

# Litigating Peacekeeper Child Sexual Abuse



**REDRESS**

Ending torture, seeking justice for survivors

CRIN CHILD RIGHTS INTERNATIONAL NETWORK

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REDRESS is an international human rights organisation that represents victims of torture to obtain justice and reparations. We bring legal cases on behalf of individual survivors, and advocate for better laws to provide effective reparations. Our cases respond to torture as an individual crime in domestic and international law, as a civil wrong with individual responsibility, and as a human rights violation with state responsibility.

CRIN is a global children's rights advocacy network. Established in 1995, we press for rights – not charity – and campaign for a genuine shift in how governments and societies view and treat children.

REDRESS and CRIN would like to express their thanks for the contribution of various individuals and organisations to this report. In particular they would like to thank the law firm White & Case for providing invaluable pro bono support on research, interviews, case study drafting and hosting events. The authors would like to thank those that provided comments on draft portions of the report, including Roisin Burke, Eléonore Chiossone, Larry Johnson, Sharanya Kanikkannan, Beatrice Lindstrom, Maxine Marcus, Sienna Merope-Synge, Kaila Mintz and Emma Schwartz. They also thank all those others that offered their time in being interviewed for the report: Eugène Bakama, Sylvestre Bisimwa, Marie Deschamps, Arsène Dieujuste, Rémy Djamouss, Carla Ferstman, Rosa Freedman, Peter Anthony Gallo, Charu Lata Hogg, Kathleen Jennings, Mario Joseph, Michel Kaboyi, Alicia Luedke, Beaupaul Mupemba, Ramita Navai, Adrien Nifasha, Sofi Ospina, Magda Pacholska, Homayra Sellier, Alvaro da Silva, Sarah Smith, Mark Snyder, Jasmine-Kim Westendorf, and a number of others that preferred not to be named.

Design by Miriam Sugranyes.

First published in January 2020.

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04/12/2013

MONUSCO Peacekeepers Patrol Town of Pinga, North Kivu

# Executive Summary

The widespread and enduring problem of sexual exploitation and abuse (SEA) by peacekeepers has been well documented over recent years. Many of the most disturbing cases have involved children, with peacekeepers from Sri Lanka, Uruguay, France, Pakistan and other countries implicated in crimes in Haiti, the Central African Republic, the Democratic Republic of Congo and elsewhere.

Troop-contributing countries (TCCs) have shown themselves largely unable to prevent abuse, prosecute the perpetrators or provide redress to the victims. The UN's role has also been criticised, prompting extensive internal reforms.

Much of the analysis to date has focused on the shortcomings in the various mechanisms that are meant to prevent, prosecute and remedy instances of abuse. These include the control structures of peacekeeping missions; the safeguarding functions of UN agencies; the investigative processes of TCCs and the UN Office of Internal Oversight Services; the military or civilian criminal justice systems of TCCs and host countries; and structures for providing support to victims.

When these mechanisms have broken down, the victims, their families, and the NGOs and lawyers that represent them have on occasions turned to the courts. The litigation undertaken by victims of peacekeeper child sexual abuse to date has, however, received relatively little analysis. Its extent, its effectiveness, the obstacles it faces, and the further opportunities available are the focus of this report. The key findings are as follows.

## **Absence of litigation**

Extensive desk-based analysis and interviews by a multi-lingual research team from REDRESS and the law firm White & Case located only a small number of cases where victims had used the courts to address peacekeeper child sexual abuse – fewer than ten. While it is possible that there are cases the research did not locate, it appears clear that, despite the prevalence of peacekeeper child sexual abuse and the focus on peacekeeper SEA from an academic and policy perspective, litigation has been a relatively underused tool so far by the lawyers and NGOs seeking to address the issue.

## **Obstacles to accountability and redress**

The findings from the case studies in the report confirm the commonly held view that peacekeeper child sexual abuse very often goes unpunished, and the victims are in most cases left without any form of reparations. In each of the case studies suspected perpetrators were not convicted or were subjected to lesser sanctions than their crimes merited. In not one of the case studies did the victim receive the full reparations to

which they were entitled. The lawyers and NGOs interviewed repeatedly reported that their clients did not feel they had obtained justice.

The case studies identify a number of main obstacles that prevent the perpetrators of child sexual abuse from being held to account, and that prevent victims from obtaining redress.

A key factor was the quality of investigations, with fact finding by TCCs often being delayed or limited by an absence of properly trained investigators, for example in Haiti. Interviewees reported that in CAR French investigations were at times carried out without the presence of specialists in crimes involving minors, mental health professionals, or any assurances that the children would be placed in environments of personal security.

Immunities and the exclusive jurisdiction of TCCs posed another significant obstacle, for example in the attempted prosecution of Pakistani peacekeepers for crimes committed in Haiti. Throughout the case studies any attempted criminal proceedings in the host countries were blocked by Status of Forces Agreements or by immunities, and any criminal prosecutions that did take place happened in the TCCs. This opened the door for a range of other difficulties, including the inability of the victims to participate in legal proceedings in foreign countries (for example in the DRC), a lack of capacity in the legal systems of TCCs (for example also in the DRC), difficulties in accessing and collecting evidence and an absence of political will in TCCs to prosecute their own soldiers (for example in Sri Lanka).

A lack of transparency in prosecution processes, particularly in military court martial processes, was another significant barrier to justice. In many of the case studies it was impossible to determine whether and how the perpetrators were convicted and sanctioned. Even when those seeking to determine the outcome of cases resorted to freedom of information proceedings, they were unsuccessful.

A range of reforms to policies, practices and legislation in TCCs and the UN are required to remove these obstacles to accountability and redress. These include improving the speed and quality of investigations and adopting a more victim-centred approach; amending TCCs' laws and criminal procedures to make them suitable for prosecuting crimes overseas; increasing transparency and victim participation in prosecutions; suspending the deployment of peacekeeping troops from TCCs that are unable or unwilling to prosecute child sexual abuse; and addressing commonly-held misunderstandings of the immunity of those associated with the UN.

## **Strategic litigation of peacekeeper child sexual abuse**

One avenue for seeking to bring about these necessary reforms is through strategic litigation. The use of strategic litigation in the peacekeeping context, involving both efforts to obtain reparations and ongoing advocacy for structural reform, could successfully prompt shifts in policies and attitudes resulting in substantive accountability and preventing future abuse.

Strategic litigation in the peacekeeper context would employ various civil society techniques, including advocacy, community engagement, capacity building and campaigning, alongside work on legal cases. It would seek to bring about a range

of impacts beyond the immediate cases, including changing legal frameworks on jurisdiction and immunities; deterring peacekeepers from future abuses; improving internal policies on monitoring and training; working in partnership and alliance to implement the strategies suggested; and reducing stigmatisation and encouraging more victims to report abuse. These would also reinforce victims' legal right to a remedy and further UN Sustainable Development Goal 16 by increasing access to justice and enhancing institutional accountability.

A number of viable legal avenues exist for seeking to address peacekeeper child sexual abuse through litigation. These range from actions against the individual perpetrator, such as instigating criminal prosecutions and bringing direct civil claims (including paternity claims), to actions against the TCC, such as civil claims in domestic courts of the TCC or claims against the TCC at regional and international human rights bodies. Cases against the UN would be more challenging given the UN's far-reaching immunities.

Techniques that have been developed in other areas, such as the domestic prosecution of international crimes using universal jurisdiction or the international enforcement of commercial civil judgments, could be employed in this area to seek justice for victims. They would require increased coordination between lawyers and NGOs in host countries and TCCs.

The regional and international human rights bodies in particular present as yet unused avenues for holding States to account for their failures to prevent, prosecute and remedy peacekeeper child sexual abuse. Key possible venues would include the UN Committee on the Rights of the Child, the African Committee of Experts on the Rights and Welfare of the Child, the UN Human Rights Committee, the Inter-American Commission on and Court of Human Rights, the European Court of Human Rights, the African regional human rights bodies and the Committee Against Torture, among others.

## **A human rights-based approach**

While the human rights obligations of the UN to prevent and remedy peacekeeper child sexual abuse have been identified in analyses such as the 2015 Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic, the human rights obligations of TCCs in this context have received less attention.

Peacekeeper child sexual abuse and institutional failures to prevent, prosecute and remedy it implicate a range of rights under treaties such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the regional human rights treaties. Relevant rights include rights of children to be protected from sexual abuse, rights of women to be protected from SEA, rights to privacy, the prohibition on torture, rights to truth and rights to an effective remedy and reparations. There also exists a wide range of soft law that is widely accepted by States and offers guidance on how to investigate sexual violence, torture and other crimes. Legal hurdles to such claims, including attribution and jurisdiction, exist, but existing jurisprudence demonstrates they can be overcome.

Human rights standards provide a crucial framework for assessing the UN and particularly TCCs' successes or failures in preventing, prosecuting and remedying peacekeeper child sexual abuse. More pressure needs to be put on policymakers to ensure that the institutional structures responsible for preventing, prosecuting and remedying peacekeeper child sexual abuse meet these human rights obligations. A key objective for lawyers and NGOs engaging in strategic litigation should be to ensure that domestic and international courts and tribunals hold individuals and States to these standards.

# 1. Introduction

Allegations of sexual abuse of children during peacekeeping operations and impunity for the perpetrators is a long-standing and much publicised problem. Complaints first emerged in the 1990s and have been made against military contingents, police, humanitarian and other civilian personnel in missions across a range of countries.

Investigations into the issue suggest that sexual abuse has been widespread and that a range of organisations and individuals have been implicated. It has been the subject of a number of internal UN reviews and resolutions over the last two decades.<sup>1</sup>

This report focuses primarily on legal avenues to combat impunity in cases of child sexual abuse by peacekeepers in UN operations.<sup>2</sup> In doing so, it does not seek to undermine the important and courageous work of the many people who work for the UN with the greatest levels of integrity in difficult and dangerous circumstances. Neither does the report ignore the broader, systemic issues of SEA of adults by peacekeepers and within the humanitarian sector more broadly.<sup>3</sup>

The report's focus reflects REDRESS's mandate to seek justice and reparations in cases of torture (one of the many human rights violations potentially implicated by peacekeeper child sexual abuse<sup>4</sup>), and CRIN's expertise on children's rights, given the particularly tragic nature of peacekeeper sexual abuse when committed against children. However, it is intended that the findings should also have a broader application outside that specific context.

The report identifies challenges and lessons based on six case studies. These primarily concern allegations against UN military peacekeepers, as those are the claims that were identified through research for the report, and because, as an organisation working across the globe to uphold principles of international law, the UN should be the standard bearer for tackling impunity in this area. The report focuses principally on actions of the military personnel serving with TCCs, as opposed to civilian peacekeepers. However, the latter category is addressed at times.

Although SEA in peacekeeping contexts is recognised as pervasive, the exact scale of the problem is hard to ascertain. The UN has only issued detailed data on allegations of SEA in its peacekeeping operations since 2015. Some information was held prior to that date but significant changes in methodology took place in 2007 and 2010, and victims' ages were only recorded from 2008 onwards.<sup>5</sup> Concerns have been raised about the way in which data is gathered and recorded,<sup>6</sup> and that statistics fail to capture nuance or account for intersectional power dynamics in exploitative relationships between local inhabitants and peacekeepers.<sup>7</sup>

Even so, the number of formal allegations that have been raised is disturbing. Between 2004 and 2016, the UN received almost 2,000 formal allegations of SEA by peacekeepers and other personnel involved in UN missions, including more than 300 complaints involving children.<sup>8</sup> The UN Secretary-General acknowledged in his 2017 Special Measures report on

SEA, “we feel certain that not all cases are reported”<sup>9</sup> and practitioners suspect that formal complaints made so far are only the “tip of the iceberg”.<sup>10</sup>

The UN has repeatedly asserted a “zero tolerance” policy to SEA, stating its prohibition amongst UN personnel and affirming that every transgression will be acted upon.<sup>11</sup> Despite this, only a very small number of perpetrators have been convicted, and accountability and redress for victims is almost non-existent.

This is partly due to jurisdictional obstacles, which prevent or limit the chances of prosecution of both military and civilian peacekeepers. Concerns have also been raised about a lack of independence and transparency in the UN’s handling of complaints of SEA within its operations, an unwillingness to confirm that functional immunity does not apply, as well as a lack of trained and experienced investigators. These issues are compounded by the contexts in which the abuse occurs – in situations of conflict and humanitarian crises where the local population is already struggling and legal institutions may be weak – and the difficulties in victims, especially children, conceiving of and accessing avenues for justice and redress.

### **Purpose of the report**

REDRESS published a report in September 2017 on *Sexual Exploitation and Abuse in Peacekeeping Operations* focusing on what happens to the victims of such abuse, a subject often overlooked and marginalised in debates on accountability. It identified the tendencies to situate liability solely with the direct perpetrators, rather than the organisations and TCCs under whose mandate those individuals operated, and to ignore victims’ right to redress in favour of charity and benevolence.

The report encompassed cases in which children were the victims of sexual abuse by peacekeepers and highlighted the particular gravity of these crimes committed against already vulnerable and marginalised individuals by the very people tasked to protect them. It identified the absence of legal redress and adequate and effective reparation for victims and noted the failure to address the problem as an urgent concern of the highest magnitude.

Several national and international NGOs have tried to challenge the lack of accountability for sexual violence by peacekeepers by taking legal claims through the courts. However, these are often isolated examples and there has so far been no comprehensive study that identifies those cases, assesses their impact and considers how attempts to achieve accountability through litigation could be improved.

The purpose of this report is to examine the use of litigation as a means of securing accountability and justice for the sexual abuse of children by peacekeepers. The report analyses a number of cases that examine previous attempts at accountability. These include French domestic proceedings for crimes committed in CAR, civil paternity claims in Haiti, freedom of information proceedings in Sri Lanka, domestic criminal proceedings in DRC, and a civil claim in Uruguay. The report identifies a number of obstacles currently faced by the NGOs and lawyers seeking accountability for child sexual abuse by peacekeepers.

The report then goes on to examine how strategic litigation could be used to address the underlying causes of peacekeeper child sexual abuse and impunity. It outlines potential legal avenues that NGOs and lawyers acting

on behalf of victims could use and concludes by setting out a human rights-based approach that could provide new substantive bases for seeking accountability in this area.

The report concludes by setting out certain recommendations for reform that find new or further support in the findings of the research undertaken. They include reforms for addressing particular hurdles identified in the case studies, methods necessary for overcoming the challenges posed by sexual abuse against children specifically, and proposals for human rights-based strategic litigation to address existing failings.

### **Methodology**

The process of preparing the report combined desk-based research with detailed interviews of individuals to identify relevant cases and assess their impact. A multi-lingual team from REDRESS and White & Case contacted over 70 key lawyers, activists, academics, journalists and former UN staff members that have worked on issues relevant to peacekeeper litigation across the world. Based on those contacts the team conducted over 30 interviews with individuals with particular knowledge of litigation relating to peacekeeper child sexual abuse.<sup>12</sup> Alongside this REDRESS convened a roundtable meeting with CRIN and other organisations to seek expert input on the direction of the study.

In some of the cases featured a large amount of information was available publicly, and several individuals involved in the case were contactable and available for interview. In other cases, only a small amount of information was publicly available, and individuals involved were difficult to locate. This is reflected in the varying levels of detail in the case studies,

and further underscores one of the key challenges to accountability being the lack of transparency in proceedings.

# 2. The Legal Context

## Sexual abuse and SEA defined

A wide range of acts with respect to children are covered by the term “sexual exploitation and abuse”, which include rape and sexual abuse, trafficking, exploitative relationships in which sex is required in exchange for things such as money, food, medicine and security. It is well established that rape and other forms of sexual violence frequently amount to torture and ill-treatment, and the gravity of these forms of criminal behaviour against children is often masked by the often-used acronym “SEA”.

The UN defines sexual exploitation as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another” and sexual abuse as “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions”.<sup>13</sup> These definitions are endorsed by CRIN<sup>14</sup> and REDRESS.

The UN Secretary-General’s 2017 report, *Special measures for protection from sexual exploitation and abuse: a new approach*, identifies different forms of sexual abuse against children as including: child rape, sexual assault, solicitation of child prostitution, trafficking for SEA, and other forms of sexual violence against children.<sup>15</sup> All sexual activity with individuals under 18 years of age is defined as sexual abuse by the UN.<sup>16</sup>

## Victims defined

The UN defines victims in the context of SEA as “a person who is, or has been, sexually exploited or abused by United Nations staff or related personnel and the allegation has been established through a United Nations administrative process or Member States’ processes as appropriate”.<sup>17</sup> This requires establishing proof of the allegation to a very high standard within a system in which UN personnel investigate possible misconduct by other members of the same organisation.

The UN recognises that there may be a variety of reasons why the available evidence is insufficient to substantiate a complaint and that such a finding does not necessarily mean the allegation was false.<sup>18</sup> Nonetheless, its narrow definition of a victim, which is only conferred to those who have their complaint substantiated, risks being at odds with the principle that an individual’s status as a victim is not contingent on the apprehension of a perpetrator, which was affirmed in the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation*<sup>19</sup> and the *1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>20</sup> This is an important principle which recognises that victim status and the rights that flow from that are not contingent on the variables of a legal process over which the victim has little or no control.

REDRESS’s previous report on SEA in peacekeeping operations noted this

narrow framing of the issue within UN reports. It highlighted that precisely who is a victim remains unclear, with references made in reports to “alleged victims” and systems for assistance distinguishing between complainants and victims, with more support provided to the latter.<sup>21</sup> As observed in the report, this is invariably an artificial distinction as processes to determine who is a victim are beset by the same problems that plague the criminal accountability process. Many individuals who were victimised are never recognised as victims due to difficulties in providing sufficient proof and the trauma involved in having to explain and be judged by people the victims perceive as being aligned to the perpetrators.<sup>22</sup>

The UN data on SEA in field locations distinguishes between allegations involving one or more victims under the age of 18, those that do not involve a victim under that age, and those where the age of the victim(s) is currently unknown.<sup>23</sup>

## Applicable legal frameworks

Although the UN has clearly defined—and prohibited—child sexual abuse, efforts to seek accountability for cases of child sexual abuse by peacekeepers have been largely unsuccessful due to a combination of factors, including (i) the absence of a single legal framework designed to cover peacekeeping troops and (ii) immunity protections for UN personnel, as the following sections now discuss.

The Charter of the United Nations, which grants the UN Security Council the primary responsibility for the maintenance of international peace and security, does not explicitly envisage the creation of peacekeeping operations.<sup>24</sup> Perhaps consequently, the laws and policies governing peacekeeping personnel have

developed in an ad hoc manner, resulting in a complex system of laws that have proven difficult to operationalize and provide only weak protections for victims of grave harms perpetrated by peacekeepers.

In addition to the UN’s internal standards of conduct dealing with SEA—including the UN Secretary-General’s Bulletin adopting a zero-tolerance policy to SEA<sup>25</sup> (discussed above)—peacekeepers are subject to customary international humanitarian law (IHL), whether they are performing duties of an enforcement or peacekeeping nature.<sup>26</sup> Whether peacekeepers can be considered “parties” to an armed conflict within the meaning of IHL remains a subject of debate,<sup>27</sup> however, the UN has agreed that its troops are obligated to “respect and ensure respect” for the Geneva Conventions and its Protocols.<sup>28</sup>

The extent to which the UN is bound by international human rights law (IHRL) obligations is also contested. However, many scholars agree that the broad protections enshrined by IHRL are incompatible with a doctrine of absolute immunity for international organisations, including the UN; similarly, courts have recently found that human rights-based challenges to UN immunity frameworks might succeed if an individual’s human rights have been violated by such immunity.<sup>29</sup> Accordingly, the UN (and TCCs) can likely be viewed as being bound by IHRL, including, for example, the duty to respect and ensure respect for the right to life and the prohibition against torture and ill-treatment, both of which are non-derogable, even in the context of armed conflict.

Additionally, as this report highlights, many of the abuses committed by peacekeepers—such as SEA—can be considered “ordinary crimes” under domestic law, though they may also rise to

the level of war crimes or other IHL or IHRL violations. As such, peacekeepers are in theory subject as individuals to the criminal, civil and, in some cases, administrative laws of their home States (including military disciplinary procedures as per national military criminal codes or regulations).<sup>30</sup> However, as the following section discusses, immunities and jurisdictional challenges often frustrate efforts to seek accountability for abuses committed by peacekeepers in their home States.

### Immunity and jurisdictional challenges

The UN's founding treaties provide that it has the status of a legal person under the domestic law of its Member States. It enjoys on their territory such privileges and immunities as are necessary for it to fulfil its purposes,<sup>31</sup> and it "shall enjoy immunity from every form of legal process" in all its operations unless it expressly waives its immunity.<sup>32</sup>

The UN and its entities, including peacekeeping missions, are immune from legal process on any subject and in any country.

Routes to criminal accountability are also affected by UN immunities rules and the process that applies to an investigation depends on the status of the alleged perpetrator.<sup>33</sup>

#### Peacekeeping troops

Members of military contingents deployed in UN operations, as well as some police and civilian staff sent by their governments to fulfil military roles on those operations, remain under the exclusive criminal jurisdiction of their national government.

According to the UN Model Status of Forces Agreement (SOFA), which governs the legal relationship between a peacekeeping operation and the host country, the exclusive responsibility to discipline and criminally sanction military contingents rests with TCCs.<sup>34</sup> Under the Memorandum of Understanding agreed between TCCs and the UN, those countries retain primary authority to investigate allegations of misconduct, including of SEA, and jurisdiction to impose criminal or disciplinary sanctions.<sup>35</sup>

This provides protection from the jurisdiction of the host country, which is prevented from investigating or prosecuting any crimes except where a soldier is court-martialled in situ and transferred to local authorities for prosecution.<sup>36</sup> But even in those cases, the TCC holds the responsibility to determine how to respond to the matter. It is possible for a TCC to waive the jurisdictional bar that prevents investigation and prosecution by a host country, but this rarely happens.

The UN must notify TCCs of any reports of SEA that implicate their military personnel and the sending State then has ten days within which to indicate if it intends to investigate the allegations (five days in the case of situations deemed to be of heightened risk).<sup>37</sup> The TCC can choose to investigate allegations of SEA in collaboration with the UN's Office of Internal Oversight Services ("OIOS"). The UN can also initiate an administrative investigation where the TCC is unwilling or unable to do so,<sup>38</sup> and can start a preliminary fact-finding inquiry if necessary to preserve evidence if the government of the TCC does not start, or until it starts, its own investigation (at which point the fact-finding report will be transferred to the TCC).<sup>39</sup> Where the TCC conducts its own investigation, it must update the UN of progress on a regular

basis, including the outcome of the case.<sup>40</sup> The UN has committed to repatriating military or police personnel "where there is credible evidence of widespread or systematic [SEA]."<sup>41</sup> The government of the TCC is obliged to ensure that the case is forwarded to the appropriate authorities for action.<sup>42</sup>

TCCs can initiate court-martial or criminal prosecution proceedings against alleged perpetrators. However, this is only possible if they have legal authority to prosecute domestic crimes extraterritorially. Many States do not have this and those that do may face domestic pressures that limit the chances of bringing successful prosecutions (see further Chapter 4). In both circumstances, the result is impunity.

#### Civilian peacekeeping personnel

UN civilian staff are immune from any legal process for all acts performed in their official capacity.<sup>43</sup> Criminal acts of SEA do not constitute official acts of a UN employee, and are therefore not covered by this functional immunity.<sup>44</sup> However, the UN asserts the right to determine whether allegations constitute criminal behaviour and whether functional immunity applies to an alleged perpetrator. The effect of this is that UN personnel are shielded from legal processes in the host country while the UN evaluates the circumstances of the allegation and assesses whether immunity applies, meaning immunity applies until that assessment is completed.

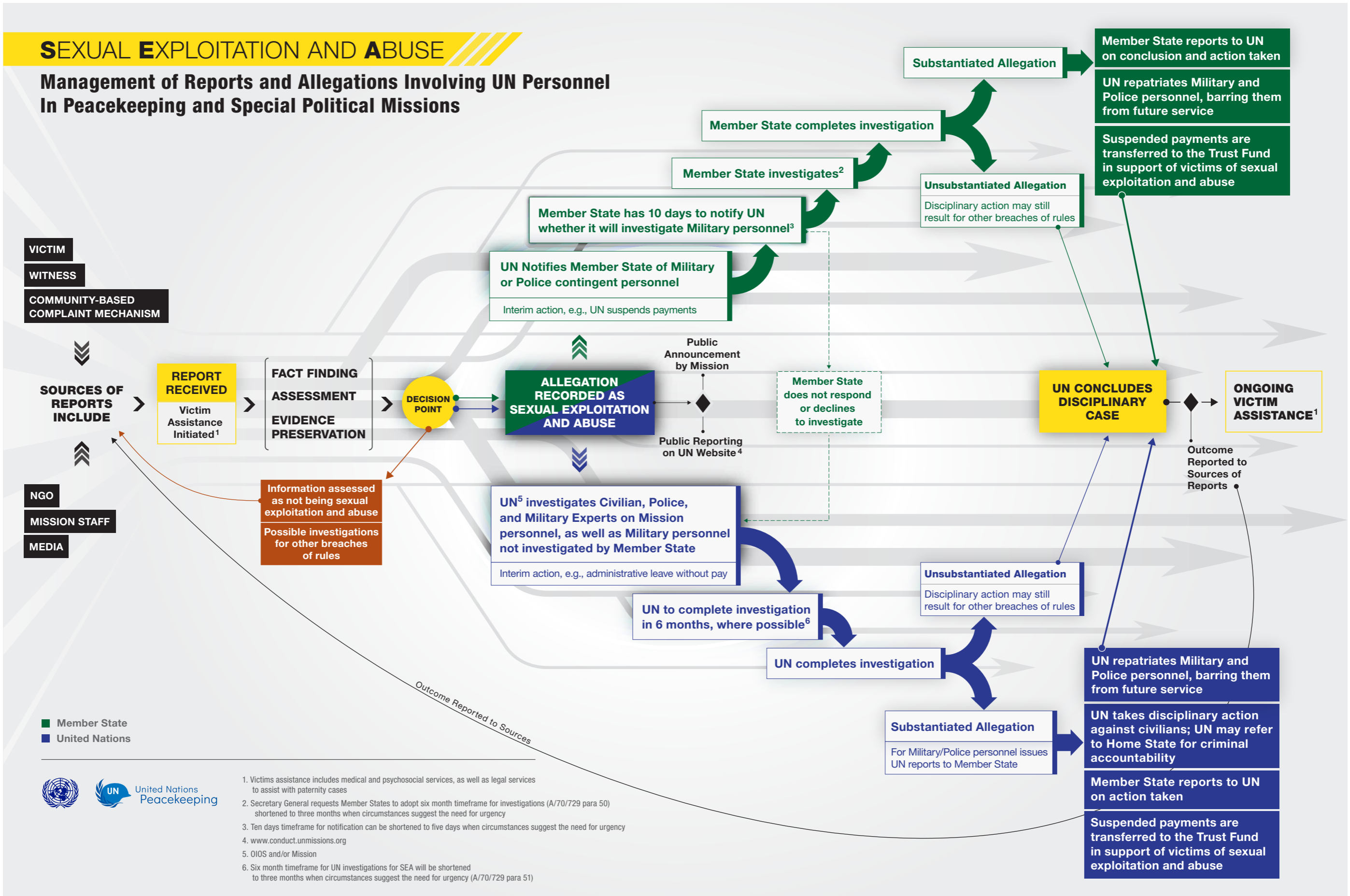
Additional protections are provided for experts on mission. They are deemed inviolable while on mission,<sup>45</sup> meaning they are immune from legal processes and afforded protection from any interference with their integrity during the mission.

The highest levels of UN staff (this generally includes heads of peacekeeping

missions) also have 'personal' immunity,<sup>46</sup> which accords them the same status as diplomats and means they cannot be charged with a crime or subjected to most civil proceedings.

Where immunity does apply, the Secretary-General of the UN has the right to waive that immunity where it would "impede the course of justice,"<sup>47</sup> but this power is rarely used and prosecutions of UN civilian staff for crimes committed on overseas missions are extremely rare. Both the 2005 landmark report of Prince Zeid Ra'ad Zeid Al-Hussein into SEA on peacekeeping missions<sup>48</sup> and the subsequent report of the Group of Experts tasked to advise how best to overcome remaining legal barriers to criminal accountability of peacekeepers<sup>49</sup> recommended that immunity be waived to allow the host country to investigate and prosecute where appropriate.<sup>50</sup>





### Non-UN peacekeeping personnel

Allegations of SEA have implicated non-UN personnel, such as staff of NGOs who implement UN programmes on the ground<sup>52</sup> or peacekeepers operating under mandates of regional organisations.<sup>53</sup> The UN has established an internal system to follow up allegations involving non-UN personnel with the relevant Member State and includes prevention and response measures in Security Council resolutions on country-specific situations.<sup>54</sup> Nonetheless, the extent to which UN doctrine and guidance applies to non-UN personnel operating within a UN-mandated mission is unclear. The failure of the UN to address child sexual abuse by French troops in Operation Sangaris, a Security Council- authorised mission in the Central African Republic that deployed alongside the UN operation MINUSCA, is discussed at Case Study 2 (French Sangaris peacekeepers in CAR). This case illustrates the lack of clarity and legal protection in this area.

UN Security Council Resolution 2272 on Sexual Exploitation and Abuse (adopted in March 2016) “urges all non-United Nations forces authorised under a Security Council mandate to take adequate measures to prevent and combat impunity for sexual exploitation and abuse by their personnel.” It calls on UN Member States to repatriate their own units from non-UN missions where there is credible evidence of widespread or systemic SEA by those units, and to appropriately investigate allegations and hold perpetrators to account.<sup>55</sup> Ultimately, this merely “urges” non-UN forces to hold themselves to account and provides even weaker accountability measures than apply in full UN missions.

Under the above frameworks, soldiers accused of SEA should be prosecuted by

their home State and civilians should be transferred to local authorities. However, the practice differs from the theory and there has been persistent failure to appropriately apply the rules relating to SEA in peacekeeping missions, resulting in an almost complete lack of accountability. The case studies within this report provide detailed examples of how the system operates in practice, and the challenges this poses are summarised in Chapter 4.

# LITIGATING PEACEKEEPER CHILD SEXUAL ABUSE - CASE STUDIES



# 3. Case Studies



UN Photo/ Logan Abassi

## Case Study 1: Criminal and Civil Proceedings in Uruguay for Events in Haiti

### Facts

The United Nations Stabilization Mission in Haiti (MINUSTAH) was established by UNSC Resolution 1542 on 1 June 2004, following instability generated by the 2004 coup d'état against President Jean-Bertrand Aristide. MINUSTAH's mandate was to restore a secure and stable environment, support the electoral process, and support the promotion and protection of human

rights. MINUSTAH ended in October 2017 and was replaced by a smaller follow-up peacekeeping Mission, the United Nations Mission for Justice Support in Haiti (MINUJUSTH).<sup>56</sup> At its peak, nearly 7,000 soldiers and 2,000 police officers as well as civilians, served in Haiti;<sup>57</sup> the first peacekeeping mission to have a majority of troops from Latin America, with Brazil providing the largest contingent as well as the military commander of the peacekeeping forces.<sup>58</sup>

MINUSTAH's record between 2004 and 2017 has been dogged by controversy.<sup>59</sup> MINUSTAH introduced a deadly cholera epidemic to Haiti through improper waste management that has killed over 10,000 people since 2010.<sup>60</sup> Its troops have also been accused of committing a number of other human rights abuses and crimes, including extensive SEA.<sup>61</sup> A 2013 UN investigation declared this particular form of violence the 'most significant risk to UN peacekeeping missions' and suggested that MINUSTAH experienced amongst the highest rates of SEA<sup>62</sup> despite the UN's 'zero tolerance' policy.

In July 2011, five marines from Uruguay stationed in the southern town of Port-Salut in a peacekeeping capacity sexually assaulted a local teenage boy named Johnny Jean, who at the time was still a child.<sup>63</sup> Jean was reportedly abducted on his way home from a football match and taken to the barracks of MINUSTAH, where he was beaten, and gang raped. The assault was recorded on a mobile phone by the peacekeepers, and the footage was leaked a month later,<sup>64</sup> resulting in protests in Haiti outside the UN base.<sup>65</sup> Shortly after the assault, the victim and his mother told Haitian radio stations that he was raped by the Uruguayan marines, and they gave evidence to the Haitian police and a local judge.<sup>66</sup>

In response to the public outrage over Jean's assault, Uruguayan President Jose Mujica wrote to Haitian president Michel Martelly, assuring him that the perpetrators would face the harshest possible sanctions.<sup>67</sup> For his part, President Martelly stated that he "vigorously condemned" the actions of those involved, and requested that the relevant authorities meet with UN officials to ensure that such acts did not occur again.<sup>68</sup>

Additionally, in the wake of public outrage, the head of operations of the Uruguayan Navy in Haiti was dismissed from his position.

### Legal proceedings

Several investigations into the alleged assault were opened by the UN Mission in Haiti, the Uruguayan Defence Ministry, and the Haitian authorities. A UN spokesperson stated that the five alleged attackers were confined to their barracks pending the outcome of three investigations and that, if the allegations proved to be true, the perpetrators "must be brought to justice."<sup>69</sup> In its preliminary report, the UN stated that Johnny Jean had not been raped but that the troops were at fault for permitting a civilian to enter a military camp.<sup>70</sup>

In September 2011, the five soldiers and their superior officer were repatriated to Uruguay.<sup>71</sup> Under the SOFA entered into by the Haitian government and the United Nations in 2004, Uruguay retained jurisdiction over its troops, granting the soldiers immunity from the Haitian State and placing the burden of prosecution on Uruguay.<sup>72</sup>

Three proceedings then occurred in relation to Johnny Jean's case: military, criminal and civil proceedings.

### Military procedure

Under Uruguayan law, members of the military may be disciplined under both military and civilian law.<sup>73</sup> In this case, the accused soldiers were placed in jail during the initial investigations by the authorities.<sup>74</sup> At the time, a spokesman for the Uruguayan Defence Ministry said in a statement that "the Navy wants to go beyond the simple fact of the video [to determine] if there are other violations of conduct". He added that the "suspects

will be tried and sentenced appropriately.<sup>75</sup> Possible punishments included the possibility of a dishonourable discharge from military service or loss of retirement benefits.<sup>76</sup>

On 19 September 2011, the five peacekeepers were charged by the military court for the “crimes of disobedience and omissions in the services,” and required to serve pretrial detention.<sup>77</sup> They were provisionally released in December 2011 pending the decision of the Uruguayan criminal court (see section below).<sup>78</sup> It is not clear whether the perpetrators faced any additional consequences as a result of the military procedure.

### Criminal procedure

In January 2012, a UN official confirmed that the accused soldiers had been released from jail in Uruguay. According to the Uruguayan prosecutor in charge of the case, the inability to locate the victim for his testimony had effectively stalled the case. This argument was refuted by the victim, who stated in a telephone interview that no one had ever asked him to provide a testimony. He stated: “They know where to find me, if they take me, I will go.”<sup>79</sup>

In May 2012, the victim travelled to Montevideo in Uruguay to testify against the defendants, although he received only partial financial support to do so.<sup>80</sup> He was accompanied by two American lawyers (Edwin Marger and Mike Pugliese),<sup>81</sup> Haitian lawyer Gervais Charles, and Pierre Espérance, director of the Haitian National Network for the Defence of Human Rights (RNNDH). Jean completed an additional series of medical exams upon his arrival in Uruguay.<sup>82</sup> During his testimony, the victim was asked to identify his abusers from a line-up of fourteen uniformed men.<sup>83</sup> Mr Espérance also confirmed that Johnny Jean testified against the soldiers on 10 May 2012 during a three-hour hearing.

The victim faced several difficulties over the course of the proceedings, including that the victim’s court-appointed translator could not speak Haitian Creole fluently, despite the victim’s testimony being central to the case. Mr Espérance expressed concerns about the Uruguayan lawyer who was appointed to the victim, stating that he did not believe the lawyer was defending the victim’s interests. Mr Espérance also voiced uncertainty about the UN, Uruguay and Haiti’s involvement in the case, and concern that the Haitian government appeared to fade into the background and was not involved in the judicial process.<sup>84</sup> He argued that the whole case appeared to be focused on how best to acquit the defendants instead of seeking justice and reparation for the victim.

Following the victim’s testimony against the defendants, Mr Charles voiced frustration at the Haitian government’s indifference and lack of engagement in the case, which he argued amounted to an interference with Mr. Jean’s right to redress and access to justice. He stated that if necessary, they would launch a case against the Haitian government.<sup>85</sup>

Following the victim’s May 2012 testimony, four defendants were charged with “private violence” (or “coercion”) rather than sexual assault, in late August 2012. The prosecutor in the case reportedly stated that the “the evidence on record does not support findings of sexual assault . . . [but that] force was used to oblige another person to tolerate an action against their will.”<sup>86</sup> In particular, the prosecutor determined that the evidence available did not demonstrate penetration sufficient for a criminal charge of rape.<sup>87</sup>

Private violence is a lesser offence than rape or sexual assault under Uruguayan law,<sup>88</sup> and carries a penalty of between three months to three years in prison—

significantly less than for a rape charge<sup>89</sup> which carries a minimum of two years and a maximum of twelve years in prison.

In March 2013, the defendants were convicted of the private violence charges,<sup>90</sup> and were sentenced to two years and one month in prison. The sentences were suspended and they did not spend any time in prison.<sup>91</sup> After the sentencing, the defence attorney claimed that Johnny Jean was lying about the abuse and requested an appeal of the conviction and an investigation against him for slander and defamation.<sup>92</sup> It is unclear whether the investigation against Johnny Jean was ever initiated, and the outcome of any appeals process is also unknown.

### Civil procedure

In Uruguay, victims may claim damages in civil tribunals. Johnny Jean’s legal team brought a case against the Government of Uruguay before the *Tribunal de lo Contencioso Administrativo*, which handles claims against the State for the acts or omissions of State agents where potential damages exceed USD 17,000.<sup>93</sup>

Johnny Jean faced several key challenges in bringing his civil case. Under Uruguayan law, the statute of limitations is not interrupted or suspended by ongoing criminal procedures, though some acts (such as an investigation) may suspend the limitation period.<sup>94</sup> Consequently, by the time his legal team sought to initiate civil proceedings, the limitation period—four years in Uruguay—had nearly run out.<sup>95</sup>

Evidentiary challenges, stemming both from the location of the crime in Haiti and Johnny Jean’s present location in the United States, and language differences further complicated the civil proceedings.<sup>96</sup>

Though Uruguay was required to respond to Jean’s claim within 30 days of its presentation (which occurred in July 2015), the government argued that the limitation period had run out, despite a prior administrative investigation that set 28 July 2015 as the deadline for submission. To settle this statute of limitations dispute, both parties were ordered to present all relevant evidence, including the date of the attack in question; reports from the prior criminal and military procedures; witness testimonies; and time-stamp information from the video of the attack.<sup>97</sup>

This procedure has not been resolved yet.<sup>98</sup> Witnesses have testified, including the victim’s stepfather, who was among the first people aware of the event. The court has yet to analyse the memory card containing the video of the attack, which it received in December 2018.<sup>99</sup>

### Impact

The unsatisfactory conviction of “private violence” in this case diminishes the severity of the assault and does not impose an adequate sanction on the perpetrators. The failure to recognize Johnny Jean’s legal status as a survivor of rape denies him an official apology, and amplifies the stigma associated with sexual assault.

States are bound by international human rights obligations to provide adequate compensation for harms suffered. However, beyond the minimal financial assistance provided to defray the cost of Jean’s travel to Uruguay to testify, he has received no financial compensation or any other form of reparation to date.

Today, despite ongoing support from his family, Jean continues to face serious mental health problems as a result of the assault and is unable to peacefully think of or plan for his future. Following the

rape, he felt obliged to leave his home of Port-Salut and seek refuge in the country's capital Port-au-Prince, before moving to the United States.<sup>100</sup>

Although this case caused public outrage both in Haiti and abroad, there is little evidence that it has had an enduring impact on how peacekeepers are regulated or policed outside of their own jurisdiction for criminal conduct that took place in the host country. Rather, Johnny Jean's case highlights how UN soldiers committing human rights abuses while deployed on missions benefit from the existing legal and practical obstacles present in this case.

### Challenges/lessons learned

Though the Uruguayan criminal justice system provided some measure of accountability for the abuses committed by the peacekeepers in question, significant evidentiary and logistical challenges impeded all three proceedings in this case. Most significantly, though defendants were sentenced through a domestic criminal procedure, the sanctions imposed were not proportionate to the gravity of the facts, making their deterrent effect doubtful.

As noted, gathering evidence was difficult, both because the facts occurred in a second country (Haiti), and because the perpetrators were no longer in that country. Over the course of the multi-country investigation, the victim was examined by doctors and testified to judicial officers in both Haiti and Uruguay, reportedly resulting in his re-traumatization without any concomitant psychosocial support.<sup>101</sup> Further, it is understood that Johnny Jean's case was not handled by investigators specialised in proceedings involving sexual violence, exacerbating the victim's sense of shame in testifying about the events that had

occurred. Johnny Jean would have benefited from both psychosocial support and access to a victims' rights liaison familiar with similar cases of abuse at the hands of peacekeepers.<sup>102</sup> In this regard, Johnny's situation as a child at the time of the events does not seem to have been considered during the proceedings.

The geographical distance also placed a significant financial burden on the investigation—without pro bono support, the victim would not have been able to pursue the litigation. That Johnny Jean was in the United States at the time of the proceedings also complicated the case, due to time differences and the language barriers inherent in the case.

Individuals working on the case expressed frustration that the UN and Haiti government's involvement was limited, making the gathering of evidence more difficult and potentially frustrating any efforts to obtain reparations or redress for harms suffered. Despite initial public outrage when the Uruguayan media published Johnny Jean's story, as the legal proceedings dragged on, interest faded. In this context, NGOs and lawyers involved in these cases could consider engaging with the relevant local communities through ongoing advocacy and activism, to encourage governments to participate fully in similar proceedings, though they also face challenges due to limited resources.



UN Photo/Catianne Tijerina

## Case Study 2: Criminal Prosecution in France for Events in CAR

### Facts

Operation Sangaris was a French military mission that operated in Central African Republic (CAR) from 2013 until 2016. The mission was sent to support the African Union Mission to the Central African Republic (MISCA) to prevent religious cleansing and potential genocide between the Muslim Séléka rebels in the north of CAR and the Catholic majority population in the south of CAR. The French government warned that the CAR was on the verge of genocide<sup>103</sup> and advocated at the UN Security Council for an intervention, resulting in the adoption of Resolution 2127. The tipping point is

widely considered to have been when a leader of the Séléka rebel group, Michel Djotodia, declared himself President of CAR after his forces took control of the capital Bangui and forced President Bozizé to flee the country.

Operation Sangaris officially began overnight on 5 to 6 December 2013 following the adoption of UN Security Council Resolution 2127. While France was authorized to engage in a peacekeeping mission by the Security Council, the Operation Sangaris troops were not UN peacekeepers per se. French forces first entered CAR in November 2013 after the request of the African Union Peace

and Security Council (AUPSC) to provide support to the MISCA, and carried out peacekeeping, disarmament, and security restoration missions until 30 October 2016.

The French intervention in CAR is widely believed to have prevented a rapidly destabilizing situation from descending into a violent genocide. Nonetheless, the French intervention was not without problems. Multiple allegations began to emerge that French troops in CAR had sexually abused children in internal displacement camps in exchange for food.<sup>104</sup>

## Legal proceedings

### French legal proceedings

The UN was informed of the child sexual abuse allegations against French troops in the spring of 2014.<sup>105</sup> However, the case was only brought to the attention of the French authorities in late July 2014, when a confidential UN report was provided to France's Defence Ministry by a whistleblower, Anders Kompass, a relatively high-ranking official in the Office of the UN High Commissioner for Human Rights (OHCHR) in Geneva.<sup>106</sup> The six-page report had been drafted by Gallianne Palayret, a UN Human Rights Officer who conducted interviews with six young boys who said they had been lured into oral sex by French soldiers in Bangui, in return for food and sometimes money.<sup>107</sup> The report also mentioned peacekeepers from Chad and Guinea.

These investigations were confirmed publicly in an April 2015 Guardian article,<sup>108</sup> after Aids Free World provided the newspaper with a copy of the report.

The Paris Prosecutor's office opened a preliminary investigation in July 2014.<sup>109</sup> Following the first investigations, a judicial investigation (*"information judiciaire"*) was opened in May 2015 led by three judges

(*"juges d'instruction"*).<sup>110</sup> The judges focused on fourteen French soldiers.<sup>111</sup> French investigators were sent to CAR in 2015 and 2016 to question children that had come forward. It is understood that there were forty-one potential child victims.<sup>112</sup>

Issues of reliability arose with some of the claims in the testimonies gathered by the investigators in CAR.<sup>113</sup> Presented with a number of pictures, a child claimed to recognize their aggressor despite the pictured person not having been in the military. Another was said to have conceded to having lied, and one child claimed to remember the name written on the alleged assaulter's uniform but was unable to read the word *"maman"* (mother).<sup>114</sup> The assertion was that some children, given the lack of personal security in CAR, were using the process as an opportunity to receive aid and thus were fabricating accusations.<sup>115</sup> The teacher who had played the role of an intermediary in collecting victim's testimonies and continued to be in touch with some children was also accused of corruption by the judges and excluded from the process.<sup>116</sup>

However, interviewees have raised doubts about the quality of the investigations carried out, by both the UN and French investigators. Some children were interviewed several times, including shortly after the abuse, while others were only interviewed almost two years after the occurrence of the incidents.<sup>117</sup> It also remains unclear whether the UNICEF evidence-gathering mission took all the necessary precautions to fulfil the standards of proof for upcoming criminal proceedings.<sup>118</sup> The children involved did not receive any adequate assistance, especially medical care, which could have helped prove the sexual abuse given the lack of other evidence.<sup>119</sup>

By the time French investigators arrived some children had already been

interviewed a number of times and had not received the required trauma care.<sup>120</sup> Some of the French investigations were reportedly conducted without the presence of specialists in crimes involving minors, mental health professionals, or any assurances that the children would be placed in environments of personal security.<sup>121</sup> It is understood that a specialist in interviewing children was only included on one of the French investigative missions.<sup>122</sup> As a result, too little regard was given to the young age of, and the trauma suffered by, the victims.<sup>123</sup>

In August 2015, four members of Operation Sangaris were interviewed by French investigators. It is understood that only one of them was placed under *"garde à vue"* or custody during the investigation.<sup>124</sup> Furthermore, despite the nature of the alleged violations, the judges preferred to use for the others the *"audition libre"*, the least demanding way of hearing suspects' statements.<sup>125</sup> Whist members of the Operation Sangaris (adults and alleged perpetrators), who could have been interviewed several times without affecting the relevance of their depositions, were only interviewed once, children and alleged victims, for whom multiple testimonies were likely to weaken the administration of justice, were interviewed multiple times.<sup>126</sup>

In March 2017, the prosecutors recommended that no charges be issued in the case as they were not able to "materially corroborate" the allegations.<sup>127</sup> With the investigators' reports, the Prosecutor's office decided there was insufficient evidence and in March 2017 requested for the case to be dismissed.<sup>128</sup> Almost a year later, in January 2018, the French magistrates dismissed the case against French soldiers.<sup>129</sup>

Several civil parties (*"parties civiles"*) have participated in the case on behalf

of the victims: ECPAT France, Enfance et Partage and Innocence en Danger. They intervened at the investigation stage by asking for further points to be investigated in CAR. However, their requests were rejected by the investigating judges.<sup>130</sup> Some have now appealed the decision not to prosecute, and the case is pending before the Court of Cassation.<sup>131</sup> If the Court quashes the decision, the case will go back to the lower court.<sup>132</sup>

### UN investigation

On the orders of the UN Secretary-General at the time, Ban Ki-moon, following public outcry, a call for an independent investigation by the Code Blue Campaign, and demarches by UN Member States, the UN commissioned an independent review into the allegations and the UN response. The investigation was chaired by Canadian Justice Marie Deschamps. The Independent Report issued in 2015 found that the allegations of sexual abuse had been "passed from desk to desk, inbox to inbox, across multiple UN offices" without action.<sup>133</sup> The report stated that "the violations were likely not isolated incidents" and that "they could potentially indicate the existence of a pattern of sexual violence against children by some peacekeeping forces in CAR."<sup>134</sup>

The report found that at its source there was a misconception amongst UN staff about when they were supposed to report sexual assault. Two competing policies on sexual abuse seem to be at the source of this misconception. The first is a policy for UN officials to respond to instances of SEA by UN actors. The second is an obligation to protect vulnerable members of the local population, as rooted in the UN's human rights mandate. In its conclusion, the report found that UN agents at times would see SEA perpetrated

by individuals not under UN auspices, such as the French forces in Operations Sangaris, and believe they had no need to report those crimes to their superiors. However, the human rights mandate in fact applies whenever the UN learns of a human rights violation. As such, even though the French presence was separate from the later “blue helmet” peacekeepers, the report reiterated that UN officials should still report when they witness human rights violations.

A more contentious action taken by the UN was investigating the conduct of Anders Kompass, the UN official who first provided the report to French authorities.<sup>135</sup> At the time Anders Kompass was the Director of Foreign Operations and Technical Assistance for the Office of the High Commissioner for Human Rights in Geneva. Following his providing the report to the French authorities, Kompass was suspended for nine months and was faced with dismissal for his decision. It was reported that Kompass was driven by his belief that the UN had failed to take sufficient action to stop the abuse.<sup>136</sup> After a nine-month suspension Anders Kompass was exonerated by the independent review into the sexual exploitation by peacekeepers and an investigation by the Office of Internal Oversight Services.<sup>137</sup>

## Impact

### Victims

To date, the French legal proceedings have not resulted in reparations for any of the victims.

In 2017, the Guardian reported that children who had allegedly been abused by peacekeeping soldiers had not received support, despite assurances from the UN that they would be protected.<sup>138</sup> Civil

parties involved in the French legal proceedings also stated that, to their knowledge, children had not received any compensation or support.<sup>139</sup>

In March 2017, an investigation by Swedish television revealed that, while UNICEF was supposed to support the victims of abuse by peacekeepers, many of these children were homeless, living in the streets without protection.<sup>140</sup> UNICEF then acknowledged that it had failed in its duty to help the victims but that new steps were taken to locate and support the children featured in the programme.<sup>141</sup> One interviewee reported that UNICEF brought a psychologist from Senegal to examine the children, but that his recommendation they receive psycho-social support was never fulfilled.<sup>142</sup>

### Public opinion

The case brought significant media attention in France and abroad to the issue of peacekeeper child sexual abuse. International newspapers, such as the *Guardian* and *The New York Times* covered the Sangaris case from the initial news about the abuse to the decision to dismiss the case.<sup>143</sup> In France, newspapers of record such as *Le Monde* published a number of articles following the case.<sup>144</sup>

The Sangaris case also raised awareness about the issue among the French legal community and mobilised NGOs to work on the issue, as attested by the number of civil parties that participated in the case. Even if the Court of Cassation were to uphold the decision to dismiss the case, the associations involved as civil parties have expressed their interest in continuing their advocacy and legal engagement to support child victims of similar acts of sexual violence.<sup>145</sup>

The Sangaris case also had an impact on the African public opinion, particularly in CAR. Local newspapers covered the case and criticized the impunity of the soldiers, as well as the failure of the CAR government to protect its citizens.<sup>146</sup> While the authorities of CAR were not involved in the French legal proceedings, they publicly expressed their regret at the lack of consideration for the child victims after the dismissal of the case.<sup>147</sup> In fact, one investigation was opened by the Prosecutor in Bangui in April 2015, but it was closed and forwarded to the French authorities in June 2015.<sup>148</sup>

### French military

The French army conducted a disciplinary investigation into the case and, according to a lawyer involved, the Sangaris case led the military to review and amend its policies on troop conduct when operating abroad.<sup>149</sup> However, as cautioned by other interviewees,<sup>150</sup> it is very difficult to access the internal policies and procedures of any military justice system. As a result, it is difficult to establish what effect any changes adopted by the French military have had. The lack of in-depth investigation into the acts of the main suspects and the dismissal of the case risk strengthening the feeling of impunity among members of the armed forces.<sup>151</sup> It is necessary for the French military authorities to put in place the appropriate policies to prevent these alleged crimes from taking place to preserve evidence in the event of future litigation. It is also important for them to state publicly the reforms implemented and the impact they have in preventing these types of violations in future operations.

### UN reporting

Following the public attention on the UN's inaction prior to the April 2015 publicity,

there has been increased pressure on the UN to be more transparent about its reporting on SEA by peacekeepers. Following the Sangaris allegations, the UN took a number of steps. In February 2016, the UN appointed Ms. Jane Holl Lute as the Special Coordinator on improving the UN response to SEA.<sup>152</sup> Secretary-General António Guterres committed to a renewed zero tolerance policy in December 2016.<sup>153</sup> In August 2017, the UN appointed Ms. Jane Connors as the UN-wide Victims' Rights Advocate at the UN headquarters.<sup>154</sup> Her role is to work with governmental, civil society, and legal and human rights organizations to build support networks to ensure remedies for victims are implemented. Some NGOs have, however, raised questions about the role's lack of independence.<sup>155</sup>

## Challenges and lessons learned

### French legal system

The French justice system appears to have failed to respond adequately to the multiple challenges raised by the case. The investigators sent to CAR were not specialised in complex crimes and did not have the expertise required to work with child victims of sexual abuse. Special guidelines and procedures are needed to ensure the independence and effectiveness of such kinds of complex overseas investigations in conflict and post-conflict areas. France has war crimes investigators who are gaining expertise in conducting these kinds of complex investigations involving vulnerable victims. But that expertise was used for this investigation as it was siloed into a military internal disciplinary matter.<sup>156</sup> In addition, the investigating judges did not take into account the recommendations and demands of the civil parties, despite their expertise in dealing with child victims and sexual violence.<sup>157</sup>



## UN response

While the Sangaris troops were not UN peacekeepers, the UN's knowledge of their conduct still implicated the UN's human rights obligations. The UN's lack of effective response and undue delay in reporting to the French authorities posed significant obstacles to secure the evidence needed subsequently by the French authorities to investigate and prosecute. As with the French investigation, the UN investigation did not appear to follow best practices in interviewing child victims and failed to be accompanied by appropriate safeguards and psychosocial support.

Whereas the UN system has developed advanced expertise in responding to and documenting conflict related sexual violence, peacekeeper SEA is siloed into a separate category of disciplinary infractions. As such, it appeared from the situation in CAR that the expertise from the human rights sector had not filtered into situations where the alleged perpetrators of the sexual abuse were foreign military forces. This was one of the core recommendations of the independent review: that acts of SEA must be addressed as part of the overall human rights and accountability framework, in addition to within the internal framework of UN disciplinary procedures. Victims of conflict related sexual violence at the hands of international peacekeepers whether UN or not should not have less access to justice than victims of conflict related sexual violence at the hands of national authorities, simply because of the affiliation of the alleged perpetrator.<sup>158</sup>

While the publication of the independent review shows that the UN has taken some steps to correct past mistakes, the effectiveness of the new policies is not yet known and needs monitoring by civil society and other relevant stakeholders.

The Sangaris case also highlighted the failure of UNICEF in assisting and protecting child victims of sexual abuse by peacekeepers. The case illustrates the need for a holistic approach to these cases, involving the relevant UN bodies in the best interests of the child victims, to secure them adequate reparations and guarantee non-repetition.



UN Photo/Pasqual Gorriz

## Case Study 3: Right to Information Proceedings in Sri Lanka

### Facts

An introduction to MINUSTAH is set out in Case Study 1 (Uruguayan peacekeepers in Haiti). The following case involved sexual abuse of at least nine Haitian children by more than 134 Sri Lankan peacekeepers from 2004 until 2007. At the time 950 Sri Lankans served with MINUSTAH.<sup>159</sup>

News of the allegations against the Sri Lankan peacekeepers broke in November 2007, when Michèle Montas, the UNSG Spokesperson, announced that MINUSTAH had received allegations of SEA committed by the Sri Lankan contingent. According to a leaked

OIOS report from 19 November 2007,<sup>160</sup> MINUSTAH requested that the OIOS initiate an investigation in August 2007, following a complaint by non-UN personnel that they had witnessed suspicious interactions between Sri Lankan soldiers and Haitian children.

### UN investigation

In addition to OIOS investigators, a Sri Lankan team was sent from Colombo to assist with the examination, including a female officer. MINUSTAH and Sri Lankan authorities reportedly investigated the allegations of abuse and any possible command accountability.<sup>161</sup>

Three months after initiating the investigation, the OIOS issued a preliminary report which found that at least 134 Sri Lankan military members (past and current members at the time of the report) sexually exploited and abused at least nine Haitian children.<sup>162</sup> The acts mostly occurred at night and at a variety of locations where the Sri Lankan military were deployed. Victims interviewed for the report include girls and boys as young as twelve years old. Some victims were sexually abused by more than 30 soldiers over the three-year period in exchange for food and money.<sup>163</sup>

Immediately after the conclusion of the OIOS's preliminary investigation, 114 of the 134 accused Sri Lankan soldiers were repatriated on disciplinary grounds.<sup>164</sup>

In 2015, in the additional information to its fifth periodic report to the CAT,<sup>165</sup> the Sri Lankan Government released some details of how the peacekeepers were dealt with.<sup>166</sup> The Government said that it had established a military court of inquiry to investigate allegations against some members of the sixth contingent deployed to Haiti.<sup>167</sup> The High Commissioner to Canada, Ahmed A. Jawad, in a 2017 article stated that there were two courts of inquiry conducted, by the Sri Lankan army and the navy respectively, to investigate crimes committed in 2006 and 2007.<sup>168</sup> The OIOS inquiry report, however, made it clear that violations had been going on since 2004 from the arrival of the first contingent of Sri Lankans in Haiti.<sup>169</sup>

It remains unclear exactly what the legal consequences have been in Sri Lanka following these allegations. There are significant discrepancies in this regard between the numbers given in various reports. Whilst the OIOS report finds that a minimum of 134 military members from different contingents of the Sri

Lankan forces are alleged to have been implicated in sexual abuse of children in Haiti, Sri Lankan investigations appear to have focused solely on 134 members of one contingent.<sup>170</sup> Although Sri Lanka, in its 2015 submission to the CAT, claimed that 23 individuals have been convicted, it remains unclear whether there have ever been sanctions following these convictions.<sup>171</sup> It appears that none of the perpetrators was imprisoned following their conviction.<sup>172</sup>

An Associated Press (AP) investigation stated that the Sri Lankan government declined to respond to their questions, but eventually told them in early 2017 that they had conducted inquiries into just 18 of the 134 soldiers implicated. Sri Lanka's submission to the Committee Against Torture (CAT) states that in June 2015 the UN Secretariat noted the outcome of its military court process and confirmed the matter closed. Sri Lanka's High Commissioner to Canada later said that the UN Secretariat wrote to the government to say that it considered the matter closed as of 29 September 2014.<sup>173</sup> It is not clear why different dates were given. No statement has been issued by the UN to contradict the Sri Lankan assertion that the issue is closed.

### Legal Proceedings

A Sri Lankan journalist seeking to find out more information about the outcome of the investigation against the soldiers, and whether they were held accountable for their crimes, filed a Right to Information (RTI) request with the Sri Lankan Right to Information Commission on 28 September 2017,<sup>174</sup> following repeated refusals by the Army to provide him with information.

He asked to be given access to the names of the peacekeepers involved, the findings of the Court of Inquiry (e.g., reports or investigative notations), a

list of the allegations made by Haitian citizens (including the nature of the crimes committed, names of the victims, and any other relevant information) and details regarding the disciplinary action taken against eleven soldiers and three officers, such as: whether they were brought before a Court Martial, and if so, the outcome of this process and the names of the officers presiding the Court Martial; the list of the allegations/crimes; disciplinary measures taken against the persons accused; and case numbers of criminal actions before Sri Lankan courts if there were any.<sup>175</sup>

In subsequent proceedings before the Sri Lankan RTI Commission, which commenced on 23 December 2017, the Sri Lankan Army challenged the RTI request on the basis that *"it related to internal disciplinary measures"*; that *"the incidents took place in 2007 and republishing the details about this issue would tarnish the name of the SLA [Sri Lankan Army]"*; that *"only 3 peacekeepers had been involved ... the number of those who were recalled did not necessarily correspond to those who had allegations against them"*; and that *"the actions taken by the SLA with regard to these allegations were already in the public domain"*. Furthermore, the SLA Information Officer submitted that *"revealing details about the Court of Inquiry proceedings would involve privacy concerns"*.<sup>176</sup>

The RTI Commission responded that *"an information request can only be declined by citing one of the exemptions in Section 5(1) (a) of the RTI Act"*. It stated that *"claiming the SLA could not provide details of the result of an inquiry that has been concluded would amount to claiming a privilege, which is not provided for in the RTI Act"*. The RTI Commission further stated that *"in assessing the public interest in such matters ... if there has been a process of inquiry, it is in the Public Authority (SLA)'s benefit to establish what concrete action it has taken regarding allegations made thereto"*.<sup>177</sup>

The RTI Commission ordered the SLA to prepare a summary of the findings of the Court of Inquiry for submission to the RTI Commission and adjourned the Appeal.<sup>178</sup>

On 15 May 2018, the Appeal procedure resumed. The SLA submitted advice it received from the Attorney General's (AG) Department, which stated that an exemption under Section 5(1) of the RTI Act would apply to the request. The RTI Commission highlighted that the exemption the AG had invoked was applicable only when the requested information was given or obtained in confidence and where it could be seriously prejudicial to Sri Lanka's relations with any State, or in relation to international agreements or obligations under international law. The RTI Commission therefore asked the SLA to clarify *"what international agreement or obligation under international law is at issue; the precise terms of the serious prejudice that can be caused; what information was given or obtained in confidence"*. The appeal was adjourned until 3 July 2018.<sup>179</sup>

On 3 July 2018, the SLA submitted that *"all the allegations were duly investigated and awarded punishments through military procedure"*, and that the UN investigation report was submitted to the SLA under *"the security clarification of strictly confidential"*, therefore the SLA could not disclose it to third parties, because to do so would *"tarnish the image of the Army and affect the relations of Sri Lanka with friendly States"*.<sup>180</sup>

The RTI Commission stated that it would examine the report and make a decision on whether it should be disclosed. It adjourned the hearing until 07 August 2018.

It appears that the RTI Commission has not taken a decision since July 2018. It has therefore not been possible to obtain any information about the outcome

of the disciplinary measures taken against the more than 100 peacekeepers accused. It understood that some actions were taken against a handful of soldiers but nothing more.<sup>181</sup>

## Impact

The lack of a decision from the RTI Commission precluded any possibility of the case having a legal impact. It has not set any new judicial precedent or changed any laws regarding access to information about peacekeeper child sexual abuse in Sri Lanka.

From a victims' perspective, the various challenges in the case also meant that little impact was achieved. The victims did not obtain justice, the truth was only partially revealed (and that was only from the leaked OIOS investigation report), and as far as can be determined no reparations were awarded.<sup>182</sup>

It might be hoped that the public nature of the allegations and scandal that ensued would have led to a change in the Sri Lankan Army's policies and attitudes in dealing with child sexual abuse. However, it would appear that given the lack of disciplinary action taken against the soldiers, little has changed. Further allegations of child sexual abuse by Sri Lankan peacekeepers in Haiti surfaced in 2013.<sup>183</sup>

However, an interviewee did acknowledge that, whereas before this case came to light, the public was not aware of SEA committed by Sri Lankan soldiers outside Sri Lanka, now public awareness in Sri Lanka of the issue of SEA by peacekeepers seems to have grown, and it is generally considered to be unacceptable.<sup>184</sup>

## Challenges and lessons learned

This case highlights the common problem of TCCs not being willing to act against

their own troops. Various factors may be at the root of this unwillingness to take action. In the Sri Lankan case, it is understood that internal political factors and the position of the Army in Sri Lanka are likely to have played a role. An interviewee reported that mainstream political parties in Sri Lanka are unwilling to criticise the Army, for fear of being criticised by opposition parties, leading to a lack of political will for disciplining and punishing accused peacekeepers.<sup>185</sup> A Sri Lankan lawyer, K.S. Ratnavale, told the AP that prosecuting members of Sri Lanka's popular military was often impossible due to victim intimidation, a lack of witnesses and poor evidence collection.<sup>186</sup>

The lack of accountability for sexual abuse by Sri Lankan peacekeepers echoes the wider failure to redress sexual violence and other serious human rights violations committed by Sri Lankan security services in Sri Lanka over recent decades.<sup>187</sup> Human rights groups have repeatedly objected to Sri Lankan troops' participation as peacekeepers while these domestic violations remain unaddressed.<sup>188</sup>

Another challenge to litigating child sexual abuse by peacekeepers is highlighted in this case: the lack of public access to information regarding military accountability processes. In many cases it is difficult to access information on disciplinary measures and other internal military information. Even if the national authorities are willing to take action against the accused peacekeepers, and soldiers face a court martial, these procedures often lack transparency and victims are not able to access any information regarding the outcome. This does not allow victims to participate in the justice process and makes it even harder for the victims to obtain reparations.

Although freedom of information legislation can sometimes be used to try to access this information, the Case Study demonstrates the difficulties in doing so. The bases on which the Sri Lankan Army has so far sought to refuse the RTI request in this case have been wholly inadequate and have not met the criteria set down in the Sri Lankan legislation. This was confirmed in the initially robust responses from the RTI Commission. Despite this, the Sri Lankan Army was able to avoid providing the information sought. This lack of transparency and access to information impedes the public (journalists, NGOs, civil society, etc.) from demanding accountability. It also hinders the ability of victims and their lawyers to bring further legal claims seeking justice.

The lack of transparency by the UN in its response to the abuses committed in Haiti further compounded the difficulties faced by victims in seeking justice, both in Sri Lanka and from the UN. The UN has yet to publicly release its preliminary report and does not appear to have advocated for or directly provided any form of reparations to victims. By continuing to treat cases of SEA as merely internal matters or disciplinary offenses, rather than criminal or civil law violations, the UN contributes to the perpetuation of a culture of impunity for the abuses discussed in this Case Study.



UN Photo/Herve Sereffo

## Case Study 4: Criminal Proceedings in DRC for Events in CAR

### Facts

MINUSCA (United Nations Multidimensional Integrated Stabilization Mission in the CAR) is a UN peacekeeping mission set up on 10 April 2014 by UNSC Resolution 2149 (2014).<sup>189</sup> It was set up to protect civilians and support the transition process (such as facilitating humanitarian assistance, protecting human rights, support for justice and the rule of law) in CAR amidst ongoing tensions between the rebel Muslim Seleka group and the Christian Anti Balaka group.<sup>190</sup> It is one of the UN's biggest peacekeeping missions. It has a total personnel of 15,054.<sup>191</sup>

The UN Conduct and Discipline Unit (CDU) has logged 129 allegations of SEA by MINUSCA peacekeepers since 2015. Of these, eight are alleged to have been committed by civilian staff, eight by police and 113 by military. 58 of these allegations involve child victims.<sup>192</sup>

Following the public scandal involving the French-led Sangaris peacekeeping operation, MINUSCA itself has faced multiple public scandals involving SEA by peacekeepers. One of the most well-known cases involves military peacekeepers from DRC. During 2015 and early 2016, many allegations of rape and sexual abuse by DRC peacekeepers in CAR came to light.<sup>193</sup>

The UN made the decision to repatriate the DRC contingents involved.<sup>194</sup>

### Legal proceedings

On 4 April 2016, a trial began before a military tribunal in Ndolo, a military prison north of Kinshasa.<sup>195</sup> Three of the 21 alleged perpetrators appeared before the court: Sergeant Jackson Kikola, charged with raping a young girl of 17 and for not following orders; Sergeant Major Kibeka Mulamba Djuma (on similar charges) and Sergeant Major Nsasi Ndazu, charged for attempted rape and disobeying orders.<sup>196</sup> The other 18 were due to be tried following the first three.

National civil society groups, such as ACAJ – l'Association congolaise pour l'accès à la justice – monitored the trial by sending an observer to the hearings.<sup>197</sup>

However, on 5 May 2016, the trial before the Ndolo military tribunal was suspended.<sup>198</sup> The defence team had asked that the alleged victims appear in person before the tribunal, and that they provide medical records proving that they were indeed raped. The tribunal accepted the defence's requests and declared that the hearings would resume once the public prosecutor fulfilled this request.

Since then, the hearings have not resumed, and the accused remain in prison to this day.<sup>199</sup> The hearings have not resumed because of the difficulties in providing what the defence team requested. It has not yet been possible to get the victims from CAR to DRC. The local government does not have the funds to fly and accommodate all the victims in DRC. Other solutions, such as using videoconference systems or sending a "commission rogatoire"<sup>200</sup> to CAR were not accepted, because they were not valid under Congolese law and criminal procedures.<sup>201</sup>

An NGO working closely with the UN in the DRC reported a perceived reluctance on the part of the UN when trying to advance the proceedings and help the gathering of evidence. Communication between the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO) and MINUSCA in the CAR was perceived to be difficult.<sup>202</sup>

### Impact

The DRC justice system's inability to overcome the evidential challenges in this case limited the possibility of any positive impact. No legal change has been evident, given the suspension of the trial with no indication that it will continue in the near future. The victims were not able to obtain justice, investigation of the facts and determination of the truth was not possible, and no reparations appear to have been awarded.

No changes in national policies or the relevant authorities' attitudes were identified. The absence of a conviction means that the case is unlikely to have applied pressure on the Congolese military to change their policies or behaviour.

It is difficult to determine whether this particular case has had any impact on the attitudes of the Congolese population as a whole. SEA by soldiers, police, armed groups and others is already a widespread issue in the national context. A lack of accountability for sexual violence and other crimes within the national context in DRC is equally common.<sup>203</sup> However, it appears that the case may have had some impact in creating awareness and initiating dialogue as a result of work by national civil society groups, such as ACAJ, to monitor and publicise the events at the trial.<sup>204</sup> It remains to be seen whether the national prosecuting authorities will find a way to continue the trial and ensure

accountability for the crimes committed. It also remains to be seen whether DRC's steps in commencing proceedings and detaining the suspects in custody in this case will be repeated for other allegations.

### Challenges and lessons learned

This case highlights a significant challenge faced when trying to litigate SEA committed by peacekeepers. Because of the exclusive jurisdiction of the TCC to prosecute its military troops, the trial of peacekeepers often happens far away from the country in which the alleged crimes actually took place. This can lead to various issues and challenges for both the prosecuting authority and for victim participation.

For the prosecuting authority, as seen in this case, there can be issues linked to procedural rules regarding testimony and evidence. The investigation itself can be difficult to carry out given that most of the people and material evidence involved are not in the same country as the investigating authorities. This can pose challenges for the preservation of material evidence and where legal systems require in-person testimony from victims and witnesses.

From a victims' point of view, even if the TCC's legal system allows them to take part in the trial, when the trials are taking place in a different country, sometimes thousands of miles away, and the victims are from conflict affected countries with limited resources, it is nearly impossible for them to participate in the process, unless they receive assistance from the TCC, the UN, their own State or civil society.

This case highlights the challenge posed by a lack of resources in the TCC's justice system. In this particular case, the trial

came to a standstill because the Congolese authorities did not have the resources needed to bring the victims and witnesses from CAR to the DRC. When a TCC itself has internal political, security and human rights challenges, it may lack the necessary ability, resources or political will to seek accountability and provide justice for SEA by peacekeepers. In the DRC's case, the country is facing internal issues that include armed conflict, extreme poverty, widespread corruption and political instability, issues that are so serious that it is host to its own UN peacekeeping mission, the MONUSCO.<sup>205</sup>

The case highlights a further issue. National human rights violations by the Congolese armed forces, the FARDC (Forces armées de la République démocratique du Congo) have been well documented by the UN itself, through the UNJHRO's monthly reports on human rights violations in the DRC.<sup>206</sup> The question therefore arises as to whether it is appropriate for the UN to employ peacekeepers from armed forces that are known to have committed human rights violations and have demonstrated an inability to act in accordance with international human rights standards.



UN Photo/Albert González Farran

## Case Study 5: Paternity Claims in Haiti

### Facts

An introduction to MINUSTAH is set out in Case Study 1 (Uruguayan peacekeepers in Haiti). One legacy of MINUSTAH's time in Haiti has been 'peacekeeper babies': children raised by single mothers who have been abandoned by their peacekeeper fathers. These children often occupy precarious socio-economic positions, lacking the resources for adequate healthcare and/or education.<sup>207</sup> Many of these single mothers have been engaged in "long and largely fruitless" legal battles to force peacekeepers who fathered their children to acknowledge paternity and contribute child support.<sup>208</sup>

Shortly before publication of this report new findings emerged reporting hundreds of peacekeeper babies in Haiti, including born to children as young as eleven.<sup>209</sup>

Ten of these women – with twelve children in total – are supported by lawyers at the Institute for Justice and Democracy in Haiti (IJDH) and Bureau des Avocats Internationaux (BAI).<sup>210</sup> Some of the claimants have children born from consensual relations within personal relationships, while others were in transactional relationships involving the exchange of money. One was a child, aged 17, at the time of her relationship with the

alleged father, constituting statutory rape under Haitian law.<sup>211</sup>

Many of the peacekeepers in the paternity cases in question are from Uruguay, while others are from Argentina, Nigeria and Sri Lanka. While these defendants may enjoy a degree of immunity in respect of criminal proceedings in Haiti, they do not enjoy any such immunity in respect of civil suits.<sup>212</sup> Despite this, the cases to date highlight the difficulties in holding the UN and individual peacekeepers to account. While paternity has been confirmed in most cases, the process - "rarely delivers any financial support for mothers."<sup>213</sup> Notwithstanding the UN's 'zero-tolerance policy' against SEA and the fact that sexual relationships between peacekeepers and residents of host countries are "strongly discouraged", the UN's peacekeeping arm does not take responsibility for financial assistance to children fathered by peacekeepers.<sup>214</sup> It has expressed its willingness only to liaise with the governments of alleged fathers, requesting that paternity and support claims be addressed, but asserts that it cannot "legally establish paternity or child support entitlements."<sup>215</sup>

The result is that redress and/or reparation for SEA victims and their children is in practice "a matter of personal accountability to be determined under national legal processes."<sup>216</sup>

## Legal Proceedings

In 2016, BAI notified the UN of their intention to file paternity suits on behalf of nine claimants. This notification was turned away by the UN on the grounds of immunity. The UN was not made a defendant in these proceedings. Instead it was asked to fulfil its obligation to provide confirmation of the defendants' names, ranks and locations as all had since been

repatriated from their posts. BAI also requested the results of any internal UN investigations, including the results of outstanding DNA tests, and confirmation from UN special representatives in Haiti that defendants in paternity cases are not protected by immunity.<sup>217</sup> The response by the UN has been incomplete. After several years of advocacy by IJDH and BAI some - but not all - claimants were provided with the results of DNA tests, in 2018. Additionally, some claimants received assistance from the UN, such as financial support in the payment of school fees. However, IJDH highlights the remaining lack of adequate assistance and legal cooperation from the UN.<sup>218</sup>

In the absence of an adequate response and/or information from the UN by December 2017, BAI and IJDH filed suits in Haitian courts on behalf of ten women and twelve children on the basis that "having and then abandoning children is not within the official capacity of a UN peacekeeper and therefore [...] this does give a Haitian court jurisdiction to resolve paternity and child support claims."<sup>219</sup> The outcomes of some of these initial cases remain pending.<sup>220</sup> In one case, the Haitian court did order the UN to comply with IJDH requests for information pending final judgment but the UN has failed to do so, in contravention of MINUSTAH's obligation to comply with Haitian domestic law under the Status of Forces Agreement 2004.

## Impact

The impact of the SEA scandal in Haiti, along with other repeated SEA scandals by peacekeepers, as well as the real and perceived failure of the UN to support the victims of SEA by UN peacekeepers and other failures of UN accountability, such as the introduction of cholera to Haiti, have all contributed to a significant lack of confidence in UN

agencies. There is a perception amongst the Haitian population that "MINUSTAH is not there to help us", but only to "steal our food, steal our goats and rape our children".<sup>221</sup>

The absence to date of decisions by the Haitian courts precludes the possibility of a legal impact and of a material change from the perspective of SEA victims, who cannot be said to have obtained justice.

For claimants who did not receive DNA testing, the absence of access to evidence held by the UN means that the truth as to the paternity of their 'peacekeeper babies' is yet to be established.

## Challenges and lessons learned

Challenges facing those who attempt to litigate such paternity cases on behalf of SEA victims are many and varied.

Many of the difficulties in Haiti relate to access to justice. There is, amongst the Haitian population, a widespread lack of confidence in the ability of the Haitian judiciary and legal system as a whole to deliver justice: "the idea of redress or any remedy is very foreign."<sup>222</sup> It may be, as a result, that current statistics relating to 'peacekeeper babies' and victims of SEA are significantly underreported. There are specific reports of women raped by Pakistani peacekeepers giving birth and being afraid to file complaints with Haitian courts.<sup>223</sup>

Such cases are also complex and any organisations bringing them require significant resources and advocacy capacity to generate sufficient public attention to influence UN decision-making. This is particularly the case given the transnational nature of the cases. As with many of the countries studied in this report, there is no legal aid in Haiti and lawyers tend to work pro-bono only in

criminal proceedings. The women affected, as a result, have extremely limited avenues of redress open to them. As in many of the other case studies, the BAI and IJDH cases were funded by the organisations working on them themselves.<sup>224</sup>

Other challenges for these and other civil claims exist relating to enforcement, service of proceedings, questions of immunity, availability of evidence, and the clarity (or lack thereof) of UN policy. With regard to immunity, difficulties were caused by the UN's failure to respond directly to the Haitian courts or to accept service of judicial notices on its premises. Claimants were instead forced to send requests for information via the Haitian Ministry of Foreign Affairs. However, there is no legal way for the claimant to compel the UN to comply with those requests - it requires the host country to do so, which they appear often unwilling to do.

The inability of the claimants to compel the UN to comply with the orders of the Haitian courts, and the refusal of the UN to communicate directly with BAI or IJDH, caused knock-on challenges in obtaining evidence such as DNA test results.<sup>225</sup>

A further crucial challenge relates to enforcement.<sup>226</sup> It remains to be seen whether - as hoped - the UN will communicate judgments and/or facilitate enforcement by domestic courts in the defendants' home countries.<sup>227</sup> The issue of enforcement is complicated further by the fact that even if an SEA victim is awarded a favourable paternity/child support ruling, it is rare that they will have access to a lawyer in the TCC to ensure the enforcement.<sup>228</sup> The TCC's courts will also have to recognise the enforceability of the judgment, which is not always guaranteed.



UN Photo/Logan Abassi

## Case Study 6: Criminal Prosecution in Pakistan and Civil Proceedings in Haiti for Events in Haiti

### Facts

On January 20, 2012, members of the Pakistani Formed Police Unit (FPU) in the United Nations Stabilization Mission in Haiti (MINUSTAH) abducted and raped a 14-year-old boy from Haiti who was mentally disabled (hereinafter referred to as “Jean”).<sup>229</sup> Jean was abducted and brought to the Pakistani peacekeepers by two Haitian men. Local youth in Haiti recall seeing the UN police in their vehicle sexually abusing Jean.<sup>230</sup> On January 23, 2012, a medical examiner examined Jean and determined that he had indeed been raped.<sup>231</sup>

In response to the assault, the Inspection and Evaluation Division of the Office of Internal Oversight Services at the United Nations (“OIOS-ID”) formed a joint investigation with the Police Division of the Department of Peacekeeping Operations (DPKO-PD).<sup>232</sup> This team was comprised of a legal adviser and two police officers. The Haitian National Police also initiated a criminal investigation and supported the United Nations’ investigation.<sup>233</sup> The investigation was completed, and a report issued in 34 days from receipt of information received by OIOS-ID.<sup>234</sup>

### Legal proceedings

Shortly after the assault, Mr. Arsène Dieujuste, the General Director of Cabinet Dieujuste et Associés, began representing Jean.<sup>235</sup> Mr. Dieujuste assisted Jean in bringing his civil claim against three Pakistani peacekeepers before the Haitian courts.<sup>236</sup> Jean’s counsel notified MINUSTAH by letter on 14 March 2012 that it would be pursuing this claim against the FPU for USD 5 million in damages.<sup>237</sup>

From 26-30 January 2012, Jean’s civil case was heard in front of a magistrate in the Haitian court.<sup>238</sup> After several months, the examining magistrate issued an order establishing that Jean had been raped by the Pakistani peacekeepers.<sup>239</sup> However, the order could not be executed because of the immunity of the members of the FPU.<sup>240</sup> They had a legal status of “experts on mission” and were part of the mission’s civil component.<sup>241</sup> This legal status granted them inviolability from personal arrest or detention and legal process of every kind.<sup>242</sup>

According to a report issued by the OIOS, the Haitian court requested that immunity of the Pakistani peacekeepers be lifted and asked for MINUSTAH’s help to ensure that the relevant provisions of the Status of Forces Agreement (the “SOFA”) be followed.<sup>243</sup> The Haitian court was apparently prepared to guarantee that the detention facilities for the Pakistani peacekeepers would be of the required standard and would allow them to serve their sentences in Pakistan.<sup>244</sup> MINUSTAH was prepared to accommodate and transport the Pakistani peacekeepers to and from trial.<sup>245</sup>

According to press reporting in February 2012 the Haitian Senate adopted a resolution calling for immunity to be lifted, and to have the Pakistani peacekeepers

tried in a Haitian court. Haiti’s Justice Minister and Foreign Minister also formally requested the same.<sup>246</sup> According to Mr. Dieujuste the Haitian Ministry for Foreign Affairs also sent a letter to the UN on 21 June 2012, requesting that the UN take measures to punish the perpetrators, but this failed.<sup>247</sup>

The OIOS report states that after apparent discussions between the Pakistani government, the Haitian government, and the DPKO-PD, the Pakistani government decided to initiate court martial proceedings against the Pakistani peacekeepers instead.<sup>248</sup> The United Nations Headquarters agreed to the Pakistani government’s decision.<sup>249</sup>

Eventually, the Pakistani peacekeepers were repatriated to Pakistan to face trial in court-martial proceedings.<sup>250</sup> Prior to the trial, the Pakistani government had informed the UN that, according to its law on court martial, it could not allow any observers to the court-martial proceedings and could not accept any decision by the Haitian courts.<sup>251</sup> Due to this restriction, there is little information on what legal arguments were made and how the court came to its ultimate decision. The court proceedings were quickly convened, and two Pakistani peacekeepers were found guilty.<sup>252</sup> However, none of the commanding officers were sanctioned.<sup>253</sup> The Pakistani government informed the United Nations that the case was now closed.<sup>254</sup>

Mr. Dieujuste was told that the Pakistani peacekeepers served time in jail, but he is not certain whether that is true.<sup>255</sup> It has been reported that the three Pakistani peacekeepers were dishonourably discharged, and one was sentenced to a year in prison in Pakistan.<sup>256</sup> Mr. Dieujuste attempted to contact officials in Pakistan by sending a letter to the Ministry for Foreign Affairs, but it does not appear that a response was ever received.<sup>257</sup> He

also requested a copy of the judgment sentencing the Pakistani peacekeepers to prison, but the Pakistani government refused to provide it.

The two Haitian men who abducted Jean were found guilty by the Haitian courts of abduction but have evaded arrest.<sup>258</sup> A “wanted” notice was issued and the police have been actively working on locating them.<sup>259</sup>

## Impact

Jean was psychologically traumatised by the assault.<sup>260</sup> He was placed in a “safe house” and has not been able to go back to his home town because he is still suffering psychologically from what happened.<sup>261</sup>

In terms of material impact, the OIOS Evaluation Report states that the Pakistani government made verbal assurances to the UN that Jean would be compensated. But the report notes that it remains unclear whether that commitment was ever honoured.<sup>262</sup> According to Mr. Dieujuste Jean never received reparations for the assault, and Mr. Dieujuste continues to fight for Jean to gain compensation.<sup>263</sup>

The factual finding by the Haitian Court did establish the truth of Jean being raped by the Pakistani peacekeepers. This is one step further than many of the other cases examined were able to achieve. Nevertheless, the inviolability of the Pakistani peacekeepers as experts on mission, and the eventual decision to allow them to be repatriated to Pakistan, prevented further action to secure justice by the Haitian Courts.

The OIOS Evaluation Report acknowledged the issues in the case: “Within the United Nations, there were persistent reservations at various levels about the court martial and the repatriations. It was considered

that it could give the impression of a scheme to get the FPU members out of the Host State; that it had increased the perception of impunity associated with United Nations personnel in Haiti; that the PCC’s measures circumvented the possibility of prosecution by the Host State; that the court martial, followed by routine repatriation, was unlikely to serve the purpose that appropriate action be taken and seen to be so; and that it could create a precedent that might complicate the handling of similar cases in the future.”<sup>264</sup>

According to Mr. Dieujuste this case undermined Haitian people’s confidence in the judicial system. Locals were apparently angered by the injustice, noting that raping a boy with learning disabilities in Haiti would have led to imprisonment for life.<sup>265</sup> It is also said that when UN vehicles pass, locals shout “here come the criminals, the rapists!”<sup>266</sup> The view of UN officials is that they are criminals who act in discriminatory ways and remain unpunished for violating the law.<sup>267</sup>

## Challenges and lessons learned

The case demonstrates the challenges that are posed by immunities in cases involving civilian peacekeepers. The inviolability of the Pakistani peacekeepers in this case, and the failure of Haiti’s efforts to have that immunity waived (including through attempting to meet the necessary requirements to ensure the peacekeepers a fair trial) precluded the possibility of justice through the Haitian courts.

The court martial process in Pakistan was not in this case an adequate alternative mechanism for accountability. The inability of victims to obtain information about the outcome of prosecutions, let alone to participate in the proceedings, is a problem that appears repeatedly when court martial processes are used

to prosecute child sexual abuse by peacekeepers. Military court martial processes as a rule do not provide sufficient transparency and independence in this respect. In this particular case, the result of the process was not public but appear to have been clearly unacceptable considering the gravity of the crime.

That Jean was unable to obtain reparations or accountability even with a significant commitment of time and resources by his legal team raises the question of how the majority of victims can be expected to seek justice without adequate legal representation and considering the great obstacles they face.



# 4. Obstacles to Accountability and Redress

## Introduction

The following chapter summarises the key obstacles identified by the case studies to seeking accountability and redress for peacekeeper child sexual abuse.

It is expected that these obstacles exist for the entire spectrum of instances of peacekeeper child sexual abuse, not just in cases where litigation has been used. However, the increased scrutiny brought by litigation in the case studies helps to shed light on the current existing challenges.

## Quality of investigations

A number of the case studies demonstrated deficiencies in the investigations undertaken both by TCCs and the UN into the instances of sexual abuse.

In Case Study 1 (Uruguayan peacekeepers in Haiti), an inability by the Uruguayan prosecutor to collect sufficient evidence resulted in the perpetrators not being convicted for sexual assault, but instead for a lesser offence of private violence. The prosecution was also delayed because the Uruguayan prosecutor was reported to have been unable to locate the victim, despite journalists having been able to locate him.

Similarly, in Case Study 2 (French Sangaris peacekeepers in CAR) initial UN investigations were reported not to have followed correct procedures, and the French investigations

were allegedly conducted at times without the presence of specialists in crimes involving minors, mental health professionals, or assurances that the children would be placed in environments of personal security.

The case studies appear to confirm the widely held views that TCCs frequently ignore their obligations to conduct prompt investigations into allegations of misconduct by military personnel on peacekeeping missions.<sup>268</sup> A lack of investigating officers with deployed units and court-martial capabilities on site limits the ability of troop-contributing countries to investigate swiftly, and it is unclear how effective the UN's efforts to follow up with those authorities are.

Poor evidence gathering harms not only the prospects of obtaining evidence for a conviction, but also poses a direct risk to the victims themselves. It was reported that the victim in Case Study 1 (Uruguayan peacekeepers in Haiti) was left retraumatised as a result of having to provide evidence multiple times in Haiti and Uruguay. It is understood that the investigators did not have expertise in investigating sexual violence, and that the victim was not provided with the necessary psychosocial support.

## Immunities

The actual or perceived immunity of the peacekeepers frequently prevented

victims' lawyers from being able to instigate legal proceedings in the host country.

In Case Study 6 (Pakistani peacekeepers in Haiti) a Haitian court went as far as making a factual determination that the victim had been raped by the Pakistani peacekeepers, but was unable to take further action because the peacekeepers were classed as experts on mission and had full inviolability. Efforts by the Haitian government to have the immunity waived were unsuccessful.

A number of interviewees also reported that incorrect public perceptions about the immunity of peacekeepers prevented people from reporting crimes in the first place and dissuaded courts and government officials from pursuing claims against individuals associated with the UN. The UN Office of Legal Affairs (OLA) has also noticed the misperception: Asked: "REDRESS's research has revealed that one barrier to national court litigation is an incorrect perception by victims and their lawyers that the UN peacekeepers and other staff members responsible for SEA are immune from prosecution. Is this a misperception that the OLA often comes across?", the OLA responded: "This is a misperception that we have seen primarily in the press."<sup>269</sup>

In cases of litigation arising out of SEA by civilian peacekeepers, the UN is responsible for determining whether functional immunity applies. Its role is to conduct an internal investigation to preserve evidence, determine whether further investigation is required, and to establish the context of the alleged crime in order to then make a determination on immunity. As was explained in Chapter 2, functional immunity legally should never apply where civilian peacekeepers have sexually abused children since these actions clearly are not part of any official

function.<sup>270</sup> It has been reported that the UN conducts investigations into the alleged crimes and the available evidence, and it does so irrespective of whether it is uncertain if functional immunity applies or not.<sup>271</sup> The UN does have authority to waive an individual's immunity but is unlikely to do so in circumstances where it has doubts about the ability of local justice systems to guarantee a fair trial or to ensure alleged perpetrators human rights and the rule of law will be respected. Such concerns are often present as peacekeeping operations typically take place in fragile and conflict-affected contexts. Yet, the UN has not indicated whether it has a listing of which countries it deems to have sub-standard local justice systems – pointing to the likely ad hoc nature of such determinations.

## Exclusive jurisdiction of TCCs

The exclusive jurisdiction of the TCCs to prosecute their troops meant that the trials of peacekeepers often happened far away from the country in which the crimes took place. This caused significant practical difficulties where victims sought to participate in criminal prosecutions or to bring litigation themselves against the individual peacekeeper or the TCC.

The exclusive jurisdiction of TCCs also caused problems where the TCCs' legal systems did not have financial or technical capacity to prosecute crimes effectively. In Case Study 4 (DRC peacekeepers in CAR) the case stalled because DRC courts required the victims to give evidence in person, but the prosecutor could not afford to transport the victims from CAR to DRC to give evidence. In Case Study 1 (Uruguayan peacekeepers in Haiti) the victim only received partial financial support from the TCC for travelling to Uruguay to give evidence, and had to rely instead on pro bono support. The court-appointed translator could not speak the

victim's language fluently, and the victim's lawyer had concerns about the quality of the Uruguayan lawyer appointed to represent the victim.

It is difficult to determine to what extent these failings are solely a product of deficiencies in the TCCs' criminal justice processes, or to what extent they may reflect a lack of political will in the TCCs to prosecute peacekeeping troops. In Case Study 3 (Sri Lankan peacekeepers in Haiti), one interviewee stated that a lack of political will likely lay behind the TCC's failure properly to sanction the troops involved. Another interviewee confirmed that mainstream political parties in Sri Lanka were unwilling to criticise the Army, for fear of being criticised by opposition parties, leading to a lack of political will for disciplining and punishing accused peacekeepers. Similarly, it could be asked whether greater political will for prosecutions in Case Study 2 (French peacekeepers in CAR) might have resulted in better-qualified and more effective investigation teams being sent by France to CAR.

### **Lack of transparency**

The obstacles for victims and their lawyers were often compounded by the fact that prosecutions were carried out through closed military court martial processes, rather than open civilian courts.

In Case Study 3 (Sri Lankan peacekeepers in Haiti), a Sri Lankan journalist had to resort to freedom of information proceedings to seek information about whether peacekeepers implicated in child sexual abuse were appropriately prosecuted and sanctioned. Despite doing so he was not able to obtain basic information about whether the perpetrators were held to account. If receiving information is difficult for

individuals based in the TCC, victims in the host country will most likely face even bigger obstacles.

Case Study 6 (Pakistani peacekeepers in Haiti) demonstrated similar difficulties caused by lack of transparency in court martial processes. Despite efforts by the victims' lawyer he was not able to find out what sanction had been imposed on the perpetrators, for example whether they were given a custodial sentence.

A lack of transparency at the UN level caused problems in Case Study 5 (paternity claims in Haiti). The UN's refusal to communicate directly with the victims' lawyers or share evidence in its possession posed significant challenges to the victims' litigation efforts.

The lack of transparency poses challenges not only for victims and their lawyers, but also for those seeking to assess the scale of peacekeeper child sexual abuse and the effectiveness of institutional efforts to prevent, prosecute and remedy it. For example, in all of the case studies it was difficult to determine whether the armed forces in question had altered their policies and practices as a result of the cases, for example through revisions to written codes of conduct, new or amended training programmes for troops, or alterations in procedures for the investigation and sanctioning of crimes.

### **Role of the UN**

Interviewees at times expressed frustration with the unwillingness of the UN to cooperate with litigation processes. In Case Study 5 (paternity claims in Haiti) interviewees identified various occasions on which the UN had failed to provide information necessary to support legal claims. In Case Study 2 (French Sangaris peacekeepers in CAR)

the UN's own assessment acknowledged that it had been too slow to respond to allegations of sexual abuse by French peacekeepers, potentially contributing to eventual difficulties in proving the case in the French courts. Interviewees for Case Study 2 suggested that the UN's expertise in dealing with conflict related sexual violence had not filtered into situations where the alleged perpetrators of the sexual abuse were peacekeeping forces, and the Independent Review recommended that acts of SEA be addressed as part of the overall human rights and accountability framework. The case prompted a number of internal reforms in the UN, the effectiveness of which need to be assessed over the longer term.

Case Study 3 (Sri Lankan peacekeepers in Haiti) demonstrated the limited extent to which the UN compels TCCs to prosecute peacekeeper child sexual abuse properly. An OIOS report in that case identified 134 suspects, but the Sri Lankan authorities convicted only a handful, and none was given a custodial sentence. Despite this, Sri Lanka stated in a submission to the CAT that in June 2015 the UN Secretariat had taken note of the outcome and considered the case closed.

### **Children as victims**

The common difficulties in documenting and proving cases of SEA (under-reporting, evidentiary challenges, vulnerability of victims, risk of stigma) appeared from the case studies to have been increased as a result of the victims being children. The required additional expertise by the investigators and prosecutors from the TCC, as well as from the lawyers and NGOs seeking to act on behalf of the victims, was often absent. Case study 2 (French Sangaris peacekeepers in CAR) demonstrated some of these problems. All the cases show little

evidence of the best interests of the child victims being taken into account by the relevant authorities.

### **Lack of legal support**

The research identified several lawyers and NGOs around the world that were providing crucial support to victims. However, the total number of such individuals and organisations identified was small, particularly when compared to the scale of the problem of peacekeeper child sexual abuse. In most of the countries studied government-funded legal aid was not available to the victims of peacekeeper child sexual, and the small proportion of victims that did obtain legal representation therefore relied on lawyers funded by NGOs.

The capacity of the lawyers and NGOs working on these cases that were interviewed for the report varied significantly. Many were operating in extremely challenging circumstances. One clear finding was that there was little, if any, coordination between those working on similar cases in different countries. Greater exchange of information on experience and strategy in general would be beneficial. But even more importantly, the lack of international coordination between lawyers and NGOs caused significant challenges for addressing the inherently inter-jurisdictional nature of peacekeeper child sexual abuse cases.

### **Lack of other support for victims**

The case studies highlighted various other areas in which support for victims was lacking, including psycho-social support and support from local courts and the government of the host country.

# 5. Strategic Litigation of Peacekeeper Child Sexual Abuse

Few of the victims in the cases studied appeared to have received psycho-social support, either from host country institutions, the UN or local NGOs. In terms of support from local courts in the host country, interviewees for Case Study 5 (paternity claims in Haiti) considered that victims' lack of confidence in the Haitian legal system was likely to have reduced the number of instances of SEA and peacekeeper babies being reported.

A further problem identified was the reliance of victims on the government of the host country to pursue their case. In Case Study 5 (paternity claims in Haiti) the victims were reliant on the Haitian foreign ministry to seek information from the UN that was necessary to take forward the cases. Case Study 1 (Uruguayan peacekeepers in Haiti) demonstrated to some extent what could be achieved where a host country government actively engaged on a particular case. However, this appeared to be an exception when compared to the other case studies, likely influenced by the high media coverage of that particular case.

Such challenges will be common given the likely unstable nature of countries that will be receiving peacekeepers. It is therefore crucial that the system for dealing with cases of peacekeeper child sexual abuse accounts for these challenges and develops ways to overcome them. At present this does not seem to be the case.

As discussed in the previous chapters, efforts to seek accountability for cases of child sexual abuse by peacekeepers are complicated by the patchwork of legal frameworks expected to cover peacekeeping troops, broad immunity protections, and the lack of political will to conduct thorough, impartial and effective investigations. Critical policy and legal changes are needed to overcome these challenges.

Strategic litigation is one avenue for seeking to bring about such reforms. Thus far, peacekeeper litigation conducted has, for a variety of reasons, had only limited success in either substantially securing redress for affected victims or meaningfully addressing the underlying enablers of impunity for child sexual abuse and other crimes.

The use of strategic litigation in the peacekeeping context, involving both efforts to obtain reparations and ongoing advocacy for structural reform, may successfully prompt shifts in policies and attitudes that can result in substantive accountability and prevent future abuse. This chapter provides a basic explanation of strategic litigation — what it is, when it may be used — before discussing criteria for understanding and measuring the impact of strategic litigation strategies in the context of peacekeeper child sexual abuse.

## Strategic litigation in the peacekeeping context

Strategic litigation can be defined as the bringing of a legal claim with an objective of change beyond the individual case, which can generally be achieved by combining casework with other civil society techniques, including research, advocacy for structural reforms, and capacity-building. Litigation is often regarded as the final strategy in social movements, in part because it is sometimes seen as risky, expensive, or time-consuming. However, by giving a voice to victims, building a public record of evidence, and highlighting policy gaps or failures of implementation, litigation can play an important complementary role to community organizing, media campaigns, and the other tools of social movements.

Organisations and lawyers pursuing strategic litigation must selectively take cases that can advance a particular legal, social or human rights change, whether preventing a particular behaviour or requiring authorities to initiate legal/policy reforms or a general change of attitude. While traditional strategic litigation has focused on achieving specific legal changes (either through new case law or by subsequent changes to legislation), more recent strategic litigation seeks to create actual change on the ground, which



the TCC), or who may have their credibility questioned in adversarial proceedings. The medical and social needs of victims need to be supported through a multi-disciplinary approach, and those measures should be tailored for the victims of child sexual abuse. Litigants need to consider the best interests of child victims and evaluate the benefits of litigation against re-traumatization, safety and other potential risks.

Litigation can also take many years, limiting the access to evidence and frustrating victims who may urgently require psychosocial support or other forms of reparation. Lawyers should consider the particular context in which they are conducting strategic litigation regarding child sexual abuse by peacekeepers and develop a risk mitigation plan accordingly.

In strategic litigation, before initiating legal proceedings (and while the litigation is ongoing) lawyers and NGOs should conduct substantial community engagement activities, including rights awareness activities, which can be valuable both as a tool of empowerment and can assist with data collection for any possible future litigation.<sup>272</sup> In contexts in which many survivors may lack concrete knowledge of their rights, these community engagement activities may be particularly important for identifying potential litigants and communicating the importance of reporting abuses as they occurred. Additionally, using civil society media and community engagement techniques can amplify the impact of any potential successes arising from the litigation in question.

For the same reasons, litigators, possibly in coalition with NGOs, should conduct advocacy activities at different points of the litigation process. For example,

lawyers seeking to use strategic litigation to effect policy changes in a particular TCC could direct advocacy efforts towards that country's parliamentarians or other stakeholders.

Finally, given the low numbers of individuals and organisations working on either providing critical support to or seeking legal remedies for victims of peacekeeper abuses, any lawyers or NGOs engaging in this work should consider conducting capacity building activities with local counterparts, such as "know your rights" or other legal training workshops—including discussion of the avenues for strategic litigation discussed in this report. By strengthening the specific legal knowledge of local attorneys and other advocates, organisations can ensure that litigation can continue in diverse forums, whether at the local, regional or international level; further, given that more than one judgment is often required to effect change, increasing the capacity of lawyers to bring a series of cases in particular jurisdictions regarding sexual abuse by peacekeepers is important.

For example, as discussed in Case Study 5 (paternity claims in Haiti), even if claimants receive favourable rulings, they will likely need additional legal support to ensure the enforcement of the judgments in the defendants' home countries; organisations working on these claims can conduct cross-context capacity building activities to build a cohort of lawyers prepared to support victims in pursuing enforcement of any judgments across the relevant TCCs.

**Assessing the impact of strategic litigation**

Strategic litigation can be used to advance a number of different goals, including policy, legal and social change. Consequently, evaluating the "impact"

can require much more work by NGOs and lawyers involved to implement decisions. Consequently, lawyers need to identify the remedies they seek, or the impact desired, at the beginning of the project. For example, lawyers or organizations working on strategic litigation cases regarding child sexual abuse by peacekeepers may seek a variety of impacts, including improving the quality of investigations into allegations of child sexual abuse; ensuring that TCCs prosecute and sanction all perpetrators appropriately; changing the way the UN deals with the cases; and increasing the number of victims

that are awarded the reparations to which they are legally entitled.

Lawyers working on cases of child sexual abuse by peacekeepers need to take a holistic approach to ensure the greatest beneficial impact for the client and the cause, and to minimise any risks. Risks include the possibility of re-traumatization for victims of SEA who may be required to testify about their experiences in multiple fora (as seen in Case Study 1 (Uruguayan peacekeepers in Haiti), in which Johnny Jean testified in both his home State and

of strategic litigation can sometimes be difficult, particularly when different actors may be seeking different results. For example, direct victims of child sexual abuse by peacekeepers may be seeking material reparations, while organisations involved in the strategic litigation may be focused on legislative impact. In some cases, it can also be challenging to identify a causal relationship between a specific case and any possible outcomes, in part because strategic litigation can be a lengthy process. In the time it takes for a set of legal proceedings to conclude, elections may have occurred (resulting in legislative changes), social norms may have changed, or other factors could have resulted in human rights changes, independently of the litigation.<sup>273</sup>

Despite these challenges, the impact of litigation can be assessed using several criteria, both as a prospective exercise prior to the instigation of a case to determine its suitability for strategic litigation and desired outcomes, and post hoc, after the litigation has ended. These criteria include:

**Justice:** The impact on the clients through (i) the declaratory element of the litigation (e.g., greater public awareness of what has occurred, including an acknowledgement of wrongdoing by the relevant authorities) and (ii) adequate punishment or sanctions (e.g., a public apology by the wrongdoer, authorities compelled to take affirmative action to repair damages).

**Truth:** Definitive findings of fact that can be of crucial importance to victims and in campaigns for accountability.

**Legal:** Changes in legal standards brought about by the litigation, whether through caselaw, legislation, or decrees.

**Policy and Governance:** Commitments to policy changes made as a result of

the litigation, and concrete changes to technical procedures necessary to implement any policy changes.

**Material:** Specific benefits to the client stemming from the litigation, such as material reparations (e.g., psychosocial support, rehabilitation, and compensation for harms suffered).

**Community:** Benefits running to others in a similar situation, beyond the individual clients (e.g., collective reparations, public education campaigns, paving the way for other claimants).

**Movement:** The impact the litigation has on the relevant social movements, both in the country in which the litigation took place and globally.

**Attitudes:** Shifts in the attitudes of decision-makers and stakeholders (such as judges, diplomats, journalists and law enforcement officials) as a result of the litigation.

**Social:** Changes in the acceptability of or tolerance to the particular issue in the country or region concerned.

These criteria, broadly categorised as they are, reflect the kinds of results that can stem from strategic litigation—both single, discrete outcomes such as reparations for the individual client(s) represented in the litigation and broader, systemic changes, such as legislative changes or other essential reforms (e.g., reforming the TCC’s internal mechanisms for opening investigations into peacekeeping troops alleged to have committed acts of sexual abuse). Additionally, some of these criteria are intended to capture intangible impacts such as changes in attitudes of relevant stakeholders, including lawmakers, journalists, or law enforcement officials

(e.g., evaluating whether strategic litigation and advocacy efforts have encouraged lawmakers to consider supporting the creation of an international jurisdiction mechanism for the prosecution of peacekeepers), as well as the effect that the process itself may have to empower and rehabilitate the victim.

Some of these criteria may be more relevant in particular contexts than others, or suitable only for evaluating strategic litigation at certain phases; for example, while “truth”-related outcomes may emerge relatively early in the litigation process, policy and governance impacts may take much longer to materialize (often after years of ongoing advocacy and community organizing). In assessing material impacts, in particular, it is important to recognize that even a court order does not necessarily ensure that a victim will receive the necessary reparations. Implementation of the reparations orders in the few successful cases documented in this report has been slow, and most victims (across multiple jurisdictions) are still waiting to receive any benefits. Lawyers should anticipate this when planning to bring strategic litigation, and measure the impact of the case(s) they initiate accordingly.

Similarly, lawyers must take a slightly different approach when both planning for and evaluating national litigation as compared to regional or international litigation. The policy changes sought at regional and international human rights mechanisms (such as the Committee on the Rights of the Child, for example) will naturally differ from those sought through national courts, in part because the judgments in the former fora do not always have the same legal weight that national decisions do, whereas national decisions will often not contain orders for State actors to implement measures of

non-repetition. Lawyers bringing strategic litigation must therefore select the forum that is best equipped to deliver judgments that may prompt the desired change.

The following table outlines in greater detail the potential criteria for use in analysing the impact of any strategic litigation regarding child sexual abuse by peacekeepers.

**1.** The **activity and techniques** column provides a high-level overview of some of the key strategies lawyers or NGOs may use to achieve the desired **outputs**. Outputs are typically, tangible or measurable results of the activities conducted, such as news stories covering a particular topic or positive judgments.

**2.** These outputs may or may not result in the **outcomes** outlined in the next column of the table below. Outcomes are the short-term and medium-term effects of the outputs (such as implemented policy changes or realized reparations for victims). Outcomes occur *because of* the activities conducted through the strategic litigation process.

**3.** The ultimate **impacts** of strategic litigation are the long-term, sometimes indirect effects of these outcomes, such as reduced stigmatization of survivors of child sexual abuse or increased community trust in local institutions. While impacts are difficult to measure and may not always materialize, they are the results that lawyers conducting strategic litigation *hope* to achieve.

	Activities & Techniques	Outputs	Outcomes	Impact
JUSTICE	<ul style="list-style-type: none"> <li>• Litigation (i.e., criminal case, civil/remedies claim, or human rights complaint)</li> <li>• Working with relevant authorities to instigate prosecutions</li> <li>• Informing survivors about their right to participate in any legal proceedings</li> <li>• Advocacy for an apology</li> <li>• Assessing desires of victims</li> </ul>	<ul style="list-style-type: none"> <li>• Litigation initiated in the appropriate forum</li> <li>• Victims' statements are recorded (and disseminated, if appropriate)</li> </ul>	<ul style="list-style-type: none"> <li>• Victims feel a sense of justice</li> <li>• Convictions on the basis of strong evidence</li> <li>• Perpetrators are punished commensurately to their crimes</li> <li>• The relevant authorities issue timely and satisfactory public apologies</li> </ul>	<ul style="list-style-type: none"> <li>• Increased community trust in local and, where applicable, international institutions, including courts and law enforcement authorities</li> <li>• Peacekeepers are deterred from committing further abuses (dismantled perception of a "climate of impunity")</li> </ul>
TRUTH	<ul style="list-style-type: none"> <li>• Documentation, fact-finding, evidence analysis, expert analysis, scientific expertise</li> <li>• Conducting media and digital communications campaign to highlight findings</li> <li>• Freedom of information requests</li> <li>• Parliamentary questions</li> </ul>	<ul style="list-style-type: none"> <li>• Summaries of judgments, press releases</li> <li>• Significant press coverage</li> <li>• Factual expert commentary</li> <li>• Country studies</li> </ul>	<ul style="list-style-type: none"> <li>• Judgments with strong findings of fact</li> <li>• The truth of allegations is confirmed; an accurate historical record of abuses committed is created and is publicly available</li> <li>• The relevant authorities accepted responsibility</li> </ul>	<ul style="list-style-type: none"> <li>• Survivors feel recognised and/or vindicated; survivors are empowered to participate in any judicial proceedings (resulting in more adequate and effective reparations)</li> <li>• Additional survivors are encouraged to report cases</li> <li>• The general public is informed about events that occurred, reducing stigmatisation</li> </ul>

	Activities & Techniques	Outputs	Outcomes	Impact
LEGAL (COURTS)	<ul style="list-style-type: none"> <li>• Engaging with members of the legal profession in host countries and TCCs</li> <li>• Conducting judicial training</li> <li>• Preparing amicus briefs</li> <li>• Conducting comparative studies of different jurisdictional approaches to peacekeeper child sexual abuse litigation</li> </ul>	<ul style="list-style-type: none"> <li>• Local working groups informally established to build legal capacity</li> <li>• Amicus briefs promoting strong analyses of relevant legal issues developed; issues framed in the "language of the court"</li> <li>• Timely, well-publicised academic and other commentary on case(s)</li> </ul>	<ul style="list-style-type: none"> <li>• A 'landmark' judgment; other authoritative caselaw and judicial statements</li> <li>• Cases that cite the relevant human rights and criminal law</li> <li>• Judiciary familiar with applicable legal frameworks, principles, rights</li> </ul>	<ul style="list-style-type: none"> <li>• Increased use of litigation globally to secure reparations successfully for survivors of child sexual abuse</li> <li>• Greater number of different lawyers and NGOs bringing cases in diverse fora</li> <li>• Development of legal framework for child sexual abuse by peacekeepers through jurisprudence; increased citations to relevant human rights conventions and other treaties</li> </ul>
LEGAL (LEGISLATION)	<ul style="list-style-type: none"> <li>• Conducting targeted advocacy at national governments and legislators (e.g., parliaments)</li> <li>• Conducting advocacy towards international actors, putting pressure on governments</li> </ul>	<ul style="list-style-type: none"> <li>• Briefing papers developed, disseminated</li> <li>• Local and regional roundtables conducted</li> <li>• Pressure groups formed</li> <li>• Model legislation</li> </ul>	<ul style="list-style-type: none"> <li>• Strong anti-child sexual abuse laws and regulations are passed (e.g., updates to national criminal codes; age of consent changed; mandatory reporting requirements; stronger sentencing provisions)</li> <li>• Increased ratification of specialised children's rights and other human rights treaties</li> </ul>	<ul style="list-style-type: none"> <li>• Legal frameworks in host countries and TCCs are in line with relevant international humanitarian and human rights law standards</li> <li>• Immunity bars and problems with extraterritorial application of national laws overcome due to strong, consistent criminalisation of child sexual abuse</li> </ul>

	Activities & Techniques	Outputs	Outcomes	Impact
POLICY AND GOVERNANCE	<ul style="list-style-type: none"> <li>• Conducting targeted domestic and international advocacy</li> <li>• Providing technical assistance where necessary (e.g., preparing child safeguarding trainings)</li> <li>• Sharing of best practices across countries/ jurisdictions in which incidents of child sexual abuse by peacekeepers occurred</li> </ul>	<ul style="list-style-type: none"> <li>• Roundtables and media outreach conducted</li> <li>• Training manuals for relevant stakeholders created</li> <li>• Draft policies, informed by best practices, created and disseminated to relevant authorities</li> </ul>	<ul style="list-style-type: none"> <li>• New policies promulgated and implemented (e.g., State policies implementing on-site court martials; child safeguarding training for all peacekeepers)</li> <li>• Budgetary allocations for training of the judiciary/police/ other stakeholders approved</li> </ul>	<ul style="list-style-type: none"> <li>• Shifts in political attitudes towards prevention and prosecution of child sexual abuse reflected in (i) commitments to change and (ii) actual, reforms to procedures, budgets and the relevant institutions</li> <li>• National authorities have implemented any court decisions</li> </ul>
MATERIAL	<ul style="list-style-type: none"> <li>• Assessing needs of victims</li> <li>• Identifying psychological, medical and social service providers to complement legal representation</li> <li>• Involving victims in legal process</li> <li>• Advocacy to UN for material assistance</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate measures of reparation for victims identified</li> <li>• UN provides material assistance</li> </ul>	<ul style="list-style-type: none"> <li>• Judgments rendered that order such remedies</li> <li>• Clients receive rehabilitation and compensation</li> </ul>	<ul style="list-style-type: none"> <li>• Victims feel recognised, and that the reparations delivered had both practical and symbolic value</li> <li>• Victims were participants in the process of identifying reparations, achieving valuable “justice” impacts</li> </ul>

	Activities & Techniques	Outputs	Outcomes	Impact
COMMUNITY	<ul style="list-style-type: none"> <li>• Community engagement</li> <li>• Public education (e.g., child sexual abuse prevention trainings)</li> <li>• Encouraging replicated mass litigation</li> <li>• Analysing affected community</li> </ul>	<ul style="list-style-type: none"> <li>• Campaigns by community groups conducted</li> <li>• Production of materials and digital communications to explain projects</li> <li>• Replicated mass litigation</li> <li>• Baseline study on affected community</li> </ul>	<ul style="list-style-type: none"> <li>• Community members played a part in the campaign, and feel ownership of it</li> <li>• Greater public understanding of the particular problem and solutions</li> <li>• Success of replicated mass litigation</li> </ul>	<ul style="list-style-type: none"> <li>• Reduced stigmatization of child sexual abuse survivors</li> <li>• Community members are informed of their rights, applicable laws and policies, and the available avenues to assert their rights (if necessary)</li> </ul>
MOVEMENT	<ul style="list-style-type: none"> <li>• Grassroots activism, including media, advocacy and online campaigning</li> <li>• Collaborating across organisations interested in working on SEA by peacekeepers</li> <li>• Cross-context learning and sharing of best practices</li> </ul>	<ul style="list-style-type: none"> <li>• Production of material to raise awareness of child sexual abuse by peacekeepers (e.g., “human stories” videos, profiles of survivors)</li> <li>• Working groups on the problem formed</li> </ul>	<ul style="list-style-type: none"> <li>• Lawyers and NGOs trained in/aware of alternative advocacy methods (drawn from civil society)</li> <li>• Continued public engagement in ongoing litigation and/or mobilized to call for meaningful accountability initiatives</li> </ul>	<ul style="list-style-type: none"> <li>• Others take up and take forward the issue</li> <li>• Greater understanding of the scope of the problem, and of ongoing prosecutions across jurisdictions and mechanisms</li> <li>• Improved ability to continue bringing perpetrators of child sexual abuse to justice</li> <li>• Diverse actors involved in combating child sexual abuse by peacekeepers (e.g., not limited solely to lawyers)</li> </ul>

	Activities & Techniques	Outputs	Outcomes	Impact
ATTITUDES	<ul style="list-style-type: none"> <li>Identifying stakeholders</li> <li>Implementing judicial education activities</li> <li>Regional and international advocacy to relevant diplomats</li> <li>Engaging the media</li> </ul>	<ul style="list-style-type: none"> <li>Roundtable discussions with the relevant stakeholders on accountability for child sexual abuse</li> <li>Media campaign to highlight the impact of child sexual abuse on survivors</li> </ul>	<ul style="list-style-type: none"> <li>Changes in opinion of stakeholders (UN officials, politicians, judges, police, diplomats) attitudes to peacekeeper child sexual abuse</li> <li>Public statements or changes in States' policies regarding the prevention and prosecution of child sexual abuse</li> </ul>	<ul style="list-style-type: none"> <li>Stakeholders (politicians, judges, police) respond differently to allegations of child sexual abuse by peacekeepers</li> </ul>
SOCIAL	<ul style="list-style-type: none"> <li>Media and communications</li> <li>Community advocacy</li> <li>Public education (e.g., child sexual abuse prevention trainings)</li> <li>Public opinion survey</li> </ul>	<ul style="list-style-type: none"> <li>Public awareness campaign on child sexual abuse by peacekeepers</li> </ul>	<ul style="list-style-type: none"> <li>Public is aware of children's rights and prohibition of sexual abuse</li> </ul>	<ul style="list-style-type: none"> <li>Public calling for changes in policy/legislation to ensure an end to child sexual abuse by peacekeepers</li> </ul>

## 6. Avenues for Strategic Litigation

The following chapter sets out potential legal avenues through which lawyers and NGOs might seek to address the issue of peacekeeper child sexual abuse using strategic litigation.

### Cases against individual perpetrators

Potential routes for bringing cases against individual perpetrators can be divided into: (i) instigating criminal prosecutions; and (ii) civil claims.

#### Instigating criminal prosecutions

##### Domestic prosecutions

While the responsibility for conducting criminal investigations and prosecutions typically lies with the TCC (or in the cases of civilian peacekeepers with the host country, if the non-applicability of immunity is confirmed by the UN),<sup>274</sup> a further avenue for strategic litigation could be for NGOs to play a more active role in attempting to instigate criminal prosecutions.

##### *Replicating the model of universal jurisdiction prosecutions*

A model for such work could be the successful role played by NGOs in pushing for the domestic prosecution of core international crimes (war crimes, crimes against humanity, torture and genocide)

on the basis of universal jurisdiction.<sup>275</sup> In such cases NGOs and lawyers work with victims, gather evidence of crimes that have taken place, and provide that evidence to national authorities willing and able to prosecute the perpetrators outside the country where the crimes took place. The NGOs support the victims through the process and in certain cases represent the victims as civil parties in the criminal proceedings.

A similar model could potentially be used more widely in the context of peacekeeper child sexual abuse, with NGOs gathering evidence and providing it to national prosecuting authorities, most likely the TCC, in an effort to instigate criminal prosecutions. While this approach may have already been taken in a small number of cases (for example, in the French prosecution of troops for crimes committed in CAR), REDRESS's research did not discover an extensive or particularly developed practice to date.

##### *Challenges to exercising extra-territorial criminal jurisdiction*

Instigating criminal prosecutions in TCCs would, however, require those countries to have laws or military codes that prohibit their troops from committing child sexual abuse (or activities that child sexual abuse could encompass, such as rape or torture). In respect of civilian peacekeepers their home countries would need to have



similar criminal laws with extraterritorial effect. According to research provided by one interviewee to REDRESS, only 13 out of 117 UN Member States examined had legislation on extraterritorial jurisdiction that allowed national courts to exercise their jurisdiction over sexual crimes committed abroad without restriction. 78 countries had legislation on extraterritorial jurisdiction with requirements to be met that limited in some way the use of national jurisdiction to prosecute sexual crimes committed abroad. 13 countries had no legislation on extraterritorial jurisdiction, meaning their courts could not exercise extraterritorial jurisdiction over sexual crimes committed abroad. And for 13 countries it was not possible to ascertain whether they had legislation on extraterritorial jurisdiction.

#### *Overcoming the reluctance of TCCs to prosecute*

Such an approach may address some of the failings in investigations currently carried out by TCCs, as identified throughout this report. However, the reluctance of TCCs to prosecute, even on the basis of strong evidence provided by NGOs, is still a potential challenge. This could be overcome by advocacy to relevant actors, such as prosecuting authorities and parliamentarians (see chapter 5); by judicial review in the courts of the TCC of decisions not to prosecute, with subsequent claims to international human rights bodies if necessary (see below); or by bringing private prosecutions in jurisdictions that allow them.

#### **Civil claims**

##### **Paternity claims**

As explored in Case Study 5 about paternity claims in Haiti, one possibility for seeking a measure of support for women

who have had children with peacekeepers is through paternity claims. The claimants in these cases may include children themselves and the victims of SEA.

Where the conduct in question constitutes a criminal offence – as in the case studies discussed in this report, or in any situations other than where the relationship was non-exploitative and between consenting adults – paternity claims are unlikely to provide all the elements of reparation that are necessary for a victim. Criminal investigations and prosecutions are also required in such cases. While this litigation may not directly result in a criminal prosecution for the perpetrator or accountability for the TCC's policy failures, the benefit of financial support provided to a peacekeeper child through a successful paternity claim should not be downplayed. Further, a factual finding of a host country court that a peacekeeper caused the pregnancy of a child could provide evidence and impetus for a subsequent criminal finding in the TCC (see above).

As outlined in Case Study 5 (paternity claims in Haiti) there are still significant challenges in this form of litigation, particularly the collection of evidence through DNA samples, the immunity of the UN and the enforcement of court orders from the host country against the peacekeepers, who are likely to have returned to the TCC.

#### *International enforcement of paternity claims*

One area in which international NGOs could potentially play a role would be facilitating the international enforcement of these paternity claims. This would be done through connecting lawyers in the host countries with lawyers in TCCs, to bring civil proceedings in the TCCs to enforce the judgments of the host country

courts. Civil judgments from one country are commonly enforced in the courts of other countries in the commercial context. Doing so is not always simple or swift, and the ease of doing so will depend on the local laws of the TCC. But if it could be demonstrated that doing so was possible, it would incentivise lawyers in other host countries to bring similar claims on behalf of the victims of SEA.

#### **Other civil claims**

Other forms of civil claims against the individual peacekeepers could allow child victims to seek justice in cases where the abuse did not cause a pregnancy. Lawyers acting for victims attempted to seek civil remedies against the individual peacekeepers in Case Study 2 (French peacekeepers in CAR).

The possibility of bringing civil claims will depend on the laws of the relevant State, including on jurisdiction, service, causes of action and possibly immunity. Claims in the courts of the TCC are likely to be easier to enforce than claims in the courts of the host country. This is a further potential role for international NGOs working on this issue: identifying local lawyers in the TCCs and providing them with the evidence gathered by local NGOs and lawyers in the host country.

The likelihood of individual peacekeepers having the financial resources to pay significant sums by way of compensation in civil claims is small. Claims against TCCs themselves (as discussed below) would be better in this respect. Nevertheless, even a modest sum could make a material difference for the victim.

#### *Strategic value of civil claims*

Such civil claims have a strategic value above paternity claims. A positive

judgment would require the court to reach a factual finding that the peacekeeper had committed some form of wrong towards the victim (with the specific requirements depending on the laws of the jurisdiction in question). The process of doing so would establish a measure of truth for the victims and their community and serve a deterrence function by ending the sense of impunity for child sexual abuse by peacekeeping forces. This technique of using civil claims, combined with advocacy and media work, to achieve strategic objectives has been used successfully in cases arising out of different contexts, including in torture cases.<sup>276</sup>

#### **Cases against TCCs**

The other primary potential avenue for strategic litigation in this context is through claims against the TCC itself. Such claims could be brought: (i) in the domestic courts of the TCC; or (ii) before other regional and international human rights mechanisms.

#### **Domestic claims**

The possibilities for bringing claims against the TCC in its own domestic courts will depend to a large extent on the laws of each jurisdiction. Claims could include a civil claim for damages against the TCC if the conduct by the peacekeepers could be shown to invoke the direct legal responsibility of the TCC itself, such as the proceedings brought against Uruguay in Case Study 1 (Uruguayan Peacekeepers in Haiti). Or the claim could potentially involve the judicial review of a failure by the TCC to prevent, investigate, prosecute, punish or repair the actions of one of its peacekeepers that had committed child sexual abuse.

While a survey of the potential legal bases for domestic claims against TCCs is not

possible given the variation between jurisdictions, some domestic jurisdictions will apply directly the provisions of international human rights law as set out in the following chapter, and others may take such international human rights law into account when interpreting domestic legislation.

### Claims to regional or international human rights mechanisms

NGOs and lawyers for child victims of peacekeeper sexual abuse could also consider regional and international human rights mechanisms as avenues for strategic litigation. These typically require that domestic proceedings have been exhausted in the courts of the TCC, unless it can be proved that judicial remedies were not effective or that there was undue delay. However, some human rights mechanisms are willing to accept claims directly without exhausting domestic remedies, such as the Economic Community of West African States (ECOWAS) Court of Justice.

The section below examines those mechanisms as potential avenues for litigation. The following chapter then sets out the substance of the human rights-based approach that could be applied in litigation before these mechanisms, including the key international treaty rights that are implicated by peacekeeper child sexual abuse and States' failure to respond adequately to it.

### Specialised child rights mechanisms

#### *UN Committee on the Rights of the Child*

The Convention on the Rights of the Child (CRC) establishes the UN Committee on the Rights of the Child (CRC Committee), composed of a group of 18 independent experts charged with monitoring the

implementation of the CRC by States Parties.<sup>277</sup> The CRC Committee may (i) issue comments on questions of treaty interpretation; (ii) receive individual communications from individuals or groups of individuals;<sup>278</sup> (iii) undertake investigations; and (iv) examine country reports from States Parties.<sup>279</sup>

### Communications before the CRC Committee

Optional Protocol 3 to the CRC (OP3), which established the communications procedure for the CRC, authorises the CRC Committee to receive complaints regarding violations of the CRC and its optional protocols.<sup>280</sup> 196 States have ratified the CRC; of those, only 45 have ratified the OP3, submitting to the communications procedure.<sup>281</sup>

OP3 provides limited opportunities for victims' participation, including facilitating closed hearings where deemed in the best interests of the child, and ensuring that children's views are accounted for in accordance with their age and maturity.<sup>282</sup>

### CRC Committee

*Receives communications from:*

- Individuals and groups

*Domestic exhaustion of remedies required*

*Submit complaint within 1 year of exhaustion of domestic remedies*

Since the entry into force of OP3 in 2014, the CRC Committee has published 22 decisions, most of which are discontinuance and inadmissibility decisions.<sup>283</sup> More than 60 cases are

currently pending.<sup>284</sup> OP3's admissibility criteria requires the facts of any communication to have occurred after the Protocol's entry into force in the State Party.<sup>285</sup>

Although the CRC Committee's views and recommendations merely provide an authoritative interpretation of the convention, Art. 11 requires that the State Party in question give the views "due consideration" and ought to submit a written response, "including information on any action taken and envisaged."<sup>286</sup> States are obliged to submit this information within six months of the publication of the Committee's views, and ultimately to implement the Committee's decision in good faith (as part of their obligations deriving from the ratification of the convention).

### Potential for claims relating to peacekeeper child sexual abuse

The CRC Committee has, to date, not considered a complaint in which individuals from a State committed, on the territory of another State, human rights abuses falling under the CRC; the bulk of its jurisprudence has concerned migrant or unaccompanied children who were ill-treated by a State Party. It has therefore not yet developed jurisprudence on the extraterritorial application of the CRC.

Finally, as noted above, OP3 authorizes the Committee to initiate investigations into "grave or systemic violations" of the rights enumerated in the CRC, the Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), or the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC). In the context of the human rights abuses described in this report, such a complaint might allege that the: (i) lack of comprehensive laws

governing the behaviour of peacekeepers in a particular country; (ii) failure to provide judicial measures that adequately punish the perpetrators of CRC violations; or (iii) State's unwillingness or inability to take effective and timely measures in response to peacekeepers' activities despite prior knowledge of rights violations, constitute a breach of the State's CRC obligations.

However, current low levels of ratification of OP3 make this avenue for litigation difficult: of the countries discussed in this report's case studies, only France has ratified OP3. The avenue may, however, be useful for other States or may become more useful in the future as more States ratify OP3.

### *African Committee of Experts on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (ACRWC) has been ratified by 48 African Union (AU) Member States and defines "children" as human beings under the age of 18. It enumerates fundamental principles including non-discrimination, protection of the best interests of the child, and children's civil, political, sociocultural and economic rights.<sup>287</sup>

The African Committee of Experts of the Rights and Welfare of the Child (ACERWC) is the monitoring body of the ACRWC.<sup>288</sup> The ACERWC is empowered to hear communications, and to make requests for advisory opinions to the African Court on Human and Peoples' Rights, although no such requests have been made yet.<sup>289</sup>

In addition to hearing complaints, the ACERWC may also investigate any issues falling under the ACRWC and can request information from States Parties regarding the implementation of the ACRWC.<sup>290</sup> States Parties are required to submit reports to the ACERWC every three years.<sup>291</sup>

## ACERWC

*Receives communications from:*

- Individuals, including children

*Domestic exhaustion of remedies required*

*Complaint preclusion - cannot address matters previously settled*

Children may submit communications, or communications may be submitted on behalf of a child with or without their agreement where the complainant can demonstrate that the submission is made with the best interests of the child in mind.<sup>292</sup> Where possible, children who are able to express their opinions ought to be informed of the communication(s) presented on their behalf.<sup>293</sup>

States are required to respond to any communication within 60 days, barring extenuating circumstances, before the ACERWC makes an initial admissibility decision.<sup>294</sup> Once deemed admissible, the respondent State Party has an additional 60 days to respond on the merits. The ACERWC may decide that a hearing is necessary, or parties may request a hearing—witnesses may be called, and children capable of expressing their opinions may participate through a child-friendly process.<sup>295</sup> Decisions are submitted to the AU Assembly and published after their consideration by the AU Assembly and any States Parties involved.

## Potential for claims relating to peacekeeper child sexual abuse

This mechanism remains relatively untested; thus far, the ACERWC has only published 10 complaints, three of which were deemed inadmissible and one of which remains pending. None of these communications concern children in situations of armed conflict.

Unlike Optional Protocol 3 of the CRC, the ACRWC has been widely ratified, including by TCCs, such as Nigeria, and States in which abuses by peacekeepers occurred, such as CAR.

The ACRWC expressly obliges States Parties to protect children against “all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.”<sup>296</sup> It also requires that States Parties take preventive measures, including the establishment of “special monitoring units to provide necessary support for the child . . . [including] reporting referrals for investigation, treatment, and follow-up of instances of child abuse and neglect.”<sup>297</sup>

In a 2018 decision, the ACERWC found that Cameroon violated its obligation to protect against child abuse and torture in a case concerning the rape of a 10-year-old girl. In particular, the ACERWC determined that Cameroon had failed to adequately investigate, punish or provide reparations for the event in question.<sup>298</sup>

Victims of sexual abuse by peacekeepers could similarly submit complaints alleging that TCCs are in violation of the ACRWC obligations by failing to conduct investigations into allegations of sexual abuse, punishing the perpetrators, or provide remedies to the victims.

## Regional human rights mechanisms

As set out in the following chapter, in addition to the specialised children’s rights mechanisms described above, many regional human rights instruments contain general provisions from which children may benefit. Child victims or their lawyers seeking judicial remedies should therefore consider bringing complaints at any of the following organs, where applicable. The following section describes the opportunities and obstacles to bringing complaints on behalf of child victims of sexual abuse by peacekeepers in these fora.

In the African human rights system, though the African Committee of Experts on the Rights and Welfare of the Child is the most obvious mechanism for adjudicating complaints about the violations of children’s rights, the African Commission on Human and Peoples’ Rights (ACHPR) and the African Court on Human and Peoples’ Rights (ACtHPR) also receive complaints.<sup>299</sup> The ACtHPR has both advisory and contentious jurisdiction concerning the application of the African Charter on Human and Peoples’ Rights, (African Charter), while the ACHPR accepts communications concerning violations of the African Charter.<sup>300</sup>

Additionally, ECOWAS has the competence to hear individual complaints of alleged human rights violations, including rights deriving from UDHR, the African Charter, and the International Covenant on Civil and Political Rights (ICCPR).<sup>301</sup> ECOWAS has previously heard cases concerning the rights of pregnant women and children, and has invoked the ACRWC.<sup>302</sup>

Several similar mechanisms operate within the Inter-American system for human rights, including the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Both bodies can hear individual complaints

and may order interim or protective measures when an individual faces immediate risk of irreparable harm.<sup>303</sup>

While there is no specific regional treaty on the rights of children within the Inter-American system, Article 19 of the American Convention on Human Rights (ACHR) explicitly provides that all children have the “right to the measures of protection required by his condition as a minor on the part of his family, society and the state”. The IACHR has interpreted this provision in light of the CRC.<sup>304</sup> Additionally, the Office of the Rapporteur on the Rights of the Child conducts country visits, disseminates reports on child rights in Member States, and can advise the IACHR in proceedings of individual petitions, cases, and requests or precautionary or provisional measures implicating the rights of the child.<sup>305</sup>

Finally, the European Court of Human Rights (ECtHR) may hear complaints concerning violations of the European Convention on Human Rights (ECHR). Although the ECHR does not make specific mention of children’s rights, the ECtHR has consistently considered other international law treaties in its jurisprudence, including the CRC.<sup>306</sup>

## Opportunities and limitations

Procedural and admissibility requirements may limit the utility of each of these mechanisms for the purposes of litigating claims concerning abuse by peacekeepers. For example, though individuals may bring complaints to most of the mechanisms discussed above, they cannot do so where the State in question has not accepted the mechanism’s jurisdiction. In other cases, though States may have accepted a mechanism’s jurisdiction, they may not have accepted the competence of the particular court to receive applications from individuals.<sup>307</sup>

Exhaustion of domestic remedies requirements may also limit the ability of applicants to bring complaints to any of the above mechanisms; however, though most international courts or quasi-courts require that applicants show they have sought relief in domestic courts, where they can demonstrate that domestic judicial systems are ineffective, most mechanisms permit complaints to proceed. Additionally, some mechanisms and courts require that communications are filed within a set period after the exhaustion of domestic remedies.<sup>308</sup>

A further limitation on the regional human rights mechanisms is the time taken to issue a decision. Communications and cases before the ACHPR, IACHR and ECtHR can take many years to be decided, even over a decade in some instances.

The following table provides a general overview of the jurisdictional and procedural requirements at the human rights mechanisms described above:

	Additional Protocol / Declaration Required	Hears Complaints from Individuals	May Order Interim Measures	Domestic Exhaustion of Remedies Required	Time Limits
African Commission on Human and Peoples' Rights		✓	✓	✓	✓
African Court on Human and Peoples' Rights	✓	✓	✓	✓	✓
Economic Community of West African States Court of Justice		✓	✓		
Inter-American Commission on Human Rights		✓	✓	✓	✓
Inter-American Court of Human Rights			✓	✓	✓
European Court of Human Rights		✓	✓	✓	✓

## Other UN treaty body mechanisms

### Human Rights Committee

*Receives communications from:*

- Individuals and groups

*Domestic exhaustion of remedies required*

*No strict time limit to submit complaints*

In addition to the CRC Committee, other UN treaty body mechanisms provide additional fora for bringing complaints about human rights violations arising from peacekeeper child sexual abuse. The following section briefly describes the available mechanisms, and the opportunities and limitations they provide in this context.

### Human Rights Committee

The Human Rights Committee (HRC) is an 18-member body of experts tasked with monitoring State Parties' compliance with the ICCPR.<sup>309</sup>

In addition to the broad protections afforded to children as individuals within a State Party's jurisdiction, the ICCPR also specifically provides that all children, without discrimination, shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."<sup>310</sup> Additionally, the ICCPR clearly prohibits gender-based discrimination.<sup>311</sup>

#### Opportunities and limitations

The HRC may consider individual communications regarding violations of the ICCPR by any States that are party to the Optional Protocol to the Covenant.<sup>312</sup> 116 States have ratified the Optional Protocol.<sup>313</sup> Some States have lodged reservations limiting the HRC's competence to examine particular complaints, despite having ratified the Optional Protocol.<sup>314</sup>

Proceedings at the Human Rights Committee can be lengthy, in part due to a significant backlog of pending cases.<sup>315</sup> Still, as a widely ratified treaty—with 173 States Parties—and relatively high ratification levels of the Optional Protocol, the HRC may be a promising venue for bringing complaints about sexual abuse of children (by peacekeepers). Though the decisions of the HRC are not legally binding, they constitute an authoritative interpretation of the ICCPR and are to be implemented by States in good faith.

### Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) is the body responsible for monitoring implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Similar to the Human Rights Committee, the CEDAW Committee may receive individual communications regarding alleged violations of the Convention by any States which are party to the Optional Protocol to CEDAW.<sup>316</sup> To date, 112 States have ratified the Optional Protocol and accepted the CEDAW Committee's competence to hear individual complaints.<sup>317</sup>

### CEDAW Committee

*Receives communications from:*

- Individuals and groups

*Domestic exhaustion of remedies required*

*No strict time limit to submit complaints*

#### Opportunities and limitations

The CEDAW Committee has a lower caseload than several of the other human rights mechanisms mentioned, so is likely to be swifter than many to issue a decision.

All complaints submitted must concern only events that occurred after the Optional Protocol entered into force for the State Party concerned.

# 7. A Human Rights - Based Approach

## Introduction

In 2015 the Independent Review Panel established by the UN Secretary-General in response to allegations of sexual abuse by peacekeepers in CAR recommended that SEA should be treated as human rights violations and dealt with within the UN's human rights framework.<sup>327</sup>

Given the obstacles highlighted in this report to bringing justice and reparations to victims, NGOs and lawyers could consider a human rights approach in cases of sexual abuse of children by peacekeepers. This approach must, however, go beyond the UN's human rights framework, if TCCs, in particular, are to be held responsible for human rights violations. The present chapter examines the legal elements of such an approach.

## Focus of chapter

This chapter focuses on potential human rights claims against TCCs, as opposed to claims against the UN or host countries. As outlined below, claims against TCCs appear a potentially promising route for strategic litigation to challenge peacekeeper child sexual abuse. While human rights obligations of the UN and host countries are also implicated by peacekeeper child sexual abuse, and legal claims against them would not necessarily be impossible, such claims are likely to face significant practical challenges, including from the immunity of the UN and the exclusion

of host country jurisdiction to prosecute peacekeeping troops under SOFAs.<sup>328</sup>

As elsewhere in the report, the chapter focuses principally on claims in respect of child sexual abuse by peacekeeping troops, as opposed to civilian peacekeepers or experts on mission, unless otherwise stated.

## Extraterritorial jurisdiction

A human rights claim against the TCC will have to establish that the acts or omissions of the TCC fall within the jurisdiction of the relevant human rights instrument(s). Such jurisdiction is likely to need to be extraterritorial, given that the victims of peacekeeper abuse are likely to be located outside the territory of the TCCs.

The human rights jurisprudence on the issue of extraterritorial jurisdiction and the following question of attribution is complex and can appear, at times, contradictory. The following brief sub-sections seek to identify some of the key issues, but for a more detailed analysis see Róisín Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law*, 2014, pages 118-178.

## International Covenant on Civil and Political Rights

Article 2(1) ICCPR states that "each State Party to the present Covenant

## Committee Against Torture

*Receives communications from:*

- Individuals

*Domestic exhaustion of remedies required*

*No strict time limit to submit complaints*

## Opportunities and limitations

States are given the opportunity to respond to any communications deemed admissible by the CAT.<sup>325</sup> The CAT may also request interim measures to be taken by the State to prevent irreparable harm to the alleged victim(s).<sup>326</sup>

As this report has noted, the CAT has previously recognised rape and sexual violence as a form of torture. Therefore, this mechanism may be a particularly effective one for developing jurisprudence.

In response to communications, the CEDAW Committee may request that a State Party take interim measures to avoid possible irreparable damage to the victim(s). States are given six months to respond to any communications, both during the admissibility and merits consideration phases.<sup>318</sup> After receipt of the Committee's decision, States must respond with a plan for implementing the CEDAW Committee's recommendations.

The CEDAW Committee is also authorized to initiate inquiries into situations of grave or systemic violations of women's rights.<sup>319</sup> Such inquiries may only be conducted with respect to States parties that have recognized the competence of the CEDAW Committee —States could opt out from this procedure by making a declaration that they do not recognize the Committee's competence.<sup>320</sup>

## UN Committee Against Torture

Finally, the CAT may also receive individual complaints. Comprised of 10 independent experts, the CAT is charged with monitoring the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).<sup>321</sup> The CAT can also undertake confidential inquiries when it has received reliable information that torture is being systematically practiced in a State Party.<sup>322</sup>

The CAT can only review complaints against only those State Parties that have accepted its competence to do so (by making a declaration under Art. 22 of the UNCAT).<sup>323</sup> To date, 69 States have made such a declaration.<sup>324</sup>

undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.<sup>329</sup> Although the definition of jurisdiction is primarily territorial, the HRC has opened the door to extraterritorial jurisdiction in specific circumstances. In its General Comment 31, the HRC stated that a State Party must ensure the rights of individuals “within the power or effective control of that State Party, even if not situated within the territory of the State party.”<sup>330</sup> As such, the HRC has understood the ICCPR to apply to individuals under the power or effective control of a State Party’s forces, including national contingents “assigned to an international peace-keeping or peace-enforcement operation.”<sup>331</sup> Following this approach, in its observations regarding human rights violations perpetrated by Belgian peacekeepers deployed to Somalia during the 1990s, including sexual abuse of children, the HRC recognised that violations in such circumstances give rise to TCC obligations under the ICCPR, considering the power or effective control over the victims.<sup>332</sup> In addition, in cases such as *Ibrahima Gueye et al v France*, the HRC found that the ICCPR may give rise to extraterritorial “subject-matter” jurisdiction, for instance when individuals can rely only on the State Party’s legislation for access to a specific right.<sup>333</sup> This last approach may be particularly relevant for child victims of sexual abuse by peacekeepers, given access to justice is often tied to the TCC’s exclusive criminal jurisdiction over these personnel.<sup>334</sup>

### European Convention on Human Rights

Regional mechanisms have developed different standards on the applicability of extraterritorial jurisdiction.

The ECtHR, in interpreting article 1 of the ECHR, regards the assumption of extraterritorial jurisdiction as an exception to

the generally prevailing territorial principle. In its case law, the ECtHR has established that an extraterritorial act could only fall within the State’s jurisdiction in exceptional circumstances if (1) the State under obligation exercises effective control of an area outside its national territory,<sup>335</sup> or if (2) the State places individuals or groups of individuals under its authority and control.<sup>336</sup>

In light of these principles, a TCC’s response to child sexual abuse perpetrated by its peacekeeping troops could potentially fall under the jurisdiction of the ECtHR.

### American Convention on Human Rights

Similarly to article 1 ECHR, article 1 ACHR obliges the State Parties to ensure to all persons subject to their “jurisdiction” the free and full exercise of the rights and freedoms enshrined in the Convention. The IACHR refers to the jurisprudence of the ECtHR in determining the scope of extraterritorial application of the Convention.<sup>337</sup> The IACHR appears to generally take a broad approach to the question of extraterritorial jurisdiction.<sup>338</sup> So far, it has declared admissible a number of cases involving States accused of extraterritorial violations. The Commission has used the criteria of “authority and control” of the State over a person<sup>339</sup> and, in some cases, “power and authority” have been found sufficient to establish jurisdiction.<sup>340</sup> Given these criteria, it is not unlikely that the victims of SEA could be considered within a TCC’s jurisdiction for the purpose of litigation before the IACHR if the required degree of control is present in those cases.

### African Charter on Human and Peoples’ Rights

The African Charter does not have a jurisdictional limitation clause.<sup>341</sup> In its jurisprudence, the ACHPR has found

States liable for violations of human rights committed abroad.<sup>342</sup> While there is still limited case law on extraterritorial jurisdiction, the broad approach taken by the ACHPR seems to indicate that human rights violations committed extraterritorially by African TCCs could be found admissible by the Commission.<sup>343</sup>

### Attribution

In order for a victim of sexual abuse by peacekeepers to bring a successful human rights claim against the TCC before the competent body, they must also establish that the breaches of human rights violations are attributable to the TCC.

It is helpful for such purposes to divide the human rights violations of the TCC into two categories: the due diligence obligations of the TCC to prevent, investigate, prosecute and repair the sexual abuse; and the direct obligations of the TCC not to commit sexual abuse.

### Due diligence obligations

It is acknowledged under international law that States have obligations to exercise due diligence to prevent, protect against and investigate sexual abuse, and to prosecute such violations and provide reparations even when violations are committed by private actors.<sup>344</sup> Due diligence obligations to prevent human rights violations have been confirmed by, among others, CEDAW, the HRC, CAT, and the UN General Assembly.<sup>345</sup> International courts and tribunals relying on due diligence obligations have included the IACtHR, ACHPR, ECtHR and ECOWAS Court of Justice.<sup>346</sup>

On such basis, combined with the jurisprudence on extraterritorial effect outlined above, TCCs are likely to have a legal duty under IHRL to exercise due

diligence to prevent,<sup>347</sup> investigate, prosecute or repair instances of child sexual abuse by their peacekeeping troops.

Further support for such an argument might be drawn from the fact that TCCs typically explicitly agree to retain jurisdiction to prosecute their troops, to the exclusion of host country, in the MoU agreed between them and the UN.<sup>348</sup> While the bilateral obligations of the TCC vis-à-vis the United Nations may not necessarily be determinative of the TCC’s obligations towards extraterritorial victims under IHRL, it would appear difficult for a TCC to argue in such circumstances that it should not hold legal responsibility toward the victim for a failure to investigate or prosecute an instance of child sexual abuse.

Finally, other international treaties, such as the so-called Lanzarote Convention, require States to establish jurisdiction over sexual violence and abuse against child victims, when the offence is committed by one of its nationals.<sup>349</sup>

### Direct obligations

A further layer of complexity exists in determining whether human rights breaches flowing directly from the act of sexual abuse itself (as opposed to the failure to meet due diligence obligations) could be attributed to the TCC.

The victim would need to demonstrate that the individual peacekeeper committing the sexual abuse was not acting *ultra vires* and simply in his/her capacity as a private individual. The International Law Commission’s (ILC’s) Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSWA) state at Art. 7: “The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ,

person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.” However, the ILC in its Commentary on Article 7 DARSIVA points out that cases “where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.”<sup>350</sup>

In the cases of UN peacekeeping missions the victim would also need to demonstrate that the command structures of the peacekeeping mission did not shift attribution away from the TCC and on to the UN.<sup>351</sup>

To what extent the above can be demonstrated in a given case is likely to depend to a certain amount on the facts of the case in question. In any event, as outlined above, if it were not possible to attribute to the TCC the human rights breaches flowing directly from the act of sexual abuse, the fact that the TCC had failed in its obligations to exercise due diligence to prevent, investigate, prosecute or repair the sexual abuse by its peacekeepers would be sufficient on its own to sustain a human rights claim for the purposes of strategic litigation.

### **Rights violated and state obligations**

As mentioned in chapter 1, the UN Secretary-General’s 2017 report, *Special measures for protection from sexual exploitation and abuse: a new approach*, identifies different forms of sexual abuse against children as including: child rape, sexual assault, solicitation of child prostitution, trafficking for SEA, other forms of sexual violence against children and “others”.<sup>352</sup> All sexual activity with individuals

under 18 years of age is defined as sexual abuse by the UN.<sup>353</sup> Those acts of sexual abuse committed by peacekeepers, as well as the failure of TCCs to protect victims, effectively investigate allegations hold accountable the perpetrators and provide reparations to victims, constitute multiple violations of children’s rights and human rights. The following paragraphs examine the main rights and States’ obligations likely to be engaged in the context of litigation before human rights mechanisms.

### **Children’s rights**

The CRC comprises the most complete statement of children’s rights and the most widely-ratified international human rights treaty in history, with 196 States Parties.<sup>354</sup> CRC defines a child as any human being under the age of 18, unless majority is attained earlier under the law applicable to the child.<sup>355</sup> Article 34 of the Convention deals specifically with the States Parties’ duties “to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>356</sup> States Parties are required to take all appropriate measures to prevent:

- (a) “The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”<sup>357</sup>

Other relevant provisions include the child’s right to privacy (article 16), right to protection from torture (article 37), and right to care during armed conflict (article 38). The right to privacy and the prohibition on torture in the context of peacekeeper child sexual abuse are discussed in more detail below.

The OPSC, which came into force in 2002, provides States with detailed requirements to end the sexual abuse of children. In particular, it creates obligations on governments to criminalise and punish these acts.<sup>358</sup> This includes a requirement to establish extraterritorial jurisdiction for criminal offences relating to the sexual exploitation of children.<sup>359</sup> While the Convention and its Optional Protocol provisions offer a comprehensive framework to establish States’ duties with respect to cases of sexual abuse of children by peacekeepers, only 45 countries have ratified the Optional Protocol on a Communications procedure, which enables individual complaints to be brought to the CRC Committee.<sup>360</sup>

The CRC and the work of the CRC Committee provide useful guidelines for advocacy and specific principles that should guide litigation involving child victims. In this respect, article 3(1) of the CRC offers a clear formulation of the need for a child-centred approach: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>361</sup>

### **Women’s rights**

Strategic litigation on peacekeeper child sexual abuse may also benefit from the gender-sensitive approach developed in the CEDAW. 189 States are party to the Convention, which prohibits sex-based discrimination and requires States to take all appropriate measures to ensure that women can fully exercise their human rights and fundamental freedoms.<sup>362</sup>

While both boys and girls have been the victims of sexual abuse perpetrated by peacekeepers, girls and women are particularly vulnerable to sexual violence.

Article 6 of CEDAW requires the State Parties to take all appropriate measures to suppress all forms of trafficking and sexual exploitation of women.<sup>363</sup> As mentioned above, the Convention aims to protect the human rights of women as a whole, thereby encompassing the physical and sexual integrity of women.

The due diligence obligation on State Parties to protect, investigate and punish sexual violence against women and girls is at the core of the recommendations of the CEDAW Committee, which has also played a pioneering role in monitoring different forms of violence against women, including conflict-related sexual violence.<sup>364</sup> Under the Optional Protocol of the CEDAW, the Committee is able to receive individual communications (see above for more information about the CEDAW Committee as a potential forum for strategic litigation). The gender-sensitive approach developed by the Committee for investigation, standards of evidence and prosecution also offers useful guidance for litigating cases of sexual abuse of children by peacekeepers before human rights mechanisms.<sup>365</sup>

### **Sexual abuse of children as a form of torture or ill-treatment**

The prohibition of torture and ill treatment constitutes a powerful tool likely to be applicable to at least some forms of sexual abuse of children. In 2015, the Independent Review Panel recommended to reframe sexual violence by peacekeepers as “a form of conflict related sexual violence (CRSV) that must be addressed under the UN’s human rights policies”.<sup>366</sup> CRSV is considered by the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict to be a gross violation of human rights.<sup>367</sup> Acts falling in this category are “Rape, sexual slavery, forced prostitution,

forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict".<sup>368</sup> Treating SEA as a form of CRSV could improve accountability processes and mechanisms, based on the framework developed for CRSV for investigation, standards of evidence and prosecution, while promoting a victim-centred and gender-sensitive approach.<sup>369</sup>

The integration of SEA within the CRSV framework still needs to be achieved at the UN level.<sup>370</sup> However, even in the absence of this policy shift, the alleged acts of rape, sexual abuse, and exploitation of children perpetrated by the peacekeepers may constitute a violation of the prohibition against torture and ill-treatment. In 1976, the European Commission on Human Rights (ECmHR) recognized rape as a form of "inhuman treatment".<sup>371</sup> Since the late 1980s, several human rights bodies, such as the CAT and the CEDAW have identified rape and sexual violence as a form of torture.<sup>372</sup> In the seminal case *Akayesu*, the International Criminal Tribunal for Rwanda defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive ... not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact".<sup>373</sup> As mentioned above, as the UN defines all sexual activity with individuals under 18 years of age as sexual abuse,<sup>374</sup> sexual abuse of children is particularly likely to be considered as a form of sexual violence and ill-treatment and, in some cases, torture.

Case law of the Inter-American Commission on Human Rights (IACHR), ECtHR and the ACHPR has also established that rape by State officials may amount

to acts of torture.<sup>375</sup> In addition, the procedural obligations of TCCs may be engaged for failing to take effective steps to protect victims, put in place criminal law provisions, conduct effective criminal investigations and provide effective reparations.<sup>376</sup>

### **Sexual abuse as a violation of the right to privacy**

The right to privacy and family life is enshrined in human rights mechanisms, such as the ICCPR and the ECHR, which prohibits arbitrary or unlawful interference with privacy and family, as well as unlawful attacks on one's "honour and reputation".<sup>377</sup> Accordingly, States have positive obligations to protect individuals against such interference or attacks. The jurisprudence of the HRC and regional mechanisms has clearly established that sexual violence may constitute an unlawful interference with the victim's privacy, which involves "fundamental values and essential aspects of private life", particularly in the sphere of child sexual abuse.<sup>378</sup>

316. As acts threatening bodily and moral integrity of an individual, sexual abuse may constitute a violation of the right to privacy. As with acts of torture and ill-treatment, procedural obligations of the TCCs may be engaged for failing to take effective steps to protect the victims, put in place criminal law provisions, conduct effective criminal investigations and provide effective reparations.<sup>379</sup>

### **The right to truth**

The right to truth is enshrined in many international instruments and has been addressed both by the UN mechanisms and in the jurisprudence of the regional human rights bodies.<sup>380</sup> It entitles the victim, their family and the general public to seek and obtain all relevant information about

an alleged violation.<sup>381</sup> It requires a victim-centred approach to justice, including participation in and access to the process.<sup>382</sup> For the victims of peacekeeper child sexual abuse and their families, the absence of effective investigation and prosecution, alongside the failure to inform them about the process, is likely to constitute a violation of their right to truth.<sup>383</sup>

### **The right to effective remedy and reparations**

The right to a remedy for gross human rights violations is a well-established norm of international law. Article 8 of the Universal Declaration of Human Rights (UDHR) provides a clear and authoritative source for the right to a remedy: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed him by the constitution or law".<sup>384</sup> Other human rights treaties codify this right, including the ICCPR and the UNCAT,<sup>385</sup> and regional bodies have also endorsed the right to a remedy in their charters.<sup>386</sup> The main State obligations in relation to the right to an effective remedy include: ensuring that victims have effective remedies through appropriate judicial and administrative mechanisms; investigating allegations of violations promptly and effectively through independent bodies; prosecuting those responsible for the violations; and providing reparation to victims.<sup>387</sup> Forms of reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>388</sup>

In the absence of access to justice and adequate reparations for victims, child sexual abuse by peacekeepers is likely to constitute a violation of the right to effective remedy, either alone or read in conjunction with other articles of the

human rights conventions, such as the prohibition of torture mentioned above.

Reparations granted to victims of sexual abuse should "be sensitive to gender, age, cultural diversity and human rights and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety".<sup>389</sup> In the case of sexual abuse by peacekeepers, the few *ex gratia* payments made to the victims by UN institutions and foreign governments<sup>390</sup> are negligible with respect to the harm suffered by the victims and fail to apply the holistic victim-centred approach promoted by human rights mechanisms.



## SUBSTANTIVE RIGHTS VIOLATIONS BY UN PEACEKEEPERS

States are obligated to respect and ensure respect for the following human rights:



### Children's Rights

The UN Convention on the Rights of the Child protects children's rights:



To privacy (Art. 16)



Against sexual exploitation and abuse (Art. 34)



To protection from torture (Art. 37)



To care during armed conflict (Art. 38)



### Women's Rights

Some provisions of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) are applicable to child sexual abuse:



States Parties are required to take all appropriate measures to suppress all forms of trafficking and sexual exploitation of women (Art. 6) – and to otherwise ensure women can fully exercise their rights



### Prohibition against Torture and Ill-Treatment

Torture is prohibited in a number of international treaties, including the:

UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

International Covenant on Civil and Political Rights (ICCPR) (Art. 7)

European Convention on Human Rights (ECHR) (Art. 3)

American Convention on Human Rights (ACHR) (Art. 5(2))

### Right to Privacy

These treaties also protect the right to privacy, which has been interpreted by the Human Rights Committee and European Court of Human Rights to include a prohibition against sexual violence



### In the absence of effective investigations or prosecutions...

States may have violated the following rights:

**The right to truth**, entitling victims, their families, and the general public to seek and obtain information about an alleged violation.

*Derived from jurisprudence by courts and treaty bodies*

**The right to effective remedy and reparation**, enshrined in numerous human rights treaties (including the ICCPR, CAT, ECHR, ACHR and African Charter on Human and Peoples Rights)

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# 8. Recommendations

As outlined in the introduction to this report, the broad issue of SEA by UN peacekeepers, both military and civilian, has received a certain amount of both academic attention and policy analysis to date.<sup>391</sup> This report does not seek to repeat all of the various and cogent recommendations for reform made in such analyses. Neither does it restate all of the proposals for reform recommended, and to varying degrees implemented, in internal UN reviews and resolutions on this issue over the last two decades.<sup>392</sup>

There are, however, certain recommendations for reform that find new or further support in the findings of the research undertaken for this report. They include reforms for addressing particular hurdles identified in the case studies, methods necessary for overcoming the challenges posed by sexual abuse against children specifically, and proposals for human rights-based strategic litigation to address existing failings.

As with the report overall, given the content of the cases identified in the underlying research the focus of the recommendations is principally on military peacekeepers. However, many of the recommendations are also expected to be relevant to civilian peacekeepers.

### Recommendations for TCCs are as follows:

- Take necessary measures to prevent the occurrence of sexual abuse by their peacekeeping forces, including through adequate training.

- Improve the quality of investigations into instances of peacekeeper child sexual abuse. This should be done by:

- ensuring that investigations meet the standards of swiftness, impartiality and effectiveness required under international human rights law;<sup>393</sup>

- ensuring specialists in working with child victims of sexual abuse always play a prominent role in investigations, to ensure the quality of evidence gathered and minimise the risk of re-traumatisation;

- ensuring investigations follow a victim-centred approach through providing psycho-social support to victims, taking into account the best interests and particular needs of children;

- taking guidance from relevant international standards, including the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict,<sup>394</sup> the forthcoming Murad Code<sup>395</sup> and other forthcoming guidelines on investigating grave human rights violations involving children.<sup>396</sup>

- As necessary amend domestic laws and policies to:

- ensure jurisdiction is asserted over crimes of child sexual abuse committed overseas;

- amend military and civilian criminal procedures to make them suitable for prosecuting crimes taken place overseas,

such as through admitting video evidence from witnesses, instituting on-site court martials, and allowing the use of a *commission rogatoire*;

- make prosecution processes, particularly military prosecution processes, sufficiently transparent to enable victims and/or their lawyers to determine the outcome of prosecutions and to participate in the process. Guidance on victims' rights to information and participation in criminal prosecutions can be drawn from the EU Victims' Rights Directive<sup>397</sup> and related guidance.<sup>398</sup>

- Publish military codes of conduct, procedures for investigating crimes committed during deployment and details of training provided to troops to ensure that detailed scrutiny is possible and that due recognition can be given when improvements are made.

- Ratify and implement international treaties requiring accountability for peacekeeper child sexual abuse, and sign up for the adjudicative processes under those treaties to ensure such standards are met. Relevant treaties include the CRC, CEDAW, ICCPR and UNCAT.

- Take all necessary measures to ensure access to reparations for all victims of sexual abuse.

- Demonstrate strong political will for holding perpetrators of child sexual abuse to account.

#### **Recommendations for the relevant organs of the United Nations are as follows:**

- Suspend the deployment of peacekeeping troops from TCCs that do not have the ability or willingness to investigate and prosecute instances of peacekeeper child sexual abuse. Naming and shaming

alone is not sufficient. Decisions to deploy troops from a particular TCC need to be based on a rigorous assessment of a number of factors, including:

- the TCC's track record to date of investigating and prosecuting instances of peacekeeper child sexual abuse;

- analyses of the laws, procedures and practice of the TCC military and civilian legal systems, to determine its current ability to prosecute cases of peacekeeper child sexual abuse committed extraterritorially; and

- any credible accounts of violations of international humanitarian and human rights law by TCC troops domestically or abroad. The recent suspension of deployments by Sri Lankan troops is a welcome example of the UN refusing to deploy troops from a particular TCC on these grounds.

- Continue to improve the quality of any investigations carried out by the OIOS and other UN organs, including through:

- implementing the measures for improvement of investigations outlined above with respect to TCCs;

- ensuring such measures are reflected in the ongoing revision of the OIOS Investigations Manual.

- Demonstrate a commitment to improving transparency and supporting legitimate litigation by engaging openly with victims' lawyers and providing required information such as DNA samples and other relevant evidence.

- Provide adequate support to victims, including psychosocial support and other assistance that may be required.

- Address recognised misperceptions among Member State courts and populations about the extent of immunity for those associated with the UN through judicial training and public communications.

- Encourage TCCs to adopt the recommendations outlined above.

It is recognised that peacekeeper host countries will often face significant challenges given their fragile and conflict-affected nature. Nevertheless, **recommendation for host countries, to the extent they are able to fulfil them, are as follows:**

- Actively support victims in cases of peacekeeper child sexual abuse in seeking justice and accountability. This should be done for example through asserting the host country's legal rights vis-à-vis the UN under the relevant SOFA, and through exerting diplomatic pressure on the UN and TCC.

- Facilitate the provision of legal support to child victims of peacekeeper sexual abuse, through legal aid where possible or through support to NGOs providing such services.

- Encourage the possibility of domestic prosecutions of civilian peacekeepers in host countries by ensuring fair trial rights and adequate standards of detention.

- Provide the required cooperation in securing evidence and other legal assistance that may be necessary to advance judicial processes in the TCCs.

#### **Recommendations for other UN Member States are as follows:**

- Help build the capacity of TCC and host country legal systems to investigate and prosecute cases of peacekeeper child

sexual abuse through technical assistance where qualified to do so.

- Apply pressure on TCCs and the UN to adopt the policy recommendations outlined above.

- Pro-actively engage in debates on potential responses to the wider problem of peacekeeper SEA, such as proposals for a Temporary Independent Oversight Panel or a Special Court Mechanism.<sup>399</sup>

- In respect of non-UN peacekeeping missions such as Sangaris, members of the Security Council might seek to exercise greater scrutiny over troop conduct through the Security Council.

#### **Recommendations for NGOs and lawyers representing victims are as follows:**

- Further increase the scrutiny of TCCs and UN investigative and prosecutorial processes in cases of peacekeeper child sexual abuse and improve the publicization of findings.

- Increase coordination between local NGOs in host countries, local NGOs in TCCs, and international NGOs. The objective of such coordination should be to develop unified strategies to ensure that the inherently transnational nature of peacekeeper child sexual abuse is reflected in a transnational response by NGOs.

- Apply a human rights-based approach to addressing the lack of accountability for peacekeeper child sexual abuse, making use of the normative frameworks and advocacy opportunities provided by doing so.

- Develop strategic litigation to address the lack of accountability for peacekeeper child sexual abuse. This could involve a number of legal avenues, including instigating criminal prosecutions, undertaking cross-jurisdiction civil cases or using regional or international human rights mechanisms.

## End Notes

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- 14 CRIN, *Sexual Violence by Peacekeepers Against Children and Other Civilians – A Practical Guide for Advocacy*, 2016, available at: [https://resourcecentre.savethechildren.net/node/10112/pdf/guide\\_-\\_peacekeeper\\_sexual\\_violence\\_final.pdf](https://resourcecentre.savethechildren.net/node/10112/pdf/guide_-_peacekeeper_sexual_violence_final.pdf), p. 3.
- 15 United Nations General Assembly, *Special Measures for Protection from Sexual Exploitation and Abuse: a new approach. Report of the Secretary-General*, February 2017, available at: [https://peacekeeping.un.org/sites/default/files/sg-report\\_a\\_71\\_818\\_special\\_measures\\_for\\_protection\\_from\\_sexual\\_exploitation\\_and\\_abuse.pdf](https://peacekeeping.un.org/sites/default/files/sg-report_a_71_818_special_measures_for_protection_from_sexual_exploitation_and_abuse.pdf), p. 41.
- 16 UN Website, *Conduct in UN Field Missions: Glossary*, available at: <https://conduct.unmissions.org/glossary>.

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- 305 *Rapporteurship on the Rights of the Child*, Inter-American Commission on Human Rights, available at: <http://www.oas.org/en/iachr/children/default.asp> Note that the Rapporteur does not receive individual complaints or requests for precautionary measures, both of which must be directed at the Inter-American Commission.
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- 307 For example, though 30 States have ratified the Protocol establishing the ACtHPR, only eight States have made a declaration permitting NGOs with observer status before the Commission and individuals to bring cases before the AfCHPR.
- 308 For example, the ECtHR requires that communications must be received within six months, while the African mechanisms suggest that communications are filed within a "reasonable period," generally understood as six months. See Ashurst LLP and Equal Rights Trust, *Navigating Human Rights Complaints Mechanisms: Rules, Tools and Resources*, 19 July 2018, p.31.

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335 *Loizidou v Turkey (Preliminary Objections)*, Appl no 15318/89 (ECtHR 23 March 1995), para. 62; *Issa and Others v Turkey*, Appl no 31821/96 (ECtHR, 16 November 2004), paras 66 et seq.; *Cyprus v Turkey*, Appl no 25781/94 (ECtHR, 10 May 2001), paras. 76 et seq.; *Al-Skeini and Others v United Kingdom*, Appl no 55721/07 (ECtHR, 7 July 2011), para. 138. This can in particular include the effective control of an area outside the national territory as a consequence of lawful or unlawful military action as well as the occupation of a territory by a Convention State.

336 *Issa and Others v Turkey*, Appl no 31821/96 (ECtHR, 16 November 2004), para. 71; *Banković and Others v Belgium*, Appl No 52207/99, (ECtHR, 12 December 2001), para. 73; *Al-Skeini and Others v United Kingdom*, Appl No 55721/07 (ECtHR, 7 July 2011), para. 134. In this case, jurisdiction can be exercised by acts of diplomatic and consular personnel residing on foreign territory in accordance with the provisions of international law. Furthermore, a State acts within its jurisdiction, if the State exercises all or individual governmental powers with the consent or acquiescence or at the invitation of the government of a territory.

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