



Enhancing accountability SEA: Is a Sector Ombudsperson the next step?

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Since the media disclosure of sexual exploitation and abuse (SEA) cases by humanitarian actors in February 2018, attempts to address the issue and increase protection against SEA have multiplied. Among other efforts to improve internal practices and create effective complaint mechanisms, the idea of creating a Humanitarian Sector Ombudsperson's office (HSO) with the power to handle SEA issues throughout the sector is also being discussed. Oxfam's Independent Commission has listed accountability as an item in its working agenda¹. The Dutch Ministry of Foreign affairs, leading on a group of donor agencies, has also commissioned a research project led by International Institute of Social Studies of Rotterdam University, looking into the concept of an HSO.

Discussion is ongoing on the exact powers and arrangement of such HSO. As its establishment and running might have various significant implications for the entire sector, a wide consultation within the sector is necessary. Such consultation should aim to assess whether the HSO is the best tool to respond to the need for enhanced protection against SEA within the sector, and if yes, how to make it function efficiently. This paper aims at feeding this reflection among ICVA members by briefly discussing some elements and practical implications in the establishment and running of an HSO.

A short description of the Ombudsperson's role

An Ombudsperson is an independent and impartial complaint handling body with its own staff and budget. It provides an opportunity to an efficient, speedy, accessible, non-litigious *procedure of addressing a grievance of an individual or organisation*. It may be accessed directly as first instance of complaint or after having initially complained within the hierarchy of the concerned structure. Usually after the Ombudsman opinion, concerned parties may or may not decide to engage the national justice system (civil, administrative or criminal law).

An Ombudsperson (upon the investigation of the complaint) usually issues *non-binding recommendations* and/or *mediates* for a resolution to the dispute. Though not binding, the Ombudsman recommendations are usually followed due to the prestige of the Office and the practice established. The Ombudsman may also *publish reports* (annual or special) and findings on any specific investigation.

There are national public Ombudspersons created by national law and financed by public funds. The oversight is ensured by the Parliament who often also appoints the Ombudsperson. In such case, the Ombudsperson independently and impartially investigates complaints filed against *administrative acts* of Government agencies. In this aspect, The Ombudsperson plays an important role in protecting human rights and individuals' interest *vis a vis* public administration.

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¹ Oxfam's Independent Commission Survivor Reference group lists in its terms of reference the research of accountability mechanisms to hold the sector accountable for how organisations manage misconduct as a focus of its work. See for more ToR at : <https://independentcommission.org/wp-content/uploads/2018/08/TOR-Survivor-Reference-Group-Final.pdf>



There are also *private sector* Ombudsperson bodies set up by voluntary national industry-wide agreement (sectorial structures) which hear complaints against private operators. Switzerland alone for example lists several Ombudsperson bodies covering banking, telecoms, housing, insurance, travel and leisure, radio and tv etc., usually handling small consumer complaints (like contesting a monthly mobile bill).

In all the above-mentioned cases, the Ombudsperson is a national body, acting within a national jurisdiction, based on national law. Two exceptions though exist. The UN system has its own Office of Ombudsman and Mediation services, but that deals exclusively with UN staff complaints, based on internal UN staff rules and regulations².

The other exception regards the particularities of the European Union. The Treaty of Maastricht established a European Ombudsman responsible to investigate compliance of EU institutions and bodies with the EU Law, including general principles of law and as established by the Court of Justice of the European Union and internal financial and staff regulations³. The European Ombudsman is thus similar to the national ombudsman that investigates acts committed by governmental agencies.

The added value of the HSO

The main aim to be served by a well-functioning HSO is to enhance investigation of and response to SEA cases within the sector. By being an independent and impartial body, well-staffed and with the required expertise, the HSO provides a solid guarantee that complaints will be well-addressed. Moreover, a victim-centred HSO will also be able to provide referral for assistance and protection of victims. In a longer run, the HSO will enhance the internal response of humanitarian and development actors to SEA cases, as they will learn from the practice of the institution and would be able to receive specific guidance from it. By having a direct interest for the cases not to end up at the Ombudsperson office, humanitarian and development actors will also invest further in complain and response mechanisms internally.

Furthermore, the HSO will generate trust by being successful and communicating well on its work. Consequently, the number of those inclined to address the Ombudsperson will increase. As the space for impunity will decrease, the HSO will also play a deterrence role and prevent future cases of SEA.

Past initiatives

In fact, the idea of the HSO is not entirely new. Seven months after the genocide in Rwanda began in 1994, an unprecedented multi-donor evaluation was launched: [the Joint Evaluation of Emergency Assistance to Rwanda](#) (JEEAR). The evaluation consisted of four separate studies, the third and largest of which was specifically dedicated to the humanitarian response and its effects. The JEEAR report recommended among others the creation of a humanitarian ombudsman function to establish a system whereby complaints about agency performance could be brought before an independent authority. One year later, that led to the development of the Humanitarian Ombudsman Project by few British agencies, which eventually became the Humanitarian Accountability Partnership (HAP) International.

² See Terms of Reference of UNOMS (Section 1.1) in SG Bulletin ST/SGB/2016/7.

³ e.g. the European Ombudsman's 2017 Annual Report highlights as a particular success the adoption of its recommendation to the EU European External Action Service that its internships become paid. The same Annual Report (pg. 34) states that it has assisted 15,837 people during that year. It handled 2181 complaints during the year and found 781 complaints to be within its stated mandate.

HAP International was the humanitarian sector's first international self-regulatory body. It played an important role in improving performance within the humanitarian sector and strengthening accountability. "[HAP Standard in Accountability and Quality Management](#)" were developed, providing organisations with a concrete tool to design, implement, assess and improve accountability among their programmes. HAP International also published the annual Humanitarian Accountability Report, which reviewed the progress made towards strengthening accountability norms and practices in the humanitarian sector. The function and role of HAP International evolved from the initial idea of a Humanitarian Ombudsman, with HAP prioritising more of a support role, standard setting and capacity building within the sector. In 2015, HAP International merged with People In Aid to form the [CHS Alliance](#), which continues to play a crucial role in standard setting and accountability of the sector, including addressing SEA cases.

Few pending questions

Today, few questions still exist to the investigative character of the proposed structure and are discussed briefly as per below:

a. HSO powers and implications of its supranational character

An international HSO would probably have the *right to perform an investigation* on any *filed SEA complaint* in a given country. Without such power, the HSO office would be empty of substance. This would imply the creation of the capacity to investigate such complaint *across national borders*. Findings on the case could be published. Further recommendations for improvements in internal practices might also be published in annual or special reports. If the investigation establishes that a SEA act has indeed taken place, the duty arises to formally report to local authorities (with SEA acts constituting crime under national criminal law).

Such power to run preliminary investigations across national borders on complaints over alleged SEA acts would certainly *require prior clearance* by national authorities. Especially since the subject matter is potentially criminal acts, which investigation is the competence of the national law enforcement authorities. In fact, the power to independently investigate criminal acts across national borders by supranational structures remains controversial. It has been recognised internationally only in exceptional cases based on agreed international conventions. One of the very few example is the [Rome Statute](#) which establishes the International Criminal Court (ICC) with jurisdiction over four crimes as defined in the Rome Statute. Moreover, even in this case, the jurisdiction of the Court is limited as per the provisions of the Rome Statute.

In the current case, as there is no internationally agreed definition of SEA acts, there is a question on the definition of the act that HSO will apply. The country of nationality of the alleged perpetrator might have a substantially different definition from that of the country of nationality of the victim, and again a different definition might be provided by the law of the country where the offence occurs. One way out might be to bind the Ombudsperson on a voluntary common agreed Code of Conduct providing for a definition of acts. It remains however to be seen how this will stand vis a vis the definitions provided by various national legislations.

Operationally, for the HSO to exercise jurisdiction, prior agreement from a substantial list of countries is required. This is a long and heavy process. In fact, the first attempts to have an ICC date back to the end of World War II. In similar lines, if HSO will negotiate jurisdiction *ad hoc* with the concerned State, there would be substantial delays to the investigations, if ever possible.

Today State sovereignty remains the cornerstone of international law and relations. Especially States where humanitarian and development actors work, might have interest in making a strong case for their sovereignty. There is little to no evidence showing that States are willing to give away an important part of such a sovereignty (related to investigation and enforcement of criminal law) to a HSO.

b. Consequences linked to the diversity of the humanitarian and development actors

Firstly, such an HSO arrangement would have to be unanimously agreed and implemented by all actors involved, both donors and implementing agencies, as a voluntary arrangement. Important issues such as oversight and accountability of the HSO have also to be addressed.

Moreover, any HSO arrangement would need to bring on board the large range of humanitarian and development, as addressing acts of SEA are a concern throughout the sector. This would mean looking broadly at accountability to include also the UN Staff, employers of Foreign States' Agencies operating in the country, private sector that is increasingly participating in humanitarian and development efforts, national NGOs etc. This will however open up other questions of immunity and national versus extra-territorial jurisdiction.

On the other hand, limiting the structure's scope to only non-governmental organisations will give the wrong message in terms of accountability to the affected population. It will also incorrectly portray the non-governmental sector as the only perpetrator of the SEA cases.

c. Accessibility and risks for the individual concerned

A key factor for the success of the Ombudsperson at the national level is its accessibility. The office is well publicised including through mass media. However even at the national level, research shows that the most vulnerable groups might still find it difficult to access the Ombudsperson at the national level. Groups such as ethnic minorities, refugees, migrants, etc. might face language and cultural barriers to access the structure or might lack trust in its efficiency and impartiality.⁴

The same reasons are often identified as the main challenges in addressing SEA in the humanitarian and development sector of today. A recent [ICVA paper](#) highlights under-reporting of SEA cases due to a mixture of gender inequalities and other power relations, leading together to an overall lack of trust to institutions and fear of reporting. The paper also recommends that while many NGOs are engaged in promoting complaint mechanisms within the communities, such efforts should be long term and require building relations of trust with the communities. The building of PSEA measures and systems should be done together with national and local actors as well as communities concerned. This has been made a focus of work also by the OXFAM Independent Commission (the Survivor Reference Group) and is a practice that needs to be supported and implemented further irrespective of the complaint mechanism chosen⁵.

It is against this background that HSO is challenged in its accessibility by the most vulnerable populations. It will be challenging for the Ombudsperson to reach out to all the local populations throughout the world, explain its work and win their trust so that they are willing to complain on alleged cases. Lack of continued presence on the ground is a disincentive for reporting SEA acts to HSO, that run the risk to be seen as a distant and intangible organisation. Further attention needs to be given also to language barriers, logistics of filing a complaint, access to qualified help in formulating the complaint, etc.

Moreover, the risk of exposure to pressure and abuse of any potential victims coming forward will always be present. Thus, the Ombudsperson will need to address such risks properly even though it might lack understanding of the local context, power dynamic and existing services. Investing in such an understanding is a must but will take time and resources.

⁴ See for example Bassina Farbenblum and Laurie Berg, Migrant workers' access to remedy for exploitation in Australia: the role of the national Fair Work Ombudsman, 2017; see also the European Network of National Human Rights Institutions, [Ombudsman Institutions address migration challenges during international conference](#), 2016

⁵ See ToR, supra note 1



Some of these issues will be addressed if the HSO will be put in motion only after the case has been already considered through the internal complain mechanism of the concerned organisation. Like this however, the current substantial challenge of under-reporting will not be addressed.

More attention needs also to be given to the collaboration with existing National Human Rights Institutions and Ombudsman in the countries concerned. When conditions allow, capacities of local and national law enforcement authorities should be built, to uphold justice and address impunity, in respect of international human rights law.

Conclusion:

There is definitely value in considering a sectorial Ombudsperson for implementing a better approach on protection from SEA. To many involved actors it could seem as the next logical step in the continued efforts to address SEA issues. Nonetheless, the supranational character of the proposed sectorial Ombudsperson is a serious practical and legal difficulty in implementing the idea. Other important issues to be addressed regard the oversight and accountability of the structure, its coverage and accessibility, etc.

Addressing SEA within the humanitarian and development sector is not a quick win and requires a mixture of approaches, measures and systems. They should be built together with national and local actors, including the authorities and the communities concerned. One of the lessons learnt from complaint mechanisms built and adjusted with the communities involved is that, even at local level they should be accompanied by measures that address power relations and gender roles and build trust by ensuring services and protection for victims. For many, these remain also the top priorities for their engagement in fighting SEA.