Annex 2.

Twinning project "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)"

No. EuropeAid/137673/DD/ACT/UA

Activity 2.3.4. Developing recommendations as regards improving the existing or employing new instruments for restoring human rights, in the spheres of personal data protection, access to public information and the prevention of all forms of discrimination in particular

Document	Recommendations based on the best EU practices regarding State liability for damage caused by public administration
Short description of the document	The Recommendations include questions of legal regulation and application of law. A proposition for amendment of law is presented with the intention to improve prerequisites to restore violated human rights. In addition to that, principles for a model of good practice are presented, as well as the guidelines for what should be avoided.
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RECOMMENDATIONS BASED ON THE BEST EU PRACTICES REGARDING STATE LIABILITY FOR DAMAGE CAUSED BY PUBLIC ADMINISTRATION

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1. INTRODUCTION

Measures to restore violated human rights depend on the nature of violation. Some are appropriate in particular context and not in a different case. The most important groups of measures are the monetary compensation of pecuniary and/or non-pecuniary damages and the direct restoration of the violated rights to the *status quo ante* by granting the victim an act he or she is entitled to receive (*restitutio in integrum*). Besides these, State's reaction to a human rights violation, as well as to a regular violation of law, also involves punitive measures towards the infringer. The latter serve as a discouragement from human rights infringements in the future and might provide an indirect satisfaction for the victim as a fact, that justice is served.

However, despite these benefits, the punitive measures do not reach full restorative effect, which must be considered as the first priority in cases of human rights violations. Restoration of violated human rights brings preventive effect similarly like punitive measures, since it usually ought to be connected to monetary compensation. These two benefits makes it superior to punitive legal liability, where the infringer is given a personal non-monetary sanctions or a fine, which is paid to the government.

2. THE LAW

Ukrainian law in regard of the Ukrainian Parliament Commissioner's for human rights (hereinafter called – the Commissioner) role in restoration of violated human rights is mainly focused on the punitive function instead of the compensatory. The Secretariat of the Ukrainian Parliament Commissioner for Human Rights is authorised draw up protocols on administrative violations by the Code on Administrative Offenses in Ukraine[1]. It prescribes administrative liability for Violations of legislation in the sphere of personal data protection – Article 188-39, among other things, states that failure to inform or failure to inform in due time the Commissioner about personal data processing or changes in personal information that must be reported according to law, reporting incomplete or false information – entails a monetary fine for guilty officials and citizens.

[1] Code on Administrative Offenses of Ukraine. The Official Bulletin of the Verkhovna Rada of Ukrainian RSR, 1984, annex to No. 51. http://zakon5.rada.gov.ua/laws/show/80731-10/page.

Article 212[3] of the Code on Administrative Offenses in Ukraine[2] also prescribes liability on public officials for refusing to disclose public information by falsely classifying it as restricted or on other faulty grounds.

The Civil Code of Ukraine includes several different grounds for liability of state or self-government for damages by public administration.[3] Article 1167 of the Code asserts that moral damage to a physical or legal person resulted from illegal decisions, acts or inactivity shall be indemnified by a person that inflicted the damage, in case of his/her guilt, except for the cases specified in part two of this Article, according to which, moral damage shall be indemnified irrespective of the guilt of the state government, governmental body of the Autonomous Republic of Crimea, local self-government, physical or legal person that inflicted it in cases concerning physical injuries, unlawful application of criminal prosecution measures or other cases specified by law.

2.1. LIABILITY OF A LEGAL ENTITY

In cases of law infringements by a public legal entity one of issues to consider is the distribution of liability between the guilty public official and the legal entity he was representing. Possible outcomes in this matter are: to impose legal sanction only to the guilty natural person; only to a legal entity, which the guilty natural person represented; to both of them.

Overall theoretically the decisive factors for this matter are whether the natural person acted *ultra vires* and whether the legal entity had taken appropriate precautions to prevent its representative from the misdemeanour in question. As legal fictions in their essence, legal persons act through natural persons who represent them (either employees, temporary representatives for particular tasks and etc.), therefore acts of these natural persons, in the sense of their objective factual content, are regarded also as acts of the legal person they are representing. Accordingly, a legal person's guilt cannot be dissociated from a natural person, acting in its name and interest. In this matter factors to be considered include whether the legal entity was controlling the natural person; the offence is related to regular activities of the legal entity; the natural person acted within the functions prescribed to him by the regulations within the legal entity or regulated externally.

However, prevailing practice in the Western legal tradition dictates that in case of damages caused by public officials, the priority measure to be invoked is the civil liability of the state or the responsible legal entity. As it was found in earlier reports of the project, there are European legal systems, such as the one of the United Kingdom, which carry relatively ample space for individual liability by public officials. France, Italy and Spain, on the one hand, proclaim very generous and indiscriminate principles of state liability in tort and, on the other hand, tend strongly and extensively to insulate their public officials and bureaucrats from individual liability, except in the most serious cases of personal misconduct and when criminal liability arises. For example, according to Estonian State liability act, public officials are not responsible for the damages caused to a person and even when the damage is caused by a person in private law acting in the name of a public authority – usually it is the public authority that is liable for the damage before the injured person. Subsequently, the public authority which has compensated the damage may later file a recourse claim against the public official or private person whose unlawful activities resulted in the occurrence of damage.[4] This principle also can be found in Article 34 of the German Grundgesetz, which states that if any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him; in the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. In legal doctrine personal liability of the individual public employee is regarded as a rare occurrence, except for the most egregious cases of personal

[2] Code on Administrative Offenses of Ukraine. The Official Bulletin of the Verkhovna Rada of Ukrainian RSR, 1984, annex to No. 51. http://zakon5.rada.gov.ua/laws/show/80731-10/page.

[3] Civil Code of Ukraine, Art. 1173-1176.

[4] Bagińska E. (ed.), Damages for Violations of Human Rights. A Comparative Study of Domestic Legal Systems, 2016, Springer, p. 60-61.

misconduct individually ascertainable. Even in those jurisdictions, such as England, in which the vicarious liability paradigm continues to provide the broad legal basis for state liability, most public employees are practically shielded from liability either through statutory immunity – common in civil law systems – or through indemnity provisions in their favour.[5]

2.2. INSTANT RESTORATION OF VIOLATED RIGHTS WITH THE COMMISSIONER'S AID

The ombudsperson carries potential to make the restoration of violated rights instantaneous. The findings of the researched Ukrainian law confirm that the Commissioner's role in *ex post* intervention in violations of human rights so far is mostly focused on liability of responsible public officials and in a significantly lesser extent on the restoration of the violated rights.

As it was previously mentioned, restoration of human rights can be divided into the monetary compensation of pecuniary and/or non-pecuniary damages and the direct restoration of the violated rights to the *status quo ante* by granting the victim an act he or she is entitled to receive (*restitutio in integrum*). Commissioner's role in the latter is constrained, since the actual act of restoration can be performed only by the authorised institution. Besides, in Commissioner's powers set out in Article 13 of the Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights,[6] create favourable prerequisites to order a public institution to take actions prescribed by law and by this to restore violated human rights *in integrum*. However, the law is lacking grounds for the Commissioner to initiate restoration of violated rights by compensating pecuniary and/or non-pecuniary damages.

This can be improved by amending the Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights as follows:

> *Article 13*
> *<...>*
> *8^2) propose for the public body to compensate the pecuniary and non-pecuniary damages inflicted to a person as a result of an unlawful act or inaction*

The current state can be improved by assigning the Commissioner right to propose that a guilty public body compensates the damages inflicted to a person as a result of an unlawful act or inaction. It is important to note, that the Commissioner must exercise this function regardless of the fact, whether the law will be amended. This authority can be derived from the current legal regulations.[7] However, embedding this power in law is necessary to ensure the continuation of the good practice for the future.

3. PRACTICAL APPLICATION

Ombudsman's power to propose a compensation as a mean to restore a violated human right should be exercised according to the principles of international law and Ukrainian national law on delictual liability. The latter is laid down in Articles 1167-1176 of the Civil Code of Ukraine which must be interpreted in harmony with judicial practice in cases where these legal rules are applied. The international law provides a rich set of rules and principles established in texts of treaties as well as case law of international courts, of which most relevant in Europe is the European Court of Human Rights (ECtHR), which oversees how the requirements of European Convention on Human Rights

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[5] Dari-Mattiacci G., Garoupa N., Gomez-Pomar F. State Liability. European Review of Private Law 4-2010, p. 786.

[6] The Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights. The Official Bulletin of the Verkhovna Rada of Ukraine (VVR), 1998, No. 20. http://zakon5.rada.gov.ua/laws/show/776/97-%D0%B2%D1%80.

[7] Among others, by the Article 3 Section 1, Articles 13 and 14 of the Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights.

and Fundamental Freedoms (ECHR) are complied. Hereinafter principles for determination of appropriate redress for human rights violations are presented.

3.1. GENERAL PRINCIPLES OF ECHR

Proper restoration of violated human rights is required by the ECHR – Article 13 establishes the right to an effective remedy, which, among others, requires to grant an effective remedy to everyone whose rights and freedoms as set forth in this Convention are violated. Jurisprudence by the ECtHR on interpretation of the aforementioned Article 13 and Article 41 provides certain principles, which can help to ensure appropriate redress for violated human rights and accordingly avoid violations of the ECHR and avoid losing cases in ECtHR.

According to Article 41 of the ECHR, if the European Court of Human Rights finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party. ECtHR has repeatedly found that one of such effective remedies is a civil action against the state.[8] Jurisprudence of the ECtHR includes numerous awards for many types of pecuniary, as well as non-pecuniary damage including distress and anxiety,[9] loss of reputation,[10] bouts of depression,[11] feelings of helplessness and frustration[12] and others. It is worth noting that grounds for state liability should not be *a priori* exhaustively listed. The ECtHR has indicated that where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he/she should have a remedy before a national authority in order both to have his/her claim decided and, if appropriate, to obtain redress.[13]

If domestic law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as it deems appropriate. The Court enjoys a certain discretion in the exercise of that power, as the adjective "just" and the phrase "if necessary" attest. Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation. In addition, if one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment.[14]

European Court of Human Rights (ECtHR) reiterates, that putting an end to the breach and making reparation for its consequences ought to conducted in such a way as to restore as far as possible the situation existing before the breach. A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants may be prevented by the inherently uncertain character of the damage flowing from the violation. An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved, the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary losses, which it is necessary to award each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable.[15] ECtHR's non-pecuniary awards serve to give recognition to the fact

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[8] E. g., ECtHR judgment in *Kurkowski v. Poland* case of 9.4.2013; decision in *Łasak v. Poland* case of 12.10.2010 and others.

[9] ECtHR judgment in *Incal v. Turkey* case of 9.6.1998.

[10] ECtHR judgment in *Doustaly v France* case of 23.4.1998.

[11] ECtHR judgment in *Estima Jorge v Portugal* case of 21.4.1998.

[12] ECtHR judgment in *Ališić v Bosnia* case of 16.7.2014.

[13] ECtHR judgment in *Leander v. Sweden* case of 26.3.1987.

[14] ECtHR judgment in *Perdigao v. Portugal* case of 16.11.2010.

[15] ECtHR judgment in *Kurić and Others* case of 12.3.2014.

that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage under the principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case.[16] Following these principles ECtHR has reimbursed medical expenses incurred as a result of torture;[17] costs sustained by the applicant and his family in their attempt to mitigate the unacceptable conditions of the applicant's detention and their negative consequences for his health;[18] medical treatment required after being shot during a security operation;[19] or even the cost of a funeral.[20]

In determination of the appropriate redress for damages resulted by human rights violations, national law certainly is the first source to be applied directly, most importantly – the rules on civil liability, laid down in Articles 1167-1176 of the Civil Code of Ukraine. However, the Commissioner ought to interpret and apply these rules with consideration of supranational law – among others, the European Convention on Human Rights and Fundamental Freedoms and its interpretation in jurisprudence of ECtHR. According to a systemic analysis of these sources, several guidelines can be distinguished of good practice to be followed and bad practice, which ought to be avoided in matters of compensation for human rights violations.

3.2. GOOD PRACTICE

- Though the content of the Commissioner's decisions to propose compensations can strongly vary depending on individual nuances of each case, but one recommended part for each decision is the legal reasons for it, chiefly – the judicial practice. Whenever it is possible, **the Commissioner's decision to propose compensations should include references to concrete cases of courts** where in similar circumstances courts ordered public body to pay a monetary compensation for a violation of human rights. This can be expected to provide a dual effect – firstly, to inform the liable public body about possible legal consequences. Having been informed about it, the public body can be more inclined to avoid unnecessary litigation and finish the dispute instantly. If this turns out differently, the second effect of the proposition are the favourable prerequisites for the victim to obtain appropriate redress through the judiciary. Without being informed about the opportunity to successfully reach it, the victim might hesitate and not pursue justice driven by doubts about the outcome of the case and intimidated by the costs of litigation. Otherwise, when the Commissioner provides precedents, the victim's hesitations might be dispersed. Besides this, information about judicial practice in similar cases makes the litigation easier and more effective, possibly even eliminates the need for costly legal aid.

- One of the main principles to follow when ascertaining the compensation for human rights violations is how **the burden of proof** is distributed. Among other things, it destines the conclusions when there are ambiguities, uncertainties of law or factual circumstances. When they occur, the conclusions are usually drawn in favour of the weaker party, which, in cases of human rights violations by the government, is the victim.

Example No. 1

The applicant submits a complaint, that while in custody, the officers of penitentiary did not provide him the opportunity to use a shower for four weeks because of repairs in the premises. The administration of penitentiary provide a reply that it is not true, the repairs took only two days and showers were available for the inmates on a regular basis. However, after inquiry, the administration fails to deliver a contract for repairs, visual or any other relevant

[16] ECtHR judgment in *Sargsyan v. Azerbaijan* case of 12.12.2017.

[17] ECtHR judgment in *Aksoy v. Turkey* case of 18.12.1996.

[18] ECtHR judgment in *Nevmerzhitsky v. Ukraine* case of 5.4.2005.

[19] ECtHR judgment in *Makhauri v. Russia* case of 4.10.2007.

[20] ECtHR judgment in *Makhauri v. Russia* case of 4.10.2007.

proof supporting their stance.

In the example above the dispute concerns factual circumstances and claims of both parties are supported only by their testimonies. Such case creates a similar probability about the facts, therefore it must be concluded that the applicant was not able to use showers in due terms. An ambiguous situation such as above cannot be solved by interpretation in favour of the administration, because it would deny any possibility for the applicant to protect his rights when there simply is no way he might have gathered relevant evidence. The administration of penitentiary, being in a more favourable position must take precautions to document and keep records of important factual circumstances and failure to do so constitutes their guilt and the applicant is eligible to an appropriate redress.

- In the investigation of factual circumstances **substance should be prioritised over the form**. Elaborate legal procedures may complicate consistency between legal and factual circumstances. When principles of good public administration are not followed, legally binding acknowledgements of some facts might become irrefutable because of formal limits of time or other reasons even when they contradict the objective reality. Therefore, in evaluation of damages for violations legal form of an act should not be given a decisive force – instead, conclusions must be drawn from analysis of actual consequences which are caused by an act or inaction of a public body.

- Another aspect to be taken into account is that there is no obligation to award compensation when a **causal link** between actions of the state (a particular public body) and the resulting harm cannot be found.

Example No. 2

A public servant unsuccessfully applies for a promotion several times during the period of two years. After the last attempt she files a complaint to a superior officer for discrimination on grounds of gender. The superior officer examines the complaint and declares it ill-founded. Afterwards medical experts diagnose that the applicant requires medical treatment for stress. Further investigation reveals that the applicant's complaint was based on misinterpreted evidence, hence the unsound, however superior officer's decision was adopted one week past the term defined by law.

The example No. 2 provides a situation where actual non-pecuniary damage was experienced and this fact is supported by valid evidence. The complaint can be based on two separate sets of circumstances and this might call for isolate investigation of lawfulness. The first set is a complaint on discrimination, which is proven to be unsound. The second concerns superior officer's actions which were not in accordance to law – the officer's decision was adopted one week past the term defined by law. In such instances a causal link can serve as basis for decision in regard of compensation. Although unlawfulness was found and the damage is acknowledged, but this particular example bears no evidence to suggest that the stress suffered by the applicant was directly attributable to the date of the superior officer's decision. Accordingly, there is no basis for compensation of damages.

- Direct pecuniary damages are not the only ones to be considered for the compensation. In the practice of ECtHR, **loss of earnings** is deemed reimbursable as well. They can be measured by assessing the amount of funds, which would have come into the victim's possession if the violation had not occurred.

Example No. 3

Applicant's husband is arrested and two days later passes away. The evidence confirms that the death resulted from torture following his arrest. The deceased left a widow and also a daughter who had been born earlier that year.

The applicant claims a total of 149,482.01 EUR compensation for loss of earnings. She provides calculations that her husband had, at the relevant time, been earning 6,579.34 EUR a year as the owner of a shop that sold food products. The size of lost earnings is arrived at through the use of the Ogden actuarial tables, based on the age of applicant's husband at the time of death – 24 – and the assumption that he would have continued working until the age of 65.

The above mentioned case constitutes grounds for compensation of lost earnings. Once the government is found responsible for the death of applicant's husband, it must follow that the loss of his future earnings is also imputable to the respondent State. An award in this respect is therefore clearly in order. A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation, but an award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable.

3.3. BAD PRACTICE

- What should be avoided is the **refusal to precisely calculate** the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses based only by the inherently uncertain character of the damage flowing from the violation. A precise calculation of the sums necessary to make reparation in respect of the pecuniary losses suffered by the applicant may be prevented by the inherently uncertain character of the damage flowing from the violation. An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved, the more uncertain the link becomes between the breach and the damage. The question to be decided in such cases is the level of just satisfaction, in respect of both past and future pecuniary losses, that it is necessary to award to the applicant.[21] This is not a sufficient ground in itself not to determine the size of a monetary compensation. Otherwise in most cases of non-pecuniary damages (for example, occurring as distress, anxiety, depression, etc.), could be left without an appropriate compensation, because they inevitably carry a trait of uncertain conversion into monetary form. In cases of pecuniary damages, outsourcing for determination value of the assets in question can be employed. For example, when property rights of real estate are infringed, the values, determined by a certified expert can be employed[22] by the initiative of parties or, when the public interest requires the Commissioner to take on a more active role, by the Secretariat of the Commissioner (covering the final costs of expert's services by the guilty party).

- Another important notion is the **consistency of practice**. When non-pecuniary damages are ascertained, it should be presumed that in two situations of human rights violations, where all relevant factual circumstances are the same, the emotional distress experienced by the victims was of the same intensity. This presumption can be proven wrong when objective relevant facts are found, which give grounds for conclusion that distress was different than in an earlier case.

Example No. 4

In judicial practice, as well as practice of the Commissioner, there is a line of four cases dealing with unlawful suspension from public service. In these cases employer suspects that a public servant committed a violation of disciplinary rules, which constitutes grounds to

[21] ECtHR judgment in *Kurić and Others* case of 12.3.2014.

[22] ECtHR judgment in *Carbonara and Ventura v. Italy* case of 30.5.2000.

remove him from service, therefore his duties are instantly suspended. After an inside investigation the public servant is removed from the office.

The servant files an appeal and delivers sound evidence that he was removed from service on grounds as a result of discrimination on grounds of gender. In recent four cases unlawful suspension for six months was considered to cause emotional distress which is redressed with a monetary compensation of 200 EUR.

However, a fifth similar case is met, where the aggrieved individual (who was removed from public service by discrimination on grounds of gender) presents written assessments by medical experts, stating that during and after the removal process the victim suffered a long depression.

Example No. 4 illustrates a situation where it has to be evaluated, whether a present case is different from earlier cases. A typical case, for which a clear trend of compensations has already been settled is as important as any other, but the Commissioner's focus on it does not have significant potential for strategic improvements of human rights protection. The Commissioner in the example No. 4 can make an important contribution by distinguishing a case as unprecedented. This can be done after analysis, whether new circumstances of a present case are important ant constitute grounds to treat this case differently. Evidence that the victim suffered a long depression can support a conclusion that in this case the non-pecuniary damage was more intense in comparison with earlier cases, especially in conjunction with other individual characteristics (for example, a more vulnerable state of the victim, particularly hostile attitude from employer or other relevant circumstances).

Example No. 5

In judicial practice, as well as practice of the Commissioner, there is a line of four cases dealing with unlawful suspension from public service. In these cases employer suspects that a public servant committed a violation of disciplinary rules, which constitutes grounds to remove him from service, therefore his duties are instantly suspended. After an inside investigation the public servant is removed from the office.

The servant files an appeal and delivers sound evidence that he was removed from service on grounds as a result of discrimination on grounds of gender. In recent four cases unlawful suspension for six months was considered to cause emotional distress which is redressed with a monetary compensation of 200 EUR.

However, a fifth similar case is met, where the violation of disciplinary rules was in fact committed, but the official acquitted was by the employer because time limitations for removal from service were missed.

Example No. 5 also deals with a case of civil servant's suspended duties with analogical settled trends in earlier practice. However, in this example a present case includes a different new circumstance regarding the outcome of inside investigation. In this example a potential claim for compensation of non-pecuniary damages can be based on the fact that the civil servant was suspended with suspicion that there are grounds for his removal from service. However, the investigation was lengthy and after it exceeded a term established by law, disciplinary sanctions could not be applied and the civil servant had to be returned to his duties. In a general view this case has similarities with others – the civil servant was suspended but not indicted after the investigation. In this view the suspension can seem unjustified. However, in this case it must be determined, whether grounds for acquittal matter. When the sanctions were not applied because of time limitations, it is possible that when the employer earlier was making a decision to suspend the civil servant and began an investigation, there were very sound grounds to suspect the infringement of disciplinary rules. Moreover it cannot be demanded from the employer to foresee, whether the investigation will succeed to meet the procedural requirements. Accordingly he might have not had the discretion to make a different decision in regard of suspension. Such reasons raise reasonable doubts, whether aforementioned cases should be treated the same way.

Examples No. 4 and 5 illustrate the threats both of unjustified departure from a settled trend of practice and unjustified adherence to it. They are presented with an intention to provide insight into evaluation how the determination of importance can deem cases different or similar and, most importantly, to emphasize the necessity of staying on constant alertness in order not to mistakenly assign a case to a typical set.

- An improper basis to refuse a compensation of damages can also be related to the identification of a violated law – a **violation of legal rule established by national law is not necessary** and the infringement of an individual rule is sufficient for compensation of damages. It is the regular practice by ECtHR to find that award of a monetary compensation is eligible, with a sole basis of a violation of an individual right. For example, if someone is subject to degrading treatment as a result of undignified conditions of imprisonment, this fact is autonomously sufficient to award the monetary compensation for non-pecuniary damages – despite the fact that national law would allow the disputed conditions of imprisonment. Also, contrarily, when a rule established by national law is breached, this does not necessarily constitute grounds for monetary compensation of damages. Every individual occasion must be evaluated in the light of criteria for delictual civil liability, one of which is the that harm was inflicted, but infringement of an individual right or a legal rule are both separate grounds individually sufficient to compensate damages. While importance of national law is in no way undermined, efficiency of the ECHR would not be fully used if absence of national law would restrict ECtHR from recognising a violation of a human right, once the factual circumstances provide sufficient grounds for such conclusion.

- One of practices to be avoided is related to limitations set by legal reasons laid out in the complaint of the aggrieved person. The Commissioner and his secretariat usually is in a better informed position about the law than the applicants whose individual human rights might have been infringed. This allows the Commissioner to *mutatis mutandis* follow a principle ***iura novit curia***, meaning "the court knows the law". According to this principle, in order to protect their rights, parties must present the relevant facts and legal evaluation of these acts is in jurisdiction of the tribunal.

Example No. 5

Land of the applicant was expropriated by the government for the public interest. The government adopted this decision in order to build a road connecting a building of local municipality with the highway. The owner of land contests this decision based on a provision of law, which requires that private property can be expropriated only when public interest demands it. According to the applicant, the municipality can be accessed from the highway through a longer road around his land and making a shortcut is not a public interest, therefore the land must be returned and damages for not being able to use it for growing crops must be compensated.

In judicial case law several instances can be found, where courts in similar circumstances declared that public interest required the land to be expropriated. However, in present case the government did not carry out a public consultation before initiation of project, which is supposed to gather and evaluate alternative suggestions for the use of public funds. The law clearly states that failing to carry out this consultation deems following actions of expropriation unlawful.

This example shows a situation where the applicant chose to support his claim based on wrong legal provisions. The rules of his choice do not justify his claim – widely accepted their meaning presupposes a conclusion in favour of the government. Hence, if the limits of the dispute are determined solely by the applicant's arguments, he will not receive a compensation. On the other hand, in the process of expropriation the government failed to follow another legal rule, which fully supports the applicant's claim.

It is the Commissioner's obligation to find the applicable legal rule and deduce the applicable legal consequences. When applicant formulates a claim based on incorrect interpretation

of law, but under relevant circumstances he is eligible to a compensation, active role is also appropriate. In such instances an appropriate action is reaching a favourable decision regardless of the imperfect claim or informing the applicant about the situation with a suggestion to correct the mistake.

- It is important to note that the proposition to compensate damages should be made only in **important cases**. The Commissioner conceptually should not become an ordinary pre-trial institution dealing with numerous typical cases of human rights violations. The nature of the ombudsperson's institution is of different kind – instead as it was already noted in previous reports, the Commissioner should focus on strategic improvements rather than casual day-to-day matters of the same kind. This means that the Commissioner must focus on individual cases featuring characteristics, mentioned in "Recommendations for improvement of the existing and employment of new instruments for restoration of human rights *vis-à-vis* the judiciary" under the section on selection of cases. In the present context this is relevant for the selection of cases, where the Commissioner should assign the compensation of damages. The criteria for selection of these cases essentially mean evaluation of the possible impact of the case for later similar cases and for the prevention of future human rights violations; severity of a particular human rights violation and the vulnerability of the victim; the public interest.

Besides the aforementioned criteria, it also should be noted that in some cases recognition of a violation can in itself be a sufficient and just satisfaction for a violation of human rights. Not in every case of human rights infringements a monetary compensation of non-pecuniary damages is necessary to restore a violated right.

Also, monetary compensation in some cases might not be the most appropriate remedy when *restitutio in integrum* is possible. Restoration of violated rights by returning the aggrieved person to a state before the violation or granting him or her an act he or she is entitled to, should be given the first priority over a monetary compensation. However, it is naturally expected that usually the Commissioner will not have the power to restore the violated rights *in integrum*. Typically such power is mandated to a particular public body. In these cases when violated rights can be restored by taking certain action *restitutio in integrum* and the authorised public body is willingly avoiding to restore the violated right, the Commissioner should not restrain from prescribing a monetary compensation for such continuity of violation.

4. SUMMARY OF RECOMMENDATIONS

Findings of the conducted research offer grounds for recommendations, which can be summarised as follows:

- **Recommendation 1:** On selected occasions the Commissioner must employ practice of proposing that a liable public entity compensates pecuniary and non-pecuniary damages for violations of human rights.
- **Recommendation 2:** The Law on the Commissioner of the Verkhovna Rada of Ukraine on Human Rights should be amended by adding a provision granting the Commissioner the power to propose for the public body to compensate the pecuniary and non-pecuniary damages inflicted to a person as a result of an unlawful act or inaction.
- **Recommendation 3:** Among others, the Commissioner should follow these principles when a decision to propose compensations is made:
  - Burden of proof must be placed on the public entity with a presumption that a claim is justified;
  - The Commissioner's decision to propose compensations should include references to concrete cases of courts;
  - The substance should be given priority over the form;
  - Uncertainties about the extent of damages must not become an obstacle to compensate them;
  - Consistent practice must be maintained;

- Both a violation of an individual right or a legal rule of national law separately should be held as sufficient basis to compensate damages;
- Reasons of an application does not limit the Commissioner to pursue a just compensation;
- The Commissioner should follow criteria of importance in selection of cases where compensation of damages is proposed.

- **Recommendation 4:** In accordance with additional functions strengthening the capacity of The Secretariat of the Ukrainian Parliament Commissioner for Human Rights by expanding the staff (employing specialists on compensation of damages for human rights violations) is to be considered.