



This project is funded by the European Union

EU Twinning Project No. UA/47b

„Implementation of the best European practices with the aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights to protect human rights and freedoms (Apparatus)“

ACTIVITY 2.2.3. MISSION REPORT

DRAFTING RECOMMENDATIONS AS REGARDS INCREASING THE EFFICIENCY OF THE ACTIVITIES OF THE OMBUDSPERSON ON ELIMINATION OF DETECTED HUMAN RIGHTS VIOLATIONS, CONTROL PROCEDURES OVER FULFILMENT OF OMBUDSPERSON’S RECOMMENDATIONS, RESPONSE TO THE OMBUDSPERSON’S ACTS OF SUBMISSION ON ELIMINATION OF DETECTED HUMAN RIGHTS VIOLATIONS

Title of document	The human rights based approach for national human rights institutions
Short description of document	Recommendation: Adapt to the new roles and challenges that are brought by the application of a human rights based approach for national human rights institutions
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Date	February 2018

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Recommendation: Adapt to the new roles and challenges that are brought by the application of a human rights based approach for national human rights institutions

Introduction

1. The global human rights regime has undergone profound transformation in recent decades. It is now well-established in an increasingly sophisticated framework of treaties, institutions, networks and ambitious standards and no longer merely a system of international treaties mainly used in inter-state relations and governed by international governmental institutions like the OHCHR.
2. National human rights institutions exist within a broad range of mandates and varying contexts. Usually, they are responsible for many issues that are connected with the label “human rights”. Often, they concentrate a lot of human rights expertise in many areas at one institution. The Ukrainian Parliament Commissioner for Human Rights clearly is amongst those with the broadest mix of mandates and scope of attention and expertise when it comes to human rights.
3. Human rights are not just to be found in issues that are conspicuously labelled with “human rights”, but shall be the basis for decision making in potentially all areas of governance, economy and education. This is probably the shortest description and common denominator of a concept called “human rights based approach”. Learning from this concept that has been developed on UN level and on European level in the context of development cooperation could also be worthwhile for a national human rights institution like the Apparatus of the Commissioner. The human rights based approach on development does not have a particularly long history, as it came into existence only in the late 1990s and was prominent when deciding on the Millennium Development Goals.
4. Although originating as a new understanding of development cooperation and as such overcoming the charity approach and the needs based approach in this area, the human rights based approach has been spread to other fields, since. This started off rather early when to a certain extent the application of a human rights based approach was equally adopted by domestic actors active in the developing countries – meaning that a human rights based approach to development may also apply to situations where no external (that is, ‘international’) development cooperation actor is involved.
5. In terms of a human rights based approach all countries are developing countries as there is not a single country where the human rights situation is completely satisfactory. Nowadays, many national and international actors try to apply the HRBA when addressing different issues that do not necessarily have a link to development cooperation. Among the most prominent of those is the human rights based approach to poverty reduction as promoted by the OHCHR¹ and the approach to care and dementia as promoted e.g. by the Scottish Human Rights Commission².

¹ See: <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>

² See: http://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf

6. The United Nations remains the principal international governmental organisation for promoting human rights. However, serious concerns focus on persistent compliance gaps between human rights standards and domestic practice. In response and against a backdrop of growing regime complexity, United Nations human rights agencies have increasingly sought to bypass states by coordinating new forms of non-state and private authority. More and more, the role of national human rights institutions becomes one of an intermediary – between the international actors, the state and the rights holders – the people protected by the human rights in question.
7. Acknowledging the idea that the future of human rights lies more in “orchestration”³ of human rights as a combination of establishing standards on a global scale while actually monitor and implement them on a national base - like in OPCAT - than in the classical global human rights governance, the national human rights institutions will most likely develop new responsibilities beyond the ones already existing.
8. Taking into account these developments, it seems rather logic that the roles of national human rights institutions will transform and become even more important and broader in the future. One of these developments will be that the expertise on how to use and apply in practice a human rights based approach when making decisions on a wide range of issues will be sought with the NHRIs. They will have a role in supporting decision making of governments and international governmental organisations as well as donors, but also evaluate the effects and impact of laws and political and economic decisions. – Again, in this role they will be an intermediary between government as duty bearer, IGOs and the principal rights holders – the people of their countries.
9. In addition to the above detailed developments, a human rights based approach has also proven to be an effective and practical tool to improve quality of services and an option to prevent many human rights violations before they occur and need to be stopped, eliminated and remedied in a retrospective manner. In this sense, it is much more efficient to get human rights “fed” into many decision making processes and routines instead of sticking with compliance monitoring, only.
10. It has to be clarified from the beginning in this paper that the HRBA is neither a completely new idea nor is it just a new way of labelling well established other approaches, like human rights mainstreaming and the like. Additionally, there is not just the one or the only human rights based approach. The concretely useful version of the HRBA might vary considerably according to context. There are some elements that need to be included in any of these approaches, to make it a human rights based approach. These will be the focus of attention of this recommendation.
11. As discussed in Part 2, evidence overwhelmingly points to the positive impact on quality that arises from a human rights based approach to service delivery. The UK Audit Commission has commented for example that those organisations that have adopted and embedded human rights principles in their everyday operation provide much higher levels of service to the public⁴.

³ See for more details of this conceptual idea: Pegram, T.: *Governing Relationships: The New Architecture in Global Human Rights Governance*, Millennium: Journal of International Studies, Vol. 43(2), 2015, 618-639

⁴ See: Victorian Equal Opportunity and Human Rights Commission, (2008), *From principle to practice: Implementing the human rights based approach in community organisations*.

What is the Human Rights Based Approach (HRBA)?

1. The HRBA is a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. An HRBA integrates the norms, standards and principles of international human rights law into the plans, policies and processes of development. This development does not necessarily have to be in the context of classical development cooperation, but can also comprise new developments like laws or policies or programmes and projects in a given country.
2. An HRBA provides tools for understanding and addressing the multi-dimensional root causes of poverty and violent conflict, including discrimination, powerlessness, lack of political participation and lack of access to basic resources and services. It ensures that any intervention addresses the most vulnerable by focusing on the promotion of the rights of women and marginalised groups, including, children, ethnic or sexual minorities, migrants, refugees and people with disabilities. It thus complements and reinforces other major agendas such as poverty reduction, gender equality, crisis prevention, good governance and sustainable development.

Human rights concept for the purpose of an HRBA

3. For the purposes of applying a human rights based approach, conceptually, human rights are:
 - **Universal** – they belong to all people.
 - **Indivisible** – there is no hierarchy between different rights.
 - **Interdependent** – the improvement of one right facilitates advancement of the others. For example, fulfilment of the right to education enables people to use their rights to political participation and to freedom of opinion.
 - States assume **obligations** under international law **to respect, protect and fulfil** human rights:
 - a. The obligation to respect requires that states refrain from directly or indirectly interfering with the enjoyment of human rights.
 - b. The obligation to protect means that states must prevent third parties (e.g. individuals or companies) from interfering, directly or indirectly, with the enjoyment of human rights. For example, states should enact legislation that prevents employers from discriminating on grounds of gender.
 - c. The obligation to fulfil obliges states to adopt legislative, administrative, budgetary, judicial and other necessary measures to achieve the full realisation of human rights.
4. Some human rights have to be fulfilled immediately, such as the right to non-discrimination. Others, such as the right to education or social security, may be achieved progressively, taking into account existing resource constraints. Progressive realisation requires concrete, measured, time bound action towards full realisation of all rights.
5. The following are the general core human rights instruments:

• The Universal Declaration of Human Rights; • The Covenant on Economic, Social, and Cultural Rights (ICESCR) • The Covenant on Civil and Political Rights (ICCPR) • The Convention on Elimination of Racial Discrimination (CERD) • The Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) • The Convention on Rights of the Child (CRC) • The Convention Against Torture (CAT) • The Convention on Migrant Workers and Their Families (MWC) • The European Convention for the Protection of Human Rights and Fundamental Freedoms • The International Convention for the Protection of all Persons from Enforced Disappearance (CED) • The Convention on the Rights of Persons with Disabilities (CRPD)

Of course, an HRBA of the Ukrainian Parliament Commissioner for Human Rights will have to focus primarily on the international duties of Ukraine including possible restrictions and reservations made by the state party relating to international instruments.

The two meta-principles of the HRBA

Do No Harm

6. The logic behind the Do No Harm principle consists of the basic concept that any new development should not cause unacceptable harm and human rights violations. All efforts to address important and pressing issues such as poverty should not result in new problems and harms. Any new development or any project or policy or law could have unintended negative impact in terms of human rights such as disadvantaging certain groups, interfering with participation rights and labour rights or contributing to poverty.
7. Based on this logic, all scrutinized programmes and projects must be established to create parameters to safeguard the rights of affected individuals and communities. This does not necessarily mean that only clear win-win situations for everybody can be approved as being in line with a HRBA. It remains possible, for example to redistribute certain assets or wealth from richer to poorer areas or groups or to invest in better investigation techniques or prosecution in order to find and bring to justice more perpetrators of a certain kind. Individually, those perpetrators will feel that the measures bring harm to them, but this kind of harm is not protected by the principle of do no harm. Do no harm means do no harm to human rights.

Do Maximum Good

8. The Do Maximum Good principle defines positive impact in terms of human rights by improving and strengthening programmes and projects. All policies and measures should have positive impact in terms of human rights such as strengthening capacity, empowerment and education on human rights, fostering participation, supporting state institutions in their capacity as supervisors and regulators, strengthening accountability and control mechanisms and tackling corruption, strengthen the rights-holders in putting forward their claims and actually get to enjoy their rights without retribution or victimisation. Although human rights standards are usually defined as minimum standards, this principle encourages an application that thinks bigger than the minimum and reaches for a feasible practical maximum.

The five working principles of a human rights based approach⁵

Human rights are indivisible and inalienable. Apply all human rights

9. The **first principle** is an overarching principle and simply states: apply all rights. It is about all beneficiaries, not a selection of them. It is about all rights, not about trade-offs between those. Indeed, a rights-based approach draws from international human rights obligations subscribed and ratified by countries. All states are legally bound to respect and operate within the confines established by the international legal obligations voluntarily entered into by the states themselves, especially those enshrining human rights. Human rights are universal and inalienable. That is what makes human rights special. They exist only due to the fact that a being is human. All people everywhere in the world are entitled to them. Any given human cannot even choose to relinquish them and cannot even give them up voluntarily. Yes, they can be interfered with and even infringed, but the rights cannot be taken away from any human person. If the Universal Declaration of Human Rights states, that “All human beings are born free and equal in dignity and rights” this is exactly what it means. Additionally, “Human rights are indivisible and equally important”. The 1948 Universal Declaration of Human Rights makes it clear that human rights of all kinds – economic, political, civil, cultural and social – are of equal validity and importance. Consequently, they all have equal status as rights, and cannot be ranked, a priori, in a hierarchical order.

Participation and inclusion

10. The **second principle** is about participation and inclusion. It aims at enabling people to have access to the information relevant for them regarding projects and programmes and to make full use of the freedom of expression. Participation is more than consultations or a technical step in project or programme preparation. It is about enabling participation in decision making processes as the basis for active citizenship. It could require, for example, building the capacity of civil society organisations (CSOs) or other citizen organisations in order to articulate their needs and expectations towards the state and making information available in an accessible way.
11. It is therefore essential that the application of this principle leads to a clear assessment of the main obstacles/caveats for an active, free and meaningful participation and identifies any barriers to such participation. Participation creates ownership and the feeling of ownership and, therefore, increases the chances that people who participated in the decision-making process will actually support the implementation of these decisions. Therefore, especially for intermediaries like the Commissioner, participation means actively involving duty bearers (like governmental actors and political decision makers) and rights-holders and their representatives from the civil society.

Non-discrimination and equal access

12. For applying the **third principle**, it is essential that all people have equal access to the basic public services and goods supported or delivered by interventions, (laws, measures or programmes). It is even more important that these interventions give a priority precisely to the marginalised groups who are the most vulnerable to poverty and human rights violations.

⁵ Based on European Commission, 2014, Tool Box, A rights based approach, encompassing all human rights for EU development cooperation, Commission staff working document

13. While it is an essential component, this principle does not focus exclusively on gender discrimination. Based on the right that all persons are entitled to equal access without discrimination of any kind on the basis of race, colour, sex, sexual orientation, ethnicity, age, language, religion or other opinion, origin, disability, birth or other status to public services, opportunities, justice and security, this principle requires taking account of all forms of discrimination. The programming and design stage of programmes must carefully assess whether specific groups are discriminated against, because, for example they live in remote areas, or because of gender bias. This discrimination might be unintended or indirect, but should always be avoided. The application of this principle needs intensive experience and knowledge about all forms of discrimination and all the different disguises it might take on. Especially the detection of possible sources of indirect discrimination needs a lot of attention and imagination.
14. Sensitivity towards gender is an integral part of the HRBA, encompassing the promotion, protection and fulfilment of all human rights and the full and effective implementation of: the Beijing Platform for Action; the Programme of Action of the International Conference on Population and Development and the outcomes of their review conferences and in this context sexual and reproductive health and rights; the CEDAW and the EU guidelines on violence against women and girls and combating all forms of discrimination against them; the EU Strategy on equal opportunities between women and men; the EU Comprehensive approach to the EU implementation of the United Nations Security Council Resolutions 1325 and 1820 on women, peace and security; and the EU Plan of Action on Gender Equality and Women Empowerment.

Accountability and access to the rule of law

1. This **fourth principle** is about the alignment of the relevant national legislation with legal human rights obligations. It is the responsibility of the state to respect, protect and fulfil human rights and facilitate good governance, it is therefore essential that accessible, transparent, and effective mechanisms of accountability exist both at central and local levels of government. It is also essential that the application of this principle leads to the identification of the lack of capacity of the state to fulfil its obligations. This principle also demands that legal services are accessible to target groups in terms of procedures, training programmes and paralegal advisory service. The ability to hold those who govern to account is crucial for better governance. However, for accountability to be effective it also needs to be demanded. Therefore, it is also important in this context to assess the capacity of the rights-holders. While it is the prime responsibility of parliaments to hold governments to account, CSOs can also play a role in boosting domestic accountability at local and national levels through a free, clear, accessible flow of information.
2. One crucial role in this regard for the Ukrainian Commissioner is the right to contribute to an assessment of draft laws so that a human rights based approach can be applied at a rather early stage of legislative developments. The core role of any ombudsman institution is tailored around the need in democratic societies, to hold those who govern accountable for the way they do this. So, in any application of a human right based approach, there should be a very distinctive position for the ombudsman and similar specialised bodies.
3. It is essential to support efforts to strengthen domestic accountability systems, including and promoting a strong role for civil society in monitoring developments and

a facilitated access of NGOs to parliaments, audit institutions, public procurement monitoring agencies and the media.

transparency and access to information

4. The **fifth principle** demands for transparency and access to information. It is already clear from the very title of this principle, that some of the core tasks of the Apparatus of the Commissioner are directly involved and responsible in this field.
5. The state and other duty-bearers can only be held accountable if citizens have access to information and if they enjoy freedom of expression. It is therefore essential that access to free and independent information, in accessible format, is guaranteed without arbitrary restrictions. This requires public access to free and independent information especially for the poorest and marginalised groups in society. It also requires that laws, programmes and projects implemented at national, regional or local level are transparent and information is accessible and actively provided to affected groups.
6. Yet again, both, the Commissioner and civil society can play an instrumental role in initiating campaigns to inform citizens about their rights and their entitlement to services. CSOs can for example complement the efforts of the authorities by summarizing and disseminating budget information and other complex matters to the public at the local level – often by converting the information into easily understandable formats.

Chart on the differences of major approaches to development:

Charity Approach	Needs Approach	Rights-Based Approach
Focus on input not outcome	Focus on input not outcome	Focus on process and outcome
Emphasizes increasing charity	Emphasizes meeting needs	Emphasizes realizing rights
Recognizes moral responsibility of rich towards poor	Recognizes needs as valid claims	Recognizes individual and group rights as claims toward legal and moral duty-bearers
Individuals are seen as victims	Individuals are objects of development interventions	Individuals and groups are empowered to claim their rights
Individuals deserve assistance	Individuals deserve assistance	Individuals are entitled to assistance
Focuses on manifestation of problems	Focuses on immediate causes of problems	Focuses on structural causes and their manifestations

Rights holders and duty bearers

7. An important characteristic of a human rights based approach is that it only makes sense to talk of a ‘right’ if there is a corresponding obligation for somebody else. In other words, a party who has a right must be able to assert this right against another party who holds a duty mirroring that right. In practice – given the nature of human rights obligations – the duty-bearer will almost always be a public authority, that is, the state on its different levels of governance. The logic twins of rights holder and duty bearer are at the very centre of the understanding of an HRBA.
8. A human rights based approach therefore, requires that it is possible to invoke the right against a sufficiently well-functioning state. Even where private persons may appear to be the principal duty-bearers with regard to certain rights – such as the right to a healthy environment – a human rights based approach still requires that the rights-holder is capable of enforcing this right against the duty-bearer, and in practice this

usually means that the rights-holder must have access (and trust) to public authorities such as courts, police and ombudspersons. So, in the end, even where businesses and other private parties have obligations towards individuals, it is for the state to ensure that the corresponding rights are enforceable against these private parties. This means that the state remains the duty bearer even if it passes on some duties to private entities. The state can never fully “privatise” its human rights obligations.

Measures applying an HRBA towards rights holders and duty bearers

- Empowering rights holders to know, claim, access and realise their rights through HR education to promote awareness among the people on their rights and entitlements.
- Fostering confidence, skills and resources to communicate with duty bearers, advocate and claim the rights.
- Strengthening duty bearers to comply with their human rights obligations and duties by:
 - a. Identification of the reasons for their underperformance of their duties,
 - b. Awareness raising on their obligations under international, regional and domestic law and identify their responsibilities,
 - c. Capacity development, so that they can meet their obligations e.g. service delivery (this may include technical assistance or financial resources),
 - d. Fostering accountability mechanisms which include downward accountability.

Recommendations

External application of the human rights based approach:

- Establish the Apparatus of the Commissioner as the primary source of expertise on the HRBA in Ukraine. Offer this expertise for:
 - The law-making process by contributing to legal developments from the earliest possible stage on.
 - Do not restrict your contribution to pieces of legislation that are conspicuously linked to human rights.
 - Offer capacity building in this regard to those who work on new legislation technically and politically.
 - Offer advice on the planning and implementation of international donor driven projects with regard to the HRBA.
 - Offer evaluation of project plans and programmes with regard to the HRBA to governmental organisations, businesses and international actors.
 - Offer advice in the process of public procurement or other use of funds in regard to the HRBA.

In order to be able to do all that, in-house capacity building is as necessary as the establishment of regular participatory cooperation with civil society organisations and independent social research.

- Promote the HRBA as the basic planning approach in a wide range of areas, including international donor intervention, programmes on infrastructure and many more.

- Offer capacity building to decision makers in suitable sectors like medical care, community providers, big infrastructure providers, education and welfare regarding the application of an HRBA.

Internal application of the human rights based approach:

As the single most important human rights institution in Ukraine, it seems very advisable to try to implement a human rights based approach for all internal policies of the Commissioner in order to act as a visible role model of this approach. In order to do so, the HRBA will have to be adopted as a tool for a change process within the organisation. After the elaboration of a suitable HRBA model, the internal policies (including those with an external effect) can be scrutinized with the HRBA functioning as a new basis for decision making and measuring the value of organisational output and outcome. Most importantly the following areas shall be given particular attention:

- Recruitment and promotion policies,
- Pay and benefits,
- Working conditions,
- Formal and informal hierarchies,
- Information policies,
- Patterns of internal communication,
- Transparency of decisions and developments,
- Transparency of priorities and special attention,
- Participation (internal and external),
- Accountability and disciplinary regime,
- Ownership/ Accountability and participation in success and failure,
- External communication,
- Attitude in external cooperation – especially with representatives of the civil society.

There is plenty of room for fine-tuning existing policies. Already a process of review and rethinking the routines and processes taken for granted and “normal” with a view stemming from the application of human rights can lead to fruitful developments and a more efficient and effective organisational performance.

The checklist in the Annex can be used with a wide variety of projects, processes and measures or even legislative to scrutinize those while metaphorically wearing “human rights based eyes” and find compliance with the above mentioned issues or areas of concern.

Annex: Checklist⁶

1. Context analysis

- Has the proposed intervention identified the immediate and underlying root causes of the main development problems also in terms of HR?
- Is the proposed programme/project/measure compliant with the existing relevant legal HR obligations?
 - Which international instruments are binding for the sector?
 - Is the constitutional framework compliant with international obligations?
- Does the proposed programme/project/measure support the implementation of recommendations that Ukraine accepted during the UN Universal Periodic Review?
- Does the proposed programme/project/measure clearly identify the rights holders/vulnerable groups with regard to the challenges identified?
- Does the proposed programme/policy/ measure assess the capacity of rights holders/vulnerable groups to claim their rights? Particularly regarding:
 - Awareness about rights and access to information,
 - Access to legal/administrative/political services for claiming their rights,
 - Access to basic services,
 - Access to decision making processes.
- Does the proposed programme/project/measure assess the capacity of state institutions to fulfil duties and responsibilities? Particularly regarding:
 - Transparency and openness,
 - Legal, political and social accountability (complaint mechanism),
 - Non – discrimination and equality,
 - Meaningful participation and empowerment.

2. Identification & formulation

- Have you identified for the sector of intervention potential gaps between human rights standards and day to day reality including:
 - Human rights concerns raised by international treaty bodies (UPR);
 - Potential negative development trends potentially leading to human rights violations;
 - Evidence of disparities for vulnerable groups;
 - Capacities of local governmental and/or non-governmental partners.

⁶ based on: Based on European Commission, 2014, Tool Box, A rights based approach, encompassing all human rights for EU development cooperation, Commission staff working document

- Do the objectives:
 - Ensure that the rights of vulnerable groups are taken into account?
 - Ensure that the targeted end–users enjoy or participate effectively in the benefits of the selected intervention strategy?
 - Ensure that inequality and discrimination issues are taken into account?
- Does the programme/project/measure:
 - Ensure that the capacities of targeted vulnerable groups are strengthened, with a view to allow them to claim their rights?
 - Aim at strengthening accountability mechanisms?
- Were target groups and/or targeted vulnerable groups involved in the decision making processes?
- Does the proposed intervention strategy identify human rights indicators?

3. Implementation

- Does the implementation process respect the working principles of legality/universality/indivisibility, participation, non-discrimination and equality, accountability and the rule of law and transparency?
- Do implementation activities ensure non-discriminatory practices and safeguards, particularly with regard to identified vulnerable groups?
- Are target groups and/or targeted vulnerable groups involved and consulted during the implementation of activities?
- Does the implementation process take into account:
 - The relations between target groups and all stakeholders?
 - The capacity gaps identified?
- Is the proposed strategy transparent in its implementation activities?
- Are the accountability mechanisms effectively used/useable?

4. Monitoring and evaluation

- Do monitoring and evaluation mechanisms effectively foresee specific monitoring with regard to the working principles of the HRBA listed above?
- Do they allow monitoring of:
 - The impact on vulnerable groups in general? On targeted vulnerable groups?
 - The effectiveness and quality of participation of targeted vulnerable groups?
 - The impact of the selected programme/project/measures on accountability mechanisms?

- Do monitoring and evaluation mechanisms effectively refer to the quality of the implementation process?
- Do the sources of information used include disaggregated data (especially on vulnerable groups), qualitative and quantitative information, assessments and recommendations provided by national/international HR bodies, NGOs and others?