

## Introduction

Originating in the 1809 Swedish constitutional system, ombudsmen are independent officials, empowered to investigate and resolve individual complaints about maladministration against government departments and/or public officials.<sup>1</sup> Ombudsmen complement the role of the courts and they deal with complaints in a more informal and accessible way.<sup>2</sup> Ombudsmen usually provide a forum to solve a dispute between the complainant and complaine and may be able to issue recommendations to address grievances, which unlike a court order are not strictly enforceable.<sup>3</sup> The public sector ombudsmen have changed materially over time and now they engage in impartial investigations, reporting, making recommendations and perform newer types of responsibilities like audits and bringing court actions. Ombudsmen schemes exist both at the domestic and international level. At the national level, one of the first ombudsman schemes established was the UK Parliamentary Commissioner Administration in 1967.<sup>4</sup> At the international level, the European Union ('EU') established the European Ombudsman to promote and oversee good administration among the EU institutions in 1995.<sup>5</sup> A further example of an international ombudsman is the United Nations ('UN') Office of Ombudsman and Mediation services, which deals with internal UN staff complaints as well as with issues of conflict and change management.<sup>6</sup> More recent developments in the field include the creation of ombudsman schemes that deal with complaints against private bodies, particularly corporations: the UK Financial Ombudsman

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<sup>1</sup> L. C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (2020) at 125. Note that, throughout the paper, I alternate terms such as 'ombudsman', 'ombuds' and 'ombudsperson' when that is the term that is used in a specific legislation, regulation, or citation.

<sup>2</sup> B. J T Tai, 'The Ombudsman and the rule of law' in M. Hertogh and R. Kirkham (eds), *Research Handbook on the Ombudsman* (2018) at 125-6.

<sup>3</sup> Ibid.

<sup>4</sup> Parliamentary Commissioner Act 1967 as emended by the Parliamentary and Health Service Commissioner Act 1987; Parliamentary Commissioner Act 1994.

<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union, Article 228 — (ex Art.195 TEC). See, also, Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom.

<sup>6</sup> UN Office of the Secretary-General, Office of the Ombudsman — appointment and terms of reference of the Ombudsman, ST/SGB/2002/12, 15 October 2002.

Service (2001)<sup>7</sup> and the Canadian Ombudsperson for Responsible Enterprise (2019)<sup>8</sup> are two examples of this kind. Accordingly, the label ‘ombudsman’ is now used for a range of public and private mechanisms that often depart from the public sector and national ombuds, with some new variants that focus almost entirely on mediation or have additional mediation powers.

At present, there is no ombudsman that deals with complaints against Non-Governmental Organisations (‘NGOs’) and other humanitarian agencies at the international level. The idea of creating an independent ombudsman for the NGO sector emerged in 2018 after The Times reported that Oxfam GB senior staff in Haiti had allegedly paid earthquake survivors for sex in 2011 and had failed to report the incident to local authorities.<sup>9</sup> In addition to Oxfam GB,<sup>10</sup> the Charity Commission for England and Wales launched inquiries against other well-established NGOs, including the World-Wide Fund for Nature (‘WWF’) UK,<sup>11</sup> and Save the Children GB,<sup>12</sup> which revealed serious lapses and issues within their accountability systems. To respond to the calls for greater accountability in the NGO sector, the Dutch Ministry of Foreign Affairs commissioned a scoping study to International Institute of Social Studies, Rotterdam University, to test the feasibility of the establishment of an International Ombuds for Humanitarian and Development Aid (‘IOHDA’).<sup>13</sup> In October 2019, the Dutch proposal was backed by the UK House of Commons International Development Committee, which ‘urge(d) the UK Government, together with Dutch Government counterparts, to display international leadership in making the ombudsman a

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<sup>7</sup> The Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001.

<sup>8</sup> (CAN) Orders in Council, P.C. 2019-299.

<sup>9</sup> S. O’Neill, ‘Minister Orders Oxfam to Hand over Files on Haiti Prostitute Scandal’, *The Times*, 9 February 2018, available at <https://www.thetimes.co.uk/article/top-oxfamstaff-paid-haiti-quake-survivors-for-sex-mhm6mpmgw>.

<sup>10</sup> Charity Commission for England and Wales, Statement of the Results of an Inquiry. Oxfam (11 June 2019); Charity Commission for England and Wales, Decision - Charity inquiry follow-up: Oxfam GB progress on safeguarding (25 February 2021)

<sup>11</sup> K. McVeigh, ‘British watchdog launches inquiry into WWF abuse allegations’, *The Guardian*, 4 April 2019, available at <https://www.theguardian.com/global-development/2019/apr/04/british-watchdog-launches-inquiry-into-wwf-abuse-allegations>.

<sup>12</sup> Charity Commission for England and Wales, Statement of the Results of an Inquiry. The Save the Children Fund - Save the Children UK (March 2020).

<sup>13</sup> D. Hilhorst, A. Naik and A. Cunningham, International Ombuds for Humanitarian and Development Aid - Scoping Study, International Institute of Social Studies (Erasmus University Rotterdam, September 2018).

reality.’<sup>14</sup> The Committee called for the establishment of an ombudsman to ‘provide a right to appeal, an avenue through which those who have suffered can seek justice by other means.’<sup>15</sup> In April 2021, after Oxfam was rocked by new sexual abuse claims in Democratic Republic of Congo, Sarah Champion (Chair of the International Development Committee) reiterated the importance of establishing an ombudsman to deal with NGO accountability and safeguarding failures.<sup>16</sup> The proposal of an international ombudsman also gained support outside governmental circles. The head of the Overseas Development Institute declared that ‘a more hierarchical form of accountability is required’ and that the ‘idea of a humanitarian ombudsman should be revisited as an alternative to self-regulation.’<sup>17</sup> Likewise, Oxfam’s Independent Commission acknowledged the relevance of the Dutch proposal as potential sector wide-solution and, simultaneously, recommended the establishment of an internal ombuds system at the organisational level.<sup>18</sup> Professor Doretha Hilhorst - a member of the 2018 IOHDA research group - claimed that ‘internal procedures are not enough, it is time to bring accountability to the next level’ by establishing an external and independent authority like the proposed IOHDA.<sup>19</sup>

Against this background, this article investigates the feasibility of the IOHDA focusing on a number of challenges that could prevent the establishment of this brand-new accountability mechanism. To do so, this article proceeds as follows. Section 1 overviews the regulation and the legal accountability of NGOs under national and international laws. Since the 2018 IOHDA proposal is not unprecedented, and a similar body was proposed by a coalition of British-based NGOs in 1997 because of their failure to protect civilians during the Rwandan Genocide, section 2 provides an historical account of the then aborted 1997 international ombudsman. Then, section

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<sup>14</sup> The UK House of Commons, International Development Committee, *Follow-up: sexual exploitation and abuse in the aid sector*. First Report of Session 2019–2020 (2019), para. 36.

<sup>15</sup> The UK House of Commons, International Development Committee, *Sexual exploitation and abuse in the aid sector*. Eight Report of Session 2017–2019 (2018), para. 193.

<sup>16</sup> S. O’Neil, ‘Oxfam rocked by new sex claims against aid workers’, *The Times*, 2 April 2021.

<sup>17</sup> C. Bennett, ‘Constructive Deconstruction: Imagining Alternative Humanitarian Action’, HPG Working Paper (May 2018) 1.

<sup>18</sup> Oxfam Independent Commission on Sexual Misconduct, Accountability and Culture, *Toward a more accountable Oxfam - Final Report* (June 2019), at 50.

<sup>19</sup> D. Hilhorst, ‘Aid agencies can’t police themselves. It’s time for a change’, *The New Humanitarian*, 22 February 2018, available at <https://www.thenewhumanitarian.org/opinion/2018/02/22/aid-agencies-can-t-police-themselves-it-s-time-change>.

3 discusses the 2018 IOHDA looking at how the international ombudsman should be constituted and function in terms of jurisdiction, mandate, role and structure. Finally, section 4 examines the logistic and legal challenges, some of which identified by the proposal itself, related to the establishment of the IOHDA. In doing so, this paper argues that the IOHDA is unlikely to succeed because of three major three challenges, which have not been considered in the IOHDA proposal adequately. First, the IOHDA's scope is too broad, and the proposal misinterprets the ombudsman's jurisdiction and traditional role. Second, the proposal does not learn any lessons from existing ombudsman schemes, available in the public and the private sector, neglecting that ombudsman institutions present limitations in promoting accountability. Third, the proposal lacks support from NGOs themselves, which are a driving force behind the establishment of accountability mechanisms at the international level and should be the principal standard-setter for an instrument like the IOHDA. In sector 5, this paper provides new insights on the regulation of the NGO sector, identifying emerging and new alternative routes to enact NGOs accountability at the international level. In the conclusion, this paper provides a series of recommendations to mitigate the key three challenges contributing to the policy and academic debate on the establishment of the IOHDA.

### **1. The regulation and the legal accountability of NGOs**

Historically, the first official mention of the term 'NGO' in a legal document is Article 71 of the 1945 UN Charter, which however omits to provide a definition of what an NGO is.<sup>20</sup> Defining the term 'NGO' is tough because of the diversity of the NGO sector and considering that multiple and, sometimes, even conflicting definitions of NGO exist across disciplines.<sup>21</sup> According to Kamminga, NGOs are best defined negatively emphasising what they are not: 1. they are private actors, not controlled or established by states; 2. they are not revolutionary forces that seek to

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<sup>20</sup> S. Charnovitz, 'Nongovernmental Organisations and International Law' (2006) 100 *The American Journal of International Law* 348, at 351.

<sup>21</sup> For an analysis on the problems of classification and definition of NGOs, see, Kerstin Martens, 'Mission Impossible. Defining Nongovernmental Organizations' (2002) 13 (3) *Voluntas* 271; Anna C Vakil, 'Confronting the Classification Problem: Toward a Taxonomy of NGOs' (1997) 25 *World Development* 2057.

overthrow governments with violence, like liberation movements or armed opposition groups; 3. they do not aim to acquire state powers, as opposed to political parties; 4. they are not for profit, in opposition to companies; 5. they are not disrespectful of the law - although they might occasionally engage in civil disobedience - and this criterion distinguishes NGOs from criminal organisations.<sup>22</sup> NGOs are important actors for the promotion of human rights, sustainable development and social justice: their contribution to standard-setting, reporting, fact-finding and for the overall promotion, implementation and enforcement of international norms, especially human rights, is significant.<sup>23</sup> In addition to advocate on behalf of those unheard or unable to speak for themselves, NGOs play humanitarian and disaster-management roles bringing aid to those affected by armed conflicts, natural disasters, and famines.<sup>24</sup> Likewise, NGOs are key players in the field of international development and, in some countries, like in Bangladesh, they operate as a parallel government as they invest more money in development than the national government.<sup>25</sup> In recent years, there has also been an expansion of NGOs activities at sea, ranging from protests aimed at scrutinising the environmental impact of business actions to search and rescue operations for migrants.<sup>26</sup>

Regulating NGOs, while promoting their legal accountability through regulatory intervention, is a challenging task. All NGOs are constituted and regulated under domestic laws. When NGOs operate transnationally, they are subject to the regulation of the home country (where the NGO is legally headquartered to operate overseas) as well as to the regulation of the host countries (where the NGO operates on the field, for example providing services to the local communities). Although differences exist across countries in their regulatory approaches towards

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<sup>22</sup> M. T. Kamminga, 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?' in G. Kreijen and et al (eds) *State, Sovereignty and International Governance* (2002), at 390.

<sup>23</sup> See, in general, M. Polizzi and A. Murdie, 'NGOs and Human Rights' in T. Davies (ed) *Routledge Handbook of NGOs and International Relations* (2019) at 251.

<sup>24</sup> See, in general, S. Roth, 'Humanitarian NGOs', in T. Davies (ed) *Routledge Handbook of NGOs and International Relations* (2019) 267.

<sup>25</sup> D. Godrej, 'NGOs: do they help?', *New Internationalist*, 1 December 2014, available at <https://newint.org/features/2014/12/01/ngos-keynote>.

<sup>26</sup> See, for example, E. Cusumano, 'Humanitarians at sea: Selective emulation across migrant rescue NGOs in the Mediterranean Sea' (2019) 40 (2) *Contemporary Security Policy* 239; M. C. Noto, 'The Arctic Sunrise Arbitration and Acts of Protest at Sea' (2016) 2 *Maritime Safety and Security Law Journal* 36.

NGOs, governments typically regulate three core aspects: first, NGO's registration and dissolution; second, NGO's ability to engage in advocacy and political activities; and, third, the the scope and the extent to which an NGO can engage in economic activities.<sup>27</sup> Increased state regulation is rarely a viable route to promote more NGO accountability because it carries the risk of restrictive and intrusive policies by governments that wish to curb NGOs activities for pure political reasons. Restrictions on NGO's activities are on the rise worldwide and this trend is not limited only to authoritarian or illiberal nations.<sup>28</sup> According to the International Center for Not-for-Profit Law, 161 restricting laws have been introduced worldwide since 2012 preventing NGOs from raising donations, providing services to those in need, and operate as watchdogs over governments.<sup>29</sup> In December 2019, the Council of Europe reported that restrictions cover different kinds of NGO activities ranging from strict disclosure requirements about NGO funding to the criminalisation of NGO boats rescuing migrants in the Mediterranean Sea.<sup>30</sup> For CIVICUS (a global network of civil society organisations), the regulatory environment for NGOs has worsened as a result of the restrictions on freedom of assembly, freedom of thought and speech introduced worldwide, through emergency legislation, to tackle the Covid-19 pandemic.<sup>31</sup>

In addition to the restrictive laws, a further issue is represented by the limited capacities of national charity regulators and watchdogs, like the Charity Commission for England and Wales, to enact accountability at the sectoral level. To elaborate, the regulation and the oversight of the

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<sup>27</sup> E. A. Bloodgood, J. Tremblay-Boire and A. Prakash, 'National Styles of NGOs Regulation' (2014) 43 (4) *Non-Profit and Voluntary Quarterly* 716, at 720-1.

<sup>28</sup> M. Glasius, J. Schalk and M. De Lange, 'Illiberal Norm Diffusion: How Do Governments Learn to Restrict Nongovernmental Organizations?' (2020) 64 (2) *International Studies Quarterly* 453; C. F. Swiney, 'The Counter-Associational Revolution: The Rise, Spread, and Contagion of Restrictive Civil Society Laws in the World's Strongest Democratic States' (2019) 43 *Fordham International Law Journal* 399; A. J. De Mattee, 'Covenants, Constitutions, and Distinct Law Types: Investigating Governments' Restrictions on CSOs Using an Institutional Approach' (2019) 30 *Voluntas* 1229.

<sup>29</sup> International Center for Not-for-Profit Law (ICNL), *Effective Donor Responses to the Challenge of Closing Civic Space* (2018), available at <https://www.hrfn.org/wp-content/uploads/2018/06/Effective-donor-responses-FINAL-1-May-2018.pdf>.

<sup>30</sup> Council of Europe – Expert Council on NGO Law, *using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States* (December 2019) CONF/EXP (2019)1. See, also, Council of Europe, *Restrictions on NGO activities in Council of Europe member States* (Draft Report) by Committee on Legal Affairs and Human Rights (Parliamentary Assembly) 15205 (6 January 2021).

<sup>31</sup> CIVICUS, *Freedom under threat during the covid-19 pandemic - a snapshot of restrictions and resilience* (October 2020), available at <https://civicus.contentfiles.net/media/assets/file/CIVICUSMonitor.COVIDBriefOctober2020.pdf>.

NGO sector is performed, at the national level, by charity regulations whose power is to grant and revoke the charity status and also issue disciplinary sanctions in cases of misconducts. Yet, charity regulators are often underfunded to perform their oversight and regulatory tasks,<sup>32</sup> have limited geographical and jurisdictional scope to assess NGO's misconducts overseas,<sup>33</sup> and do not provide an avenue to ascertain NGO's liability nor do they offer victims of NGO's abuses reparations.<sup>34</sup>

Looking at international law, the regulation and the accountability of NGOs is equally challenging. In general, the role and status of NGOs has been formally acknowledged in some international treaties, including the UN Charter<sup>35</sup> and the Geneva Conventions.<sup>36</sup> At the regional level, there has been a more comprehensive attempt to regulate the status of NGOs through the European Convention on the Recognition of the Legal Personality of International NGOs.<sup>37</sup> International law does not place any involuntary and direct obligations upon NGOs from which their liability could arise for a shortfall in compliance. Under international law, the global system is state-centric and NGOs, like any other non-state actor, do not possess legal personality.<sup>38</sup> For this reason, NGOs cannot be subject to the same accountability standards meant for states, for example the international human rights regime. It is worth noticing that the issue of NGO

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<sup>32</sup> S. Phillips, 'Putting Humpty Together Again: How Reputation Regulation Fails the Charitable Sector' (2019) 10 (4) *Nonprofit Policy Forum* 1, at 6.

<sup>33</sup> Ibid. See, also, H. K. Anheier and S. Toepler, 'Policy Neglect: The True Challenge to the Nonprofit Sector' (2019) 10 (4) *Nonprofit Policy Forum* 1.

<sup>34</sup> D. Carolei, 'What happens when NGOs are accused of violating human rights?', *Open Democracy*, 16/04/19, available at <https://www.opendemocracy.net/en/transformation/what-happens-when-ngos-are-accused-violating-human-rights/>

<sup>35</sup> Article 71, Chapter X, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>36</sup> Article 10, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Article 10, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Article 10, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Article 10 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. For an account of the regulation of NGOs under international humanitarian law, see, C. Barrat, *Status of NGOs in International Humanitarian Law* (2014).

<sup>37</sup> Council of Europe, *Explanatory Report on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, ETS 124, Strasbourg 1986.

<sup>38</sup> S. Charnovitz, *supra* note 20, at 335. The status and the legal personality of NGOs has been debated by scholars; for a comprehensive examination of the topic, see, R. H. Ben-Ari, *The Legal Status of International Non-Governmental Organizations: Analysis of Past and Present Initiatives* (2013); P. M. Dupuy and L. Vierucci (eds) *NGOs in International Law: Efficiency in Flexibility?* (2008); A. K. Lindblom, *Non-Governmental Organisations in International Law* (2006).

accountability was not even included in the study on the responsibilities of international organisations conducted by the International Law Commission in 2011.<sup>39</sup> According to the Special Rapporteur Giorgio Gaja, NGOs were not included in this study because ‘they do not generally exercise governmental functions and moreover would not raise the key question of the responsibility of member States for the conduct of the organization.’<sup>40</sup> There are, however, some international obligations which emerge from a series of partnership, cooperative and consultative arrangements that exist between NGOs and international organisations, notably ECOSOC Resolution 1996/31,<sup>41</sup> which replaced ECOSOC Resolution 1296,<sup>42</sup> that prescribes a series of obligations for NGOs to gain and maintain the consultive status at the UN Economic Social and Social Council.<sup>43</sup> Essentially, NGOs undertake these obligations in exchange of having granted participatory rights at the UN meetings with penalties, in the event of non-compliance, consisting either in the suspension or withdrawal of the consultive status.<sup>44</sup> In that respect, Noortman noticed that the ‘apparent neglect for NGO responsibility/accountability in international legal discourse can be understood and explained by the combination and preoccupation with (the absence of) international legal personality and extant normative focus on NGO rights.’<sup>45</sup>

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<sup>39</sup> International Law Commission, *Draft articles on the responsibility of international organizations*. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87).

<sup>40</sup> G. Gaja, *First Report on Responsibility of International Organizations*, UN Doc. A/CN.4/532, 26 March 2003, 12.

<sup>41</sup> ECOSOC Resolution 1996/31, 25 July 1996, Consultative relationship between the United Nations and non-governmental organizations.

<sup>42</sup> ECOSOC Resolution 1296 (XLIV), 23 May 1968, UN doc. E/4548.

<sup>43</sup> B. K. Woodward, ‘Non-state actors responsibilities: obligations, monitoring and compliance’ in N. Gal-Oh, C. Ryngaert and M. Noortmann, *Responsibilities of the Non-State Actor Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), at 40-41.

<sup>44</sup> *Ibid.*

<sup>45</sup> M. Noortman, ‘NGOs in international law: reconsidering personality and participation (again)’ in T. Davies (ed) *Routledge Handbook of NGOs and International Relations* (2019) 194. As Noortman notices, even if the legal accountability of NGOs is underdeveloped and underreached among international lawyers there is a fast-growing literature on the concept across the social sciences and beyond. Multiple definitions of NGO accountability exist, and scholars have analysed the concept from different perspective exploring ‘for what’, ‘how’ and ‘to whom’ NGOs should be accountable. For a un updated literature review on NGO accountability see M. Kaba, ‘NGO accountability: A Conceptual Review’ across the engaged disciplines’ (2021) *International Studies Review* 1. For a comprehensive analysis of the concept and seminal works, see, L. Jordan and P. van Tuijl (eds) *NGO Accountability. Politics, Principles and Innovations* (2006); A. Ebrahim, ‘Accountability in Practice: Mechanisms for NGOs’, (2003) 31 (5) *World Development* 813, M. Edwards, *NGO rights and responsibilities: A new deal for global governance* (2000).



Another reason why the demand for greater accountability has been ignored in the international legal discourse is that NGOs are stereotypically seen as the ‘good guys’ among the different actors populating the international arena.<sup>46</sup> Traditionally viewed as morally impeccable and selfless champion of human rights accountability, nobody ever questioned the human rights impact of NGOs on the populations they work with, their legitimacy to speak in international forums, and their transparency.<sup>47</sup> Interestingly, this neglect makes NGOs underregulated, under international human rights law, compared to other non-state actors, such as multinational companies. Indeed, the human rights responsibilities of multinational companies date back to the 1970s with the emerge of the ‘New International Economic Order’,<sup>48</sup> and the creation of a set of non-legally binding standards, notably the 1976 OECD Guidelines for Multinational Enterprises (‘OECD Guidelines’)<sup>49</sup> and, more recently, the UN Guiding Principles on Business and Human Rights (‘UNGPs’).<sup>50</sup> On the contrary, there is no international instrument that outlines the human rights responsibilities for NGOs.<sup>51</sup>

It is for the above reasons that issues of NGO accountability have been addressed predominantly thought self-regulation: voluntary standards defined by NGOs for NGOs (e. g. codes of conduct, accreditations schemes, peer-assessment tools etc.). Over the past twenty years, there has been a proliferation of self-regulatory initiatives worldwide.<sup>52</sup> Prominent attempts to regulate the sector include the Sphere Standards (Humanitarian Charter and Minimum standards),

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<sup>46</sup> A. Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors and Human Rights’ in P. Alston (ed) *Non-State Actors and Human Rights* (2005), at 62.

<sup>47</sup> Ibid.

<sup>48</sup> Declaration on Establishment of the New International Economic Order, 1 May 1974, A/RES/S-6/3202, where the UN General Assembly provided in Section V of Resolution that ‘all efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations.’

<sup>49</sup> Organisation for Economic Cooperation and Development, *Guidelines for Multinational Enterprises Annex to Declaration on International Investment and Multinational Enterprises*, OECD Doc. C (76) 99 (Final) (1976) subsequently amended in 1979, 1982, 1984, 1991, 2000 and 2011.

<sup>50</sup> UN Human Rights Council, 17th Session, Agenda Item 3, *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie* (21 March 2011) A/HRC/17/31.

<sup>51</sup> A. K. Lindblom, *supra* note 38, at 187-9.

<sup>52</sup> O. B. Breen, A. Dunn, and M. Sidel, ‘Regulatory Waves: an introduction’, in O. B. Breen, A. Dunn and M. Sidel (eds) *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (2017), at 2-3.

Accountable Now, and the Red Cross Code of Conduct. However, self-regulation has been criticised because it is often ineffective in promoting compliance with industry standards due to their voluntary nature, sometimes lacks of adequate monitoring and enforcement mechanisms, and does not encourage beneficiary participation and stimulate peer-to-peer learning adequately.<sup>53</sup> In the wake of the 2018 sexual abuse and exploitation scandals, the UK House of Commons International Development Committee concluded that the NGO sector should move beyond self-regulation, because it failed to ensure that safeguarding and accountability standards are being upheld by NGOs.<sup>54</sup> The Committee labelled self-regulation as fallible because Oxfam was deemed to have one of the best accountability policies as certified by the Humanitarian Quality Assurance Initiative, which is commonly regarded as a credible certification body in the NGO sector.<sup>55</sup> Accordingly, the Committee called for the establishment of an ombudsman asking the UK Government, together with Dutch Government counterparts, to display international leadership in making the ombudsman, namely the 2018 IOHDA, a reality.<sup>56</sup>

Before exploring the 2018 IOHDA proposal and see how this ombudsman should look like, the next section examines the first ombudsman proposal made on the field. From a historical perspective, the idea of an international ombudsman for the NGO sector is not unprecedented, and a similar proposal was already made in 1997.

## **2. The 1997 British proposal: the ombudsman for humanitarian assistance**

The first calls for an international ombudsman date back to the 1990s. After the failure to protect civilians during the Rwandan Genocide, the 1994 Joint Evaluation of Emergency Assistance proposed the creation of an ombudsman as a solution to the poor performance of aid agencies and

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<sup>53</sup> A. Traxle, D. Greiling and H. Hebesberger, 'GRI Sustainability Reporting by INGOs: A Way Forward for Improving Accountability?' (2018) 24 (3) *Voluntas* 1, at 13; A. Crack, 'Reversing the Telescope: Evaluating NGO Peer-Regulation Initiatives' (2016) 28 *Journal of International Development* 40, at 46-9; L. Hammad and B. Morton, 'Greater Influence, Greater Responsibility: are INGOs' Self-Regulatory Accountability Standards Effective?' The North-South Institute (2011), at 14-6.

<sup>54</sup> The UK House of Commons, International Development Committee, *supra* note 14, at paras 34-36.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* The UK House of Commons, International Development Committee, *supra* note 15, at para.193.

the lack of external oversight in the humanitarian sector.<sup>57</sup> This proposal was then discussed on the occasion of the 1997 World Disasters Forum, which launched a feasibility study led by the British Red Cross and supported by several British-based NGOs: the Ombudsman for Humanitarian Assistance ('OHA').<sup>58</sup> The UK Department for International Development funded the project. It contemplated the creation of an independent and impartial body capable of overseeing and handling complaints against NGOs operating in humanitarian contexts, including failure to comply with Red Cross Code of Conduct and the Sphere Humanitarian Charter and Minimum Standards.<sup>59</sup>

The findings of the feasibility study revealed that the OHA would face significant challenges in delivering accountability leaving many questions unanswered: unclear jurisdictional boundaries (should the ombudsman operate solely within the jurisdiction of UK organisations?), lack of legitimacy and authority (who is the ombudsman and who is the office accountable to?), and financing (who will pay for it?).<sup>60</sup> The final report gave two options to NGOs. Option one ('Pilot Test') called for a pilot to test the OHA on the field involving NGOs outside the UK. Option two ('Do Nothing') offered NGOs the possibility of considering the study as a stand-alone project without taking further actions.

In March 2000, the OHA proposal was aborted, and the project took a different direction following a meeting of NGOs at the International Federation of Red Cross in Geneva.<sup>61</sup> Besides the challenges highlighted in the feasibility study, NGOs were not particularly enthusiastic about the OHA. Some argued that the OHA was promoting a model accountability based on control and policing, which could be excessively intrusive for NGOs' independence.<sup>62</sup> The lack of clarity about the OHA enforcement powers, as well as the uncertainties regarding the jurisdiction of the OHA

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<sup>57</sup> D. Peppiatt, 'The Ombudsman Project: Pilot project to investigate the concept of an Ombudsman for humanitarian assistance', *Relief and Rehabilitation Network Newsletter* N. 9 (1997), at 17.

<sup>58</sup> *Ibid.*

<sup>59</sup> A. Davis, 'Concerning Accountability of Humanitarian Actions', *HPN Network Paper* N. 58 (2007), at 8.

<sup>60</sup> *An Ombudsman for Humanitarian Assistance? A report on the findings from a feasibility study presented to the World Disasters Forum* (London, June 1998) 16-9.

<sup>61</sup> D. Doane, 'The Humanitarian Accountability Project: A Voice for People Affected by Disaster and Conflict', *Humanitarian Exchange HPN* N. 17 (October 2000), at 19.

<sup>62</sup> K. Van Brabant, 'Regaining Perspective: The Debate over Quality Assurance and Accountability', *Humanitarian Exchange HPN* N. 17 (October 2000), at 22-5.

over those NGOs that did not support the feasibility study, were two reasons to terminate the project.<sup>63</sup> According to Stockton, some NGOs were hostile to the OHA because they did not want to subject the ‘humanitarian act of compassion to technical, legal or contractual norm.’<sup>64</sup> Hilhorst noted that the main reason for ending the OHA experiment was the reluctance of NGOs to yield power and autonomy to an external body.<sup>65</sup>

Even if the OHA was never brought to life, the discussion about its establishment led eventually to the development of the first self-regulatory initiative in the humanitarian sector: the 2001 Humanitarian Accountability Project.<sup>66</sup> Since then, the ombudsman proposal has been lost in favour of self-regulation. The rapid growth of self-regulation initiatives in the following years suggested that NGOs were confident in considering self-regulation as the main route to deal with their accountability issues.<sup>67</sup> As documented in the introduction and in the previous section of this paper, the idea of the international ombudsmen has recently re-emerged with confidence as an alternative to self-regulation’s failure in promoting accountability. The 2018 IOHDA proposal tabled by the Dutch gave to the NGO accountability community a new opportunity to discuss the feasibility of the establishment of an ombudsman, illustrating how this international body should look like.

### **3. The 2018 Dutch Proposal: The International Ombuds for Humanitarian and Development Aid**

Sponsored by the Dutch Government, the 2018 IOHDA scoping study was conducted by the International Institute of Social Studies, Rotterdam University. The study involved contributions from 76 participants including donors, governments, UN representatives, national and

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<sup>63</sup> I. Christoplos, ‘Humanitarianism, pluralism and ombudsmen: Do the pieces fit?’ (1999) 23 (2) *Disasters* 125, at 127.

<sup>64</sup> N. Stockton, ‘The code of conduct in practice: A personal View’ in N. Leader and J. Macrae (eds), HPG Report 6 *Terms of engagement: Conditions and conditionality in humanitarian action* (July 2000), at 19.

<sup>65</sup> See, in general, D. Hilhorst, ‘Being Good at Doing Good? Quality and Accountability of Humanitarian NGOs’, (2002) 26 (3) *Disasters* 193.

<sup>66</sup> M. Deloffre, ‘Global accountability communities: NGO self-regulation in the humanitarian sector’ (2016) 42 (4) *Review of International Studies* 724, at 737-8.

<sup>67</sup> A. Callamard, ‘NGO Accountability and the Humanitarian Accountability Partnership: Towards a Transformative Agenda’ in L. Jordan and P. van Tuijl (eds) *NGO Accountability: Politics, Principles and Innovations* (2006), at 184.

international NGOs, the Red Cross and experts in the field.<sup>68</sup> The aim of the study was twofold. First, it aimed to assess whether there is a need for an international ombuds. Second, it aimed to show how this brand-new body might function and fit with existing NGO governance and accountability mechanisms.<sup>69</sup>

The findings were promising in relation to the first aim of the study. The IOHDA was perceived positively by the vast majority of research participants with some considering self-policing as ineffective, and others thought it had never worked in practice.<sup>70</sup> There was also an overlapping consensus among participants that donor governments could do more in taking the lead in establishing this new external oversight.<sup>71</sup> Participants also agreed that the IOHDA should play a complementary function in preventing and addressing abuses and that the primary responsibility for dealing with complaints rests on NGOs and existing mechanisms.<sup>72</sup>

The IOHDA's authority could come from a number of sources ranging from a voluntary agreement or moral pressure through to national or international laws.<sup>73</sup> In particular, the study provides six alternative options to clarify how the IOHDA can be established and where its authority would be derived from. Option one is that the IOHDA could be constituted through sectoral self-regulation initiatives and/or internal organisational regulation and its authority would be rooted in voluntary commitments. Option two proposes setting up the IOHDA in the form of a single private entity, such as an NGO/organisation, under national law. Option three consists of framing the IOHDA as an individual donor mechanism that draws its authority from funding agreements. Option four is a joint sectoral ombuds model, supported by donor funding requirements. Option five contemplates the establishment of the IOHDA as an inter-governmental body set up through an international treaty. Finally, under option six, IOHDA would be a UN inter-governmental body mechanism established through a resolution adopted by a UN body.

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<sup>68</sup> D. Hilhorst, A. Naik and A. Cunningham, *supra* note 13, Annex I: Participants.

<sup>69</sup> *Ibid.*, at 3.

<sup>70</sup> *Ibid.*, at 20-1.

<sup>71</sup> *Ibid.*, at 22-3.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at 24.

There are, of course, pros and cons to each of these options. For instance, the study acknowledges that constituting the IOHDA within the framework of international law – as per options five and six - would give it strong authority and international reach, but this option would require significant inter-governmental agreements.<sup>74</sup> Likewise, the study acknowledges that authority derived from a mixture of donor conditionalities, voluntary agreements and moral pressure is more readily achievable.<sup>75</sup> In terms of preference among the six options, research participants converged towards option four:

*‘a joint sectoral entity that complements and strengthens existing accountability mechanisms is nested in an international body and governed by different parts of the sector, with the work carried out by a small secretariat supported by a flexible roster of technical experts and on-the-ground specialists.’<sup>76</sup>*

The IOHDA would be owned and governed based on a multi-stakeholder approach which involves both host countries and agencies (international and local NGOs, multilaterals, and private organisations). Donors are likely to get involved too in managing and setting up the organisational machinery, considering that IOHDA’s authority and existence will depend on donor’s funding.

In terms of organisations covered, the IOHDA will exercise different degrees of authority over a wide range of humanitarian and development entities including NGOs, the UN and other multilaterals, the Red Cross, private organisations and donors.<sup>77</sup> So, the IOHDA is not proposed solely for the NGO sector. The authority of the IOHDA over these organisations may vary depending on the type of voluntary commitments and/or agreements between donors and funding recipients.<sup>78</sup> Interestingly, it is suggested that the IOHDA could have the authority to assess complaints against those organisations not covered by voluntary commitments and/or donor requirements from which the ombuds will derive its authority from.<sup>79</sup> Governments and peace-keeping operations are excluded from the IOHDA oversight.

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<sup>74</sup> Ibid., at 25.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid., at 41.

<sup>77</sup> Ibid., at 26.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

The complaint mechanism should be available for aid recipients and affected populations, rather than for organisational personnel (like staff or volunteers) raising concerns on their behalf.<sup>80</sup> In terms of jurisdiction and scope, the IOHDA should be there for all kinds of complaints made by the affected populations.<sup>81</sup> These may include sexual abuse and exploitation, but also complaints about the quality of aid or even cases regarding fraud and corruption.<sup>82</sup> Therefore, the IOHDA's scope is broad and covers a variety of issues. However, there was enough consensus among participants that the top priority should be given to sexual exploitation and abuse by aid workers. On this matter, research participants also raised a legitimate concern of how affected populations would access - and make a complaint to - the IOHDA due to issues related to geographical proximity, language and cultural barriers, and difficulties in capturing complaints on sensitive matters like sexual misconducts.<sup>83</sup> To overcome these issues, and also be more accessible, it is suggested that the IOHDA will need to have an international presence through global-and-national-level networks of supporters and the capacity to undertake field missions.<sup>84</sup> To make the ombuds as accessible as possible, it is also suggested that it could receive complaints from others speaking on behalf of complainants (e.g. staff, visitors or community members).<sup>85</sup>

The complaint mechanism would be hierarchically organised into a two-tier system.<sup>86</sup> As noted above, the IOHDA should play a complementary role in handling and addressing complaints against NGOs and thus the primary responsibility to deal with complaints rests on the organisations.<sup>87</sup> Consequently, the IOHDA would operate as a second-tier appeal body and can be reached after internal and or sectoral organisational mechanisms have been exhausted by the complainant. Put simply, the IOHDA would be a last resort complaints mechanism. If the IOHDA is the appeal body, it is important that the first-tier system functions appropriately with NGOs being capable to handle complaints in the first place. In light of this, the IOHDA should also play

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<sup>80</sup> Ibid., at 29.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid. at 30.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid., at 5.

<sup>86</sup> Ibid., at 38-41.

<sup>87</sup> Ibid., at 33.

a role in advising and helping NGOs to strengthen and develop robust first-tier complaint mechanisms.<sup>88</sup> This advisory role should be accompanied by a proactive role that allows the IOHDA to conduct audits of the complaints mechanisms within the first-tier system to inspect whether they are functioning and to adequately respond to the needs of communities.<sup>89</sup>

The primary role of the IOHDA would be to respond to complaints when they are not adequately handled in the first-tier system. In that case, there are three options available: 1. referral with or without accompaniment; 2. enquiry, investigation and recommendations; and 3. liaising with the NGO, with a follow-up and escalation if necessary.<sup>90</sup> On a technical level, the IOHDA has no authority to impose legal sanctions, and it relies on non-legally binding recommendations to address organisational misconducts. In the case of persistent non-compliance and/or failure to implement the recommendations by the NGO, the IOHDA may have the ability to publish the outcome of the investigation with the consequent threat to funding and reputation.<sup>91</sup>

The next step that should be undertaken is the testing of the proposed model.<sup>92</sup> The testing aims to shed light on the mandate, structure and modalities of the IOHDA and to assess the support of stakeholders. More detail and further work about the development of the proposed model in terms of legal basis, organisational structure, costs and nesting is needed too. This step should be accompanied by an assessment of the status of existing complaints mechanisms coupled with a further test about the feasibility of the IOHDA in humanitarian and development sites.<sup>93</sup>

#### **4. Challenges**

The scoping study is a good starting point to develop a comprehensive debate concerning the establishment of an international ombudsman. The study has the merit of unpacking the essential elements of the IOHDA in terms of scope, jurisdiction, role and structure. Nevertheless, the

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<sup>88</sup> *Ibid.*, at 38-41.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, at 33, and at 38.

<sup>91</sup> *Ibid.*, at 5.

<sup>92</sup> *Ibid.*, at 42-3.

<sup>93</sup> *Ibid.*



scoping study is far from being exhaustive, and there are a number of challenges of a logistic or legal nature.

The study itself identifies several challenges which are to some extent similar to those faced by the aborted OHA. First, there are practical challenges revolving around the authority, logistics and administration of the proposed body. The logistical and administrative complexities primarily concern the nesting and the location of the IOHDA, considering that it requires a global presence and an international reach.<sup>94</sup> The question of authority will need to be addressed more in-depth: from where does the authority of the ombuds come?<sup>95</sup> This is a vital question because it is proposed that the IOHDA could have authority over a wide range of organisations, including those NGOs choosing not to support it actively. Second, there is an issue with the costing arising from the establishment and the maintenance of the IOHDA.<sup>96</sup> Apart from finding enough financial resources to support the proposed administrative machinery, the key question is whether donors or organisations should bear the costs of the IOHDA because the choice between these two options will inevitably influence the independence of the complaint mechanism.<sup>97</sup> Third, there are legal and jurisdictional issues as well as the unanswered question of how the IOHDA would link with domestic laws and national authorities.<sup>98</sup> Fourth, there are concerns about the accessibility and the potential risks arising for the complainants given their vulnerability and the sensitive nature of the issues concerned.<sup>99</sup> As already documented above, complainants might face language and cultural barriers in accessing the mechanism. Even worse, victims might decide not to report an incident due to a variety of reasons: fear that they could lose assistance from the NGO as a result of the complaint being filed, lack of trust towards the entity, perception of impartiality, gender inequalities and power imbalance.<sup>100</sup>

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<sup>94</sup> *Ibid.*, at 32.

<sup>95</sup> *Ibid.*, at 40.

<sup>96</sup> *Ibid.*, at 36.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, at 42.

<sup>99</sup> *Ibid.*, at 30, and at 40.

<sup>100</sup> M. Shuteriqi, 'Enhancing accountability SEA: Is a Sector Ombudsperson the next step?' Discussion paper commissioned by ICVA' (September 2018) 4. See, also, K. Lattu, 'To complain or not to complain still the question: Consultations with humanitarian aid beneficiaries on their perceptions of efforts to prevent and respond to sexual

Beyond the logistic and legal issues identified by the scoping study, there are three other challenges that should be examined in greater detail.

The first challenge has to do with IOHDA's jurisdictional scope and its misinterpretation of the ombudsman's traditional role. As it stands from the scoping study, the proposed ombuds should have the authority to respond to 'all kinds of complaints' raised by the affected populations.<sup>101</sup> This is a broad scope which could cause ambiguity in terms of determining the ombudsman jurisdiction and competence. Pragmatically speaking, it would be unfeasible, not to say idealistic, to believe that a single scheme can be equipped with powers, resources, and authority to deal with an undefined number of issues and complaints. What is even more controversial is the strong emphasis on handling complaints regarding a series of misbehaviors that amount to offences under criminal law, including sexual exploitation and abuse by aid workers. While the proposed model has the noble ambition to tackle the impunity of sexual crimes in the aid sector, it should be noted that none of the existing ombuds schemes have been designed to deal with criminal issues. Their competence is traditionally limited to investigate issues of injustices arising from maladministration, such as the lack of transparency, administrative irregularities or failure to uphold ethical principles.<sup>102</sup> In that regard, the IOHDA seems to misinterpret the traditional role assigned to ombudsmen as they do not deal with crime-related matters nor do they exist to replace criminal courts. Furthermore, criminal liability is by definition personal and rests on individuals and it cannot be ascribed to the organisation the individual - who allegedly perpetrated the abuse - works for. Put simply, the IOHDA is not a criminal judge. By the same token, Penny Mordaunt (UK Secretary of State for International Development, 2017-19) highlighted that there is a risk

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exploitation and abuse' (2008) Humanitarian Accountability Partnership, available at [www.pseataaskforce.org/uploads/tools/tocomplainornottocomplainstillthequestion\\_hapinternational\\_english.pdf](http://www.pseataaskforce.org/uploads/tools/tocomplainornottocomplainstillthequestion_hapinternational_english.pdf).

<sup>101</sup> D. Hilhorst, A Naik and A Cunningham, *supra* note 13, at 29.

<sup>102</sup> In a nutshell, maladministration means poor or failed administration. According to the European Ombudsman, maladministration 'administrative irregularities, unfairness, discrimination or the abuse of power, for example in the managing of EU funds, procurement or recruitment policies.' European Ombudsman, 'how can the ombudsman help', available at <https://www.ombudsman.europa.eu/en/how-can-the-ombudsman-help>. In the UK, the most quoted definition of maladministration is that of a Cabinet Minister, Richard Crossman, who in 1967 who listed 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and so on.' *Official Report* HC 734 Col 51. In other jurisdictions, the concept of maladministration is broader than one employed in the UK. In Denmark, for example, the ombudsman might examine 'mistakes' and 'unreasonable decisions' and, in Norway, the ombudsman can investigate decisions which are 'clearly unreasonable.' Hilaire Barnett, *Constitutional and Administrative Law* (2019), at 791.

that an international ombudsman might replicate certain regulatory institutions that are already in place at the national level, like the Charity Commission for England and Wales.<sup>103</sup> For this reason, the ombudsman should not be framed as global charity commission operating as a sort of supra-national NGO regulator. While ombudsman institutions do not and should not investigate the commission of a crime, they should and do have jurisdiction over a wide range of administrative authorities involved in the criminal justice area (e. g. ministries with responsibilities over criminal justice or the police force) and investigate whether there are illegal or improper administration in these areas. For example, the Spanish Ombudsman operates as National Preventive Mechanisms against torture and other cruel, inhuman or degrading treatment or punishment following the ratification by Spain of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>104</sup> More specifically, the Spanish ombudsman undertakes preventive work in the form of monitoring and visits to places of detention, institutions and any other facilities where individuals are deprived of their liberty.<sup>105</sup> Likewise, there are a number of ombudsman schemes dealing with allegations of corruption in the public sector operating in different jurisdictions, including Republic of Korea, Jordan and Ghana.<sup>106</sup> The World Bank acknowledges the key role that ombudsman schemes play in tackling corruption by ‘overseeing the conduct of senior public officials, collecting and reviewing assets and income declarations, investigating instances of alleged or suspected corruption, and educating and informing the public regarding issues related to corruption’.<sup>107</sup> In light of this, the IOHDA’s mandate should be to investigate whether the NGO leadership and management have engaged in conduct or failed to act in ways that did not prevent an employee from committing a crime or took follow-up actions to stop illicit conducts from happening again.

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<sup>103</sup> The UK House of Commons, International Development Committee, *supra* note 15, at para 192.

<sup>104</sup> J. Beqiraj, S. Garahan and K. Shuttleworth, Ombudsman schemes and effective access to justice: A study of international practices and trends, International Bar Association (October 2018), at 17. See also Spanish Ombudsman, Spain’s National Preventive Mechanism against Torture: Annual Report 2016, available at <https://bit.ly/2OynZVJ>.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, at 21

<sup>107</sup> *Ibid.* See also The World Bank, Governance & Public Sector Management (2016), available at <https://bit.ly/2KeHjUf>.

The second additional challenge is that the scoping study fails to mention that existing ombudsman schemes present limitations in holding public and private bodies accountable and have also been subject to criticism. In some countries, dissatisfied users of public service ombudsman schemes gave birth to associations – known as ‘ombuds watchers’ - to organise protests against the ombudsmen and advocate for their reform.<sup>108</sup> In developing countries, ombudsmen emerged mainly because international donors, like the World Bank, put pressure on national institutions to deal with corruption and lack of transparency in the public sector.<sup>109</sup> Yet, in some developing countries, ombudsmen remain largely ineffective or exist only on paper: ‘these countries have adopted this institution in an effort to improve their human rights image and it is more of a front or facade for human rights or democracy.’<sup>110</sup> Examining the pertinent European Court of Human Rights (‘ECtHR’) jurisprudence, Laffranque – former ECtHR judge – concluded that the ombudsman does not constitute an effective remedy within the meaning of Article 35 of the European Convention on Human Rights (‘ECHR’).<sup>111</sup> According to Laffranque, most national European ombudsmen have no power to impose legally binding decisions on administrative authorities, their investigations do not represent an effective remedy under the meaning of Article 13 ECHR, and this is so even in cases where the ombudsman has additional powers to launch court cases or challenge the constitutionality of national laws.<sup>112</sup>

Looking at some of the criticisms relevant to development of the IOHDA, one issue would be that the IOHDA scoping study contemplates the possibility of receiving complaints from others speaking on behalf of complainants (e. g. staff, visitors or community members), as a matter of enacting the accessibility of this accountability mechanism.<sup>113</sup> Put simply, the complaint could be filed either by the affected person directly or by others speaking of his or her behalf. In putting

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<sup>108</sup> See, in general, C. Gill and N. Creutzfeldt, ‘The ‘Ombuds Watchers’: Collective Dissent and Legal Protest Among Users of Public Services Ombuds’ (2018) 27 (3) *Social & Legal Studies* 367.

<sup>109</sup> N. Abedin, ‘The Ombudsman in developing democracies: The Commonwealth Caribbean experience’ (2010) 23 (3) *International Journal of Public Sector Management* 221, at 228.

<sup>110</sup> *Ibid.*, at 245.

<sup>111</sup> J. Laffranque, ‘The Ombudsman in the Eyes of the European Court of Human Rights’ (2020) 29 *Juridica International* 95, at 97-9.

<sup>112</sup> *Ibid.*

<sup>113</sup> D. Hilhorst, A. Naik and A. Cunningham, *supra* note 13, at 5.

emphasis on the importance of enabling and encouraging others to complain on behalf of the affected person, the scoping study adds: ‘it is therefore envisaged in this case that the complaint may come from a staff member, a visiting consultant, a donor or other persons in the locality with the ability to report, rather than from the vulnerable person him or herself.’<sup>114</sup> In this context, an analogy with the UK Parliamentary Commissioner for Administration can be made. A common criticism to the UK Parliamentary Commissioner for Administration is that any complaints has to be filed through a Member of Parliament under section 6 (3) Parliamentary Commissioner Act 1967.<sup>115</sup> This requirement, known as the ‘MP filter’, implies that the complainant has no direct right of access to the ombudsman. This filter has been viewed by many as an arbitrary barrier between the ombudsman and the complainant which, in turn, could be limiting to the ombudsman’s powers of investigation. In 2014, the UK House of Commons Public Administration Select Committee was highly critical of the MP filter as it ‘disempowers citizens, obstructs access to their rights, and deters people from making complaints.’<sup>116</sup> In light of this criticism, the UK Government published, in December 2016, a draft bill to create a Public Service Ombudsman for UK reserved matters and public services in England: one of the draft bill’s most notable innovation is the removal of the MP filter.<sup>117</sup> Based on that, the idea of allowing complaints through a representative speaking on behalf of the complainant could have the paradoxical effect of rendering the IOHDA difficult to reach rather than enacting its accessibility, representing a procedural barrier similar to the MP filter.

Additionally, criticisms to the way in which ombudsmen operate are not limited to schemes existing in the public sector but also extend to those available in the private sector, including the 2019 Canadian Ombudsperson for Responsible Enterprise, a governmental executive ombudsman. According to Keenan, the Canadian ombudsperson has not been granted enough independence to conduct investigations about allegations of abuse by Canadian companies operating abroad

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<sup>114</sup> Ibid., at 30

<sup>115</sup> Parliamentary Commissioner Act 1967, *supra* note4).

<sup>116</sup> The UK House of Commons Public Administration Select Committee, *Time for a People’s Ombudsman Service*. Fourteenth Report of Session 2013–14 (2014), at para 55.

<sup>117</sup> Draft Public Service Ombudsman Bill Presented to Parliament by the Parliamentary Secretary, Cabinet Office by Command of Her Majesty (December 2016).

because it operates under the direct control of government authority and advises the Minister of International Trade on issues concerning responsible business.<sup>118</sup> These close ties with the Canadian government exposed the ombudsperson to allegations that it lacks of appropriate investigate powers to report publicly and impartially its findings and to encourage governmental pressure on companies in the event of non-compliance.<sup>119</sup> This criticism is particularly pertinent for the issue of the IOHDA's independence considering the uncertainties regarding how this ombudsperson would be sponsored and managed: as noted previously, the fundamental question is whether NGOs or institutional donors (like aid agencies and national governments) should bear the costs of creating and sustaining this new accountability mechanism.<sup>120</sup> This implies that potential threats to the IOHDA's independence could come from several sources, including institutional donors and NGOs' self-interests. Furthermore, there are several issues related the IOHDA's independence which have not been addressed by the scoping study yet, namely: appointment, removal, tenure and remuneration of the ombuds. These factors all matter in terms of ensuring and maximizing the independence of the ombuds from its sponsorship.<sup>121</sup> In that respect, the 2019 Venice Principles on the Protection and the Promotion of Ombudsman Institution provide guidance regarding the procedure of appointment and dismissal of the ombudsman, as well as its term of office.<sup>122</sup> These principles provide an optimal version of independence where an ombuds is appointed by and reports to the legislative body to investigate the administrative branch of the government. Albeit not written for the international or private sector ombudsmen, the Venice Principles can be relied upon to draft provisions governing the relationship between the IOHDA and its sponsor – whether that would be NGOs or institutional donors – ensuring that

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<sup>118</sup> See, in general, K. Keenan, 'Canada's New Corporate Responsibility Ombudsperson Falls Far Short of its Promise', (2020) 5 (1) *Business and Human Rights Journal* 137.

<sup>119</sup> J. Saloranta, 'Establishing a Corporate Responsibility Ombudsman: Enhancing remedy through state-based non-judicial mechanisms?' (2021) 28 (1) *Maastricht Journal of European and Comparative Law* 102, 108. See, also, C. Kamphuis, 'Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement' in I. Freichtner et al. (eds.), *Human Rights in Extractive Industries: Transparency, Participation, Resistance* (2019), at 502.

<sup>120</sup> D. Hilhorst, A. Naik and A. Cunningham, *supra* note 13, at 36.

<sup>121</sup> B. Thompson, 'The Challenges of Independence, Accountability and Governance in the Ombudsman Sector' in R. Kirkham and C. Gill (eds) *A Manifesto for Ombudsman Reform* (2020), at 147

<sup>122</sup> Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019)

a set of adequate standards will be met when it comes to appoint, dismiss, and remunerate the pertinent ombuds.

The third and last challenge is that, so far, there has been little support for any form of mechanism or external scrutiny to hold NGOs to account, like the IOHDA, outside of donor relationships.<sup>123</sup> This is a significant challenge because the scoping study indicates that one of the next steps is to investigate the support of the stakeholders towards this initiative.<sup>124</sup> While the UK House of Commons International Development Committee has been consistently sympathetic towards the establishment of the IOHDA, the UK Department for International Development labeled the same proposal as ‘impractical’ and ‘controversial’ and concluded that it should be abandoned.<sup>125</sup> When questioned about the feasibility of the IOHDA, Professor Doretha Hilhorst responded that, even if the international ombudsman should play a complementary role in promoting accountability in light of the proposed two-tier system, organisations like UN and the Red Cross are skeptical about it because they ‘do not see the need for external oversight as complementary to internal mechanisms.’<sup>126</sup> Beyond the support that the IOHDA should gain in international diplomacy circles among governments, international organisations and donors, there is the further challenge of getting the support of NGOs themselves. Apart from a handful of NGOs’ representatives that took part to the scoping study,<sup>127</sup> there has been no real commitment by NGOs

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<sup>123</sup> J. Daun, ‘Humanitarian accountability: a conceptual analysis’, working paper N. 41. RECAP – Refugee Law Initiative (2020) at 8.

<sup>124</sup> D. Hilhorst, A. Naik and A. Cunningham, *supra* note 13, at 8.

<sup>125</sup> S. Edwards, DFID gives up on idea for an international safeguarding ombudsman, *Devex*, 23 October 2019, available at <https://www.devex.com/news/dfid-gives-up-on-idea-for-an-international-safeguarding-ombudsman-95886>.

<sup>126</sup> Kuno, The potential of an international Ombuds for humanitarian and development aid - a scoping study (23 November 2018) 11, available at <https://www.kuno-platform.nl/wp-content/uploads/2019/02/Final-report-International-Ombuds.pdf>.

<sup>127</sup> D. Hilhorst, A. Naik and A. Cunningham, *supra* note 13, Annex I: Participants. Among the 70 participants to the scoping study, there are 25 NGOs listed: CIVICUS, Adeso Africa– African Development Solutions, International Alert, All India Disaster Mitigation Institute, Disasters Emergency Committee, Save the Children International, Catholic International Development Charity (CAFOD), Communicating with Disaster Affected Communities Network (CDAC), Coastal Association for Social Transformation Trust (COAST) Bangladesh, Norwegian Refugee Council (NRC), World Vision UK, Christian Aid, Steering Committee for Humanitarian Response, Medecins Sans Frontieres-International, Somalia NGO Consortium, Aids free World/Code Blue, International Association of Professionals in Humanitarian Assistance and Protection (PHAP), Tearfund, Action Against Hunger (ACF)-USA, Hear Their Cries, Action Conte la Faim (ACF) France, Global Mentoring Initiative, Oxfam, ICCO-Cooperation, Humedica.

in backing the IOHDA through official campaigns and advocacy activities at the international level. In general, NGOs are a driving force behind the establishment of international accountability mechanisms. There are several international institutions that would never have brought to life if NGOs did not campaign actively for their establishment and their creation was left to the mere political will of states and international organisations alone. For example, the establishment of the International Criminal Court ('ICC') is the result of effective advocacy strategies performed by the Coalition for the ICC - a global network of over 2,500 NGOs – and it is for this reason that the ICC is regarded as an achievement of global civil society.<sup>128</sup> Similarly, NGOs advocacy has frequently triggered the processes of human rights standard-setting, leading to the codification of prominent international human rights norms including freedom from torture, rights of the child and rights of indigenous peoples.<sup>129</sup> In light of this, and given that the IOHDA is a body specifically designed for their accountability, NGOs should be the principal standard-setters for the proposed international ombuds. Unless NGOs campaign for such a normative change and take a proactive role in setting this new body, it is improbable that the IOHDA will ever be established. In that regard, it is worth recalling that IOHDA's precursor (the 1997 OHA examined in section 2) failed because of multiple reasons, including the fact that NGOs were generally reluctant to yield autonomy to an external authority empowered to scrutinise their conduct. For the same reason, it is more likely that NGOs will reject, instead of campaigning for, an international ombudsman.

Moreover, it is worth noticing that most of the NGOs that took part to the scoping study operate internationally and are headquartered either in Western Europe or North America. More participation from grassroots organisations, NGOs based in the Global South, and of the affected populations would have been desirable both in the scoping study and, at later stage, in the standard-setting process of the IOHDA. More involvement of actors from the Global South is an imperative in light of the recent calls to decolonize the aid sector, unpack locally-led development and shift the power from Northern to Southern NGOs. As documented by Deloffre, one of the reasons why the HAO failed is because it was perceived to be dominated by a small set of Global North

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<sup>128</sup> M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (2006).

<sup>129</sup> T. van Boven, 'The Role of Non-Governmental Organisations in International Human Rights Standard-Setting: A Prerequisite for Democracy' 1990 (20) *California Western International Law Journal* 207, at 211.



actors.<sup>130</sup> Interestingly, while the process for developing NGO self-regulatory standards, such as the Sphere Project, was more inclusive than the HAO and relied on a broad-based consultation, these standards still reflect the practice of a small dominant group of western-based NGOs who decided what game was being played.<sup>131</sup>

## 5. Alternative routes to enact NGO accountability at the international level

While the establishment of the IOHDA is being discussed in international circles as potential solution to make NGOs more accountable, it is important to identify new and emerging routes to enact NGOs accountability at the international level.

To respond to the accusations of sexual abuse in the NGO sector, there have been a few brand-new regulatory initiatives, overseen by intergovernmental agencies, launched to strengthen safeguarding policies and move beyond sectoral initiatives largely based on self-reporting and self-monitoring. For example, INTERPOL, in partnership with the UK Department for International Development and the UK Association of Chief Police Officers Criminal Record Office, have established the Project Soteria: ‘an initiative that seeks to develop mechanisms for safer recruitment of staff in the international aid sector, and prevent sexual offenders from using positions in the sector to access and offend against children and vulnerable adults.’<sup>132</sup> The aim of the project, which is currently being trailed, is twofold. One the one hand, it aims at creating new criminal records and background checks for aid workers and promote information sharing between aid and law enforcement agencies.<sup>133</sup> On the other hand, it aims at developing a humanitarian passport so the identity and work history of all individuals working in the aid sector can be checked

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<sup>130</sup> M. Deloffre, “An Independent Commission for Voices in Crisis: Changing the referee instead changing the game,” Humanitarian Practice Network (HPN) Blog, April 26, 2021. Available at [https://odihpn.org/blog/an-independent-commission-for-voices-in-crisis-changing-the-referee-instead-of-changing-the-game/?utm\\_content=buffer55aa9&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](https://odihpn.org/blog/an-independent-commission-for-voices-in-crisis-changing-the-referee-instead-of-changing-the-game/?utm_content=buffer55aa9&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)

<sup>131</sup> Ibid

<sup>132</sup> INTERPOL, SOTERIA Project: Preventing individuals from using aid work as means to access and offending against the vulnerable. Available at <https://www.interaction.org/wp-content/uploads/2021/04/Soteria-Factsheet-V.3-002.pdf>

<sup>133</sup> UK Department for International Development, Press Release ‘International Development Secretary calls on UK aid agencies to share data on staff misconduct’, available at <https://www.gov.uk/government/news/international-development-secretary-calls-on-uk-aid-agencies-to-share-data-on-staff-misconduct>

and tracked more easily.<sup>134</sup> At the same time, the OECD Development Assistance Committee, adopted the 2019 Recommendation on Ending Sexual Exploitation, Abuse and Harassment in Development Cooperation and Humanitarian Assistance, a non-legally legal binding instrument that sets standards for member governments, bilateral donors and their implementing partners, including NGOs.<sup>135</sup> This instrument makes a number of recommendations to the adhering parties, including developing survivor- and victim-centred response mechanisms to deal with sexual abuse at the organisational level and ensuring international coordination with donors and implementing partners for abuse prevention and response.<sup>136</sup> While the Sotera Project and the OECD Recommendation represent an important step forward in establishing new external oversights for NGOs, Clark warns about the potential challenges that NGOs might face from the implementation of these initiatives, including the duplication of mechanisms and standards, new layers of bureaucracy and additional resources to ensure norm compliance, the risk of inappropriate cultural intrusion and competition between conflicting national standards.<sup>137</sup>

Another route consists in applying business and human rights law, meant to apply only to multinational corporations, to make NGOs more accountable for their human rights performance. In the past few years, there have been important developments in that respect. There is a growing number of NGOs that signed up to the UN Global Compact,<sup>138</sup> together with an emerging caselaw that suggests that the OECD Guidelines for Multinational Enterprises apply to NGOs, and other kinds of non-profit entities.<sup>139</sup> In February 2016, Survival International filed a complaint against

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<sup>134</sup> Ibid

<sup>135</sup> OECD, DAC Recommendation on Ending Sexual Exploitation, Abuse, and Harassment in Development Cooperation and Humanitarian Assistance: Key Pillars of Prevention and Response OECD/LEGAL/5020 (Adopted on 12/07/2019)

<sup>136</sup> Ibid.

<sup>137</sup> G. Clarke, 'The Credibility of International Non-Governmental Organizations (INGOs) and the Oxfam Scandal of 2018' (2021) *Journal of Civil Society* 1, at 15 - <https://doi.org/10.1080/17448689.2021.1994200>.

<sup>138</sup> The UN Global Compact, launched at UN Headquarters (New York, 26 July 2000), amended at 1st Global Compact Leaders Summit, UN Headquarters (New York, 24 June 2004), Participation to the GC is open to business and non-business participants. At the time of writing, over 1,500 NGOs signed the GC as non-business participants. The GC website clarifies that 'non-business participants are also encouraged to commit their organisation to the 10 Principles and to report on progress made within their organisation'. See UN Global Compact website, About the Global Compact – Frequently Asked Questions, available at <https://www.unglobalcompact.org/about/faq>.

<sup>139</sup> National Contact Point Norway, Initial Assessment and Final Conclusion, 129 *Roma in Kosovo v. Norwegian Church Aid (NCA)*, on 26 September 2011; National Contact Point of Switzerland, Initial Assessment Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood

the WWF under the OECD Guidelines, alleging the WWF's involvement in human rights abuse of indigenous people in Cameroon.<sup>140</sup> The Swiss National Contact Point (NCP) accepted the complaint against the WWF, asserting that the OECD Guidelines apply to NGOs when they: 1. carry out business activities, 2. operate in more than one country, and 3. are registered or operate in adhering countries of the OECD Guidelines.<sup>141</sup> In addition to the WWF, there have been other complaints under the OECD Guidelines against different kinds of non-profit entities, including the international governing body of football associations, the Fédération Internationale de Football Association ('FIFA'), and multi-stakeholder initiatives, namely MSI Bunsucro and Roundtable on Sustainable Palm Oil.<sup>142</sup> In deciding these complaints, the pertinent NCPs ruled that OECD Guidelines apply to these entities, although formally non-profits.<sup>143</sup> Following a similar line of reasoning, Schimmel proposes to use the UNGPs as a normative template to define a framework for the human rights responsibilities of NGOs.<sup>144</sup> Professor John Knox (former UN Special Rapporteur on Human Rights and the Environment, and member of the independent panel of experts to review the WWF accusations of human rights abuses) observed that the WWF's new Social Policies and Standards, modelled on the World Bank, have basic flaws and that it should start over, building on UNGPs and human rights norms.<sup>145</sup> Because new government-led

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Workers' International (BWI) on 28 May 2015; National Contact Point of Switzerland, Initial Assessment Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by Americans for Democracy and Human Rights in Bahrain (ADHRB) on 11 February 2016; National Contact Point of Switzerland, Initial Assessment, Specific Instance regarding the World Wide Fund for Nature International (WWF) submitted by Survival International (SI) Charitable Trust on 20 December 2016; National Contact Point of Switzerland; Initial Assessment Specific Instance regarding the Roundtable for Sustainable Palm Oil (RSPO) submitted by Transformation for Justice (TuK) Indonesia on 31 May 2018; National Contact Point of United Kingdom, Initial assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: complaint from IDI, EC and LICADHO against Bonsucro Ltd, on 25 September 2019.

<sup>140</sup> National Contact Point of Switzerland, Initial Assessment, Specific Instance regarding the Worldwide Fund for Nature International (WWF) submitted by Survival International (SI) Charitable Trust on 20 December 2016; National Contact Point of Switzerland.

<sup>141</sup> D. Carolei, 'Survival International Vs WWF: Using the OECD Guidelines for Multinational Enterprises as a means of NGO accountability' (2018) 2 *Human Rights Law Review* 371, at 182.

<sup>142</sup> D. Carolei, 'Accountability beyond Corporations: The Applicability of the OECD Guidelines for Multinational Enterprises to Non-profit Organisations' (2022) 13 (1) *Nonprofit Policy Forum*, 31-47.

<sup>143</sup> Ibid.

<sup>144</sup> N. Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs. Respecting and Fulfiling the Right to Reparative Justice for Genocide Survivor in Rwanda* (2020) at 52.

<sup>145</sup> J. H. Knox, letter sent to Pavan Sukhdev, President, Marco Lambertini, Director-General, WWF International Gland Switzerland (30 June 2021) available at for download at

international initiatives to regulate the NGO sector could be accused of concealing sinister political agendas, or at least of being inappropriately intrusive, business and human rights instruments, although not designed with NGOs in mind, provide an attractive and moderate avenue to enhance NGO accountability.<sup>146</sup>

In addition to the application of business and human rights law to NGOs, another route to enact NGO accountability consists in extraterritorial jurisdiction, that is: holding an NGO liable for misconducts perpetrated overseas (in host countries) using the law of the country where the NGO is registered or headquartered (home country) to operate internationally. The caselaw on the matter is still scant but there are a couple of landmark cases that deserve consideration. In 2016, Steven Patrick Dennis, a Canadian citizen, filed a lawsuit before the Oslo district court against his former employer - the Norwegian Refugee Council ('NRC') - for an incident that happened in Kenya.<sup>147</sup> The Oslo district court held that NRC owes a duty of care to their employees when they operate in hostile environments overseas.<sup>148</sup> In the aftermath of the Oxfam GB scandal in Haiti, Andrew MacLeod (former chief of operations of the UN Emergency Coordination Centre) advanced the possibility of using extraterritorial jurisdiction noticing that 'if they [victims] were adults, perpetrators should be charged in front of the courts in Haiti because prostitution is illegal. If they are children, they should be charged in front of UK courts for breaking international sex tourism laws.'<sup>149</sup> The statutory inquiry launched by the Charity Commission into Oxfam GB highlighted that NGOs are expected to report suspected criminality to overseas law enforcement authorities.<sup>150</sup> Nonetheless, there still could be occasions in which reporting may not be feasible,

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<https://www.mediafire.com/file/djd94a93rq79b24/Knox+Comments+on+WWF+Safeguards+-+30+June+2021.pdf/file>

<sup>146</sup> See D. Carolei and N. Bernaz, 'Accountability for Human Rights: Applying Business and Human Rights Instruments to Non-Governmental Organisations' (2021) 13 (3) *Journal of Human Rights Practice* 507, 522.

<sup>147</sup> *Steven Patrick Dennis v. Flyktninghjelpen* [Norwegian Refugee Council], Index no. 15-132886TVI-OTIR (Oslo District Court, 2015).

<sup>148</sup> *Ibid.*

<sup>149</sup> H. Yorke, 'Oxfam workers could face UK prosecution over sex crimes', *The Telegraph*, 12 February 2018 available at <https://www.telegraph.co.uk/news/2018/02/12/oxfam-scandal-charity-commission-deals-1000-safeguarding-incidents>. See, also, J. Grierson, 'Oxfam scandal: Penny Mordaunt to meet National Crime Agency', *The Guardian*, 14 February 2018, available at <https://www.theguardian.com/world/2018/feb/14/oxfam-scandal-penny-mordaunt-to-meet-national-agency>.

<sup>150</sup> Charity Commission England and Wales, Inquiry Report: Summary Findings and Conclusions Oxfam (11 June 2019) 26.

such as when the victim's consent is legally required for reporting or when the victim lacks trust in the local criminal justice system because there can be a real risk of harm for cultural reasons (e. g. in situations of pregnancy outside of marriage, prostitution or sex with teenagers or people of the same sex).<sup>151</sup> Likewise, in explaining why Dennis succeeded in holding NRC accountable, Sandvik noted that taking NGOs to court through extraterritorial jurisdiction is an 'extraordinary complicated, expensive and time consuming-process, involving multiple-jurisdictions and languages.'<sup>152</sup>

## 6. Conclusion

The establishment of an international ombudsman for NGOs could fill a regulatory and accountability gap in global governance, but this paper has shown that there are several issues that makes the IOHDA proposal ambitious, logistically and legally. The IOHDA proposal unpacks the core components of this new ombuds in terms of nature, jurisdiction, role and structure, but it also acknowledges that there a number of problems associated with its establishment, namely: authority, maintenance, coverage and accessibility. This paper identified three further challenges related to the creation of this body. First, the IOHDA's scope is too broad and puts excessive emphasis on sexual abuses, neglecting the traditional role and jurisdiction of the ombudsman in handling complaints. Second, it neglects that existing ombudsman schemes presenting limitations, including the MP filter (UK Parliamentary Commissioner for Administration) and could lack impartiality and sufficient investigative powers to assess misconducts (Canadian Ombudsperson for Responsible Enterprise). Third, the IOHDA lacks support from NGOs, a driving force behind the establishment of international accountability mechanisms, which should be the principal standard-setter for a body designed to deal with their accountability, like the IOHDA.

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<sup>151</sup> Ibid.

<sup>152</sup> K.B. Sandvik, 'Humanitarians in court: how duty of care travelled from human resources to legal liability' (2019) *The Journal of Legal Pluralism and Unofficial Law* 1, 7

In order to mitigate the above challenges, this paper makes three key recommendations. First, it should be elucidated with greater clarity that the IOHDA's scope is limited to addressing solely whether the NGO leadership and management have engaged in conduct or failed to prevent, address or report to the relevant authority the commission a crime, specifically cases of sexual abuses. By no means, the IOHDA could act as a criminal judge; neither can it possibly deal with an undefined volume of complaints of different kinds. In that respect, it would be helpful to clarify the exact boundaries of the IOHDA's jurisdiction through, for example, a list of excluded matters that would fall outside the remit of this ombudsman. Second, even if the UK Parliamentary Commissioner for Administration and Canadian Ombudsperson for Responsible Enterprise are designed for the public and the business sector, it would be worth asking what kind of lessons can be learnt from these schemes when it comes to testing the IOHDA. In this way, the international ombuds could emerge more effective in providing accountability compared to existing schemes, paying particular attention to the issue of accessibility of the IOHDA for the complainants (if the complaint can be filtered through a representative) and the issue of ensuring the IOHDA impartiality from donors' pressure and NGOs' self-interests. In order to ensure and maximize the independence of the ombuds from its sponsorship, it is suggested that the issues of appointment, removal, tenure and remuneration of the IOHDA the are adequately addressed, using the 2019 Venice Principles as a normative guidance. Third, NGOs should be actively involved and take the lead in the establishment, management and be the principal standard-setters of the IOHDA. When and if the IOHDA is brought forward to the next stage (that is, testing stakeholders support towards this initiative), it is suggested to increase the participation of NGOs through forms of democratic dialogue involving all different components of global civil society - in particular NGOs and affected populations from Global South - because participatory approaches will truly make NGOs both the ruler and the ruled of the IOHDA. The Charity Ethical Principles adopted by the National Council for Voluntary Organisations ('NCVO') - the umbrella body for charities in England and Wales - in the aftermath of the Oxfam GB scandal represents a good example of participation: essentially, the NCVO ran an online consultation for almost three months to ensure that the final version of the code is based on feedback from the widest possible range of NGOs and

stakeholders.<sup>153</sup> Participatory approaches can go as far as to involve NGOs' beneficiaries and the affected populations: for instance, the Uganda National NGOs Forum consulted beneficiaries, at the draft stage, while developing the NGOs Quality Assurance Mechanism.<sup>154</sup> While the establishment of the IOHDA is being discussed further, this paper has also identified new and emerging alternatives routes to enact NGO accountability at the international level. The first route consists in new regulatory initiatives, launched by intergovernmental organisations. One of these initiatives is the Project Soteria led by INTERPOL which aims at tackling sexual abuse through new criminal records and background checks for aid workers, granting them a humanitarian passport. Another initiative is the Recommendation on Ending Sexual Exploitation, Abuse and Harassment in Development Cooperation and Humanitarian Assistance developed by the OECD Development Assistance Committee. The second route consists in applying the business and human rights framework meant for corporations to NGOs, particularly those carrying out business activities, using the three major initiatives in field: the UN Global Compact, the OECD Guidelines, and the UNGPs. The third route is extraterritorial jurisdiction through which an NGO is held liable for misconducts perpetrated overseas using the law of the country where the NGO is registered or headquartered to operate internationally. Yet, as this paper has documented, none of these routes is perfect and all of them present some challenges, including the duplication of regulatory standards, jurisdictional issues, difficulties in gathering evidence, and cultural barriers for complainants. Despite these challenges, the complaint filed against the WWF under the OECD Guidelines, the increasing number of NGOs signing to the UN Global Compact, the case filed by Dennis against NRC in Norway, and the Project Soteria being trailed all demonstrate the feasibility of these routes in holding NGOs accountable and confirm the increased regulatory attention over the issues of NGO accountability.

Whichever route is chosen, ensuring NGO accountability is now a pressing need for building a better and safer world. Creating an international ombudsman is inevitably challenging.

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<sup>153</sup> NCVO, *Charity Ethical Principles* (January 2019) available at <<https://www.ncvo.org.uk/policy-and-research/ethics/ethical-principles>>; NCVO, 'Code of Ethics: How we developed the draft code', available at <https://www.ncvo.org.uk/policy-and-research/ethics>.

<sup>154</sup> D.Guénéheux and A. Bottomley, *Accountability for Civil Society by Civil Society: A Guide to Self-Regulation Initiatives* (CIVICUS 2014) 300.

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But the IOHDA represents a golden opportunity to create a more robust regulatory and accountability framework for NGOs, bringing about the normative change needed at the international level.