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**2016 Meeting of Legal Advisers of Specialized, Related
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**2016 Meeting of Legal Advisers and Legal Liaison Officers
of UN Offices, Funds and Programmes and other entities**

Sexual exploitation and abuse

Presentation

by

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Colleagues,

Ladies and Gentlemen,

I want to use this meeting to discuss issues relating to current efforts to address allegations of sexual exploitation and abuse. This is an issue that presents major challenges for the UN. Not only does the appalling nature of the allegations, with all the attendant media attention, undermine the credibility and image of the Organization, but addressing the problem itself in the international context of UN operations, with all its multiple aspects, is difficult to do, and there is no easy fix.

Currently, the UN is undertaking major efforts to address the issue of SEA, and the Secretary-General has appointed a Special Coordinator to improve the UN's response. Challenges arise both with respect to how to prevent SEA and how to ensure accountability when it happens.



While issues concerning SEA are not unique to the UN, the UN context makes them particularly challenging to address. Peacekeeping operations are often deployed to fragile States with extremely vulnerable populations. And although the UN has standards in place regarding acceptable conduct for both civilian and military personnel, they are difficult to enforce. When these standards are not met, and when crimes may be committed, they are difficult to prosecute. Depending on the category of personnel involved, the UN will have to rely on the troop contributing State to investigate and prosecute its military personnel, or in the case of civilian personnel, rely on the host State, whose legal system may not be fully functional, or the State of nationality of the accused, to ensure criminal accountability. As we all know, crimes of a sexual nature are difficult to prosecute even in the best conditions, and particularly so when they involve children. In the UN context, this difficulty is compounded by so many factors.

Last year, the issue was brought to the fore when the UN came in for significant criticism both in the media and from Member States with respect to its handling – or mishandling - of allegations of SEA in the CAR. As you will recall, these concerned allegations against members of Operation Sangaris – French troops, operating under the authorization of the Security Council, but not under UN command and control.



A Human Rights Officer working with MINUSCA had interviewed six young children who reported that they had been sexually abused, or seen other children being abused, by members of Operation Sangaris, in exchange for small amounts of food or money. Although the Human Rights Officer informed both the UN Mission and OHCHR of the alleged abuse, no action was taken until months later when the reports were leaked to the French authorities by a senior member of OHCHR. As the reports were leaked in un-redacted form, thus exposing confidential information about victims, UN leadership took disciplinary action against the official who leaked them, rather than focussing on the protection concerns of the children involved. In light of the seriousness of the allegations and the UN's poor response to them, the Secretary-General appointed an external panel to review the UN's response and to make recommendations as to how the UN should address similar allegations in the future, whether in respect of UN or non UN personnel.



This “external panel” was of course what is now known as “the CAR Panel”, chaired by Marie Deschamps, which issued its report in December 2015, and which made a series of 12 recommendations, with potentially far-reaching consequences for how Organization addresses SEA. These recommendations touch on different aspects of the UN’s treatment of this issue, including how we treat victims and how we cooperate with national authorities to ensure accountability. But the most significant aspect to them is the over-arching general approach of treating issues of SEA as a “human rights” issue, with the victim placed at the centre of the UN’s actions. This is a shift for the Organization, which to date, has largely addressed this matter as a conduct and discipline issue, and even then, has struggled to ensure accountability, whether via its own disciplinary mechanisms or by requesting Member States to investigate and prosecute criminal acts by their nationals.



Just to put this in context, the CAR Panel report comes over a decade since the UN last conducted its last major review of SEA issues, following on from reports in 2002 that aid workers and UN peacekeepers were exploiting refugees in West African refugee camps. These reports led to a flurry of activity at UNHQ - which included setting standards of conduct, reviewing legal challenges to accountability, amending the MOU with TCCs to include specific undertakings from TCCs to maintain discipline among members of their military contingents, and to set out roles and responsibilities for the investigation of offences.

To give a brief historical overview, in 2003 the SG issued a Bulletin entitled “Special Measures for Protection from Sexual Exploitation and Sexual Abuse. This was the first time that the Organization set out particular standards of conduct expected of staff, and managers, for the specific purpose of preventing and addressing cases of sexual exploitation and abuse. It now of course applies to all categories of personnel (police, military observers, the military, UNVs, contractors, consultants) either via agreements with TCCs, or via individual undertakings.



Then in 2004, there were shocking reports of SEA by a significant number of UN personnel in the DRC, and it became clear that the measures that were in place were inadequate. This led to the appointment of Prince Zeid as the SG's Special Adviser on addressing SEA. In 2005 the SG presented Prince Zeid's report on the issue to the General Assembly. The report examined the issue in all its aspects, including (i) current standards of conduct; (ii) the investigative process; (iii) organizational managerial and command responsibility; and challenges to individual accountability. Recommendations were made to the Secretariat and Member States.

Following on from the Zeid Report, a Group of Experts was appointed to examine challenges to accountability in respect of officials and experts on mission which came up with a number of proposals to close legal loopholes, most of which have not been implemented by Member States. These included ambitious proposals such as (i) having the UN assist States hosting operations to prosecute crimes committed by UN personnel on their territories; (ii) concluding an international convention that would require States parties to investigate, arrest, prosecute and extradite alleged offenders and to render mutual legal assistance; and (iii) of having the Security Council establish an international court, under Chapter VII of the Charter, to try such crimes.

While these proposals did not receive much support, in 2008 the GA adopted resolution 62/63 in which it requested States to establish their jurisdiction over serious crimes committed by their nationals when serving as UN officials or experts on mission – at least where that conduct also constitutes a crime under the laws of the host State, and to cooperate in facilitating investigations and prosecutions. In the same resolution, the GA



tasked the SG with referring credible allegations of criminal conduct by their nationals to States, and requesting information from them as to what efforts they had made to investigate and prosecute. These were all important steps towards the legal framework that we have in place today.

The recommendations of the CAR Panel build on this work, but as mentioned earlier, take it further, and place SEA under the architecture of the Organization's human rights mechanisms. Recommendation 1 requires that the UN "acknowledge that SEA by peacekeepers ... is a form of CRSV to be addressed under the UN's human rights policies". Recommendation 3 requires that the UN "develop a single policy harmonizing the SEA and human rights policies". Recommendation 4 requires mandatory and immediate reporting of allegations of sexual violence to human rights officers in UN missions, and to the SRSG on SVC, and if it involves children, to the SRSG for CAAC.



While of course it makes sense to treat violations of human rights as such, irrespective of whether the perpetrators are under UN command and control, the implications of such an approach in respect of UN personnel are still in the process of being determined.

First, it is important to note that SEA is broader in scope than the concept of CRSV. While the most serious forms of SEA (e.g. rape, forced prostitution and serious sexual assaults, etc.) by UN personnel (military and civilian) would, depending on whether they have a nexus to an armed conflict, fall within the scope of CRSV, it is clear that not all forms of SEA (e.g. non coercive acts, and acts which would not constitute crimes) would constitute CRSV.

The 2003 SG’s Bulletin “Special measures for protection from SEA” sets out standards of acceptable conduct, rather than a list of crimes or human rights violations which are prohibited. CRSV has been defined as serious sexual violations (such as rape, sexual slavery, forced prostitution, forced pregnancy etc) which are linked directly or indirectly with a conflict. While the two concepts may overlap in respect of the most serious forms of SEA, it is clear that not all forms of SEA will constitute CRSV or other human rights violations. As such, although non-coercive sex with an adult member of a vulnerable population in exchange for gifts or food may fall foul of the SG’s zero tolerance policy for SEA, it will not constitute a crime or a human rights violation.

As existing mechanisms already give effect to fundamental human rights requirements, including the obligation to prevent SEA to investigate and prosecute criminal acts; and to provide victim assistance, we need to



determine what additional specific measures will be taken, and in respect of what acts or omissions? We will also need to assess what will be the “added value” of these mechanisms, and how will they be implemented without causing conflict or overlap with existing mechanisms, and without creating potential additional liabilities for the United Nations.

I would now like to say a few words about cooperation with national authorities. When we cooperate with our own TCCs in respect of crimes which are alleged to have been committed by their personnel serving in UN operations, we have a legal framework in place as to how that cooperation will take place. But when the UN becomes aware of alleged offences committed by international forces, not under UN command and control, such as Operation Sangaris in the CAR, the process is often more complicated.



As the UN's cooperation with national authorities to ensure accountability raises issues of the application of UN privileges and immunities, OLA has an important role to play. An issue that has come to light in respect of allegations involving non UN personnel in CAR, is that UN entities on the ground (such as OHCHR and UNICEF) that obtain information regarding such allegations may not be prepared to divulge information about the victims on the basis of confidentiality concerns.

While these are legitimate considerations, particularly where there may be protection concerns, it goes without saying that it creates serious challenges to ensuring accountability. How can Member States investigate and prosecute serious allegations made against their personnel if the UN will not share witness statements, or identify the alleged victims?

While this challenge may not be unique to UN operations, it is symptomatic of the kinds of issues that arise in this context. In a national context, law enforcement authorities which investigate criminal cases are also available to ensure protection for victims and witnesses. In the context of peacekeeping operations, this is often not possible.



The CAR Panel noted that the principle of confidentiality is central to the UN’s mandate to protect civilians, and that sharing information that has been provided under conditions of confidentiality, without first obtaining the individual’s informed consent to disclosure, could endanger the security of the individual or occasion a violation of his/her human rights. At the same time, it noted that sharing of information may be necessary to hold perpetrators to account and to allow for effective prosecution.

The CAR Panel highlighted the importance of addressing this conundrum. In its Recommendation 6, it required that the UN review “UN policies dealing with confidentiality in order to establish a proper balance between informed consent, protection and accountability”. OLA conducted a detailed review of the legal framework which applies in respect of this issue, together with all the relevant policies from within the Secretariat and other subsidiary bodies of the UN. Of 18 relevant policies, OLA found that 10 of these struck an appropriate balance between the need to safeguard victim information with the requirement that under appropriate circumstances, such information can and should be shared with national authorities for purposes of accountability. OLA found that the remaining 8 focussed only on maintaining the confidentiality of such victim information and provided little, if any guidance to UN officials about when and how such information can be shared with national authorities for accountability purposes.



Given the number and diversity of policies on the treatment of confidential victim information, going forward OLA recommends that the following elements be considered when UN entities issue policies, directives or guidelines concerning the treatment of confidential victim information:

- that any assurance given by a UN official that the confidentiality of information about victims or other third parties will be maintained, should be as precise as possible, - including as to what circumstances confidential information might need to be disclosed to national authorities for purposes of accountability;
- in what circumstances UN officials may give confidentiality assurances to ensure that the confidentiality undertakings do not exceed what is strictly necessary and appropriate; and whether such undertakings should provide for the possibility of modifying the confidentiality when there are compelling reasons to do so for purposes of accountability; and
- the need to set forth clear guidance as to the circumstances in which confidential information can be disclosed to national authorities for purposes of accountability.



These are just some of the issues that we in OLA are working on at the moment in connection with SEA.

Of course, the recommendations of the CAR Panel also relate to other issues, - including how we address issues concerning privileges and immunities, and OLA is now taking a more proactive approach to ensure the cooperation and active participation of UN personnel in accountability processes, where possible.

The CAR Panel also recommended that the UN re-negotiate its legal arrangements with TCCs so as to allow host countries to exercise subsidiary jurisdiction to prosecute crimes of sexual violence by peacekeepers. This would be a major change to the existing legal framework where TCCs have exclusive criminal jurisdiction over their personnel serving in UN operations, and is likely to be a greater challenge.



Finally, in March this year, the Security Council adopted resolution 2272 which is the Council's first resolution specifically addressing sexual exploitation and abuse. This resolution is also significant as it provides important tools to the Secretary-General to take effective measures to address SEA, including the repatriation of entire units where there is credible evidence of widespread or systemic SEA, and clear authority to replace military units or formed police units where a particular TCC/PCC has failed to take appropriate steps to investigate allegations, hold perpetrators accountable, or inform the Secretariat of the relevant actions taken.

I'll stop here, and would now like to invite you all to participate in an active discussion on these issues, and how your respective agencies address issues of SEA.