of simply transferring an offending priest to another parish, without informing the new parish of any prior incidents or allegations, came under fire and forced the church to re-evaluate its protocols for handling cases of clergy sexual abuse’, or women raped in hotels or shopping malls when the owners failed to supply appropriate lighting or security guards.<sup>95</sup>

Thus in principle, following Chamallis’ argument, a victim of sexual exploitation or abuse may be able to sue an international organisation or a humanitarian agency or NGO for negligence, for having failed to put in place appropriate measures to prevent the exploitation and abuse which was foreseeable in the context. What would constitute “appropriate measures” would depend on the circumstances and would be a criterion of reasonableness of steps taken as opposed to result. Nevertheless, it is an avenue worthy of exploration. Clearly, the United Nations is immune from private suit and has not established any alternative modes of settlement by which claimants can pursue claims against the organization.<sup>96</sup> Part of its arguments for failing to put in place an alternative mode of settlement is its view that it would be inappropriate to utilise public funds to submit to any form of litigation with the claimants to address anything more substantial than compensation for car accidents or contractual disputes.<sup>97</sup> Somehow the humanitarian mandate of

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<sup>95</sup> Ibid.

<sup>96</sup> Considered in Ferstman (n 73) and Ferstman (n 42).

<sup>97</sup> Ferstman (n 42), 53-4.

the UN makes a claim in damages inappropriate or unseemly. This extraordinary argument and the gap it produces notwithstanding, clarity in how a claim could be framed is a small step forward.

In contrast, international humanitarian organizations like Oxfam or Save the Children have no immunity from suit. It is perfectly feasible to argue that if an organisation has a duty to terminate or discipline employees who engage in exploitation or abuse, they should also have a duty to compensate victims when they fail to take such action. Given what is known about sexual exploitation and abuse, it is a foreseeable risk that organisations should plan for and take appropriate steps to prevent and mitigate. Their failure to do so makes them negligent for the ensuing behaviour. But going even beyond this, it is employees' position of power vis-à-vis the local population, fostered by the way in which humanitarian organisations operate in emergency and even development contexts that makes the exploitation and abuse possible. In this sense, the sexual exploitation and abuse becomes a feature of the employment – it is inextricably tied to that type of employment. The vicarious liability of the organization is thus something that should continue to be pursued and put to courts as it aligns with the reality of how sexual exploitation and abuse happens.

#### *E. The practical barriers to pursuing reparations claims*

##### *1. Claims against the UN*

As indicated earlier, wrongful conduct occurring in the context of a UN mandated mission would be attributable to the UN for the purposes of assessing institutional responsibility and the concomitant obligation to afford reparations. If the mission is UN mandated, then it would

constitute a subsidiary body of the UN and any actions which occur in the course of the conduct of the mission would constitute acts of the organization.

The status of forces agreements only refer to a small number of private claims which can be adjudicated against the UN mission itself through a standing claims commission. Large scale abuses such as the failure to exercise due diligence to prevent sexual exploitation and abuse or the vicarious liability or negligence of the organisation, are not covered. The UN has argued that only the individual perpetrators and the troop contributing country are responsible for reparations.<sup>98</sup> Leaving the questionable merits of that argument aside, as there is no venue to challenge that contention given institutional immunities and the lack of standing of individuals to pursue claims against the organization, the victims have had no avenue to pursue a claim.

## *2. Claims against the humanitarian organization*

A claim against a humanitarian organization can be lodged for negligence and potentially vicarious liability in respect of an employee's conduct. It could be brought in the courts of the host state, which may be simpler and more accessible for victims based there, though potentially unreliable and inaccessible in a post-conflict context. Civil courts are notoriously difficult, costly and time-consuming to navigate. A claim could also be brought in the country where the organization is registered or headquartered, if the court determines that it is the most appropriate forum.<sup>99</sup>

In addition to the significant challenge for victims of sexual exploitation and abuse to organise and find the finances to hire lawyers and mount an effective claim, unless there are robust

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<sup>98</sup> See above (n 41-45) and accompanying text.

<sup>99</sup> *Dennis v Norwegian Refugee Council* (Oslo District Court, Deputy Judge Lena Skjold Rafoss, 25 November 2015); discussed in Kristin Bergtora Sandvik, 'Humanitarians in court: how duty of care travelled from human resources to legal liability', (2019) *J Legal Pluralism and Unofficial Law* 1.

discovery processes, it may be difficult for the victims to prove negligence to the requisite standard, given their limited vantage point in terms of the evidence. If the claim is brought in the host state, it will be difficult for the court in that country to compel an international humanitarian organization that is no longer active in that country to cooperate. Frameworks for the recognition of foreign civil rulings and judgments are notoriously weak.

### *3. Claims against the troop contributing or home country of the wrongdoer*

The possibility for a victim of sexual exploitation and abuse to lodge a claim against a foreign state is very limited, despite the UN Secretary-General's request 'that Member States receive claims from victims and call upon Member States to establish the mechanisms to do so.'<sup>100</sup> As with any extraterritorial claim, it will be difficult for victims in the host state to organise, secure the funding, hire competent counsel and navigate a foreign legal jurisdiction in order to pursue a claim. As is explained by REDRESS,

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.<sup>101</sup>

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<sup>100</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>101</sup> REDRESS (n 6), 38.

These practical difficulties are compounded by the added challenges to prove that the foreign state bears responsibility for the harm, which would only be theoretically possible if the wrongdoer was an employee of the state at the time of the wrongdoing (e.g., a member of the military seconded to the peacekeeping mission). For instance, it might be possible to argue that, despite its certification to the contrary, the foreign state failed to vet the personnel it put forward to serve with the UN before deployment, or failed to provide mandatory pre-deployment training on sexual exploitation and abuse, etc.

There is limited anecdotal information about ex gratia payments<sup>102</sup> though no known instances in which a court has found a troop contributing or home country of the wrongdoer liable for damages for sexual exploitation and abuse.

#### *4. Claims against the individual wrongdoer*

For the most part, peacekeepers and associated personnel and the staff of humanitarian aid agencies, are in the host state temporarily. An exception is locally recruited staff, contractors and volunteers, though these may be judgment-proof after the end of the mission.

After an allegation of sexual exploitation and abuse is made, it is usual that the alleged wrongdoer, if an expatriate, leaves the country, usually at the insistence of the employer. It is unusual for alleged wrongdoers to be detained by the host country. Once the individual is outside the country, extraterritorial claims for damages will be difficult to pursue, for many of the same reasons set out in section E.3 above.

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<sup>102</sup> Ibid.

There are a small number of instances in which civil claims for paternity are being pursued by victims in the host state, where the victims are located, yet the cases will only succeed with significant assistance and support by the peacekeeping mission and the troop-contributing. In the only known public case, Haitian victims with the support of local and international NGOs, filed a claim for child support before Haitian courts. However, counsel for the victims blames the UN for failing to facilitate those claims:

since August 2016, the BAI [*Bureau des Avocats Internationaux*] has advocated in and out of court for its clients to obtain this assistance and cooperation from the UN. Yet, for over two years, the UN has remained non-responsive, non-cooperative and opaque in its approach, failing to provide essential evidentiary documentation and adequate and transparent assistance to clients. Your organization is now circumventing the BAI's legal representation and failing to comply with court orders that would facilitate Haitian court processes. The UN's lack of follow-through with its commitment to victims has made it nearly impossible for our clients to obtain justice in reality.<sup>103</sup>

There is no known case that has been successfully concluded, not least enforced within or outside of the country.

#### F. *Conclusions*

There is currently no reparation for sexual exploitation and abuse perpetrated in conflict and post-conflict settings by peacekeepers and associated personnel and the staff of humanitarian aid agencies. There is no good reason capable of justifying this exceptional gap.

The fixation with treating the survivors of sexual exploitation and abuse solely as potential beneficiaries of charity and assistance ignores their rights to remedies and reparation, whether those rights are framed under human rights law or the private law of tort. Reparation is not a perfect solution and will undoubtedly not serve all of victims' interests; it is particularly difficult to

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<sup>103</sup> Letter from Mario Joseph, Av. and Brian Concannon Jr. to Assistant Secretary-General Jane Connors, UN Victims' Rights Advocate, 14 January 2019.



implement especially in contexts of extreme poverty and where there is often little proof of the underlying crimes. But it is not impossible to implement; there is an array of experience in providing locally accessible, context-specific and affirmative reparation measures. The difficulties associated with it do not justify the failure to put systems in place to afford it. In addition to the potential benefits to the victims themselves, reparations can underscore the wrongdoing and empower the victims, it can also serve as a catalyst to change institutional behaviour in order to avoid recurrence. This is particularly important with systemic violations like sexual exploitation and abuse.

The failure to afford reparation – to even have a conversation with victims about their rights to reparation and what this might entail – is simply a consolidation and extension of the abuse of power they have already experienced.