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Preventing Sexual Exploitation and Abuse in the Aid Sector – Regulative Approach

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About the IJL

The International Association of Jewish Lawyers and Jurists (IJL) strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions. The IJL is especially committed to issues that are on the agenda of the Jewish people.

The IJL was established in 1969 by three distinguished human rights leaders – the 1968 Nobel Peace Prize laureate Rene Cassin, Justice Haim Cohen of the Israeli Supreme Court, and Justice Arthur Goldberg of the US Supreme Court. The IJL is an accredited ECOSOC Special Consultative NGO at the United Nations.

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Preventing Sexual Exploitation and Abuse in the Aid Sector – Regulative Approach

1. Introduction

Aid sector operations¹ are conducted all over the world. Such operations usually take place in situations of extreme conditions, including armed conflicts, natural disasters, or as a consequence thereof (e.g. in refugee and internally displaced persons camps). In recent years, and especially in the wake of #MeToo and #AidToo campaigns, attention to the problem of sexual exploitation and abuse (SEA) in the aid sector has grown and a process to prevent sexual exploitation and abuse (PSEA) has been going on. At the same time and spurred by a localization debate, there are strong calls for the aid sector to step down from its ivory tower and seek guidance from and ensure leadership of members of local communities across operations.

For the purpose of this paper we refer to the term “Sexual Exploitation and Abuse” in the widest scope. For practical reasons, we adopt the World Health Organization’s definition according to which:

Sexual exploitation: Actual or attempted abuse of a position of vulnerability, power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another; **Sexual abuse:** Actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.²

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¹ We refer to the term “aid sector operations” in a wide scope which includes different types of operations conducted in order to provide aid, goods, treatment, etc. to affected communities.

² See: www.who.int/about/ethics/sexual-exploitation-abuse

Moreover, we take a broad approach to SEA which includes not only sexual and gender-based abuse and exploitation of people seeking or receiving humanitarian or development assistance by aid or peacekeeping actors, but also SEA occurring within organizations and by third-party-perpetrators against aid workers.

SEA during crisis situations is not unique to the aid sector. Nevertheless, the pervasive nature of the phenomenon, and the exploitative behavior which takes advantage of the extreme conditions, create a unique set of circumstances.³ While acknowledging that individual incidents will probably not disappear, it is important to take this process forward and identify the different types of relief operations, the different SEA challenges that they face, and available preventive practice.

The work of the aid sector is important and often indispensable. This means that while SEA cannot be overlooked or tolerated, it is also important to avoid over-regulating this sector in a manner that will impede the crucial contribution of this sector.

This paper does not aim to provide go-to solutions, but rather to help promote the discussion towards a (better) approach for PSEA in the aid sector by addressing potential regulative strategies.

2. Recent IJL Activity on the Topic

In the last year, the IJL has stepped up its activity on the topic of PSEA in the aid sector with a view to raise awareness of the problem and reinvigorate the debate. Much of the discussion provided in this policy paper is based on insights from these activities.

(a) Academic Workshop on Legal Aspects of Relief Operations (May 2019)

In May 2019, the IJL organized an academic workshop in collaboration with the Minerva Center for the Rule of Law under Extreme Conditions, at the University of Haifa,⁴ and the Israeli School

³ Sean O'Neill, Disaster zones are a magnet for sexual predators, www.thetimes.co.uk/article/disaster-zones-are-a-magnet-for-sexual-predators-h9nz0pbz7

⁴ <http://minervaextremelaw.haifa.ac.il/>

of Humanitarian Action.⁵ The event, titled “Legal Aspects of Relief Operations,” gathered over 40 experts from all over the world, including scholars, humanitarian activists and legal advisers, with different expertise and from various disciplines within the aid sector.

The workshop included three main panels:⁶

- (i) Standardization, Regulation, and Liability of Relief Actors – **Ms. Aninia Nadig**, Policy and Practice Manager, Sphere;⁷ **Dr. Odeda Benin-Goren** “the EMT initiative”;⁸ **Mr. Itay Epshtain** - International Lawyer, Magen David Adom;⁹ and **Ms. Shadia Sbait**, Strategy and Development Advisor, Humanity Crew.

The speakers addressed advantages and challenges of adopting and implementing professional standards within aid sector operations on foreign land. The speakers addressed specific standardization models such as the “Sphere Handbook”,¹⁰ which provides recommended guidelines and core humanitarian standards; the EMT Initiative,¹¹ which provides minimum standards for emergency medical teams (EMTs); and the IDRL Guidelines,¹² which address international disaster relief assistance (IDRL).

- (ii) Preventing Sexual Exploitation and Abuse in the Aid Sector – **Dr. Stephanie Cartier**, Legal Officer, UN Office of the Legal Affairs; **Mr. Kevin Chang**, Human Rights Legal Adviser and Visiting Scholar in Peace and Conflict Studies, University of Sydney;¹³

⁵ www.bhumanitarian.com/

⁶ The full program of the event is available at: <http://minervaextremelaw.haifa.ac.il/index.php/en/32-center-events/330-legal-aspects-of-relief-operations>

⁷ Video of presentation available at: <https://youtu.be/WgHCbleo-OY>

⁸ Video of presentation available at: <https://youtu.be/5XtVeCJc6gw>

⁹ Video of presentation available at: <https://youtu.be/jF5AVtev5to>

¹⁰ <https://spherestandards.org/wp-content/uploads/Sphere-Handbook-2018-EN.pdf>

¹¹ <https://extranet.who.int/emt/>

¹² www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/

¹³ Video of presentation available at: <https://youtu.be/BXqDRUvauq4>

Mr. Jerry Locula, Former Human Rights Officer UNMISS (UN Mission in South Sudan);¹⁴ and **Mr. Larry Bottinick**, Senior Legal Officer, UNHCR.

The speakers addressed the issue of PSEA mainly in the context of the UN system, including implementation of the “zero tolerance” approach by imposing administrative and disciplinary measures against UN employees who were involved in SEA incidents; dealing with peacekeeping forces operating in crisis areas; the problems of UN immunity; encouraging donor states to prevent impunity; and the manner in which UN agencies address PSEA internally.

- (iii) Maintaining Human Rights of the Addressed Population - **Ms. Ira Ryk-Lakhman**, Tadmor-Levy & Co.;¹⁵ and **Ms. Rosa Da Costa**, Lecturer, Tel-Aviv University.

In this panel, the speakers addressed the maintenance of human rights of the addressed and affected populations from administrative aspects, as well as the use of advanced technology such as blockchain.

(b) Side Event at the HRC 41st Session (June 2019): Preventing Sexual Exploitation and Abuse (PSEA) in the Aid Sector

During the 41st session of the Human Rights Council, the IJL held a side event on this topic, which included a panel of experts.¹⁶ The discussion included three expert speakers: **Ms. Asmita Naik**, International Human Rights Consultant, **Dr. Miranda Brown**, PSEA Manager from CHS-Alliance, and **Ms. Gry Tina Tinde**, PSEA Adviser from the International Federation of the Red Cross and Red Crescent Societies. The discussion was moderated by IJL’s Director of International Organisations, **Adv. Ido Rosenzweig**.

¹⁴ Video of presentation available at: <https://youtu.be/5I-P61eLSNM>

¹⁵ Video of presentation available at: <https://youtu.be/Y881g6D07Kc>

¹⁶ The event was co-sponsored by the Permanent Mission of the Republic of Croatia to the UN in Geneva, and the Permanent Mission of Israel to the UN in Geneva. A video of the entire side event is available at: <https://youtu.be/7jg9lu3KeMI>

In the discussion, the three experts addressed key issues of PSEA in the aid sector including the progress in the PSEA process in the last couple of decades, the importance and the practical value of adopting an internal PSEA policy, and the important role of donors, legal advisers and managers in ensuring the effectiveness of such policies.

The experts suggested some practical goals for PSEA in the aid sector in 2020.¹⁷ These included that all organizations should have effective, safe, confidential and functional complaint mechanisms; organizations should embrace and salute those who raise concern about SEA incidents; The Human Rights Council should establish a Special Procedure to review PSEA (such as an independent expert or a special rapporteur); access of SEA victims to health services must be ensured; and evidence must be properly collected to hold up in court.

(c) Statements during Human Rights Council Sessions in 2019

- (i) HRC 40th session – March 2019 – The IJL issued a statement calling for commencing a process aimed at developing clear and universal standards for PSEA in the aid sector, in collaboration with the relevant actors, including UN agencies and NGOs.¹⁸
- (ii) HRC 42nd session – September 2019 – The IJL issued a statement calling for initiating a working group on this matter, in collaboration with the relevant actors, including UN agencies, sponsor states, humanitarian aid organizations, scholars, the Special Rapporteurs, and NGOs.¹⁹

Key elements raised by the experts in the side event and in the workshop are incorporated in this policy paper.

¹⁷ IJL's side event on PSEA in the aid sector, supra note 16 at 54:30 and onward.

¹⁸ Statement at the HRC 40th session, March 2019 delivered by Mr. Ido Rosenzweig. The video of the statement is available at: <https://youtu.be/-Gek4eZDbYc>

¹⁹ Statement at the HRC 42nd session, September 2019 delivered by Mr. Maurice Kirschbaum. The video of the statement is available at: <https://youtu.be/PXHPikJwGTw>

3. PSEA in the Aid Sector – Exploring the Problem

Aid sector operations are conducted all over the world. Such operations usually take place in situations of extreme conditions, including armed conflicts, natural disasters, or as a consequence thereof (e.g. in refugee and internally displaced persons camps).

The aid sector is not unified. It is composed of various types of relief operations and actors, including, inter alia, UN affiliated operations (such as peacekeeping missions), UN agencies (such as UNHCR), INGOs, NGOs, individuals, community-based initiatives, and State operations. Relief operations differ in their characteristics, such as the duration, size, field of operation, capacity, interaction with the local population, etc.

In recent years, awareness of the problem of SEA in the aid sector has grown. The rise of *#MeToo* and *#AidToo* campaigns has helped to bring this problem, and how it affects people who depend on life-saving humanitarian aid, to the attention of mainstream media and public knowledge.

While SEA is not a phenomenon unique to the aid sector, the difficult circumstances, including the overseas character of such operations, combined with the fragile conditions and often weak rule of law institutions on the ground, create an atmosphere conducive for SEA.

Ensuring justice for those experiencing SEA, or committing it, requires a concerted, joint effort by governments and aid actors. To date, aid actors have been expected to prevent and respond to SEA mostly by themselves, and they have tended to fall back on policy development and staff training, since domestic law enforcement remains outside their mandate. Where SEA is illegal, it is crucial that national judiciary systems educate themselves on causes of and solutions to ending sexual and gender-based violence, which includes SEA, and ensure that these acts are investigated and prosecuted like other criminal offenses. When the alleged perpetrator works for the UN or other international organizations and is thus entitled to immunity, this protection needs to be lifted or be defined as not applicable to SEA. The UN Secretary-General, António Guterres, stated in February 2018 that the UN will not seek immunity in cases of SEA.²⁰ Nevertheless, examples of SEA cases where the UN has lifted immunity are not readily available.

²⁰ <https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/840/84012.htm>

SEA within relief operations can be perpetrated by different stakeholders. It can take place within the organization, by humanitarian staff towards members of affected communities, by members of the affected communities towards relief staff, as well as by third parties towards affected communities and humanitarian staff.

Unfortunately, there is no shortage of examples, but in order to show the diversity of the threats it is important to address a few scenarios that took place in recent years.²¹ The purpose of the examples following is not to point a finger at a specific mission or organization, but rather to show that SEA, in a broad definition that encompasses sexual and gender-based violence involving the aid sector, is not unique to any specific sector or sub-sector or framework within the aid sector:

(a) **SEA by UN Peacekeepers against the local population:** In 2017, when the personnel of the UN Stabilisation Mission in Haiti (MINUSTAH) departed after more than a decade (2004 – 2017), they left behind hundreds of children born to local women and girls that they had impregnated. Some of them were only 11 years-old at the time.²²

(b) **SEA By third party (local soldiers) against aid workers:** On July 11, 2016, a civilian journalist was killed and several aid workers were subjected to sexual assault, rape and gang rape by South Sudanese soldiers in the Terrain hotel compound outside of Juba, South Sudan.²³ In September 2018, ten South Sudanese soldiers were convicted and sentenced to jail for rape and murder.²⁴

²¹ Sabine Lee & Susan Bartels, 'They Put a Few Coins in Your Hand to Drop a Baby in You': A Study of Peacekeeper-fathered Children in Haiti, International Peacekeeping, available at: www.tandfonline.com/doi/pdf/10.1080/13533312.2019.1698297

²² Lee & Bartels, supra note 21; see also Michael Brice-Saddler, U.N. peacekeepers fathered, then abandoned, hundreds of children in Haiti, report says, available at: www.washingtonpost.com/world/2019/12/18/un-peacekeepers-fathered-then-abandoned-hundreds-children-haiti-report-says/

²³ Flora McCrone, War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016–18, Small Arms Survey Briefing paper (August 2019), available at: www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf; Testimony of survivors is available at: www.youtube.com/watch?v=tYoIRwm8iX8

²⁴ Denis Dumo, South Sudan soldiers sentenced to jail for murder, rape in 2016 hotel raid, Reuters, available at: www.reuters.com/article/us-southsudan-security/south-sudan-soldiers-sentenced-to-jail-for-murder-rape-in-2016-hotel-raid-idUSKCN1LM0XK

- (c) **SEA By third party (community leaders) against beneficiaries:** On April 25, 2019, Human Rights Watch published a report about SEA taking place in Mozambique following cyclone Idai by local community leaders who demanded sexual favors in exchange for humanitarian supplies, including food, that they were given as humanitarian aid for free distribution among the local community.²⁵
- (d) **SEA By aid workers against beneficiaries:** according to a report by UNFPA on gender based violence in Syria in 2017, “Sexual exploitation by humanitarian workers at distributions was commonly cited by participants as a risk faced by women and girls when trying to access aid.” ... “[T]he more the girl gives to the distributor, the more aid she will receive”²⁶ to the point that some women chose to refuse to go to the distribution centers to avoid the social presumption of what they had to do in order to receive the aid.²⁷
- (e) **SEA By aid workers against aid workers:** On February 7, 2015, Megan Nobert from UNICEF was drugged and raped by a fellow humanitarian, a colleague who worked as a contractor for UNICEF, while working in a camp in Bentiu, South Sudan.²⁸

In August 2017, Report the Abuse published the conclusions of a survey among over 1,000 aid workers (96% of which were expatriate staff) about SEA incidents that they had experienced in the course of their work:²⁹

²⁵ Mozambique: Cyclone Victims Forced to Trade Sex for Food, Community Leaders Exploit Vulnerable Women, available at: www.hrw.org/news/2019/04/25/mozambique-cyclone-victims-forced-trade-sex-food

²⁶ Whole of Syria Gender-Based Violence Area of Responsibility: Voices from Syria 2019 - Assessment Findings of the Humanitarian Needs Overview, UNFPA, p. 30, available at: [www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/2017-12 voices from syria 2nd edition.pdf](http://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/2017-12%20voices%20from%20syria%202nd%20edition.pdf)

²⁷ James Landale & Vinnie O'Dowd, Syria conflict: Women 'sexually exploited in return for aid', available at: <https://www.bbc.com/news/world-middle-east-43206297>

²⁸ <https://news.sky.com/story/aid-worker-i-was-drugged-and-raped-by-a-fellow-humanitarian-11249057>

²⁹ Report the Abuse, Humanitarian Experiences with Sexual Violence: Compilation of Two Years of Report the Abuse Data Collection, August 2017, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/RTA%20Humanitarian%20experiences%20with%20Sexual%20Violence%20-%20Compilation%20of%20Two%20Years%20of%20Report%20the%20Abuse%20Data%20Collection.pdf>; see also House of Commons International Development Committee "Sexual exploitation and abuse in the aid sector"

- 1) 87% noted that they knew a colleague who had experienced sexual violence in the course of their humanitarian work.
- 2) 41% reported having witnessed a sexual violence incident against a colleague, and
- 3) 72% of those reporting were survivors of sexual violence. **64% of them noted that the assault was by a colleague.**

Since the early 1990s, preventing sexual exploitation and abuse (PSEA) has been discussed in different fora. SEA was found to be rampant in the UN Transitional Authority in Cambodia, and alleged perpetrators included military, police and civilian staff and staff of other aid actors in the country. The UN Special Representative to Cambodia, Yasushi Akashi, sparked outrage when he said it was “natural” for hot-blooded young people who had endured the rigors of the field to want to have a few beers and to chase “young beautiful beings of the opposite sex.”³⁰ The UN staff’s immunities and privileges and the Status of Force Agreements with States sending troops, made it almost impossible to prosecute SEA perpetrators connected with the UN or peacekeeping operations. Therefore, the UN has established internal overview mechanisms to address PSEA, including the Special Coordinator on improving the United Nations response to SEA, the Victims’ Rights Advocate, complaint mechanisms, a trust fund and more.³¹ The Secretary General, who announced a “zero tolerance policy,” also addresses this issue on a regular basis, including by explicitly recognizing the UN’s obligation to combat SEA within its own operations.³² Recently, the Secretary General has also announced the appointment of a Civil Society Advisory Board on prevention of sexual exploitation and abuse by United Nations personnel and by non-United Nations forces operating pursuant to a Security Council mandate.³³

Outside the UN, the situation has received less attention. Although with the increasing awareness of PSEA within aid sector operations, and especially the rise of the *#MeToo* and *#AidToo*

[Eighth Report of Session 2017–19, p. 66, available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/840/840.pdf](#)

³⁰ Sandra Whitworth, *Men, Militarism, and UN Peacekeeping: A Gendered Analysis* (2004), p. 71; See also <https://www.phnompenhpost.com/post-weekend/i-dont-think-people-learned-lesson-untac>

³¹ See www.un.org/preventing-sexual-exploitation-and-abuse/

³² For example see www.youtube.com/watch?v=oO6sWiv9hws

³³ www.un.org/preventing-sexual-exploitation-and-abuse/content/civil-society-advisory-board-prevention-sexual-exploitation-and-abuse

campaigns, the discussion and research have been broadened to include non-UN relief operations as well.³⁴ International NGOs have faced condemnation and loss of public trust and donations following critical reports on the way they handled reports of SEA against affected people and sexual harassment against female staff.

Different organizations may manage PSEA in different ways. Some may rely on internal mechanisms aimed for that purpose.³⁵ Other organizations might choose to adopt suggested standards such as those provided by SPHERE,³⁶ or CHS Alliance.³⁷ In some cases, the choice of PSEA strategy and mechanism is a result of a requirement by some States, as a precondition to receiving governmental support.³⁸ However, despite these steps and attempts, not enough progress has been achieved in PSEA in the aid sector.³⁹

One of the counter arguments against establishing mechanisms of PSEA is that when time is pressing and people are starving, one cannot put emphasis on the process. Pursuant to such reasoning, it is only after food, health and shelter are secured, that one can devote resources to

³⁴ See for example Feinstein International Center - STOP the Sexual Assault against Humanitarian and Development Aid Workers, available at: http://fic.tufts.edu/assets/SAAW-report_5-23.pdf; UK's House of Commons (International Development Committee) - A report on Sexual exploitation and abuse in the aid sector, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/840/840.pdf>; Chatham house discussion - Preventing Sexual Exploitation in the United Nations (4/7/2018), available at: <https://chathamhouse.soutron.net/Portal/Default/en-GB/RecordView/Index/172806>; and Report the Abuse, supra note 29.

³⁵ See for example the IFRC Secretariat Policy on Prevention and Response to Sexual Exploitation and Abuse, authored by Gry Tina Tinde, available at: https://media.ifrc.org/ifrc/wp-content/uploads/sites/5/2018/06/IFRC-Secretariat-Policy-on-Prevention-and-Response-to-SEA_final.pdf. Another example is of CESVI, available at: www.cesvi.org/wp-content/uploads/2018/08/PSEA-Policy.pdf; see also the World Health Organization's SEA policy, available at: www.who.int/about/ethics/sexual-exploitation_abuse-prevention_response_policy.pdf

³⁶ The SPHERE Handbook 2018, available at: <https://spherestandards.org/wp-content/uploads/Sphere-Handbook-2018-EN.pdf>

³⁷ See PSEA Implementation Quick Reference Handbook available at: https://d1h79zlgfht2zs.cloudfront.net/uploads/2019/07/PSEA_Handbook.pdf

³⁸ For example, see the UK's DFID's Safeguarding Standards at: www.gov.uk/guidance/safeguarding-against-sexual-exploitation-and-abuse-and-sexual-harassment-seah-in-the-aid-sector#dfids-safeguarding-standards

³⁹ Edith M. Lederer, AP, UN report: Sex abuse in UN peacekeeping drops, up elsewhere, available at: <https://apnews.com/8532c54fcc19462392bf2ae94a01e8f4>

ensuring law and order and other so-called privileges. This line of argument is known as “the greater good” argument.⁴⁰

“Providing“ is indeed the key, namely making sure that people in need get food, treatment and have a roof over their heads. However, this cannot be allowed to be done at any cost and it cannot disregard the protection of those who are vulnerable. PSEA needs to be regarded as a crucial element of any operation and it must be effective and result oriented.

Another element that should be taken into account is the diversity of the aid sector. There are many organizations with different characteristics, and when it comes to regulation, one size definitely does not fit all. We suggest that in the course of the discussion about potential solutions, mechanisms and internal policies, similarities and differences between various characteristics of relief operations should be considered. These include, for example:

- a. **Size of organization** – with regard to its work force;
- b. **Nature of the mission** – military, civilian, governmental, etc.;
- c. **Sector of operation** - Agriculture, Animal Welfare, Capacity Building for Civil Society Organizations (general), Communications/Technology, Conflict Prevention and Resolution/Peace and Security, Construction, Debt Relief, Disaster Risk Reduction Preparedness, Economic Rehabilitation and Development, Education, Energy, Environment, Fishing, Food Aid, Forestry, Gender, Health, Humanitarian Aid, Human Rights Democracy and Governance, Mining and Extractive Resources, Protection, Refugee Resettlement, Shelter and Housing, Social Services, Trade, Transport/Infrastructure, Water Sanitation and Hygiene;⁴¹
- d. **Staff origin** – local population, expatriate staff, foreign state officials, UN staff;
- e. **Role of mission:** peacekeeping missions, food and goods distribution, construction, rescue missions, training, etc.;
- f. **Duration of mission:** short term, long term;
- g. **Type of extreme condition:** armed conflict, natural events, etc.;

⁴⁰ Danielle Spencer, *Cowboys and Conquering Kings: Sexual Harassment, Abuse and Exploitation in the Aid Sector*, p. 16-17, available at: www.changingaid.org/uploads/4/2/5/1/4251044/cowboys_and_conquering_kings_3.pdf

⁴¹ This list is taken from the Inter-Action NGO Aid Map database and is meant to serve as an indication of the diversity of the sub-sectors of operations. Available at: www.ngoaidmap.org/p/downloads

- h. **Interaction with the local population:** from day to day interaction up to complete isolation;
- i. **Budget** – budget of the organization in general and the budget of the mission.

Following the identification of relevant characteristics, one can start thinking about the appropriate modules of regulation. Moreover, it will help to identify when a good practice can be relevant to other similar types of missions. For example, while it might be easier to control the activities of small organization's staff, big organizations (such as the UN, IFRC, MSF) have larger budgets and are more equipped to monitor and implement their PSEA policy.

4. Addressing PSEA Effectively

In order to ensure effective PSEA activity, there are many elements that must be addressed. As mentioned above, the aid sector is not unified and different organizations might face different challenges in order to implement and improve their PSEA struggle. However, the following list attempts to cover the main features of such elements required to ensure effective and productive PSEA activity within the aid sector. The items on the list do not appear in order of importance, and some may overlap or be relevant only to certain types of organizations and aid sector operations or missions.

- (1) **Accountability** – Ensuring that neither the organization nor the perpetrators avoid accountability.
- (2) **Awareness** – The organization's managers, employees, and volunteers must all be aware of the prohibitions and the root problems. Furthermore, beneficiaries must be aware of their rights and entitlements.⁴²
- (3) **Coverage** – An organization's PSEA accountability and responsibility goes beyond actions conducted by its own personnel. When outsourcing services to an external party, or by giving the goods to the community leaders, the organization cannot ignore SEA incidents conducted by such third parties.

⁴² http://pseataaskforce.org/en/addressing_it

- (4) **Donors** – Donor states and private donors need to invoke their influence over the aid sector to demand the embrace and implementation of PSEA policies.⁴³
- (5) **Evidence** – Proper collection of evidence is required in a manner acceptable and recognized for bringing those responsible to justice.⁴⁴ Criminal investigations of SEA are the responsibility of law enforcement authorities.⁴⁵
- (6) **Health services** – SEA survivors need to receive immediate access to proper health services, including mental and physical care.
- (7) **Human Resources** – Organizations should assign staff designated to establish a PSEA policy, coordinate its distribution throughout the organization, and ensure its implementation. Such staff must be adequately trained and assigned to manage complaints and conduct investigations properly.⁴⁶ NGOs' Human Resources departments have PSEA responsibility performed by applying vetting procedures and cooperation within their networks.⁴⁷
- (8) **Immunity** – a PSEA policy cannot provide blanket exemptions from prosecution of international staff by national law enforcement bodies. Such exemptions for organizations and for their employees are often part of an international organization's headquarters agreement. Such agreements should be revised in order to avoid impunity.⁴⁸
- (9) **Internal policy** – Organizations must develop and adopt an internal PSEA policy in order to set clear standards and send a message throughout the organization.⁴⁹ Such internal policy has

⁴³ See for example Cowboys and Conquering Kings, supra note 40, p. 4

⁴⁴ Gry Tina Tinde, “there are so many survivors of gender based violence who will absolutely not be able to get anywhere with their case, even if they went straight to the hospital, because the people at the hospital may not be trained or have the equipment to take evidence that can hold up in court”; IJL’s side event on PSEA in the aid sector, supra note 16 at 58:00.

⁴⁵ Aid organizations only carry out administrative investigations, to determine whether the misconduct has happened or is likely to have happened, and whether to terminate the perpetrator’s contract or impose other disciplinary measures.

⁴⁶ Asmita Naik: [It is] “absolutely essential for every organization to have a safe, confidential and functional complaint mechanism.” IJL’s side event on PSEA in the aid sector, supra note 16 at 55:00.

⁴⁷ Examples of inter-agency mechanisms for vetting candidates and current employees are the UN’s Clear Check <https://www.unsystem.org/content/clear-check-screening-tool-standard-operating-procedure> and the Steering Committee for Humanitarian Response’s Inter-Agency misconduct Disclosure Scheme <https://www.schr.info/the-misconduct-disclosure-scheme>

⁴⁸ As Gry Tina Tinde, IJL’s side event on PSEA in the aid sector, supra note 16 at 18:00 said: “a text has no value unless people are held accountable.”

⁴⁹ CHS-Alliance PSEA Implementation Quick Reference Handbook, p. 6, available at: https://d1h79zlgfht2zs.cloudfront.net/uploads/2019/07/PSEA_Handbook.pdf : “The most widely used standards

to be linked with national legislation and the relevant international treaties and practices.⁵⁰

- (10) **Legal advice** – When establishing their PSEA policy, aid organizations need to use adequate legal advice on preventing SEA *ex ante* and managing any incidents *ex post facto*.
- (11) **Overview mechanism** – Organizations need to establish and maintain internal overview mechanisms, or subscribe to external overview, in order to verify that they are implementing their PSEA policy. There are different ways to conduct such overview, including, for example, an internal ombudsperson, using external overview services,⁵¹ and establishing a UN special procedure, such as a working group or a Special Rapporteur dedicated to the topic of PSEA in the aid sector.⁵²
- (12) **Prioritization (the greater good)** – PSEA must be sufficiently prioritized within the organization. Protecting SEA survivors and providing humanitarian aid for the affected population cannot be regarded as conflicting values. SEA should not be overlooked or covered-up in the name of the humanitarian imperative.⁵³
- (13) **Reparations** – SEA survivors need to receive proper reparations for any damage resulting from misconduct.
- (14) **Reputation** – Organizations should be praised for uplifting SEA survivors, whistleblowers and for taking strong actions against SEA cases. This will help to convince organizations not to choose to quiet down a complaint, cover it up or address it internally, in order to prevent any potential damage to their reputation (and potential harm in donations).⁵⁴
- (15) **Resources** – Adequate resources must be allocated for PSEA purposes such as implementation.

with regard to PSEA are the IASC (Inter-Agency Standing Committee) Minimum Operating Standards for Protection from Sexual Exploitation and Abuse for UN and non-UN staff.”

⁵⁰ Gry Tina Tinde: “There has to be ownership, and that is easier to get if you have a policy that is actually produced by your own organization, which is recognizable in terms of working,” IJL’s side event on PSEA in the aid sector, supra note 16 at 15:00; IFRC’s policy available at: https://media.ifrc.org/ifrc/wp-content/uploads/sites/5/2018/06/IFRC-Secretariat-Policy-on-Prevention-and-Response-to-SEA_final.pdf USAID’s policy available at: www.usaid.gov/sites/default/files/documents/1872/USAID_PSEA-Policy_for_external_consult.pdf

⁵¹ Asmita Naik, IJL’s side event on PSEA in the aid sector, supra note 16 at 31:30

⁵² Miranda Brown, CHS-Alliance at IJL’s side event on PSEA in the aid sector, supra note 16 at 47:30

⁵³ Cowboys and Conquering Kings, supra note 40, pp. 16-17

⁵⁴ Feinstein report, supra note 34, p. 44; See also Asmita Naik: “In many reports written recently it says that this is a very fragmented sector where organizations are working in their own interest and about their reputation and not about the moral and human values”, IJL’s side event on PSEA in the aid sector, supra note 16 at 32:30

- (16) **Revolving door**⁵⁵ – Organizations need to collaborate in order to avoid the hiring and recirculation of perpetrators in the aid sector by adopting screening mechanisms such as the Misconduct Disclosure Scheme⁵⁶ and the Aid Sector Passport.⁵⁷
- (17) **Transparency** – Developing a culture of transparency on SEA in organizations⁵⁸ and vis-à-vis local populations.
- (18) **Whistleblower protection** – A main obstacle to the reporting of SEA, both by survivors and those who have been made aware of the misconduct, is fear of retaliation.⁵⁹ A witness protection program needs to be put in place to ensure the safety and continued wellbeing and livelihood of those affected.

One way to ensure that such measures are properly adopted and implemented in the aid sector is by the use of regulation. However, regulation can easily be a two-edged sword if it ends up limiting other important activity of the aid sector. Therefore, we suggest to learn from research that has identified six main modalities of regulation that can enable tackling social challenges (and not only extreme conditions or emergencies or gender-based violence).⁶⁰

The six modalities of regulation are: (1) Regulation through Information, (2) Licensing, (3) Civil Liability, (4) Criminal Liability, (5) Taxation & Subsidy, (6) Insurance.

These modalities that are applicable to states within the national system, can be adapted to other level of regulations, such as the international and the organizational level. These regulation modalities can be used by applying one of the modalities or a combination of a few of them. We

⁵⁵ IJL's side event on PSEA in the aid sector, supra note 16 at 35:45.

⁵⁶ The Inter-Agency Scheme for the Disclosure of Safeguarding-related Misconduct in Recruitment Process within the Humanitarian and Development Sector, available at: www.schr.info/the-misconduct-disclosure-scheme

⁵⁷ “a culture of transparency on sexual exploitation and abuse is important for both building trust, and for allowing the sharing of best practice across the sector,” <https://fundraising.co.uk/2018/10/18/interpol-pilot-aid-worker-passport-system-announced-international-safeguarding-summit/>

⁵⁸ https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/840/84011.htm#_idTextAnchor094, para. 137

⁵⁹ According to Redress, 90% of SEA survivors do not report, see Sexual Exploitation and Abuse in Peacekeeping Operations: Improving Victims' Access to Reparation, Support and Assistance, p. 29, available at: <https://redress.org/wp-content/uploads/2017/08/REDRESS-peacekeeping-report-English.pdf>

⁶⁰ Eldar Haber and Amnon Reichman, Regulatory Processes, Attitudes and Modalities (forthcoming).

suggest that the aid sector can benefit from addressing these modalities of regulation in order to enhance the PSEA efforts within it, in the following manner:

(1) **Regulation through Information** – Regulation through information is a broad type of regulatory mechanisms that relies mostly on the notion that individuals can make better decisions when provided with more accurate and complete information,⁶¹ and lack the ability to make efficient choices without such knowledge. This modality of regulation is based on the notion that the mere conveying of information to the public reduces knowledge gaps, and that informed decisions are considered better than uninformed decisions.⁶² Potential downsides of this modality include the potential costs of producing such information, over-flooding with too much information to be able to distinguish between the important and marginal data, and protection of privacy concerns.

The effectiveness of the regulation through information depends on the regulated field. In the case of SEA, this method requires ensuring that the organization provides relevant information about its PSEA related activity and policies, such as periodical reports with statistical data on SEA complaints, and incidents that occurred and the way they were handled through PSEA mechanisms and regulations (while respecting privacy).

Relevant information must also be shared with the relevant population, especially on the risks and prohibitions of SEA, and the rights and reparations that SEA victims are entitled to. Such information should be provided by all relevant sectors, including for example, the local authorities, civil society organizations and aid organizations.

(2) **Licensing** – Regulation through licensing or permits is based on the general idea that a State can set certain conditions that must be met in order to perform certain activities, enter certain professions or vocations, or gain access to certain social or physical domains.⁶³ There are many professions that require licensing, permits or certifications, such as, lawyers, doctors, and

⁶¹ Haber and Reichman, p. 9.

⁶² Id, p. 11.

⁶³ Id, p. 12.

psychologists. Persons and organizations or corporations may be subject to permit requirements, as a manner to address potential harm that may be associated with certain activities or practices. Registration regime can ensure that an organization has sufficient proficiency to perform certain activities.

Such regulative modality can be used to impose certain standards upon the organization prior to granting it a permit to operate. Within the context of PSEA, the State in which an aid sector organization registers can require the implementation of a PSEA policy. A permit to operate within an affected area in a certain field of operations can be conditioned either upon registration in the country of origin, or by demonstrating an effective PSEA policy to the affected State.

The advantage of this modality is that it enables States to condition the operation of aid organizations on having appropriate PSEA policies. This can foster the creation of a SEA-free culture within the aid community. The explicit demand to demonstrate an effective PSEA policy can create a clear incentive for the organizations. On the other hand, the main downside of such modalities is the added burden on the organizations, both financially and in other resources, including human resources. It can also be used by the State to overregulate the activity of such organizations and hinder their activity for political reasons. If the burden on the aid sector is too high, it might have a detrimental effect on the important activity of these organizations.

- (3) **Civil liability** – This modality of regulation includes different forms of civil law, such as property, contract, unjust enrichment, and most importantly torts.⁶⁴ The civil liability is shaped by the relevant State. The important element of civil liability through tort law is the ability to cover and regulate both intentional and unintentional interactions.⁶⁵ The imposition of civil liability allows the State to ensure that individuals, corporations and organizations are incentivized to optimally avoid hazardous behavior.⁶⁶

⁶⁴ Id, p. 13.

⁶⁵ Id, p. 14.

⁶⁶ Id.

One of the main advantages of regulation through civil liability is the ability to set strict liability, for example on an organization that lacks a PSEA policy or which has failed to obtain the proper licensing (when such license is required). Other advantages are that it can enable the State to impose mandatory punitive damages to victims, and create evidentiary presumptions in favor of the victim. Lastly, unlike the usual situation regarding organizations, and especially aid organization, the responsibility might be institutional and not necessarily personal.

The downside of this modality is that they require victims: to be aware of the wrongdoings that they were subject to and to openly come forward (naming), to identify the wrongdoer (blaming), and to conduct legal proceedings, which might take place in a court away from their current location (claiming). Moreover, even if they are aware of the possibility, they might be unequipped to assess their damages. Naturally, this might also raise technical questions, including, inter alia, regarding the applicable jurisdiction of the relevant tort law for actions conducted in a different State.

A different type of downside of the civil liability modality is the deterring effect on small/medium size aid organizations, which usually do not have resources or finances necessary to engage in court proceeding concerning tort claims. Therefore, it is important to ensure that having a qualified and implemented PSEA policy should serve in favor of the organization within this context, and thus constitute a strong positive incentive.

(4) **Criminal liability** – this modality is considered as the last resort and the most aggressive regulative measure. The main purpose of criminal law as a tool for regulating behavior, is deterrence – deterring a particular perpetrator from committing similar offenses,⁶⁷ as well as deterring potential future perpetrators. Criminal liability can be imposed on regulated entities,⁶⁸ as well as on the people operating them, for direct responsibility or negligence. Criminal proceedings have a significant effect on a person’s reputation. The same goes for an

⁶⁷ Id, p. 15-16.

⁶⁸ Id.

organization that has failed to ensure a safe working environment and therefore might suffer a serious blow to its reputation.⁶⁹ Such criminal reputation might also cause loss of a license or prevent obtaining one.

Often there are general impunity problems due to the extreme conditions that triggered the activity of the aid organizations in the area. Moreover, some aid organizations might condition their activity upon immunity from criminal proceedings in the host State. Ensuring extraterritorial jurisdiction over acts of SEA would help to ensure accountability.

On the downsides of criminal liability there are significant obstacles which are not unique to SEA in the aid sector, such as the lack of evidence, which might require international collaboration between States. Another downside is similar to that mentioned in the analysis of civil liability about the uninformed victim, as usually without a complaint, the authorities will not be able to proceed with criminal procedures. Lastly, the territorial aspect might also serve as an obstacle when the perpetrator and the victim in a SEA situation are located not only in different States, but even in different continents. As a result, one might conclude that the probability to be prosecuted is low in many cases and thus the deterrence would be of limited impact.⁷⁰

- (5) **Taxation/subsidy** – The use of taxation and subsidy is an indirect incentive by giving, for example, tax deductions to companies or organizations, or by the threat to remove such deductions.⁷¹ As the aid sector relies significantly on donations, the registration State can condition tax exemptions for donations on the adoption and implementation of an effective PSEA policy or the submission of periodical PSEA reports (as a form of the information modality). Alternatively, the State can provide a reduced license fee (or a complete exemption) to organizations that meet such criteria as a form of subsidiary.

⁶⁹ Id, p. 16-17.

⁷⁰ Id, p. 18.

⁷¹ Id, p. 19.

(6) **Insurance** – Insurance is a risk-sharing mechanism that administers compensation for loss.⁷²

One of the uses of insurance is as an incentive to adopt a certain framework or policy. For example, in case of a civil liability modality, the victim of a SEA will still be entitled to compensation for the wrongdoing that she/he had suffered, but due to the fact that an organization has maintained and implemented a PSEA policy, it will be covered by insurance. This can provide a positive incentive for the organizations to adopt and implement an effective PSEA policy, and not just a written one. One of the main downsides of this modality is the additional burden of insurance payments on the usually limited budget of the organization.

5. Suggestions of Application to PSEA

This section offers a few suggestions on how to implement the relevant modules of regulation (introduced in the previous section) within the framework of PSEA, while taking into account some of the unique characters of PSEA in the aid sector. It is important to emphasize that these are merely initial examples of suggestions and as such, should not be considered as a comprehensive analysis of all available regulative options.

(1) **Donors' Overview Mechanism** – By conditioning donation on an existing and functioning PSEA policy, donors can play a very active role in promoting PSEA. An alternative donor mechanism can be based on increasing donations to organizations with a positive record of PSEA implementation, thus creating a positive incentive for the organizations. An example for that would be the British DFID's payment by results approach.⁷³

(2) **Licensing Regime** – Using an international licensing tool, such as the Interpol's Aid Sector Passport that aimed to facilitate background checks and vetting status of potential employees

⁷² Id, p. 20.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249928/Payment-by-Results.pdf; See also Gry Tina Tinde, IJL's side event on PSEA in the aid sector, supra note 16 at 22:00: "There is an example for IFRC. We are now in partnership with DFID, the British Development Agency, on payment by results. So we are actually being monitored during the year and at the end of the year on how we advance on this topic."

within the aid sector, can be understood as a form of licensing regime (or a combination together with informational transparency) dedicated to the aid sector.⁷⁴

Another model of licensing can rely on existing standards such as SPHERE's Handbook.⁷⁵ Therefore, only an organization that can provide assurance that it has adopted and implemented such internationally accepted PSEA standards will be allowed to enter and operate within a State.

Lastly, a licensing regime can be used to ensure that trained and licensed experts on PSEA will be attached to civil society and international aid operations and encourage the development of such education programs.⁷⁶

(3) Code of Conduct – adopting a code of conduct by the organization, which addresses also a reference to the organization's PSEA policy, and provides clear definitions and prohibitions, which can go beyond minimal legal requirements.⁷⁷ Such codes of conduct can include several modules of regulation, such as disciplinary measures and transparency. Such codes of conduct can also serve to make it clear to the employees of the organization that sexual relations within the organization or with the affected population are prohibited. The prohibition can be a strict one, or focus on situations when potential power gaps exist, especially with the affected population which depends on the aid provided.⁷⁸

(4) International Overview – creating an international overview mechanism, such as an international ombudsperson, can serve both to track complaints over SEA, and as an appeal

⁷⁴ Supra note 57.

⁷⁵ Supra note 10.

⁷⁶ IFRC Global Study: Effective law and policy on gender equality and protection from sexual and gender-based violence in disasters (2017), found that disaster law lacked references to the documented increase in SGBV during emergencies and how to prevent and respond. Available at: https://media.ifrc.org/ifrc/wp-content/uploads/sites/5/2017/10/Gender-SGBV-Report_-_Global-report.pdf

⁷⁷ Gry Tina Tinde, IJL's side event on PSEA in the aid sector, supra note 16 at 21:25.

⁷⁸ Gry Tina Tinde, IJL's side event on PSEA in the aid sector, supra note 16 at 22:50.

procedure against inadequate treatment over SEA complaints by an organization.⁷⁹ Such mechanisms can also include a vetting process for the creation of a database of aid organizations. Such auditing will examine the implementation of PSEA policies.

A different mode of international overview can be the establishment of a special procedure mechanism such as a special rapporteur or a working group by the Human Rights Council to address complaints and suggest standards on SEA in the aid sector.

For example, commencing a working group at the Human Rights Council on this matter, established in collaboration with the relevant actors, including UN agencies, sponsor States, humanitarian aid organizations, scholars, the Special Rapporteurs, and NGOs. Such a working group should prepare a work-plan addressing this issue of compliance with international legal regulations, while continuing to meet the challenges of humanitarian aid operations. All relevant parties should be included in the working group.

6. Conclusions

The PSEA process is moving forward. Attention to the problem and attempts to address it are definitely better than ten, fifteen or twenty years ago. However, unfortunately, not enough has been done to demonstrate a significant change on the ground.

By working with a variety of actors, first and foremost with local communities and including the UN and its agencies, donor States, humanitarian aid organizations, scholars, etc., the PSEA process can move towards practical steps aimed to decrease SEA in relief operations and the aid sector, without undermining the core objective of relief operations. Using a regulatory regime as a solution can be easy but also dangerous. We must be cautious not to over-regulate the aid sector into

⁷⁹ Asmita Naik, IJL's side event on PSEA in the aid sector, supra note 16 at 33:00: "there's a lack of independent oversight... we are talking about contexts where there's a breakdown in law and order, these are not developed systems where there are existing mechanisms that can deal with these issues... We rely on the organizations either self-policing or policed by donors who fund them... It comes down a lack of independent oversight. One of the ideas that come forward is the need for some kind of form of international ombudsman that can act as a kind of an appeal mechanism."

stagnation. Any process, regulative or not, mandatory or voluntary, must be conducted step by step and hand in hand with the aid sector.