**Submission to the Office of the High Commissioner on Human Rights (OHCHR):**

 **“Protecting the rights of the child in humanitarian situations”**

## **Overview**

This submission is for the OHCHR in response to its call for inputs on information relevant to the report it is preparing: “Protecting the rights of the child in humanitarian situations.” The report will be presented to the Human Rights Council at its thirty-seventh session to inform its annual day of discussion on children’s rights.

Legal Action Worldwide (LAW) is a think tank of lawyers who provide creative legal assistance in fragile and conflict-affected states. LAW’s areas of expertise include the accountability of security forces, natural resource exploitation and displacement, and sexual violence. LAW’s current projects include a project seeking to provide creative legal solutions to ending Female Genital Mutilation/Cutting (FGM/C) and a project addressing Sexual Exploitation and Abuse (SEA) committed by peacekeepers and security forces.

This submission will address some of the main challenges relevant to protecting the rights of the child in humanitarian situations within LAW’s areas of expertise, including sexual exploitation and abuse (“SEA”) perpetrated by security forces, including, United Nations (“UN”) and African Union (“AU”) peacekeepers and FGM/C.

## **Sexual exploitation and abuse (“SEA”)**

### **1.1 Definition of SEA**

The UN Secretary-General in *“Special measures for protection from sexual exploitation and sexual abuse”[[1]](#footnote-1)* (2003) defines SEA as follows:

* ***Sexual exploitation*** means “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”;
* ***Sexual abuse*** means the “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions”.[[2]](#footnote-2)

SEA covers a “wide spectrum of behaviour”, including, rape, gang rape, sexual assault, sexual slavery, sex trafficking, prostitution, and ‘transactional’ or ‘survival’ sex.[[3]](#footnote-3) Victims of SEA have been children, women and men, some reports have highlighted that SEA is, in some contexts, disproportionately perpetrated against children, particularly young girls.[[4]](#footnote-4)

### **1.2 Allegations of SEA against children in peacekeeping missions**

SEA perpetrated by security and peacekeeping forces is not a recent phenomenon[[5]](#footnote-5). Cases against UN peacekeeping personnel have been reported in Bosnia and Herzegovina, Kosovo, Cambodia, Timor-Leste, the Democratic Republic of the Congo, Haiti, Liberia, South Sudan, Somalia and the Central African Republic (CAR).[[6]](#footnote-6) Allegations of SEA committed by African Union (“AU”) peacekeepers have also been made in the context of Somalia[[7]](#footnote-7) and the CAR[[8]](#footnote-8).

**1.3 Policies for the prevention of SEA**

In 2003, the UN Secretary-General issued a bulletin instituting a zero-tolerance policy to SEA prohibiting all sexual activities with persons below 18 years and all forms of transactional sex, and strongly discouraging sexual relationships between UN personnel and host populations.[[9]](#footnote-9) This was a ground-breaking step and catalysed a range of policy documents and reports on SEA by UN peacekeepers.[[10]](#footnote-10) A new strategy has been presented this year with a view to responding to SEA and therefore to upholding victims’ rights. As a result, a senior human rights expert has been appointed at the Assistant Secretary-General Level in charge of reporting directly to the Secretary General[[11]](#footnote-11). In the same vein, the African Union Commission set out a specific policy and a Reviewed Code of Conduct which prohibit SEA[[12]](#footnote-12).

In 2011, the UN Secretary-General adopted a human rights due diligence policy setting out measures that United Nations support “cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures”.”[[13]](#footnote-13) The UN has provided support to regional peacekeeping operations, including AU operations, for example, to AMISOM in Somalia. Thus, the UN also has a responsibility to stop its support to AMISOM if it has substantial grounds to believe that AMISOM personnel are perpetrating SEA[[14]](#footnote-14).

### **1.4 Inadequacy of current practices targeting SEA**

In 2004, UN Secretary General asked the Permanent Representative of Jordan, His Royal Highness Prince Zeid Ra’ad Zeid al-Hussein to prepare a comprehensive report on sexual exploitation and abuse in UN peacekeeping missions.[[15]](#footnote-15) The report held that while many important efforts were under way to address SEA, they were “ad hoc and inadequate to deal with the problem.”[[16]](#footnote-16) It’s recommendations included increased propagation of UN standards of conduct, reforming the investigative process, including the establishment of a permanent professional investigative mechanism, strengthening the accountability of the organization, managers and commanders, and ensuring individual disciplinary, financial and criminal accountability.[[17]](#footnote-17) In response to the Zeid Report, the UN formed a Group of Experts to advise on overcoming legal barriers to criminal accountability of peacekeepers, staff, and experts on mission.[[18]](#footnote-18) Their 2006 report provides a comprehensive overview of the barriers to accountability and steps to take to address them.[[19]](#footnote-19)

The UN has taken steps to implement the Zeid report recommendations, including the establishment of a new Conduct and Discipline Unit (CDU), the overhaul of the administrative justice system, and the development of training, investigative and victim assistance procedures.[[20]](#footnote-20) However, more needs to be done, particularly concerning increasing criminal accountability and access to justice for victims of criminal offences committed by military and non-military peacekeeper personnel. [[21]](#footnote-21)

UN and African Union troop contributing countries (“TCCs”) have exclusive jurisdiction over military contingents for any criminal offences they commit in host countries. The UN Model Status of Forces Agreement (SOFA) provides that military members are generally immune from prosecution in the host country, instead the TCC is responsible for investigating and prosecuting alleged misconduct of members of its military. [[22]](#footnote-22) Non-military peacekeeping personnel, including peacekeeping officials, UN staff, and experts on mission, have functional immunity, meaning they cannot be prosecuted or incur civil liability for acts carried out in their official capacity.[[23]](#footnote-23) Thus, TCC’s do not always have exclusive jurisdiction over non-military personnel, however, “overwhelming” practice has been for the UN to refer the case to TCCs anyway.[[24]](#footnote-24)

TCCs do not always hold perpetrators to account for a number of reasons. Firstly, there may be a lack of political will. Further, “gaps or loopholes may prevent certain categories of persons or certain types of offences from being prosecuted.”[[25]](#footnote-25) Finally, there may be practical difficulties to holding trials, such as accessing evidence or there may be legislative barriers, for example, local laws that do not provide for extraterritorial prosecutions. [[26]](#footnote-26)

### **1.3 Recommendations for more effective approaches to combating SEA, ensuring access to justice and that the right of the child to participate and to be heard is respected**

Article 12 of the Convention on the Rights of the Child (“CRC”) provides that a child shall have the right to be heard in any judicial or administrative proceedings affecting them. This is “one of the fundamental values of the Convention.”[[27]](#footnote-27) For child victims, this means that “every effort has to be made to ensure that a child victims or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or her involvement in the judicial process.”[[28]](#footnote-28) Current practice in seeking accountability for child victims of SEA violates article 12 as victims are not consulted and there has been an ongoing trend of impunity for crimes of SEA committed by peacekeeping personnel.

Recommendations to increase criminal accountability, include extending jurisdiction to investigate and prosecute SEA to host and other states, addressing disparities in domestic criminal law and/or developing a new international convention to regulate the criminal liability of peacekeepers.[[29]](#footnote-29) Steps to implement these recommendations would be welcome and would signal that SEA committed by peacekeepers against women and children in humanitarian situations is being taken seriously and would also serve to decrease impunity.

LAW recommends that certain types of SEA be treated as constituting international war crimes and/or crimes against humanity. Reframing crimes constituting SEA, including transactional sex, as international crimes could increase the impetus to adequately investigate and prosecute it and instigate behavioural change in the conduct of involved individuals, governments, and international support networks, including the UN and AU.

## **FGM/C committed in humanitarian contexts**

### **2.1 Challenge of FGM/C**

A violation of the rights of the girl child in humanitarian situations that is often neglected is the "resurgence of female genital mutilation within the community under attack, as a way to reinforce cultural identity".[[30]](#footnote-30) FGM/C is mostly carried out on young girls between infancy and age 15. For example, in Somalia, the majority of FGM victims are aged 4-9 years old.

There are severe consequences to the infliction of FGM/C in humanitarian situations. Firstly, FGM/C is often a prerequisite to early forced marriages which increase in such situations[[31]](#footnote-31). Further, there is generally a lack of adequate healthcare and psychosocial services in humanitarian situations. FGM/C can have serious health complications and risks, these rise substantially if left untreated. For example, there is increased risk of maternal and prenatal mortality due to FGM/C, this is further exacerbated in humanitarian situations due to a lack of trained medical personnel and facilities.[[32]](#footnote-32) Gender-based violence increases during humanitarian situations. Women and girl children who have been subject to FGM/C face serious complications from sexual violence, for example, for a survivor of Type III FGM/C (infibulation), “forced penetrative sex can cause severe physical trauma, haemorrhage, shock, and in some cases death.”[[33]](#footnote-33)

One challenge to protecting the rights of the child in humanitarian situations to not be subjected to FGM can be the lack of criminalization or enforcement of legislation criminalizing FGM/C. However, international law and international legal mechanisms could provide an avenue for redress and set precedents to better protect the rights of the girl child to not be subjected to FGM/C.

### **2.2 Recommendation of recognizing FGM/C as torture in order to better protect the rights of the girl child**

A consensus is emerging amongst international legal scholars whereby FGM/C can amount to torture under international law[[34]](#footnote-34). The prohibition of torture is absolute and is recognized as a fundamental principle of international law. FGM/C meets the criteria under the UN Convention against Torture. According to article 1, torture entails the intentional infliction of severe pain and suffering for a prohibited purpose with the involvement of a public official. Firstly, any type of FGM/C causes not only immediate but also long-term pain and suffering, both mental and physical. Secondly, it is intentionally inflicted, although the perpetrators argue that FGM/C is necessary to comply with a traditional practice and not to hurt, objectively the intent is to harm as it implies the cutting and the removal of a girl’s body. Thirdly, the purpose of FGM/C is prohibited as it is a discriminatory practice. In addition to undermining the right to physical and mental integrity as well as the right to health, FGM/C is inherently discriminatory, as only women and girls are subjected to it. Finally, the last criteria for torture is that a public official must have instigated, consented or acquiesced to the act. It is important to highlight that an act perpetrated by private person is considered as torture when the state has failed to prevent and protect victims from it. The Committee against Torture has applied this principle to States Parties’ “failure to prevent and protect victims from gender-based violence such as […] female genital mutilation.”[[35]](#footnote-35)

The practice violates the right of the child enshrined by the Convention on the Rights of the Child that provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment (Article 37).

LAW recommends recognizing that FGM/C constitutes torture under international law in order to treat this crime with the gravity it deserves, afford victims of FGM/C with remedies, and protect women and girls from FGM/C in the future.

1. UN Secretary General, *Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ST/SGB/2003/13, (15 October 2003), available at <<https://oios.un.org/resources/2015/01/ST-SGB-2003-13.pdf>>. [hereinafter “Secretary-General’s Bulletin”]. [↑](#footnote-ref-1)
2. Secretary-General’s Bulletin section 1. [↑](#footnote-ref-2)
3. Zeid report para. 3. [↑](#footnote-ref-3)
4. Corinna Csaky, *No one to turn to: the under-reporting of child sexual exploitation and abuse by aid workers and peace-keepers*, (2008) available at < http://www.alnap.org/resource/20082> p.5. [↑](#footnote-ref-4)
5. United Nations General Assembly, *Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly: A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, A/59/710 (24 March 2005), available at < https://www.globalpolicy.org/images/pdfs/zeidrep.pdf> [hereinafter “Zeid report”] para. 3. [↑](#footnote-ref-5)
6. Marie Deschamps et al., *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (17 December 2015) available at <<http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf>> 15. *See* Zeid report para.1. [↑](#footnote-ref-6)
7. Human Rights Watch, “*The Power These Men Have Over Us”: Sexual Exploitation and Abuse by African Union Forces in Somalia,* (2014), available at <https://www.hrw.org/sites/default/files/report_pdf/somalia0914_4up.pdf> [hereinafter “HRW 2014 report”]. [↑](#footnote-ref-7)
8. HRW, *“Central African Republic: Ugandan Troops Harm Women, Girls”,* (2017), available at < <https://www.hrw.org/news/2017/05/15/central-african-republic-ugandan-troops-harm-women-girls>>. [↑](#footnote-ref-8)
9. Secretary-General’s Bulletin”, para.3.2. *See* Zeid report para.4. [↑](#footnote-ref-9)
10. HRW 2014 report, p.3. [↑](#footnote-ref-10)
11. UN Secretary-General, *“Special measures for protection from sexual exploitation*

*and abuse: a new approach”,* (2017) available at < https://conduct.unmissions.org/sites/default/files/a\_71\_818\_1.pdf>. [↑](#footnote-ref-11)
12. African Commission in Somalia, *“Policy on Prevention and Response to Sexual Exploitation and Abuse”*, (2013), available at <http://amisom-au.org/wp-content/uploads/2014/01/Easy-to-read-guide\_AMISOM-SEA-POLICY.pdf>. [↑](#footnote-ref-12)
13. United Nations General Assembly Security Council, *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to President of the Security Council: Human rights due diligence policy on United Nations support to non-United Nations security forces,* A/67/775-S/2013/110, (5 March 2013) available at <http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/20thsession/IdenticalLetterSG25Feb2013\_en.pdf> [↑](#footnote-ref-13)
14. HRW 2014 Report p. 33. [↑](#footnote-ref-14)
15. *See* Zeid report; Jenna Stern, *Reducing Sexual Exploitation and Abuse in UN Peacekeeping: Ten Years after the Zeid Report*, Civilians in Conflict (February 2014) available at <<https://www.stimson.org/sites/default/files/file-attachments/Policy-Brief-Sexual-Abuse-Feb-2015-WEB.pdf>> [hereinafter “Stern, Reducing SEA”] p.5. [↑](#footnote-ref-15)
16. Zeid report para.11. [↑](#footnote-ref-16)
17. Zeid report summary. *See* Stern, Reducing SEA p.5. [↑](#footnote-ref-17)
18. Carla Ferstman, United States Institute of Peace, *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*, (September 2013) [hereinafter “Ferstman, Criminalizing SEA”] available at <<https://www.usip.org/sites/default/files/SR335-Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf>> p.6. [↑](#footnote-ref-18)
19. *See* United Nations General Assembly, Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations: *Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts in mission with respect to criminal acts committed in peacekeeping operations,* A/60/980, (16 August 2006). [↑](#footnote-ref-19)
20. Stern, Reducing SEA p. 5. [↑](#footnote-ref-20)
21. *See* Ferstman, Criminalizing SEA. [↑](#footnote-ref-21)
22. Stern, Reducing SEA p. 10. [↑](#footnote-ref-22)
23. Ferstman, Criminalizing SEA p.7. [↑](#footnote-ref-23)
24. *Ibid*. p.4. [↑](#footnote-ref-24)
25. *Ibid*. [↑](#footnote-ref-25)
26. *Ibid*. [↑](#footnote-ref-26)
27. United Nations, Committee on the Rights of the Child*, General Comment No. 12: The right of the child to be heard* (1 July 2009) CRC/C/GC/12 para 2. [↑](#footnote-ref-27)
28. *Ibid*. para 63. [↑](#footnote-ref-28)
29. Ferstman, Criminalizing SEA p.6-10. [↑](#footnote-ref-29)
30. World Health Organisation, *Violence against women, In situations of armed conflict and displacement*, (1997). [↑](#footnote-ref-30)
31. 28 Too Many, "*The Impact Of Emergency Situations On Female Genital*" available at: <<http://28toomany.org/media/uploads/the_impact_of_emergency_situations_on_fgm.pdf>> para. 3.3. [↑](#footnote-ref-31)
32. *Id*. para. 3.5. [↑](#footnote-ref-32)
33. *Id*. para. 3.6. [↑](#footnote-ref-33)
34. Legal Action Worldwide*, “FGM should be recognised as a form of torture”,* (2017), available at <<http://www.legalactionworldwide.org/fgm-recognised-form-torture/>>. [↑](#footnote-ref-34)
35. UN Committee against Torture, General Comment No 2, UN Doc CAT/C/GC/2 (2008). [↑](#footnote-ref-35)