

ABOVE THE LAW? INNOVATING LEGAL RESPONSES TO BUILD A MORE ACCOUNTABLE U.N.: WHERE IS THE U.N. NOW?

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I. INTRODUCTION

This is an issue that has come under increasing scrutiny amid allegations of sexual exploitation and abuse by United Nations (U.N.) personnel, including peacekeeping forces, and allegations that peacekeepers introduced cholera to Haiti.¹ Any starting point for considering whether the U.N. is “above the law” and possible innovative “legal responses to build a more accountable U.N.” is an analysis of where the U.N. is today on these important issues.² Following is a two-part analysis: first of the remedies available generally to third parties harmed by the activities of U.N. peacekeeping operations with a particular focus on the Haiti cholera victims; second, of the regime governing sexual exploitation and abuse by U.N. personnel and U.N. peacekeeping forces. As this two-part analysis will demonstrate, the problems that have arisen that raise the issue whether the

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1. Panel including August Reinisch, Caramba Kandeh, and Beatrice Lindstrom, moderated by Kristen Boon, *Above The Law? Innovating New Legal Responses to Build a More Accountable U.N.*, International Law Weekend of the ILA/ 2 ILSA (2016).

2. For discussion of where the U.N. might go in the future to address possible innovative ways to build a more accountable future see August Reinisch, *To What Extent Can and Should National Courts ‘Fill the Accountability Gap?’*, 10 INT’L ORG. L. REV. 572 (2014); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT’L L. 341 (Winter 2016); CODE BLUE, *A Practical Plan to End Impunity for Peacekeeper Sexual Abuse*, <http://static1.squarespace.com/static/514a0127e4b04d7440e8045d/t/588289db2994ca3d59b93c38/1484949980156/FINAL+Special+Courts+Mechanism+-+Updated+January+2017.pdf> (last updated Jan. 2017).

U.N. is “above the law” stem more from failures to timely and conscientiously follow the provisions of existing regimes that govern these matters rather than the absence of appropriate obligations or mechanisms under those existing regimes—the absence of the political will to do the right thing in a timely manner!

II. REMEDIES GENERALLY AVAILABLE TO THIRD PARTIES HARMED BY U.N. PEACEKEEPING ACTIVITIES.

Since the creation of the U.N., the need for the organization to enjoy immunity from the jurisdiction of Member States has been widely recognized as necessary to achieve its important and far ranging purposes under the U.N. Charter.³ However, throughout the years, it has been understood that this immunity was not intended simply to shield the Organization from responsibility as a “good citizen” on the world stage to respond to justifiable claims against the Organization by third parties resulting from the activities or operations of the Organization. The U.N. has largely achieved the objective of assuming its responsibility as a good citizen, although three recent situations in the peacekeeping context have raised questions about whether it continues to do so—claims against the U.N. by the Mothers of Srebrenica, displaced persons in Kosovo, and Haiti cholera victims.

Generally, claims by third parties against the U.N. cover a broad range of claimants who allege to have been harmed in some way by the activities or operations of the Organization, and generally divide into two categories: claims of a contractual nature and tort claims.

In regard to third party contract claims, individual consultants, contractors—large and small—and others who interact with the U.N., including in the peacekeeping context, generally must seek to resolve their claims in some manner under Section 29 of the Convention on the Privileges and Immunities of the U.N. (the General Convention)—calling for the U.N. to establish a modality for resolving disputes of a private law character.⁴

The principal modality for resolving disputes of a private law character since the inception of the U.N. has meant initially an effort to amicably resolve the dispute administratively e.g., negotiated settlement. Failing such an amicable resolution, the usual modality has been for the parties to seek to resolve the dispute through arbitration, usually under the terms of the contract entered into with the Organization that provide for such arbitration and specifies how it is to be organized.⁵

3. U.N. Charter art. 1, ¶¶ 1–4; U.N. Charter art. 105, ¶ 1.

4. Convention on the Privileges and Immunities of the United Nations art. 8, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

5. Bruce Rashkow, *Immunity of the United Nations: Practice and Challenges*, 10 INT’L ORG. L. REV. 332, 337–39 (2013).

In regard to tort claims, initially, the focus was on automobile accidents involving U.N. vehicles or vehicles driven by U.N. staff or officials in the performance of official functions—including in the field. Over the years, as the role of the U.N. expanded in the area of peacekeeping and other field missions, it became necessary or desirable for the Organization to obtain its own air carrier capability, routinely through charter arrangements with providers of the aircraft, rather than rely on services provided by commercial entities or even member states. In both instances, the U.N. has relied on worldwide insurance policies to address its exposure to risks of third party claims, although in regard to air services it also seeks to protect itself contractually by shifting the risk to the provider of the aircraft.⁶

In regard to third party claims resulting from the operations and activities of operational subsidiary bodies of the U.N. in the field, e.g., UNDP and UNICEF, those organizations routinely enter into agreements with the beneficiary states where such activities occur to hold harmless the Organization in respect of claims that may arise in relation to its activities.⁷

With respect to peacekeeping missions, the Organization has internal administrative processes in place to deal with claims against the Organization.⁸ Initially, these processes have included local internal claims review boards the decisions of which may be challenged by requests for further administrative review within the Organization.⁹ As a practical matter, these boards have worked well over the years to resolve claims on a day-to-day basis, even if at times their decisions have been administratively challenged.

However, the Status of Forces Agreements (SOFAs) with the States in which such peacekeeping missions take place have historically also provided routinely for a standing claims commission. Notably, throughout the history of U.N. peacekeeping missions no such commission has ever been established.¹⁰

6. See Rashkow, *supra* note 5.

7. *Id.* at 340; see also Michael Wood, *Do International Organizations Enjoy Immunity Under Customary International Law?*, in 55 LEGAL ASPECTS INT'L ORG., IMMUNITY INTERNATIONAL ORGANIZATIONS 12 (Niels M. Blokker & Nico J. Schrijver eds., 2015).

8. Rashkow, *supra* note 5, at 339; see also *Administration of Justice in the United Nations, A Guide to Resolving Disputes*, 1 (2009), http://www.un.org/en/oaj/unjs/pdf/guide_to_resolving_disputes_en.pdf.

9. Rashkow, *supra* note 5, at 339–41; U.N. Secretary-General, *Administrative and Budgetary Aspect of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶ 31, U.N. Doc. A/51/389 (Sept. 20, 1996) [hereinafter *Peacekeeping Liability Report I*].

10. Rashkow, *supra* note 5, at 344–45; see also *Peacekeeping Liability Report I*, *supra* note 9, ¶ 8; U.N. Secretary-General, *Administrative and Budgetary Aspect of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations*, ¶ 7, U.N. Doc.

Over the years, for one reason or another, tort claims have usually been amicably resolved without recourse to arbitration.¹¹ That said, occasionally, the Organization has been sued or threatened to be sued in a national court. Such suits are inevitably either amicably resolved or dismissed on the basis of the Organization's immunity.¹²

In the late 1990s, however, in response to the growth in peacekeeping missions and related claims, the Organization adopted a special regime to deal specifically with third party contract and tort claims arising in the context of such missions.¹³

Notably, the Organization went to great lengths in designing this regime to balance the obligations of U.N. peacekeeping missions to respond to third party claims with the obligations of the host country that invited such mission into the country to assume some responsibility in principle for such claims.¹⁴ That balance resulted in certain types of claims being excluded altogether and limits being set on the damages for which the Organization would be liable in relation to certain contract and tort claims. The Organization established these financial limitations with the understanding that the host country would ultimately be responsible for compensation, if any, beyond these limits.¹⁵

The regime excludes liability altogether for claims resulting from or attributable to activities of U.N. peacekeepers arising from "operational necessity".¹⁶ The concept of "operational necessity" was developed specifically in connection with U.N. peacekeeping operations and, while similar to the more traditional concept of "military necessity", goes a bit further.¹⁷ Notably, the concept of "military necessity", governed by the laws of war, remains under the new regime as an exemption from liability specifically relating to combat operations.¹⁸

The new regime imposes temporal and financial limitations on the liability of the Organization in terms of personal injury, illness or death and

A/51/903 (May 21, 1997) [hereinafter *Peacekeeping Liability Report II*].

11. Rashkow, *supra* note 5, at 340; see also August Reinisch, *Convention on the Privileges and Immunities of the United Nations*, UNITED NATIONS AUDIOVISUAL LIB. OF INT'L. L. (2009), http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf.

12. Rashkow, *supra* note 5, at 340–41.

13. See G.A. Res. 52/247, Third-Party Liability: Temporal and Financial Limitations (July 17, 1998).

14. *Peacekeeping Liability Report I*, *supra* note 9, ¶ 20.

15. *Id.* ¶¶ 39, 42.

16. See G.A. Res. 52/247, *supra* note 13, ¶ 6; *Peacekeeping Liability Report I*, *supra* note 9, ¶

14.

17. See *Peacekeeping Liability Report I*, *supra* note 9, ¶ 16.

18. *Id.*

for property damage resulting from or attributable the activities of peacekeeping operations in the performance of their official duties.¹⁹ In this last respect, it also excludes certain kinds of damages, e.g., non-economic loss.²⁰

The new regime recognizes that third party claims may continue to be addressed, as they have in the past, by local claims review boards.²¹ It also preserves the long-standing but never invoked option under SOFA arrangements for the establishment of a standing claims commission.²²

Underlying the efforts of the Organization throughout the years to amicably settle third party claims is the desire or goal of the U.N. to be, and to be seen as, a good citizen on the world stage; to be fundamentally fair in dealing with individuals injured in some manner as a direct result of U.N. actions.

However, with the increase in peacekeeping activities and the evolution of more robust peacekeeping mandates since the end of the Cold War, the realities of such a more active engagement have raised new challenges. These challenges are perhaps most clearly reflected in the decisions of the U.N. in invoking immunity in the face of claims by the Mothers of Srebrenica, the displaced persons in Kosovo and the Haitian cholera victims.

On the one hand, with both the Mothers of Srebrenica and the Kosovo cases, the issue is the failure of the U.N. to appropriately protect innocent civilians in situations involving threats of armed hostilities. In the case of Mothers of Srebrenica, it was the failure of the U.N. peacekeeping mission to protect such civilians from almost certain death pursuant to a policy, if not mandate, to provide such protection in the face of an armed attack by hostile forces.²³ In the case of Kosovo²⁴, it was the placement by the U.N. Interim Administration in Kosovo of internal displaced persons in camps to protect such civilians from the threat of armed hostilities that, because of lead pollution, resulted in damage to their health. With the Haitian cholera victims, it is the issue of the ostensible negligence of the U.N. in failing to adequately screen troops for cholera prior to deployment in Haiti or to

19. Rashkow, *supra* note 5, at 340–41.

20. See G.A. Res. 52/247, *supra* note 13.

21. *Id.*

22. *Peacekeeping Liability Report I*, *supra* note 9.

23. European Court of Human Rights Press Release ECHR 194, Complaint About UN's Immunity from National Jurisdiction in Civil Case Concerning Srebrenica Massacre Declared Inadmissible (June 27, 2013) [hereinafter Press Release].

24. *Letter from U.N. Under-Secretary-General Addressing the Claim for Compensation on Behalf of Roma, Ashkali and Egyptian Residents of Internally Displaced Person ("IDP") Camps in Mitrovica, Kosovo*, UNITED NATIONS (July 25, 2011), <http://www.sivola.net/download/UN%20Rejection.pdf> [hereinafter *Claim for Compensation*].

properly maintain waste treatment facilities utilized by such troops that arguably caused a cholera outbreak that affected innocent civilians.²⁵

In each of these cases, the U.N. declined to accept responsibility to compensate the victims for injuries they suffered as a result of the actions of those U.N. missions.

The Mothers of Srebrenica case was initially brought in Dutch courts where the U.N. maintained its immunity.²⁶ The Dutch Supreme Court, overruling the Appellate Court, upheld that immunity as absolute, indicating that the assertion of immunity under Section 2 of the General Convention is not affected by the failure of the U.N. to provide a modality for bringing these claims under Section 29 of the Convention.²⁷ The ruling of the Dutch Supreme Court raises a fundamental issue of the relationship of the claimed immunity under Section 2 of the General Convention to the requirement under Section 29 for the U.N. to provide a modality for reviewing these claims.²⁸ The ruling also raises the issue of what is meant under Section 29 by its reference to disputes of a “private law character”.²⁹

The claimants appealed this decision to the European Court of Human Rights.³⁰ That Court declared the application of the Mothers of Srebrenica inadmissible. In so doing, the Court upheld the immunity of the U.N. stating, in passing, that what was at issue were operations established by the Security Council resolutions under Chapter VII of the U.N. Charter fundamental to the mission of the U.N. to secure international peace and security, and the Convention (European Convention on Human Rights) cannot be interpreted in a manner that would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the U.N.³¹

The use of force under a U.N. Security Council mandate is always a complex issue. The distinction that the Court drew between Chapter VII peacekeeping operations established by the Security Council and the requirement of the European Convention is inherently relevant and important to the issue of whether the actions of the U.N. troops that are at the heart of

25. See generally *Cholera Litigation Frequently Asked Questions*, INST. FOR JUST. & DEMOCRACY HAITI, <http://www.ijdh.org/2014/12/topics/health/cholera-litigation-faq/> (last visited on Feb. 19, 2017) [hereinafter *Frequently Asked Questions*].

26. Thomas Henquet, *Introductory Note to the Supreme Court of the Netherlands: Mothers of Srebrenica Association et al. v. The Netherlands*, 51 I.L.M. 1322–363 (2012).

27. *Id.*; see also Bella Murati, *U.N. Immunity Overrides Ius Cogens Norms of International Law*, STRASBOURG OBSERVERS (July 23, 2013), <https://strasbourgobservers.com/2013/07/23/unimmunity-overrides-ius-cogens-norms-of-international-law/#more-2135>.

28. Rashkow, *supra* note 5, at 342.

29. *Id.*

30. Press Release, *supra* note 23.

31. Rashkow, *supra* note 5, at 344.

the claims of the Mothers of Srebrenica present a claim under Section 29 of a “private law character”.

In the Kosovo case, the U.N. Interim Administration asserted that the claims do constitute claims of a private law character, adding that the claims ‘in essence amount to a review of the performance of the U.N.’s mandate as the Interim Administration of Kosovo’.³² Notably in exercising its authority as “the Interim Administration”, the U.N. arguably was exercising “governmental authority” on behalf of or in the place of whatever national governmental entity might have been responsible for the area in the absence of the U.N. Security Council having created a U.N. peacekeeping mission to do so. It is important to note what would appear to be critical distinctions between that situation and the Haiti situation.

Initially, and perhaps most critical, is the fact that in Kosovo, the U.N. was not operating in the capacity simply of a “peacekeeping mission”. It was acting in the capacity essentially of the temporary governmental authority—the “Interim Administration”. Moreover, in this context, in explaining its position, the U.N. addressed other possibly critical factors relating to the long history of industrial pollution in the area and the precarious security situation in Kosovo to which the U.N. was responding in order to protect lives.³³ Arguably, when the U.N. acts in such circumstances, it is acting in a “governmental capacity” as well as a peacekeeping capacity, especially given the security aspects of the precarious situation and the risk to innocent lives. In this respect, there is a much stronger case for characterizing the actions of the “Interim Administration” as addressing political or policy matters of a governmental nature that do not give rise to claims of a private law character within the meaning of Section 29, than there is in the Haiti situation.

On the other hand, it is much more difficult to see how the new peacekeeping liability regime would not apply to the Haitian cholera victims. More specifically, it is difficult to understand the position of the U.N. that these claims “are not receivable”.

In the case of the Haitian cholera victims, the U.N. initially and for a long time simply took the position that the claims are “not receivable”.³⁴ The only rationale publicly provided in asserting this defense was its assertion that considering those claims would necessarily include a review of political

32. *Claim for Compensation*, *supra* note 24.

33. *Id.*

34. *See Frequently Asked Questions*, *supra* note 25. *See also* Jonathan M. Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES (Aug. 17, 2016), https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html?_r=0.

or policy matters.³⁵ The claimants while continuing to urge the Organization to establish a claims commission under the terms of the SOFA with Haiti to review these claims, filed suit against the U.N. in the Federal District Court in New York.³⁶

The U.N. did not respond to the lawsuit and, instead, requested that the United States Government seek dismissal of the case on the U.N.'s behalf.³⁷ In March 2014, the U.S. Attorney filed a statement of interest in the case, asserting the absolute immunity of the defendants under Section 2 of the General Convention.³⁸ During the briefing and hearing on the issue of immunity, the claimants clarified that they were not arguing that there had been a waiver of immunity, express or implied, but that, because the U.N. had failed to provide a modality for resolving their claims in breach of its obligations under Section 29, the U.N. was not entitled to assert immunity under Section 2 of the Convention, among other arguments.³⁹ In January 2015 the District Court judge dismissed the case on the basis of the U.N.'s immunity from suit under Section 2.⁴⁰ Plaintiffs appealed in February 2015 and, following the submission of briefs, the case was argued before the Court in March 2015.⁴¹ The Court handed down its opinion on August 18, 2016, affirming the decision of the lower court.⁴² But that decision, while resolving the claim in those courts on the basis of the absolute immunity of the U.N. under Section 2 of the General Convention, does not answer the question of whether the Haitian claims are of a "private law character" under Section 29 of the General Convention.

The history and basis of a defense that tort claims by third parties against the U.N. "are not receivable" apparently is relatively recent, and until the Haiti cholera case has not been the subject of much scrutiny. For example, it came to the attention of a number of scholars, only during the course of the public discussion of the Haiti cholera case, that the Organization in 2011 used that formulation in response to claims against the Organization in the

35. Rashkow, *supra* note 5, at 343; *see also* Edith M. Lederer, *U.N. Rejects Damage Claim for Haiti Cholera Victims*, INST. FOR JUST. & DEMOCRACY HAITI (Feb. 21, 2013), <http://www.ijdh.org/2013/02/topics/health/un-rejects-damage-claim-for-haiti-cholera-victims/>.

36. *See Georges v. United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015) (explaining that in October 2013, IJDH and partners filed a class-action lawsuit against the U.N. in the District Court for the Southern District of New York, on behalf of Haitian and Haitian-American cholera victims and their families). Subsequently, two other class actions were filed against the U.N., another in the Southern District of New York and a third in the Eastern District of New York.

37. *See Frequently Asked Questions*, *supra* note 25.

38. *Id.*

39. *Id.*

40. *See generally Georges*, 84 F. Supp. 3d 246.

41. *See Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016).

42. *Id.*

Kosovo.

That said, for a long time, the U.N. has declined to explain the basis of its assertions in the Haiti cholera matter that the claims are “not receivable” because considering those claims would necessarily include a review of political or policy matters. However, recently, in two instances, the U.N. offered a fuller explanation of the basis of its position.

The first such fuller explanation was a letter dated November 24, 2014 from the Secretary General responding to a letter dated 25 September 2014 from three Special Rapporteurs and one Independent Expert appointed by the Human Rights Council which constituted in the Human Rights context an “allegation” letter.⁴³ The “allegation” letter suggests that the U.N. by its response to the claims of the Haiti cholera victims violated the human rights of these victims in a number of respects, most particularly by denying that the U.N. was the cause of the cholera outbreak and by denying the victims a right to a legal remedy.⁴⁴ In accordance with established procedures with such “allegation” letters, the U.N. was requested to provide a response to the concerns expressed in the letter.⁴⁵

The second such fuller explanation was a letter from the Secretary General dated February 19, 2015 responding to a letter to him dated December 18, 2014, by 77 Members of the U.S. Congress urging the U.N. to provide a modality to review the claims of the Haitian cholera victims.⁴⁶

The Secretary General’s November 25, 2014 response to the “allegation” letter deals at considerable length in denying the “human rights basis” for the claims of the victims.⁴⁷ In respect of the “legal basis” for rejecting these claims, the November 25 letter asserts the argument that claims based on political or policy related grievances “such as those related to the actions or decisions taken by the Security Council or the General Assembly” are excluded.⁴⁸ However, it goes on to establish a principled legal framework for determining whether particular claims qualify as having a

43. *Letter from Pedro Medrano, Assistant U.N. Secretary-General, Senior Coordinator for Cholera Response to Ms. Farha, Mr. Gallon, Mr. Pura and Ms. de Albuquerque*, UNITED NATIONS (Nov. 25, 2014), <http://opiniojuris.org/wp-content/uploads/Haiti-Nov14-explanation-to-SRs.pdf> [hereinafter *Letter from Pedro Medrano*].

44. *Id.*

45. *Id.*

46. U.N. Secretary-General, Letter dated Feb. 19, 2015 from the Secretary-General addressed to the Distinguished Members of Congress (Feb. 19, 2015) [hereinafter *Letter from Ban Ki-moon*]. See also Jake Johnson, *Ban Ki-moon Explains to Congress Why the U.N. Won’t be Held Accountable for Cholera in Haiti*, HAITI RELIEF & RECONSTRUCTION WATCH (Feb. 27, 2015), <http://cepr.net/blogs/haiti-relief-and-reconstruction-watch/ban-ki-moon-explains-to-congress-why-the-un-wont-be-held-accountable-for-cholera-in-haiti>.

47. *Letter from Pedro Medrano*, *supra* note 43.

48. *Id.*

“private law character”.⁴⁹ Thus, it asserts that in assessing a claim under Section 29, the “Organization does not rely solely on the allegations of the claim itself but also assesses the character of the claim in the context of all of its circumstances.”⁵⁰ It further asserts that “the nature of the duty allegedly owed by the Organization, the nature of the conduct or activity at issue, and other relevant circumstances are all pertinent”.⁵¹

The letter addresses three instances where claims were asserted but the U.N. declined to recognize such claims, as if to suggest that these examples support the conclusion that the Haitian claims do not and cannot qualify under the framework set out as having a “private law character”.⁵² Unfortunately, the examples cited do not support that conclusion. Two of the instances were the Mothers of Srebrenica case and the claims of the Kosovo displaced persons, already addressed above and distinguishable from the Haiti situation for reasons previously discussed.⁵³ The third instance was the refusal of the U.N. in 1996 to accede to a request by the Rwandan Government in 1996 to establish a claims commission to review fourteen claims relating to the alleged failure of the U.N. (UNAMIR) in the context of the 1994 genocide to provide protection to Rwandan nationals.⁵⁴ While this appears to have been the first public discussion of the Rwandan request, the Rwandan case is similar in nature to the Mothers of Srebrenica case, and can be distinguished on the same basis that the claims relate to an issue of a use of force by a U.N. peacekeeping force under a Chapter VII resolution by the Security Council. In conclusion, while this “fuller” explanation is more detailed than both the earlier ones made during the litigation in U.S. courts (and also the later one made to the 77 U.S. Congressmen), it fails to explain how the Haitian claims do not qualify as having a “private law character.”

The Secretary General’s response of February 19, 2015 to the 77 U.S. Congressmen’s letter highlights the serious efforts of the U.N. to address the crisis—at the national and local level.⁵⁵ Unfortunately, the letter does not resolve the longstanding controversy of whether the U.N. shares any legal responsibility for the crisis. The Secretary General’s letter again correctly focuses on the legal issue of whether the Haitian victims may be viewed as having a claim against the Organization under Section 29 of the General Convention, or under the SOFA between the U.N. and Haiti.⁵⁶ The letter

49. *Id.*

50. *Id.*

51. *Id.*

52. *Letter from Pedro Medrano, supra* note 43.

53. Rashkow, *supra* note 5 at 344; *Claim for Compensation, supra* note 24.

54. *Letter from Pedro Medrano, supra* note 43.

55. *Letter from Ban Ki-moon, supra* note 46.

56. *Id.*

notes that Section 29 is limited by its terms to consideration of private law claims, going on to broadly describe such claims as those “arising under contracts, claims relating to the use of private property in peacekeeping contexts or claims arising from motor vehicle accidents”, and acknowledges that the Organization has regularly received and provided compensation for such claims.⁵⁷ However, it goes on to assert that claims by Haitian victims are “not receivable” because, unlike the other claims mentioned, those claims “raised broad issues of policy that arose out of the functions of the U.N. as an international organization” and, therefore, “could not form the basis of a private law character”.⁵⁸ Essentially for the same reason, the letter dismisses the argument that Haitian victims should be able to bring their claims before a claims commission established pursuant to the SOFA.⁵⁹ Notably, the letter does not identify the “broad issues of policy that arose out of the functions of the U.N. as an international organization” upon which it is relying to distinguish the Haiti claims from the kinds of claims it acknowledges are recognized as receivable, or otherwise to explain how the Haiti claims “d[o] not fall within the scope of Section 29.”⁶⁰

Initially, as a matter of principle, it would be possible, as the letter from the Members of the U.S. Congress proposed, to establish a claims commission under the SOFA to address the Haitian claims. No such commission has ever been established despite the fact that the authority to do so has been included in virtually every SOFA executed over the long history of U.N. peacekeeping missions.

Establishing such a commission for the first time in these circumstances presents a number of complex legal and practical issues. Initially, it would be necessary to establish the composition and mandate for such a commission, including the standard for compensation of victims. It would also be necessary to identify funding to provide such compensation. Such an exercise has been complicated in the matter of the Haitian cholera victims by years of inaction and intervening events, such as the earthquake of 2010 and the recent devastating hurricane. For example, identifying the victims and causation in these circumstances raises significant challenges in a country where allegedly there is not a regular and reliable system for recording these matters.⁶¹ Of course, in the U.N., there is always the issue of providing the funds to establish and operate such a commission and for compensating the thousands of claimants.⁶² Even were there a will to establish such a

57. *Id.*

58. *Id.*

59. *Id.*

60. Letter from Ban Ki-moon, *supra* note 46.

61. See U.N. Secretary-General, *A New Approach to Cholera in Haiti*, ¶57, U.N. Doc. A/71/620 (Nov. 25, 2016) [hereinafter *New Approach*].

62. *Id.* ¶¶ 58–59.

commission, providing relief to the victims through such a mechanism could take years.

In any event, such a commission is not the only way that the Organization can acknowledge any responsibility it may have for the crisis or respond to claims. Thus, the U.N. has routinely handled such third party claims in the past through local internal review boards established in the peacekeeping missions, or through negotiated settlement agreements. Indeed, in 1965, in another situation that, somewhat like this case, involved mass claims relating to the activities of the U.N. peacekeeping mission—in the Congo (ONUC), the Organization negotiated lump sum settlements to resolve the matter.

In the late 1960s, the U.N. was faced with some 1400 claims by Belgian nationals as well as claims from individuals from various other countries for damage to persons and property in the Congo caused by U.N. peacekeepers. In that instance, the U.N. negotiated a lump sum settlement of all Belgium nationals with the Belgian Government accepting \$1.5 million as a final settlement of such claims.⁶³ A similar lump sum settlement was reached with the USSR regarding claims by Russian nationals.

Under the circumstances, it is difficult to understand the argument that the Haiti claims are not of a “private law character” under Section 29, especially given the long practice of the U.N. in recognizing claims by those injured as a direct result of U.N. activities including in the peacekeeping context. Thus, in addition to the kinds of claims mentioned in the Secretary General’s letter to the U.S. Congressmen, the U.N. has since its inception recognized that those directly injured as a result of negligent activity by the Organization, for example in the maintenance of the U.N. Headquarters in New York, are entitled to make a claim against the Organization. In principle, the same is true in other instances where the U.N. might arguably have failed to safely maintain or operate its facilities and equipment or vehicles, including in the peacekeeping context. Indeed, it is more difficult to understand the argument that the U.N. is not legally responsible for the cholera outbreak, at least in part, in light of the special legal regime established by the U.N. in the late 1990s to deal with claims by private individuals specifically in the context of peace-keeping operations.

Thus, it is difficult to understand what is meant by “broad issues of policy that arose out of the functions of the U.N. as an international organization” and which “could not form the basis of a claim of a private law

63. See Exchange of Letters Constituting an Agreement Between the United Nations and Belgium Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals, Belg.-United Nations, Feb. 20, 1965, 535 U.N.T.S. 198.

character”⁶⁴ or how such an argument is consistent with the long history of the U.N. responding to claims for personal injury resulting from the actions of the Organization and the specific provisions of the peacekeeping liability regime.

Notably, were the U.N. to acknowledge some responsibility, it would be open to the Organization to work out with the Government of Haiti and other interested parties some appropriate way to address that responsibility. Of course, any such outcome could and should take into account the ongoing efforts of the U.N. more generally to prevent the further spread of cholera in Haiti and provide the afflicted communities and individuals with assistance. What is important for the reputation and credibility of U.N. is for it to acknowledge some responsibility for the crisis and, as a good citizen on the world stage, to address that responsibility. It appears that the U.N. may in fact be moving in that direction.

Thus, the U.N. has recently dramatically changed its position regarding the Haiti cholera victims both offering an apology for not having done more to assist the victims of the cholera as the tragedy unfolded and acknowledging that it has a “moral” obligation to assist the victims.⁶⁵

In August of 2016, Secretary Ban Ki Moon, whose term would conclude at the end of the year, announced a new approach to cholera in Haiti. He stated that he deeply regrets the terrible suffering that the people of Haiti have endured as a result of the epidemic and that the U.N. has a moral responsibility to the victims and to support Haiti in overcoming the epidemic. The Secretary General indicated that the new approach, that he aimed to present to the General Assembly, consisted of two tracks. Track One, to intensify support for cholera control and response, and Track Two, a proposal to provide material assistance for those most affected by cholera.⁶⁶

The announcement of this new approach is said to have been prompted by the Report of Philip Alston, U.N. Special Rapporteur on Extreme Poverty and Human Rights.⁶⁷ A draft of Alston’s report became known to the U.N.

64. Letter from Ban Ki-moon, *supra* note 46.

65. See Press Release, Secretary-General, Secretary-General Apologizes for United Nations Role in Haiti Cholera Epidemic, Urges International Funding of New Response to Disease, U.N. Press Release SG/SM/18323-GA/11862 (Dec. 1, 2016) [hereinafter Statement of Secretary General of Dec. 1, 2016]; see also *New Approach*, *supra* note 61.

66. *New Approach*, *supra* note 61, ¶ 1.

67. See Philip Alston, *Mandate of the Special Rapporteur on Extreme Poverty and Human Rights*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Oct. 5, 2016), <https://assets.documentcloud.org/documents/3173480/United-Nations-Letters-on-Cholera.pdf>; see also Phillip Alston (Special Rapporteur on Extreme Poverty & Human Right) Statement 2016/68 (Oct. 25, 2016) [hereinafter Statement of Philip Alston].

Secretariat and the public about the same time that the Secretary General announced his new approach to cholera in Haiti. Notably, both of those developments occurred around the same time as the U.S. Court of Appeals announced its decision rejecting the appeal of the Haitian claimants on immunity grounds.

In October, the U.N. Security Council, in renewing the mandate for the Haiti peacekeeping mission, took note of intention of the Secretary General to develop a package that would provide material assistance and support to those Haitians directly affected by cholera.⁶⁸

In November, the Secretary General issued his report to the General Assembly elaborating his proposals for a two-track approach to cholera in Haiti. The proposals in Track One involve intensifying the Organization's support in order to reduce and ultimately end transmission of cholera, improve access to care and treatment and address longer-term issues of water, sanitation and health systems in Haiti. Track Two proposes the development of a package that will provide material assistance and support to those Haitians most directly affected by cholera. The Secretary General stressed that these efforts must include, as a central focus, the victims of the disease and their families.

Track One essentially is a continuation and enhancement of the initiative that the Secretary General and the U.N. had launched in 2014, but which never received the financial support envisioned in those proposals and was overtaken by the impact of Hurricane Matthew on Haiti.⁶⁹ Track Two, however, contains new elements intended to reflect the Organization's commitment to assist and support those most directly affected.⁷⁰ The Report states that consideration is given under Track Two to two possible elements: a) a community approach; and b) an individual approach.⁷¹ Under the community approach, victims and their families and affected communities would receive assistance and support through community projects, in particular relating to poverty, poor housing, and lack of basic services.⁷² Projects would be established in consultation with communities and, to the extent possible, linked to and coordinated with Track One.⁷³ The Report indicates that the individual approach relates to the payment of money to families of those individuals who died of cholera, suggesting the payment of

68. S.C. Res. 2313, ¶ 3 (Oct. 13, 2016).

69. *New Approach*, *supra* note 61, ¶ 20.

70. *Id.* ¶ 36.

71. *Id.* ¶ 41.

72. *Id.* ¶ 42.

73. *Id.* ¶¶ 41–42.

a fixed amount per deceased individual that would be the same for each household.⁷⁴

As the Report acknowledges, Track Two “is aimed at providing a meaningful, but necessarily imperfect, response to the impact of cholera on individuals, families and communities.”⁷⁵ The Report candidly highlights the many imperfections in the initiative. It stresses that secure funding simply to enable “development of a meaningful package” is essential to ensuring the appropriate consultations, including at the state and local level in Haiti, and is useful to avoid raising expectations.⁷⁶ It provides that it is “imperative” to have the assurance of adequate funding for community projects prior even to conducting consultations in the affected communities.⁷⁷ With respect to the individual approach, it asserts that accurate information as to the number of cholera deaths and the identification of the deceased and their family members is required, while identifying serious challenges in obtaining such information. As with the community based approach, the Report states that the individual approach would also require “further development of the package”, which would itself require funding, as well as the certainty of a threshold amount of funding sufficient to provide a meaningful fixed amount per cholera death.⁷⁸ Finally, the Report stresses that a priority is to be given to eliminating cholera and responding to the devastating effects of Hurricane Matthew, and that the “new approach” to cholera in Haiti is premised on the assumption that sufficient additional “voluntary” funding will be made available to deliver on Track Two without detracting from Track One.⁷⁹

In December, the Secretary General presented his new approach to the General Assembly and sought its support for this new initiative.⁸⁰ In the course of his comments, the Secretary General reiterated his deep regret for the loss of life and suffering caused by the cholera outbreak in Haiti and, again apologized on behalf of the U.N. to the Haitian people. The Secretary General made clear that he was apologizing for the U.N. not having done enough with regard to the cholera outbreak and its spread in Haiti. He again referred to the U.N.’s failure in this regard as a “blemish” on the reputation of U.N. peacekeeping and the Organization world-wide, and to the “moral responsibility” on the U.N. to act. In this context, he acknowledged that

74. *New Approach*, *supra* note 61, ¶ 54.

75. *Id.* ¶ 36.

76. *Id.*

77. *Id.* ¶ 53.

78. *Id.* ¶¶ 55–59.

79. *New Approach*, *supra* note 61, ¶ 63.

80. *See* Statement of Secretary General of Dec. 1, 2016, *supra* note 65.

funding for the efforts of the U.N. to assist the people of Haiti has proven difficult to secure.

The Secretary General described the new two-track approach, for which he requested \$400 million over two years divided equally between Track One and Track Two. He explained that work on Track One was well under way, describing work being undertaken, thanking donors who have provided support for Track One, and expressing the hope that further contributions would become available soon. With respect to the community approach under Track Two, he noted that the U.N. has been consulting with the Government of Haiti and that the consultations will continue into 2017. His comments reflected a focus on projects reflecting community needs not related to cholera, such as education grants, microfinance and other initiatives that would be complementary to and, to the extent possible, consistent with work under Track One. With respect to the individual approach, his comments focused on the requirements for identification of the deceased and their family members and the certainty of sufficient funding for compensation. In this respect, he expressed the need for further on the ground consultations to develop this package, while acknowledging the difficulties relating to the development of the needed information. Concluding, the Secretary General referred to the “familiar obstacle” of adequate funding; stressing that funding for Track One needs to be prioritized.⁸¹

It is important to the standing and reputation of the U.N. and to the people of Haiti that these new elements included an apology, even if the apology was not in terms of the harm caused to the people of Haiti by the negligence of the U.N. but rather in terms of the U.N. generally not doing enough to help the people of Haiti deal with the cholera outbreak and its spread. In this respect, the Secretary General was careful to cast the apology in terms of the “moral responsibility” of the U.N., as distinguished from any legal responsibility. Whether this apology and the enhanced efforts of the U.N. to address the suffering of the Haitian people are sufficient to effectively remove the “blemish” on the reputation of the U.N. remains to be seen, especially in light of the challenges identified by the Secretary General to the implementation of the new approach, both in terms of funding the new approach and, in regard to the development of modalities and funding to address the individual element of Track Two.

III. REMEDIES FOR HARM CAUSED BY U.N. PEACEKEEPERS IN REGARD TO MISCONDUCT RELATING TO SEXUAL EXPLOITATION AND ABUSE (SEA)

Sexual exploitation and abuse by U.N. staff and officials and U.N. peacekeepers became a significant issue during the 1990s and early 2000s in

81. *Id.*

connection with the increase in U.N. peacekeeping activities in the Balkans and Africa, particularly with widespread reports of such abuses by U.N. peacekeeping troops and civilian staff of the U.N.'s mission in the Congo—MONUC—in 2004.⁸² While the U.N. has repeatedly taken actions over the years to address this problem, those actions failed to eliminate the problem. Indeed, in the Spring of 2014, a new scandal arose in relation to allegations that international troops serving in a U.N. authorized peacekeeping mission in the Central African Republic (CAR) had sexually abused a number of young children in exchange for food or money, and that the U.N. failed to act timely or appropriately under U.N. policies and mandates in response to those allegations.⁸³ The scandal has led to new and proposed actions by the U.N. to strengthen its regime against SEA.

In 2003, in response to reports of sexual exploitation of refugees by aid workers in West Africa in the early 2000s, Secretary General Annan issued a Bulletin expressly prohibiting conduct that constitutes SEA by U.N. staff, including the staff of the separately administered organs and programs of the U.N.⁸⁴ The Bulletin stipulates that any acts of sexual exploitation and abuse committed by U.N. staff members or persons under contract with the U.N. “constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal”.⁸⁵ In addition to disciplinary action, in cases where SEA has been determined to have occurred, the U.N. routinely considers referral of the matter to the national authorities of the perpetrator for prosecution or other appropriate action.⁸⁶

Notably, U.N. civilian police and military observers and U.N. peacekeeping troops were not covered by this Bulletin.⁸⁷ In 2004, the Secretary General formally extended the prohibitions in the Bulletin to civilian police and military observers.⁸⁸ However, U.N. peacekeeping troops are traditionally subject to the exclusive authority of their contingent

82. See generally Rep. of an Indep. Review on Sexual Exploitation & Abuse by Int'l Peacekeeping Forces in the Cent. Afr. Rep., transmitted by Letter Dated June 23, 2016, from the Secretary-General to the General Assembly, U.N. Doc. A/71/99 (June 23, 2016) [hereinafter *Kompass Inquiry Report*].

83. *Id.*

84. U.N. Secretary-General, *Secretary-General's Bulletin: Special Measures for Protection From Sexual Exploitation and Sexual Abuse*, § 3, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter *Secretary-General's Bulletin: Special Measures for Protection 2003*].

85. *Id.* § 3.2(a).

86. *Id.* § 5.

87. U.N. Secretary-General, Letter dated Mar. 24, 2005 from the Secretary-General addressed to the President of the General Assembly, ¶¶ 14–22, ¶¶ A.14–21 U.N. Doc. A/59/710 (Mar. 24, 2005). [hereinafter *Zeid Report*].

88. See *id.* ¶ A.17–21.

commander and national authorities. Under the circumstances, it is up to that commander and the national authorities of that Member State to address allegations of SEA against these individuals.⁸⁹

In 2005, in response to subsequent and numerous reports of SEA in peacekeeping missions, the Secretary General commissioned a report by a panel led by Ambassador Zeid from Jordan on the subject of SEA.⁹⁰ The resulting Zeid report addressed a wide spectrum of behavior ranging from solicitation of prostitutes, which was legal in some host countries, to acts considered criminal offenses in virtually all countries, such as rape and pedophilia.⁹¹ This included rape disguised as prostitution, for instance when the victim was given money or food to give the acts the appearance of consent.⁹² In addition, the report addressed the issue of “peacekeeper babies” which is very difficult to address because of the absence often of an effective legal system in the host country.⁹³

As the response to the Zeid report demonstrated, the issue of addressing SEA in the U.N. peacekeeping context is complicated by the fundamental nature of U.N. peacekeeping, where members of troop contributing contingents are under the exclusive authority of the commanders of those contingents, not the U.N. In a nutshell, the regime for military contingents is that complaints are referred to national contingents who are responsible for investigating and taking appropriate action. This has usually involved repatriating the named individuals and following up in the troop contributing member state. There is a responsibility to report the results of the investigation and follow up action to the U.N.⁹⁴ The Zeid panel came up with a number of recommendations.⁹⁵ Unfortunately, the U.N. General Assembly declined to act on a number of those recommendations, primarily those that would undermine the exclusive authority of the national troop contingent commanders.

89. See Bruce Rashkow, *AJIL Unbound, Remedies for Harm Caused by UN Peacekeepers*, AM. SOC'Y INT'L L. (Apr. 2, 2014 3:55 PM), <https://www.asil.org/blogs/remedies-harm-caused-unpeacekeepers>; see also Contingent Owned Equipment (COE) Manual (setting out terms and conditions for deploying troop contingents voluntarily provided to UN), A/C.5/60/26 (2005), as revised by report of the Special Committee on Peacekeeping Operations and its Working Group on 2007 resumed session, A/61/19 (Part III) (2007), Annex, Article 7 quinquies, ¶ 1; U.N. Secretary General, *Model Status of Forces Agreement*, U.N. Doc. A/45/594 (Oct. 9, 1990).

90. Zeid Report, *supra* note 87.

91. *Id.* ¶ 3.

92. *Id.* ¶¶ 5–6.

93. *Id.* ¶ 6.

94. See Rashkow, *AJIL Unbound, Remedies for Harm Caused by UN Peacekeepers*, *supra* note 89, ¶ 15; see also A/61/19 (Part III), *supra* note 89 Annex, Article 7 sexiens, ¶ 1.

95. Zeid Report, *supra* note 87, ¶¶ 23–27, 31–36, 38–65, 68–93.

Nonetheless, following the 2005 Zeid report, the U.N. implemented a number of important initiatives to address SEA in order to educate and sensitize both U.N. peacekeeping personnel and the local population as to what SEA is and the responsibility of U.N. for responding to allegations of such misconduct, including the procedures for dealing with complaints, and measures for assisting the victims of SEA. Among these initiatives are the following:

- a) In 2007, the Model Memorandum of Understanding to be used between troop contributing states and the U.N. was revised to include and make applicable to U.N. peacekeeping contingents the specific prohibitions against SEA from the 2003 Bulletin.⁹⁶
- b) In 2008, the U.N. adopted its Comprehensive Strategy on Assistance to Victims of SEA by U.N. staff and related personnel.⁹⁷ The Comprehensive Strategy on Assistance, specifically provides for basic assistance and support to both complainants and victims of SEA.⁹⁸ Assistance and support takes the form of medical care, legal services, support to deal with psychological and social effects of the experience as well as material care, such as food, clothing, emergency and safe shelter.⁹⁹ Children born as a result of SEA are to receive assistance with their individual needs, and the U.N. is to work with member states to facilitate within their competence, the pursuit of claims related to paternity and child support.¹⁰⁰ However, the Comprehensive Strategy expressly provides at the outset that “the strategy shall in no way diminish or replace the individual responsibility for acts of sexual exploitation and abuse, which rests with the perpetrators” adding that “the strategy is not intended as a means for compensation”.¹⁰¹ As this provision suggests, SEA is considered in the same manner as ordinary criminal acts by U.N. personnel, not U.N. actions for or which the U.N. might be liable to third parties.
- c) Also in 2008, the U.N. passed a resolution providing for the criminal accountability of U.N. officials and experts on mission.¹⁰² That resolution, *inter alia*, urged member States to consider establishing

96. A/61/19 (Part III), *supra* note 89, ¶¶ 28–29.

97. G.A. Res. 62/214, United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, ¶ 1 (Distr. Mar. 7, 2008).

98. *Id.* ¶ A.4.

99. *Id.* ¶ A.6–7.

100. *Id.* ¶ A.8.

101. *Id.* ¶ A.3.

102. G.A. Res. 62/63, Criminal Accountability of United Nations Officials and Experts on Mission (Distr. Jan. 8, 2008).

jurisdiction over crimes in their domestic laws committed by their nationals while serving as U.N. officials or experts, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the host state.¹⁰³

d) In 2012, the Secretary General initiated a policy of human rights screening of U.N. peacekeeping personnel to prevent selection and deployment of individuals involved in human rights violations, including SEA.¹⁰⁴ Under this policy, the Secretary General has reaffirmed the authority to request the repatriation of any individual contingent member alleged to having engaged in SEA or other human rights violations.¹⁰⁵ Indeed, the Secretary General has asserted the authority to request the repatriation of entire units if the circumstances so warranted. He has exercised that authority in connection with both individual contingent members and entire units.¹⁰⁶

In addition, since the Zeid report, the Secretary General has issued regular reports regarding the implementation of U.N. initiatives to address SEA, including an annual report on “Special Measures for the Protection from Exploitation and Sexual Abuse”.¹⁰⁷ Unfortunately, those reports demonstrate that while the situation has improved, there continue to be problems with compliance by troop contributing states, both in terms of complaints of violations of the SEA prohibitions by contingent members and with the timely follow up by troop contributing states on such complaints.¹⁰⁸

In 2016, the independent Kompas Inquiry Panel issued its report.¹⁰⁹ That report was highly critical of the U.N. and its handling of SEA in the Central African Republic (CAR). Extraordinary for any U.N. inquiry, the Kompas Report identified three very high officials that it said had abused their authority and another seven high officials that were the subject of “adverse observations” for failure to act appropriately in the face of the

103. *Id.* ¶¶ 2–3.

104. U.N. Policy, Human Rights Screening of United Nations Personnel PK/G/21987 (Dec. 11, 2012); U.N. Secretary-General, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, U.N. Doc. A/67/775-S/2013/110 (Mar. 5, 2013); *see also* U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ¶ 93, U.N. Doc. A/70/729 (Feb. 16, 2016) [hereinafter *Special Measures for Protection 2016*].

105. *See Special Measures for Protection 2016*, *supra* note 104, ¶ 45.

106. *Id.* ¶ 60.

107. *See* G.A. Res. 57/306, Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa (Apr. 15, 2003); *see also* U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, Summary, U.N. Doc. A/67/766 (Feb. 28, 2013) [hereinafter *Special Measures for Protection 2013*].

108. *See, e.g., Special Measures for Protection 2016*, *supra* note 104.

109. *See generally* Kompas Inquiry Report, *supra* note 82.

serious allegations of SEA.¹¹⁰ The Kompas Report made twelve recommendations for going forward to better deal with SEA in the peacekeeping context.¹¹¹

In February 2016, the Secretary General issued a report laying out his plans for evaluating and addressing the recommendations of the Kompas Report, including a number of measures already taken to address those recommendations. The report also contained requests from the Secretary General to the General Assembly to assist in addressing the recommendations, including recommendations that related to the exclusive authority of the Member States contributing U.N. peacekeeping troops over such troops.¹¹²

In March 2016, the Security Council adopted a resolution addressing the Kompas Report and the Secretary General's initial response to the report.¹¹³ The Security Council endorsed the strong response by the Secretary General to the continuing allegations of SEA in peacekeeping and welcomed the appointment by the Secretary General of a Special Coordinator to assist the Secretary General in improving the U.N.'s response to SEA, while also affirming a number of the Secretary General's ongoing initiatives.¹¹⁴

In June 2016, the Secretary General issued his annual report on "Combatting Sexual Exploitation and Abuse" where he updated his February report on the ongoing efforts to evaluate and address the Kompas Inquiry Report recommendations, and otherwise strengthen the Organizations response to SEA.¹¹⁵ The Secretary General reported on the status of the

110. See *id.* at Annex III (explaining the three high level officials found to have abused their authority were: head of the Human Rights and Justice Section (HRJS) in MINUSCA "outright disregard for his obligations"; the Special Representative of the Secretary General (SRSG) of MINUSCA "total abdication of his responsibility to uphold human rights in the implementation of the MINUSCA mandate"; and the Under Secretary General in charge of the U.N.'s Office of Internal Oversight Services (OIOS) "failed to undertake an independent process". The additional seven high officials that were the subject of "adverse observations" included: the High Commissioner for Human Rights; the Secretary General's Chef de Cabinet; the Under Secretary General in charge of the U.N.'s Department of Peace Keeping Operations (DPKO); a senior staff member in the Executive Office of the Secretary General (EOSG) as well as the Under Secretary General for the Office of Legal Affairs (OLA) and a senior official in UNICEF).

111. Kompas Inquiry Report, *supra* note 82; *Special Measures for Protection 2016*, *supra* note 104, ¶¶ 83–84.

112. *Special Measures for Protection 2016*, *supra* note 104, ¶¶ 86–97.

113. S.C. Res. 2272 (Mar. 11, 2016).

114. *Id.* ¶¶ 1–5.

115. U.N. Secretary-General, *Combating Sexual Exploitation and Abuse*, ¶ 4, U.N. Doc. A/71/97 (June 23, 2016) [hereinafter *Combating Sexual Exploitation and Abuse*].

recommendations.

Only four of the twelve were accepted without qualification: recommendations four (mandatory and immediate reporting of all allegations); six (review U.N. policies dealing with confidentiality); seven (establishment of a trust fund for victims of SEA); ten (adoption of an approach to immunity that presumes cooperation of U.N. staff in accountability process).¹¹⁶

Five recommendations are partially accepted: one (acknowledge that SEA by peacekeepers is a form of conflict related sexual violence to be addressed under U.N. human rights policy); two (creation of a coordination unit within Office of the High Commissioner for Human Rights (OHCHR) reporting directly to the Commissioner of OHCHR); three (creation of a working group to support the Coordination Unit made up of experts to develop a single policy harmonizing the SEA human rights policies and develop processes promoting criminal accountability); eleven (the U.N. negotiate with troop contributing states provisions for screening troops); and twelve (maintain a comprehensive and up to date human rights data base hosted by OHCHR).¹¹⁷

The remaining three were “under consideration”: five (establishment of a professional investigative team under the authority of the Coordination Unit to be made available for immediate deployment when SEA is reported); eight (the U.N. negotiate with troop contributing countries provisions to ensure prosecution, including by granting host countries subsidiary jurisdiction to prosecute); and nine (the U.N. negotiate the inclusion in agreements with troop contributing countries provisions ensuring transparency and cooperation in accountability processes).¹¹⁸

Notably, the three “under consideration” and most of the five only “partially accepted” relate to the traditional exclusive authority of the commander of the national contingent and national authorities of troop contributing countries. These recommendations in many respects harken back to the recommendations of the Zeid report on which the General Assembly was unable to reach agreement because of the objections of troop contributing countries.

Subsequently, the Secretary General issued his annual 2017 Report in February dealing with Special Measures for the protection from sexual abuse.¹¹⁹ The 2017 report presents the Secretary General’s “new approach” to preventing and responding to SEA. Following on the Kompas Report and

116. *Id.* Annex.

117. *Id.*

118. *Id.*

119. See U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, U.N. Doc. A/71/818 (Feb. 28, 2017) [hereinafter *Special Measures for Protection 2017*].

earlier responses by the Secretary General and the Organization to the findings, conclusions and recommendations of that Report, the 2017 Secretary General's report outlines a victim-centered strategy rooted in transparency, accountability and ensuring justice. The "new approach" seeks to build on a strong partnership with Member States.

The Secretary General's 2017 report describes a four-part strategy. First, elevating the voice of the victims themselves and putting their rights and dignity at the forefront of the efforts to combat SEA. This would include tangibly improving the medical, social, legal and financial assistance provided to the victims "where appropriate". Second, ending impunity for those guilty of SEA. This would include greater transparency on reporting and investigations. Third, building a truly multi stake network to support the efforts of the U.N., which includes more direct and continuous engagement with civil society and other experts and organizations. Fourth, raise awareness worldwide regarding the problem of SEA to address the stigma and discrimination that victims face and promote the U.N. as a global platform for sharing best practices in prevention and response.¹²⁰

Among the many proposals contained in the report, they include the following relating to "Reconnecting to United Nations values and principles": strengthen the initial screening of candidates for every U.N. post; ensure that individuals terminated owing to substantiated allegations of SEA will not be rehired in any other part of the Organization; request that a clause be included into the personal history profile or its equivalent as to whether the applicant was the subject of pending allegations or disciplinary measures at the time of separation, and agreeing to sharing this information with other U.N. entities; cooperate, "as appropriate", with Governments and external organizations in the conduct of their own reference checks; and ask Member States to enter voluntarily into a "Compact" on specific measures to strengthen efforts to address SEA.¹²¹

In regard to "[p]utting the rights and dignity of victims first", the report proposes, *inter alia* to:

- a) Conduct and issue the results of risk assessments of each operational deployment in terms of SEA.¹²²
- b) Appoint a system wide victim's right advocate reporting directly to the Secretary General, to work within the Organization and with local authorities and civil society organizations to ensure victims access to appropriate and timely judicial processes; to ensure that every victim receives appropriate personal care, follow up attention and information

120. *Id.* ¶ 13.

121. *Id.* ¶ 16.

122. *Id.* ¶ 23.

on the progress of his or her case; to build networks of support and to assist in ensuring that the full effect of local laws are brought to bear.¹²³

c) Instruct the appointment in the four peacekeeping operations with the highest number of cases of SEA to identify a position to perform the functions of victims' right advocate, and request Member States to regularize that position.¹²⁴

d) Regularize and apply globally the 2016 Draft Victims' Assistance protocol following the ongoing pilot period testing.¹²⁵

e) Request Member States to increase the resources to support victims considering the following possible mechanisms: permit direct assistance out of existing Trust Fund to Support Victims of SEA; withhold reimbursement payments to troop contributing countries in the event that investigations are not undertaken, reported on and concluded in a timely manner and transfer the amounts withheld to the Trust Fund.¹²⁶

f) Request Member States receive claims from victims, and call upon them to establish mechanisms to do so.¹²⁷

g) Explore the possible use of *ex gratis* payments to victims in exceptional cases and where the Member State mechanisms do not lead to an appropriate outcome.¹²⁸

h) Propose that mandating bodies (Security Council and General Assembly) endorse, as appropriate, a special protocol on preventing SEA as part of the mandates and budgets they approve that could include, for example, strict guidelines on fraternization, prohibitions on alcohol consumption.¹²⁹

i) Seek Member State support for system wide consolidated confidential repository of case information to be placed under the supervision of the Special Coordinator on Improving the U.N. Response to SEA.¹³⁰

Some of the most important and controversial proposals in the report relate to ending impunity:

123. *Id.* ¶¶ 27–29.

124. *Special Measures for Protection 2017, supra* note 119, ¶ 30.

125. *Id.* ¶ 33.

126. *Id.* ¶ 34.

127. *Id.* ¶ 35.

128. *Id.*

129. *Special Measures for Protection 2017, supra* note 119, ¶ 36.

130. *Id.* ¶ 38.

- a) Improve speed, accuracy and comprehensiveness in report of serious allegations of SEA, including the development of a standardized incident reporting form.¹³¹
- b) Support the strengthening of community based complaint mechanisms.¹³²
- c) Present proposals to Member States for consolidating the many investigative capacities throughout the Organization dealing with SEA, creating specialist cadre of SEA investigators.¹³³
- d) Seek to establish clear procedures to address unacceptable behaviors by implementing partners and commercial vendors who operate in the name of the U.N.¹³⁴
- e) Strive to neither solicit nor accept contributions to the work of the U.N. by any person, company or Government that does not demonstrate an active commitment to the values of the U.N. in regard to SEA.¹³⁵
- f) Engage with Heads of State or Government of States that fail to follow up after the U.N. refers SEA cases for their action.¹³⁶
- g) Renew call upon Member States to extend extraterritorial jurisdiction over crimes that may be committed by their nationals when assigned to the U.N. or operating under its authority.¹³⁷

In the Report, the Secretary General elaborated on the commitments he proposed Member States make under the voluntary Compact that he proposes between him and those states.¹³⁸ Some of these commitments reflect proposals already identified above, such as the commitment to cooperate fully with the victims' rights advocate; agree to implementation of procedures to withhold reimbursement to U.N. troops in the event investigations are not undertaken, reported or concluded in a timely manner, and to transfer withheld payments to the Trust Fund in substantiated cases.¹³⁹ Others are complimentary to these earlier proposals, such as appoint focal points in capitals to serve as a direct liaison for victims to address potential paternity claims and assist the U.N. in following up on such cases, and agree to exercise or establish extraterritorial jurisdiction of crimes committed by civilian personnel when assigned to the U.N. or operating under its authority.¹⁴⁰

131. *Id.* ¶ 40.

132. *Id.* ¶ 42.

133. *Id.* ¶ 45.

134. *Special Measures for Protection 2017*, *supra* note 119, ¶ 51.

135. *Id.* ¶ 52.

136. *Id.* ¶ 54.

137. *Id.*

138. *Id.* ¶ 59.

139. *Special Measures for Protection 2017*, *supra* note 119, ¶¶ 59(b)(iii), (xv), (xvi).

140. *Id.* ¶¶ 59(b)(iv), (xviii).

Other proposals, for example some of those relating to the conduct of investigations bear on what has historically been viewed as the exclusive authority of troop contributing states over their contingent members.¹⁴¹ Some of these proposals are familiar, harkening back to the 1995 Zeid report and the more recent Kompas Report. Thus, the Secretary General proposes that in the proposed Compact, Member States commit to joint investigations with the U.N. or with independent, external experts; or agree to “in situ” court martials or permit live streaming to enable victims’ access to criminal proceedings.¹⁴² There is also a proposal that Member States agree to obtain DNA on a voluntary basis from all deployed personnel for purposes exoneration or conviction where such evidence would be indispensable.¹⁴³

The Secretary General specifically seeks to extend protection against SEA to the conduct of non U.N. international forces authorized by the U.N. by asking the Security Council to ensure that when it authorizes such deployments it call on such states to take a variety of steps similar to those in place for U.N. personnel, and to work with the regional organizations which provide forces under the authorization of the U.N. otherwise to reduce the potential for SEA.¹⁴⁴

IV. CONCLUSION

As the foregoing analysis demonstrates, both in regard to the Haiti cholera claims and in regard to SEA, there have been significant developments within the U.N. Those developments with respect to the Haiti cholera claims suggest that the problems relating to the introduction of cholera into Haiti arose more from failures to timely and conscientiously follow the provisions of the existing regime that governs those matters. The question in such circumstances is whether the U.N. can muster the political will to do the right thing in a timely manner. It appears that as the end of his term approached, the immediate past Secretary General paused to consider whether the U.N. under his leadership had failed in the past and that he was determined as he departed office to set a new course going forward. Whatever happens going forward after his departure, the immediate past Secretary General by his actions has helped to restore some of the U.N.’s credibility that had been lost because of this matter over the past few years. That said the question remains as to how the U.N. under the new Secretary General will follow up on this initiative.

The situation regarding SEA is in a sense simpler and more complex. As the Kompas Report amply demonstrates, the problems that have arisen

141. *Id.* ¶ 59(b)(ix).

142. *Id.* ¶¶ 59(b)(ix), (xii).

143. *Id.* ¶ 59(b)(xiii).

144. *Special Measures for Protection 2017*, *supra* note 119, ¶¶ 60–63.

were primarily driven clearly by failures to timely and conscientiously follow existing mandates on U.N. offices and officials and the specific regime that governs SEA. While that Report concludes that “fragmented bureaucracy” contributed to the failure of the U.N. to prevent the sexual abuse of children in the CAR, it also identified a “culture of impunity” and an “abdication of responsibility”. Thus, it is clear from the report that the primary cause was the failure of individuals with clear responsibilities and clear opportunities to act, failed to do so. It is extraordinary that three of the highest-ranking officials in the U.N. were found to have “abused their authority” and that seven other high officials were the subjects of “adverse observations” in this regard. A close reading of those findings must lead one to conclude that the failure in this instance was one of individuals to act conscientiously and timely under existing mandates and policies.

That said, the SEA situation is more complex in that it must address the tensions between a vigorous and timely response to allegations of SEA and the reluctance of troop contributing countries to surrender the exclusive authority they have over their forces in a peacekeeping mission. This tension addresses the regimes that govern SEA, and particularly the response by troop contributing countries to allegations of SEA by their troops. This tension became obvious with the Zeid report and is reflected again in the response of the Secretary General to the twelve Kompas Report recommendations, especially the three that were originally “under consideration” as well as some of the five that were originally “partially accepted.”

The new Secretary General, in his February 2017 SEA report, seeks to resolve that tension, as did the Zeid and Kompas reports, in favor of greater protections and more effective and timely responses to SEA.¹⁴⁵ Specifically, his proposals more fully reflect acceptance of the five recommendations that were previously only “partially accepted” as well as the three that were only “under consideration.”¹⁴⁶ All eight of those recommendations, as previously noted, relate to the traditional exclusive authority of troop contributing states over their forces. There is no doubt that progress has already been made, and more will be made. However, it remains to be seen whether and to what extent the proposals relating to those eight recommendations in the Kompas Report will be accepted by the General Assembly, including most importantly by the troop contributing states who have resisted in the past serious inroads to their traditional exclusive authority.

145. *Id.* ¶ 79.

146. *Id.* ¶ 79(c-j).

