



## HUMAN RIGHTS

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# THE SIGNIFICANCE OF THE 2005 UN BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION

**INTRODUCTION.** *The research analyzes the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines) of December 16, 2005. The Article examines the stages of the adoption of this document, the concept, structure, basic provisions, as well as the importance for the development of modern international law, particularly in the field of human rights protection and international humanitarian law. Consequently, the Article provides a detailed analysis of the approach to the central subject of this document, that is, the right to a remedy and reparation, which is expressed in practical application by universal and regional bodies on human rights and in the field of humanitarian law. In this regard, the position of the right to a remedy and reparation in the complex of human rights is determined, as well as their interconnection and relation to each other.*

**MATERIALS AND METHODS.** *The theoretical researches of the Russian and foreign experts in the field of international law have been analyzed in this very Article as well as the normative documents, recommendations,*

*and decisions of the treaty bodies on human rights within the UN system, the law enforcement practice of universal and regional judicial and quasi-judicial bodies for the protection of human rights and in the field of international humanitarian law have also been studied. Such methods of scientific cognition as analysis and synthesis, the generalization method, the system-structural method, as well as the historical-legal and legal-technical methods have also been applied in this research.*

**RESEARCH RESULTS.** *The Article reveals the significance and impact of the mechanism developed in the Basic Principles and Guidelines, in general, on the international human rights system. The Basic Principles and Guidelines are an international document, developed with the best practice of existing legal systems. It was adopted unanimously through the consensus reached by all parties concerned. The Basic Principles and Guidelines are aimed at codifying the provisions on the right to a remedy and reparation enshrined in various international treaties and as well as at developing a unified approach to these rights. Thus, the said international instrument does not create any new rules but classifies and unifies the set of provisions on the right to a remedy*

and reparation. This nature of the Basic Principles and Guidelines makes them an attractive tool for international bodies in their law enforcement practice related to ensuring the right to a remedy and reparation.

**DISCUSSION AND CONCLUSIONS.** *The Basic Principles and Guidelines enshrine the responsibility of States in the field of human rights protection, when the second party to the conflict is individual, or individuals whose rights have been or may be violated. Therefore, the Basic Principles are focused on the interests of the victim of a violation of human rights, that is, they are deliberately humanistic and human rights oriented. The document provides a classification of victims to more adequately cover human rights mechanisms that ensure the protection of persons, individually or collectively. Further, it pays special attention to the protection of victims of gross violations of human rights. In addition, the Basic Principles and Guidelines list and describe forms of reparation for the victims of human rights violations.*

**KEYWORDS:** *International Law, International Human Rights Law, Human Rights Protection System, International Humanitarian Law, Basic Principles and Guidelines, right to legal protection, remedies, victims of human rights violation, reparation, restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition*

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## ПРАВА ЧЕЛОВЕКА

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# ЗНАЧЕНИЕ ОСНОВНЫХ ПРИНЦИПОВ И РУКОВОДЯЩИХ ПОЛОЖЕНИЙ ООН, КАСАЮЩИХСЯ ПРАВА НА ПРАВОВУЮ ЗАЩИТУ И ВОЗМЕЩЕНИЕ УЩЕРБА 2005 г.

**ВВЕДЕНИЕ.** Настоящая статья посвящена анализу международно-правового документа под названием «Основные принципы и руководящие положения, касающиеся права на правовую защиту и возмещение ущерба для жертв грубых нарушений международных норм в области прав человека и серьезных нарушений международного гуманитарного права», принятого Генеральной Ассамблеей ООН 16 декабря 2005 г. (далее - Основные принципы и руководящие положения). Авторы исследуют этапы принятия указанного документа, его концепцию, структуру, основные положения, а также значение для развития современного международного права, в частности в области международной защиты прав человека и международного гуманитарного права. В целях реализации поставленной задачи проводится детальный анализ подхода к центральной теме документа - праву на правовую защиту и возмещение ущерба, что выражается в практическом применении универсальными и региональными органами по правам человека и в области международного гуманитарного права. В этой связи определяется положение права на правовую защиту и возмещение ущерба в каталоге прав человека, равно как и их взаимосвязанность и позиция по отношению друг к другу.

**МАТЕРИАЛЫ И МЕТОДЫ.** При написании настоящей статьи были проанализированы теоретические материалы исследований российских и зарубежных специалистов в области международного права; изучены нормативные документы, рекомендации и решения договорных органов по правам человека в системе ООН, а также правоприменительная практика универсальных и региональных судебных и квазисудебных органов по защите прав человека и в области международного гуманитарного права. При проведении исследования были применены такие методы научного познания, как анализ и синтез, метод обобщения, системно-структурный метод, а также историко-правовой и юридико-технический методы.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** В статье раскрывается значимость и влияние механизма, выработанного в тексте Основных принципов и руководящих положений в целом на международную правозащитную систему. Основные принципы и руководящие положения представляют собой международный документ, разработанный с учетом наилучшей практики существующих правовых систем, принятый единогласно, на основе достигнутого консенсуса всеми заинтересованными сторонами. Основные принципы и руководящие положения направлены на кодификацию разрабо-

ванных по различным международным договорам положений о праве на правовую защиту и возмещение ущерба, выработку единого подхода к указанным правам. Таким образом, рассматриваемый международный документ не создает каких-либо новых норм, но упорядочивает и придает единомыслию своду положений о праве на правовую защиту и возмещение ущерба. Подобный характер Основных принципов и руководящих положений делает их привлекательным инструментом для международных органов в их правоприменительной практике, связанной с обеспечением права на правовую защиту и возмещение ущерба.

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** Основные принципы и руководящие положения закрепляют ответственность государств в области защиты прав человека, при этом второй стороной конфликта называют физические лица, то есть, правам которых был или может быть причинен ущерб. Таким образом, Основные принципы и руководящие положения ориентированы на интересы жертвы нарушения прав человека, то есть заведомо носят гуманистический и правозащитный характер. В тексте документа дается классификация жертв, с целью более адекватного охвата правозащитных механизмов, обеспечивающих защиту лиц в индивидуальном или коллективном порядке. Особое внимание в документе уделяется защите жертв грубых и массовых нарушений прав человека. Кроме того, Основные принципы и руководящие положения перечисляют и раскрывают имеющиеся формы возмещения ущерба для жертв нарушений прав человека.

**КЛЮЧЕВЫЕ СЛОВА:** международное право, международное право прав человека, система защиты прав человека, международное гуманитарное право, Основные принципы и руководящие положения, право на правовую защиту, средства правовой защиты, возмещение ущерба, жертвы нарушения прав человека, реституция, компенсация, реабилитация, сатисфакция, гарантии неповторения случившегося

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## 1. Introduction

The rule of law is the key to ensuring the protection of human rights and fundamental freedoms at the national and international levels. The rule of law cannot exist where human rights are not respected, and no one can talk about the protection of human rights without the rule of law.

Consequently, the rule of law is a way of implementing human rights not only in theory, but mainly in practice. The rule of law and human rights are aimed at achieving justice and a dignified life for every person without any discrimination. Thus, the rule of law and human rights are interrelated, mutually reinforcing each other and inseparable.

Given the multidimensional nature of the obligation to ensure human rights, the State is obliged not only to prevent possible violations of human rights, but also to avoid actions, such violations may entail, as well as respect, protect and fulfill human rights. The principle of justice permeates all international human rights treaties without exception.

The efforts to ensure and protect human rights have an essential role in maintaining international law and order. Furthermore, the international system for the protection of human rights cannot be considered effective without the possibility of persons whose rights have been violated in one way or another to demand for the redress through free access to remedy and reparation. This provision is equally applicable to the norms of international humanitarian law, which are aimed at protecting human rights in conditions of armed conflict.

Thus, it is necessary to provide every person with legal remedies, which include access to an independent, effective and impartial judicial process<sup>1</sup>, recognition by the State of the fact of human rights violations, the search for the truth, bringing the perpetrators of the violation to justice, as well as reparation for the damage caused to victims.

The significance attached by the international community to the right to a remedy and the right to reparation has been reflected in the enshrining of these rights in various international treaties on the human rights, either through direct fixation or through broad interpretation. The latter often refers to the right to reparation, which does not appear in the texts of several international treaties.

The right to a remedy is enshrined in the International Bill of Human Rights, which is understood as a set of the following fundamental human rights instruments: the 1948 Universal Declaration of Human Rights (Art. 8)<sup>2</sup>, the 1966 International Covenant on Civil and Political Rights (para. 3 of Art. 2),<sup>3</sup> the 1966 International Covenant on Economic, Social and Cultural Rights<sup>4</sup> and the Optional Protocols to these Covenants.

The right to reparation is enshrined in the following universal international human rights treaties: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6)<sup>5</sup>, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 14)<sup>6</sup>, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Art. 15, para. 9 of Art. 16,

<sup>1</sup> Shelton D. Human Rights, Remedies. – *The Max Planck Encyclopedia of Public International Law*. Vol. IV. Amsterdam. 2002. P. 1101.

<sup>2</sup> Universal Declaration of Human Rights, proclaimed and adopted of 10 December 1948. URL: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 15.03.2021).

<sup>3</sup> International Covenant on Civil and Political Rights of 16 December 1966. URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 15.03.2021).

<sup>4</sup> Even though the ICESCR does not contain provisions on the right to a remedy and reparation, the UN Committee on Economic, Social and Cultural Rights in its general comments, in interpreting the norms of the Covenant, has repeatedly emphasized the importance of remedies and various forms of reparation, fully supporting the position of the Basic Principles and Guidelines. See, for example, UN Committee on Economic, Social and Cultural Rights: General comment No. 3 (1990) “The nature of States parties obligations” (art. 2, para. 1 of the Covenant) of 1 January 1991. URL: [https://digitalibrary.un.org/record/114868/files/E\\_1991\\_23\\_E\\_C.12\\_1990\\_8-EN.pdf](https://digitalibrary.un.org/record/114868/files/E_1991_23_E_C.12_1990_8-EN.pdf) (accessed 15.03.2021); UN Committee on Economic, Social and Cultural Rights: General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) of 11 August 2000. URL: <https://undocs.org/E/C.12/2000/4> (accessed 15.03.2021); UN Committee on Economic, Social and Cultural Rights: General comment No. 16 (2005) “The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights) of 11 August 2005. URL: <https://undocs.org/E/C.12/2005/4> (accessed 15.03.2021).

<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. URL: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed 15.03.2021).

<sup>6</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf> (accessed 15.03.2021).

para. 6 of Art. 18, para. 5 of Art. 22)<sup>7</sup>, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (Art. 24)<sup>8</sup>, as well as in different regional human rights instruments as: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 13 and 41)<sup>9</sup>, the 1969 American Convention on Human Rights (Articles 10 and 25)<sup>10</sup> and the 1981 African Charter on Human and Peoples' Rights (para. 2 of Art. 21)<sup>11</sup>.

While the international human rights treaties adopted in different years, include measures aimed at ensuring effective remedies for victims of human rights violations, this very right (right to a remedy) has been included in different ways. Thus, some of its essential parts can be divided and enshrined in different Articles or remedies can be included in the norms concerning fair trial or reparation. In this regard, Art. 8 of the 1948 Universal Declaration of Human Rights states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". However, effective remedy of those violated implies not only the right to access to justice, but also reparation for the victim of human rights violations. Consequently, there is a way for the broader legal interpretation.

Further, the elements of remedies can be dispersed throughout the treaty like in the case of the European Convention on Human Rights, which has different Articles for the right to a fair trial (Art. 6), for the right to an effective remedy (Art. 13) and for just satisfaction (Art. 41).

The positive dynamics in concluding the right to a remedy and the right to reparation for violations of human rights in a wide range of international legal documents necessitated the development of a unified approach to these rights. In this

regard, a decision to prepare a separate document was made within the UN. One of the main purposes to adopt the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law was to unify the understanding of the rights to a remedy and reparation a quite different in various human rights treaties. So, this treaty codified the best practice of States as well as international instruments without creating any new rule.

## **2. Process of development and adoption of Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law**

The necessity to define and classify provisions relating to ensuring each person or group of persons the right to remedy and to reparation required from the international community to develop a unified document that could be adopted not only by various universal and regional bodies, but also by State structures.

Let us take a quick look at the phases of the development and adoption of the Basic Principles and Guidelines.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter referred to as "the Sub-Commission")<sup>12</sup> has been involved since 1989<sup>13</sup> in the development of the unified document in the field of providing victims of violations of human rights and norms of international humanitarian law with remedies and reparation. The activity of the Sub-Commission on the preparation of the document was carried out under the direct su-

<sup>7</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990. URL: <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx> (accessed 15.03.2021).

<sup>8</sup> International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006. URL: <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx> (accessed 15.03.2021).

<sup>9</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. URL: <http://www.echr.ru/documents/doc/2440800/2440800-001.htm> (accessed 15.03.2021).

<sup>10</sup> American Convention on Human Rights of 22 November 1969. URL: <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf> (accessed 15.03.2021).

<sup>11</sup> African Charter on Human and Peoples' of 26 June 1981. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf> (accessed 15.03.2021).

<sup>12</sup> In 1999, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities was transformed into the Sub-Commission on the Promotion and Protection of Human Rights, and in 2006 - into the Advisory Committee.

<sup>13</sup> UN Economic and Social Council: Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. November 13, 1989. URL: [https://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN\\_4-Sub\\_2-1989-58\\_E-CN\\_4-1990-2.pdf?null](https://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-Sub_2-1989-58_E-CN_4-1990-2.pdf?null) (accessed 15.03.2021).

pervision of the UN Commission on Human Rights (hereinafter referred to as “the HRC”) and was also included in broader studies on the strengthening of justice and the international system for the protection of human rights in the transition period.

Several human rights non-governmental organizations, such as the International Commission of Jurists, Amnesty International and Redress Trust, as well as some States, primarily representing Latin America (first of these is Chile) were proactive in the process of drafting the document. Western European States had a lesser active position in that field. While negotiations on the document being developed were open, all interested parties could freely express their positions, which demonstrated their willingness and interest in obtaining the result.

Also, in 1989, in accordance with Resolution 1989/13 of the UN Sub-Commission on the Promotion and Protection of Human Rights, the Dutch lawyer and professor of international law Theodor van Boven was entrusted to conduct a study on the right to restitution, compensation and rehabilitation of victims of serious violations of human rights and fundamental freedoms and on the possibility of developing basic principles and guidelines.<sup>14</sup> In 1990, Van Boven presented a preliminary report on the results of a one-year study, and in 1993 - a final report, the main provisions of which were included in the developed draft principles on restitution, compensation and rehabilitation.

The 1993 report considered the positions provided by non-governmental organizations and experts from various States, especially those, where gross and massive violations were of a larger scale<sup>15</sup>.

The final report was sent to the HRC for consideration, and in 1994 States and NGOs were invited to study and discuss it. The Special Rapporteur amended the draft document according to the comments received as well as to the results of working meetings organized jointly by the International Commission of Jurists and the Maastricht Center for Human Rights. The final version of this draft was sent to the HRC for consideration in 1997.

It should also be noted that the provisions on the State responsibility and reparation, enshrined in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts as well as the norms of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, were under consideration at the development of the Basic Principles and Guidelines. The Declaration was developed in the framework of a regional meeting in Ottawa (Canada) and was adopted at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders.

However, let us return to the study of the provisions of Theodor van Boven’s 1993 report [Crawford, Pellet, Olleson 2010: 579]. The report recognized the impossibility of fully eliminating and redressing the consequences of serious and massive violations of human rights, as well as the disproportionality of any reparation [Keburiya 2016:125–127]. The need for special attention to the search for truth, remedy and bringing to justice those responsible for human rights violations was stated also in that document<sup>16</sup>.

The provisions of this report by Theodor van Boven were reflected in the draft principles, which consisted of three parts: basic principles, forms of reparation, and procedural elements. According to the provisions of this draft in terms of determining the basic principles, it is an obligation of the State to provide victims of human rights violations with remedies, including the right to reparation. The second part of the document established the concept of the reparation and a classification of its forms (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition). Further, the procedures and mechanisms for ensuring fair, effective and prompt access to justice are defined in the last part of the draft.

The next significant milestone in the development of the draft Basic Principles and Guidelines was the establishment by HRC Resolution 1998/43 of the position of Independent Expert, which was occupied by Professor M. Sheriff Bassiouni, formerly Chairman of the Drafting Committee in Ottawa and

<sup>14</sup> UN Economic and Social Council: Resolution No. 1990 /36 “Compensation for victims of gross violations of human rights”. May 25, 1990. URL: <https://digitallibrary.un.org/record/196840/files/e-1990-90-e.pdf> (accessed 15.03.2003)

<sup>15</sup> UN Sub-Commission on the Promotion and Protection of Human Rights: Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms : final report. Submitted by Theo van Boven, Special Rapporteur. July 2, 1993. P. 53. URL: <https://www.refworld.org/docid/3b00f4400.html> (accessed 15.03.2021).

<sup>16</sup> Ibid. P. 53.

actively involved in the preparation of the draft Basic Principles and Guidelines. In 1999, another draft of the document was presented to the HRC, and in 2000, it was presented in its final form<sup>17</sup>. At the same time, the draft was revised for the third time.

After the presentation of the draft to the HRC, it did not send it to a vote, but referred it to States, intergovernmental and non-governmental organizations for consideration. Nevertheless, several States were interested in suspending the final adoption of the draft Basic Principles and Guidelines before the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance is held in Durban, South Africa, in September 2001.

The appointment of M. Sheriff Bassiouni was followed by a series of consultations with experts from both governments and non-governmental organizations and resulted in the inclusion of the provisions related to international humanitarian law in the draft<sup>18</sup>. In addition, it became necessary to make the text more laconic and clearer. It should be noted that the process of preparing the draft did not move according to a specific plan but considered every proposal from States and NGOs. Thus, an open forum for negotiations was provided, with the goal of ultimately developing and agreeing on a document that would be most acceptable to all parties concerned.

At the same time, returning to the issue of including provisions relating to international humanitarian law in the draft, we would like to mention the following. The initial drafts of the Basic Principles and Guidelines, prior to the second version, presented in 1995, remained within the limits of international human rights law. All the drafts followed already contained the norms of international humanitarian law, which, however, did not find the approval of some States, whose claims were mainly reduced to a different way of development of human rights law and humanitarian law and their special nature. The latter led to differences in the complex of rights and obligations that each of these branches of international law imposes on States.

The main difference between these branches of international law lies in the specifics of the human rights measures proposed by humanitarian law, which are applied only in situations of armed conflict [Rusinova 2006: 11-12]. In other words, opponents of the unification of the norms of the two areas of law advocated the adoption of two separate documents. However, this position still did not find wide support among the parties involved in the process. According to most of the parties concerned, the focus of the Basic Principles and Guidelines is on the protection of human rights, while this document does not specify the legal distinction between violations of international human rights law and international humanitarian law.

It should be noted that, even though these branches of international law indeed have different ways of developing, they intersect in many provisions and, no less important, provide additional protection measures for victims, although using often different terminology [McCracken 2005:77–79].

In this regard, the position of the International Court of Justice in its 2004 advisory opinion in the case “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*” should be cited as an example. In this advisory opinion the Court noted that international humanitarian law and international human rights law complement each other, and, despite different legal sources, they cannot be mutually exclusive<sup>19</sup>. Both branches of international law have developed in the context of the consolidation of customary and treaty law, as well as general principles of law, which are also sources of international law.

It is also necessary to note the following point: in the title of the Basic Principles and Guidelines, the term “gross violations of international human rights law” is used, but already in Principle 26, the inadmissibility of restricting any rights or obligations provided for by national legislation or international law is especially noted, and the application of the right to a remedy and reparation, as set out in this document,

<sup>17</sup> UN Commission of Human Rights: Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33 “The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms”. January 18, 2000. URL: [https://digitallibrary.un.org/record/407931/files/E\\_CN.4\\_2000\\_62-EN.pdf](https://digitallibrary.un.org/record/407931/files/E_CN.4_2000_62-EN.pdf) (accessed 15.03.2021).

<sup>18</sup> Ibidem.

<sup>19</sup> International Court of Justice: Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. July 9, 2004. URL: <https://www.un.org/unispal/document/autoinsert-178825/> (accessed 15.03.2021).

to victims of any violation of international human rights law and humanitarian law. Therefore, it can be concluded that it is optimal to use the term “violation of human rights” rather than “serious violations of human rights” to be able to cover a wider range of human rights violations that entail the victim’s right to claim protection for damages. As to the serious violations of humanitarian law, this document means the crimes under international law.

When developing the idea that the Basic Principles and Guidelines should include serious violations of international humanitarian law, the authors of this document referenced to the Rome Statute of the International Criminal Court concerning the meaning of the war crimes. In this regard, several corresponding norms have been included in the Basic Principles and Guidelines on legal consequences coming from the international crimes. Thus, this document obliges States to investigate and to prosecute the person responsible for the violations and if the person is found guilty, he or she must be punished (para. 4). “To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction” (para. 5).

In addition, there was some inconsistency during the development of the draft Basic Principles and Guidelines, between the provisions of different legal systems regarding the right to collective reparation, which was incorporated into the draft. Thus, the continental legal system is not familiar with class action in court, and the common law is not aware of the possibility of a civil claim in criminal proceedings.

As a result of the compromise reached by the parties, the final text of the Basic Principles and Guidelines considered the provisions of the continental legal system, common law and, to some extent, the norms relevant to Islamic law.

On 13 April 2005, nearly sixteen years after the beginning of the drafting process, the UN Human Rights Commission<sup>20</sup>, at its 61st session in Geneva, adopted the final version of the Basic Principles and Guidelines with 40 votes “for”, with 13 abstentions<sup>21</sup>. Its noteworthy that there were no votes against the adoption of the document. Thus, its consensual nature was confirmed. On December 16, 2005, by Resolution No. 60/147, the UN General Assembly supported and adopted the final version of the Basic Principles.

### 3. Structure of the Basic Principles and Guidelines

Let us move on to consider the structure of the Basic Principles and Guidelines, and then determine the level of significance of this document for international law, as well as the practical application of its provisions by various universal and regional judicial and quasi-judicial bodies.

The structure of the Basic Principles and Guidelines is as follows: Preamble, 13 chapters, combining 27 Articles (principles). The Preamble defines the goals and objectives of this document, including emphasizing that “the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity”.

As for the international humanitarian law the Basic Principles and Guidelines in its Preamble refers to the Art. 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV)<sup>22</sup>, Art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977<sup>23</sup>, and Articles 68 (concerning protection of the

<sup>20</sup> UN Human Rights Council replaced Commission on Human Rights by Resolution No. 60/251 adopted by the UN General Assembly on 15 March 2006.

<sup>21</sup> The following States voted for the adoption of this document: Austria, Argentina, Belgium, Bolivia, Brazil, Burkina Faso, the UK, Venezuela, Hungary, Guatemala, Greece, the Dominican Republic, Ireland, Spain, Italy, Cyprus, Costa Rica, Latvia, Mexico, Nigeria, the Netherlands, Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Uruguay, Finland, France, the Czech Republic, Chile, Switzerland, Sweden, Ecuador, Estonia, and Japan. At the same time, several States abstained from voting: Australia, Germany, Egypt, India, Qatar, Mauritania, Nepal, Saudi Arabia, Sudan, the USA, Togo, Eritrea, and Ethiopia.

<sup>22</sup> Article 3: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 18 October 1907. URL: <https://ihl-databases.icrc.org/ihl/INTRO/195> (accessed 15.03.2021).

<sup>23</sup> Article 91 — Responsibility: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of



victims and witnesses and their participation in the proceedings) and 75 of the Rome Statute of the International Criminal Court (concerning reparations to victims)<sup>24</sup>.

Article 8 of the Rome Statute gives the meaning of “war crimes” defining them as serious violations of the laws and customs applicable in international armed conflict or in an armed conflict not of an international character. Further, war crimes meaning “grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention” are: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages.

Other serious violations of the laws and customs applicable in international armed conflict<sup>25</sup> include, among others, attacks against the civilian population as well as civilian objects, killing or wounding surrendered combatant, using poison or poisoned weapons, poisonous or other gases, improper using emblems or flags, pillage or other taking of property contrary to international humanitarian law [Sandoval-Villalba 2009: 243–281].

In cases of armed conflicts not of the international character, serious violations are “any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judge-

ment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable”<sup>26</sup>.

In its Art. 75 concerning reparations for the victims of serious violations, the Rome Statute reflects the language of the draft of the Basic Principles and Guidelines on this issue: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”.

The framework of the Basic Principles and Guidelines has been developed with an emphasis on the obligation of States to provide victims of violations of human rights and international humanitarian law with remedies and reparation. However, even though it is the State that is the primary subject of international law, the possibility of unlawful actions on the part of international organizations cannot be ignored. The Basic Principles and Guidelines do consider the responsibilities of international organizations, for example, Principle 15 states the following: “...In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim”.

The Basic Principles and Guidelines are a document focused on the position of the victim of violations of human rights and international humanitarian law. Regarding the definition of the victim, even at the stage of drafting the text of the Basic Principles and Guidelines, some controversy arose around the inclusion in the concept of “victim” not only individuals but groups of individuals, collectively. Which means that the person could be understood as a victim individually as well as in a group or collectively. In the final version of the document, the concept of “victim” is given in Chapter V, in Principles 8 and 9. Thus, the wording of Principle 8 stipulates that “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of

International Armed Conflicts (Protocol I) of 8 June 1977. URL: [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf) (accessed 15.03.2021).

<sup>24</sup> Rome Statute of the International Criminal Court of 17 July 1998. URL <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (accessed 15.03.2021).

<sup>25</sup> Ibid. Para. 2 b) of Art. 8.

<sup>26</sup> Ibid. Para. 2 c) of Art. 8.

international humanitarian law”. In addition, already in the Preamble, we can observe “that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively”. Within the meaning of the same Principle 8 of the Basic Principles and Guidelines, “victim” is understood not only as direct victim or person who was directly damaged, but also indirect victims. Let us refer to the text of the mentioned Principle in this context: “the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”. While the definition of potential victims is not explicitly enshrined in the Basic Principles and Guidelines, it does imply the obligation of States to implement such policies that include compliance with international law with national legislation and human rights policies, thereby preventing the possibility of human rights violations [Shelton 2015: 60–61].

As noted further in the Preamble, this document does not replace existing norms of international law and domestic law, but only proposes mechanism, procedures and methods for fulfilling the responsibilities of States and of the international community in general with respect to providing victims of violations of human rights and humanitarian norms with remedy and reparation for the harm suffered.

Further, let us note that the following wording is enshrined in the title of the Basic Principles and Guidelines: “gross violations of international human rights law”. Nevertheless, Principle 26 of this document emphasizes the inadmissibility of limiting any rights or obligations enshrined in domestic or international law, including the right to reparation. Thus, the drafters of the document concluded that it is advisable to use the term “violation of human rights” rather than “serious violations of human rights”, since any violation leads to adverse consequences, regardless of the severity.

According to Principle 11 (section VII) of the Basic Principles and Guidelines “remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms”<sup>27</sup>.

It is worth noting that, even though the right to reparation for harm suffered is enshrined in several international treaties in the field of human rights protection and international humanitarian law, for the first time only the Basic Principles and Guidelines in one document listed in the most complete form the rights of victims of access to justice and to reparation for harm suffered [McCracken 2005:77-79].

#### **4. Forms of reparation for the violations of human rights established in the Basic Principles and Guidelines**

Particular attention in the document is paid to the forms of reparation, namely: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. The first two forms are material, while the last three are non-material forms of reparation for harm suffered. Let us study briefly the definition of each of the five identified forms of reparation.

*Restitution* (lat. “*restitutio in integrum*” meaning “restoration in the previous state”, “in the previous rights”). The Basic Principles and Guidelines define it as the ability to “restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property” (Principle 19).

Restitution as a form of reparation was already known to the ancient jurists. Thus, according to Roman law, if it is possible to restore the violated relationship or return the thing to the owner in the same condition, reparation for damage could be made in the form of restitution. According to the judgement of the Permanent Court of International Justice in the case concerning the Factory at Chorzyw, restitution is the core aim of reparation: “The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by

<sup>27</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the UN General Assembly Resolution No. 60/147 of 16 December 2005. URL: <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> (accessed 15.03.2021).

international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed<sup>28</sup>.

The Basic Principles and Guidelines highlight the restoration of citizenship as one of the examples of reparation. In this regard, if a person is deprived of citizenship in violation of international law, restitution can be achieved by restoring citizenship. This formula has been recognized, for example, by the UN Working Group on Enforced or Involuntary Disappearances<sup>29</sup> as well as the African Commission on Human and Peoples' Rights<sup>30</sup>.

When it is forced displacement of a person abroad of the State of citizenship or permanent residence caused by threats to his or her life and health, the State is obliged not only to eliminate such risks, but also to take appropriate measures to ensure the safety of the person and his life, as well as create conditions for the return of such faces to their homeland<sup>31</sup>. The practice of international courts to some extent correlates with the right to return to the homeland, recognized by the international law, in particular the right of the refugees to return to the State they were forced to leave<sup>32</sup>.

In cases of deprivation of property in violation of human rights, restitution means, in general, the return of property. In this regard, the European Court of Human Rights has ruled that the most appropri-

ate form of reparation is the return of property<sup>33</sup>. The UN Human Rights Committee also recommended property restitution, i.e. return in the same condition prior to the violation or, if it is not possible, compensation<sup>34</sup>. In addition, the African Commission on Human and Peoples' Rights recommended the use of restitution as reparation for human rights violations when the robbery of the victim's property<sup>35</sup>.

As it was previously said, since restitution is aimed at restoring a situation existed before violation, it cannot be applied in every case. Article 35 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts names "a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: a) is not materially impossible; b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". If there is no possibility for restitution or it is insufficient for the full reparation, as a rule, compensation is paid based on a financial assessment of the damage caused (Art. 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts). But if there is no way to apply neither restitution nor compensation, "a State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation"

<sup>28</sup> Permanent Court of International Justice: Case Concerning the Factory at Chorzyw (Claim for Indemnity) (The Merits). Germany v. Poland. Judgment of 13 September 1928. URL: [http://www.worldcourts.com/pcij/eng/decisions/1928.09.13\\_chorzow1.htm](http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm) (accessed 15.03.2021).

<sup>29</sup> UN Economic and Social Council: General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance. January 12, 1998. Para. 75. URL: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/1998/43&Lang=E> (accessed 15.03.2021).

<sup>30</sup> African Commission on Human and Peoples' Rights: Case of Malawi African Association et al. v. Mauritania. Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98. May 11, 2000. URL: <https://www.refworld.org/cases,ACHPR,52ea5b794.html> (accessed 15.03.2021).

<sup>31</sup> UN Human Rights Committee: Case of Jimenez Vaca v. Colombia. Communication No. 859/1999, March 22, 25, 2000. Para. 9. URL: <https://www.refworld.org/cases,HRC,3f588ef4a.html> (accessed 15.03.2021).

<sup>32</sup> Para. 2 of Art. 13 of the UN 1948 Universal Declaration of Human Rights; Para. 4 of Art. 12 of the 1966 International Covenant on Civil and Political Rights; Art. 5 d) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>33</sup> European Court of Human Rights: Case of Papamichalopoulos and others v. Greece (Article 50). Application No. 14556/89. Judgment of 31 October 1995. Para. 38. URL: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-57961%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-57961%22]) (accessed 15.03.2021).

<sup>34</sup> UN Human Rights Committee: Case of Robert Brok and Dagmar Brokova v. Czech Republic. Communication No. 774/1997. Paras. 7.4, 9. URL: [http://www.worldcourts.com/hrc/eng/decisions/2001.10.31\\_Brok\\_v\\_Czech\\_Republic.htm](http://www.worldcourts.com/hrc/eng/decisions/2001.10.31_Brok_v_Czech_Republic.htm) (accessed 15.03.2021); UN Human Rights Committee: Case of Dr. Karel Des Fours Walderode v. The Czech Republic. Communication No. 747/1997. November 21, 1996. Paras 8.4, 9.2. URL: <http://hrlibrary.umn.edu/undocs/747-1997.html> (accessed 15.03.2021).

<sup>35</sup> African Commission on Human and Peoples' Rights: Case of Malawi African Association et al. v. Mauritania. Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98. May 11, 2000. URL: <https://www.refworld.org/cases,ACHPR,52ea5b794.html> (accessed 15.03.2021).

(part 1 of Art. of the Draft Articles on Responsibility of States for Internationally Wrongful Acts).

Restitution is the first form of reparation that should be applied to restore violated human rights. However, if it cannot be applied, other forms of reparation are implemented.

*Compensation* (lat. “*compensatio*” meaning “action of compensating”, “remuneration”, “equalization”) is also a material form of reparation for damage caused to the physical or psychological state of a person. In the text of the Basic Principles and Guidelines, the definition of compensation is given in Principle 20, saying “compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: *a*) physical or mental harm; *b*) lost opportunities, including employment, education and social benefits; *c*) material damages and loss of earnings, including loss of earning potential; *d*) moral damage; *e*) costs required for legal or expert assistance, medicine and medical services, and psychological and social services”.

The Preamble of the Basic Principles and Guidelines mentions the need to establish, strengthen and expand special compensation funds aimed at providing prompt and adequate payments to victims of human rights violations. In addition, we shall also state that compensation, despite the frequency of its application, should not be equated with the right to reparation, since it is part of it, and not itself.

In its judgement in the case concerning the Factory at Chorzyw, the Permanent Court of International Justice defined compensation as a substitute for restitution when the latter cannot be applied. The amount of compensation must be equivalent to restitution in kind, in other words, the amount of what was lost due to violation: “Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained

which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”<sup>36</sup>.

In addition, damage to individuals should be the basis for determining the amount of compensation measures. It should be noted that compensation for material and non-material damage, especially for unlawful deprivation of life or imprisonment, is also payable. Thus, in the famous case of the British ship *Lusitania*, the need for compensation was determined as follows: “It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy”<sup>37</sup>.

Of all the forms of reparation for damage, it is compensation that is most often used in international practice. According to Art. 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which is dedicated to the notion of compensation, “The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution” and “the compensation shall cover any financially assessable damage including loss of profits insofar as it is established”.

This non-exhaustive criterion for determining compensation allows the development of methods for financially assessing the damage caused, which cannot be physically seen. The pain and suffering endured by a victim of a human rights violation are also subject to economic assessment. The concept of compensation confirms the obvious provision, according to which the amount of compensation payments should be proportional to the violation with considering moral damage.

International jurisprudence is unanimous in providing compensation to victims of loss of income. In cases where the loss of a job is due to a violation of human rights, the UN Human Rights Committee, for example, without calculating the amount of compensation, recommends to States to compensate for the lost earnings based on the salary that the victim would receive if his rights were not violated<sup>38</sup>.

<sup>36</sup> Permanent Court of International Justice: Case Concerning the Factory at Chorzyw (Claim for Indemnity) (The Merits). Germany v. Poland. Judgment of 13 September 1928. URL: [http://www.worldcourts.com/pcij/eng/decisions/1928.09.13\\_chorzow1.htm](http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm) (accessed 15.03.2021).

<sup>37</sup> Mixed Claims Commission (United States and Germany). Opinion in the *Lusitania* Cases. November 1, 1923. P. 35. URL: [https://legal.un.org/riaa/cases/vol\\_VII/1-391.pdf](https://legal.un.org/riaa/cases/vol_VII/1-391.pdf) (accessed 15.03.2021).

<sup>38</sup> UN Human Rights Committee: Case of *Busyo v. Democratic Republic of Congo*. Communication No. 933/2000. September 19, 2003. Para. 6.2. URL: <https://undocs.org/en/CCPR/C/78/D/933/2000> (accessed 15.03.2021); UN Human Rights Committee: Case of *Nyekuma Kopit a Toro Gedumbe v. Democratic Republic of the Congo*. Communications No. 641/1995. July 26, 2002. Para. 6.2. URL: <http://hrlibrary.umn.edu/undocs/641-1995.html> (accessed 15.03.2021).

The economic consequences of human rights violations are so various that it is difficult to classify them for compensation purposes. International jurisprudence seeks to create standards for determining the exact amount of compensation to be paid to victims of offenses that have suffered real losses. They can vary in different legal systems, which indicates the uncertainty, therefore, the international practice is in constant development in this matter. It follows from the practice of universal and, to a greater extent, regional human rights courts that compensation, as a rule, excludes damage that is not subject to economic assessment [Gray 1987:33–34]. If pecuniary damage exists, no exact figure from the victim is required to determine compensation [Kaplow, Shavell 1996:191–209]. In the absence of precise information on quantitative indicators of the amount of damage suffered, compensation is provided based on the principle of fairness [Cornejo Chavez 2017:372–392].

Non-pecuniary damage is sometimes easily calculated economically, which comes to the cost of medical or psychological treatment, drugs, etc. However, it can also be measured based on the principle of “equality”, which is an accepted method of assessing damage in comparative jurisprudence, subject to the availability of appropriate evidence.

The first in the list of non-material forms of reparation in the Basic Principles and Guidelines is *rehabilitation* (lat. “*rehabilitatio*” meaning “rehabilitation”), that “should include medical and psychological care as well as legal and social services” (Principle 21).

Rehabilitation is guaranteed by the provisions of many universal treaties and declarations. The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in its para.1 of Art. 14 states that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. The 1989 UN Convention on the Rights of the Child in Art. 23 and Art. 24 also stipulates the need for States to promote international cooperation in the exchange of information on the possibilities of providing children with rehabilitation measures, including medical and psychological treatment. In addition, Art. 39

of this Convention declares that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child”.

Further, the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance in Art. 24 notes that “the right to obtain reparation ... covers material and moral damages and, where appropriate, other forms of reparation such as: a) restitution; b) rehabilitation; c) satisfaction, including restoration of dignity and reputation; d) guarantees of non-repetition”.

Rehabilitation measures are often viewed as part of compensation. In this regard, the violating State is required to provide an amount of money to cover the victim’s rehabilitation when paying compensation. This provision is reflected in the mentioned above para. 1 of Art. 14 of the Convention against Torture, according to which the State provides compensation, “including the means for as full rehabilitation as possible”.

Here, it should be noted that rehabilitation is provided not only in the case of physical or psychological suffering of victims, but it can be of a social nature as well, when it comes to, for example, rehabilitation of victim’s dignity, social position and general legal status. Some of these rehabilitative measures, such as legal status rehabilitation, are carried out, for example, through the removal of convictions or annulment of unlawful sentences<sup>39</sup>.

Further, the document establishes such a form of reparation as *satisfaction* (lat. “*satis*” meaning “enough”, “sufficient”, and “*facere*” meaning “to do”; “*satisfactio*”, “*satisfacio*” meaning “satisfaction”, “ask for forgiveness”, “apologize”), which, in the document under consideration, means a whole range of measures: “a) effective measures aimed at the cessation of continuing violations; b) verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; c) the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification

<sup>39</sup> Кебурия К.О. Право на возмещение ущерба по международному праву за нарушения государствами прав человека: diss. ... канд. юрид. наук [The Right to Reparation in International Law for The State’s Violations of Human Rights: candidate thesis]. Moscow. 2018. P. 66. (In Russ.).

and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; *d*) an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; *e*) public apology, including acknowledgement of the facts and acceptance of responsibility; *f*) judicial and administrative sanctions against persons liable for the violations; *g*) commemorations and tributes to the victims; *h*) inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels” (Principle 22).

In a number of cases, international courts in their decisions determined that the recognition of the fact of violation of human rights is already satisfaction in itself. Meanwhile, according to the Inter-American Commission on Human Rights, in cases of gross and massive violations of human rights, recognition or condemnation is not enough to provide fair reparation for the damage suffered by the victims<sup>40</sup>. Therefore, adequate, in other words, sufficient compensation is needed.

The Basic Principles and Guidelines, in general, provide an extensive list of measures that States must take to ensure that reparations for victims of human rights violations are satisfactory, including making public the facts of human rights violations, ending ongoing violations, searching for missing persons, identification and reburial of the deceased. Considering the importance of not only the search for the truth, but also the recognition of the fact of a violation of human rights, the obligation to bear responsibility for it seems to be a key principle of investigation and establishment of the truth in each specific case of violation. In this vein, the Basic Principles and Guidelines recommend that human rights organizations publish their reports for the public to access or so, to be transparent.

It is worth noting the activities of Truth Commissions, which are usually created by the governments of States and are temporary non-judicial bodies to investigate the facts of massive and gross violations

of human rights, for example, committed during civil wars. Victims of such serious violations of human rights, including their relatives and the whole society, have the right to know the truth about the events of the past, the cause and consequences of these events, to establish the whereabouts of the missing or killed persons. The perpetrators of human rights violations must be identified and held responsible<sup>41</sup>. In addition, the Truth Commissions are adopting recommendations for the establishment of special programs aimed at reparation of victims of human rights violations [Bishnu 2017:192–230].

Even though public apology is symbolic, it is addressed to present and future generations as a clear indication that the violation should not happen again. This is especially important in cases of violations of the rights of groups or a large number of victims, sometimes impersonal, or in cases of serious violations in the past<sup>42</sup>.

Thus, the main task of satisfaction as a form of reparation is to restore the dignity, psychological health, honor and reputation of the victims of violations of international human rights norms [Banteckas, Oette 2013: 547–550].

Non-material forms of reparation, except for rehabilitation, as mentioned above, in the Art. 37 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Meanwhile, the Draft Articles on State Responsibility does not value satisfactory measures. They are, nevertheless, important in the field of human rights protection, where in conditions of inequality between the State and the person whose rights are violated, the State has a significant role to investigate violations, as well as to establish the reasons that led to the violation.

Finally, *guarantees of non-repetition* are enshrined in the list of forms of reparation, which are generally structural measures aimed at helping to prevent future violations of human rights and humanitarian law. These include measures such as: *(a)* ensuring effective civilian control of military and security forces; *(b)* ensuring that all civilian and military proceedings abide by international standards of due process, fairness

<sup>40</sup> Inter-American Court of Human Rights: Case of El Amparo v. Venezuela. Judgment of September 14, 1996 (Reparations and Costs). Para. 35. URL: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_28\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_28_ing.pdf) (accessed 15.03.2021).

<sup>41</sup> OHCHR: Rule-of-law Tools for Post-Conflict States. Truth commissions. 2006. URL: <https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf> (accessed 15.03.2021).

<sup>42</sup> Inter-American Court of Human Rights: Case of Cantoral Benavides v. Peru. Judgment of December 3, 2001 (Reparations and Costs). Para. 81. URL: [https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec\\_88\\_ing.pdf](https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_88_ing.pdf) (accessed 15.03.2021); Inter-American Court of Human Rights: Case of Moiwana Community v. Suriname. Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs). Para. 216. URL: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_124\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf) (accessed 15.03.2021).

and impartiality; (c) strengthening the independence of the judiciary; (d) protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law” (Principle 23).

The guarantees of non-repetition, like satisfaction, are not always suitable for application at the interstate level, but their importance in the field of human rights protection can hardly be overestimated. The measures enshrined in the Basic Principles and Guidelines are mainly aimed at strengthening national institutions under the rule of law, including the independence of the judiciary and civilian control of military and security forces.

Part two of the Draft Articles on State Responsibility includes Chapter II “Reparation for Injury”, which examines the forms of reparation that can be provided by the State responsible for the violation: restitution, compensation and satisfaction (Art. 34). The Basic Principles and Guidelines differ in the definition of reparations from the text of the Draft Articles on State Responsibility on several conceptual points. Thus, the termination of the violation is included in the concept of satisfaction as one of the forms of compensation for damage in the Basic Principles and Guidelines, while in the Draft Articles on State Responsibility, it together with non-repetition of the violation, stands separately and independently of compensation for damage (Art. 30 – “Cessation and non-repetition” and Art. 31 – “Reparation”). The cessation of the violation, while not reparation, is

nevertheless part of the general obligation to comply with international law. More of it, in the opinion of the International Law Commission, the termination of violation of international obligations and guarantees for non-repetition of what happened are aspects of the restoration of legal relations affected by the violation (Art. 30, para. 1, b).

Sometimes the termination of the violation overlaps with restitution, especially in cases of deprivation of property. Yet, unlike restitution, the cessation of violations is not limited by proportionality. Thus, restitution is applicable only if possible, and cessation of violations can be used in any case. In the same vein, the Commentary to the Draft Articles on State Responsibility notes that guarantees of non-repetition can be realized in practice both through satisfaction and both satisfaction and restitution [Crawford 2002: 196-201].

While the obligation to cease a continuing violation in general does not require interpretation and clarification, guarantees of non-repetition can take a variety of forms, indicating the various measures necessary for the State to take to ensure the measures to prevent further violations.

Non-repetition guarantees also cover structural changes that can be achieved through the adoption of appropriate legislative measures. The UN Human Rights Committee, in its 2016 Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights<sup>43</sup>, reaffirmed the need for legislation as a first step towards achieving a guarantee of non-repetition of human rights violations and in addition to bringing the State’s national legislation in conformity with the provisions international law.

To prevent further violations, persons at risk of violation of their rights should be provided with special protection measures. Such persons include human rights defenders, media workers and other persons working in the field of human rights protection. According to the position of the UN Human Rights Committee expressed in the case of *Suarez de Guerrero v. Colombia*, ensuring the effective observance of the right to life requires States to amend their domestic legislation to bring it in line with Art. 6 of International Covenant on Civil and Political Rights.<sup>44</sup>

<sup>43</sup> UN Human Rights Committee: Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights dated November 30, 2016. URL: <https://undocs.org/en/CCPR/C/158> (accessed 15.03.2021).

<sup>44</sup> UN Human Rights Committee: Case of Pedro Pablo Camargo v. Colombia, Communication No. 45/1979. March 31, 1982. Para. 15. URL: <http://hrlibrary.umn.edu/undocs/newscans/45-1979.html> (accessed 15.03.2021); UN Human Rights Committee: Concluding Observations on Venezuela. April 26, 2001. Para. 8. URL: <https://www.refworld.org/docid/3be1216f4.html> (accessed 15.03.2021).

Summarizing all the above, we shall note that all five forms of reparation for victims of violations of human rights and international humanitarian law can be applied both independently and in combination with several or even all other forms of reparation<sup>45</sup>. Moreover, recourse to only one of the forms significantly limits the overall effectiveness of reparation. In other words, the most expedient seems to be the simultaneous and combined use of several forms of reparation, considering, of course, the details of each specific case. Only in that way it is possible to achieve full and comprehensive reparation for victims of violations both individually and collectively<sup>46</sup>.

### 5. Basic Principles and Guidelines in the Practice of Universal and Regional Judicial and Quasi-judicial Bodies

While the Basic Principles and Guidelines are not legally binding, this document is the first comprehensive codification of the rights of victims of violations of international human rights law and international humanitarian law to a remedy, reparation and access to justice.

The Basic Principles and Guidelines have provided guidance to universal and regional judicial and quasi-judicial bodies in the context of providing the reparation for the victims for the harm they suffered. The high appraisal of this document was expressed, for example, by the International Criminal Court (hereinafter referred to as “the ICC”) in its judgment of January 18, 2008 in the case of *Thomas Lubanga Dyilo*. In this judgment, the Court, facing the lack of

a definition of the concept of a victim in the Rome Statute, referred to the provision of Principle 8 of the Basic Principles and Guidelines as “guidance”<sup>47</sup>, according to which “victim” refers to a person who has suffered direct harm, individually or collectively, directly or indirectly, in various forms (physical or psychological harm, mental suffering and economic loss)<sup>48</sup>.

Reflecting the specifics of reparation for harm suffered by a group of persons, it is worth noting that in the aforementioned case of *Thomas Lubanga Dyilo*, the ICC for the first time developed a procedure for a comprehensive mechanism for the implementation of collective reparation for damage, including the preparation of a list of potential victims, an assessment of the extent of damage caused to victims, an analysis of the scope of responsibility of Thomas Lubanga Dyilo, and if necessary, revision of the monetary amount of reparation<sup>49</sup>.

International universal and regional mechanisms for the protection of human rights are often guided by the Basic Principles and Guidelines, including for determining the form of reparation. For example, the Inter-American Court of Human Rights in its decisions regarding reparations for victims of human rights violations repeatedly refers to the provisions of the Basic Principles and Guidelines. It is noteworthy that the Court began to refer to this document at the stage of development of its draft [Rubio-Marín, Sandoval 2011: 1062-1091]<sup>50</sup>.

In general, we can state that the positions of the regional systems of human rights protection (European, Inter-American and African)<sup>51</sup> do not contra-

<sup>45</sup> Inter-American Court of Human Rights: Advisory Opinion OC-9/87 of October 6, 1987 Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights). Para. 24. URL: [https://www.corteidh.or.cr/docs/opinion/es/seriea\\_09\\_ing.pdf](https://www.corteidh.or.cr/docs/opinion/es/seriea_09_ing.pdf) (accessed 15.03.2021).

European Court of Human Rights: Case of Silver v. the United Kingdom. Application No. 5947/72, No. 6205/73, No. 7052/75, No. 7061, No. 7107/75, No. 7113/75, No. 7136/75. Judgment of 25 March 1983. Para. 113. URL: <https://hudoc.echr.coe.int/en/g#%22itemid%22:%22001-57577%22> (accessed 15.03.2021).

<sup>46</sup> UN General Assembly: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. November 17, 2006. URL: [https://digitallibrary.un.org/record/861416/files/A\\_HRC\\_34\\_62\\_Add-1-EN.pdf](https://digitallibrary.un.org/record/861416/files/A_HRC_34_62_Add-1-EN.pdf) (accessed 15.03.2021).

<sup>47</sup> International Criminal Court: The Prosecutor v. Thomas Lubanga Dyilo. Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008. P.16. URL: [https://www.icc-cpi.int/CourtRecords/CR2008\\_03972.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF) (accessed 15.03.2021).

<sup>48</sup> *Prava cheloveka. Uchebnik*. Otv. red E.A. Lukasheva [Human Rights: a textbook. Ed. by E.A. Lukasheva]. Moscow: Norma Publ. 2015. P. 480-489. (In Russ.)

<sup>49</sup> International Criminal Court: The Prosecutor v. Thomas Lubanga Dyilo. Press Release. February 9, 2016. URL: [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1188.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1188.aspx) (accessed 15.03.2021).

<sup>50</sup> Inter-American Court of Human Rights: Case of Bámaca-Velásquez v. Guatemala. Judgment of February 22, 2002 (Reparations and Costs). Para 75. URL: [https://www.corteidh.or.cr/corteidh/docs/casos/articulos/Seriec\\_91\\_ing.pdf](https://www.corteidh.or.cr/corteidh/docs/casos/articulos/Seriec_91_ing.pdf) (accessed 15.03.2021); Inter-American Court of Human Rights: Case of Castillo-Páez v. Peru. Judgment of November 27, 1998 (Reparations and Costs). Para 48. [https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec\\_43\\_ing.pdf](https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_43_ing.pdf) (accessed 15.03.2021).



dict the provisions laid down in the Basic Principles and Guidelines [Solntsev, Keburiya 2014:16–25].

Thus, Art. 13 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) guarantees the right to an effective remedy for damages to persons whose rights and freedoms have been violated, and Art. 41<sup>52</sup> contains provisions on just satisfaction for the injured party [Tomuschat 2000:1409–1430].

The 1969 American Convention on Human Rights establishes the obligation to pay “just satisfaction” (Arts. 10 and 21)<sup>53</sup> and the 1981 African Charter on Human and Peoples’ Rights also provides for the right of deprived peoples to receive adequate compensation (para. 2 of Art. 21)<sup>54</sup>. In addition, the African Commission on Human and Peoples’ Rights developed the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which provide for the right of victims of human rights violations to achieve remedies and reparation<sup>55</sup>.

The European Court of Human Rights (ECtHR), when dealing with remedies and reparation is guided by the concept of justice, considering the circumstances of the very case. The ECtHR, when establishing the amount and form of reparation, considers not only the positions of the applicant and the violating State, but the public interest of the case. At the same time, there is an obvious positive moment in the prac-

tice of the ECtHR, namely, that the Court considers such determining factors in each case as the actual circumstances of the violation, as well as the political and economic situation not only in a particular State, but in the region where the victim lives<sup>56</sup>.

Unlike the ECtHR, which includes reparations on the merits, and the IACHR and the IACtHR consider claims for remedies and reparation in separate proceedings, the ACHPR and the ACtHPR, in turn, consider claims for remedies and reparation, either on the merits or, in some cases, in separate proceedings. In addition, claim for remedies and reparation should be submitted to the ECtHR separately from the main complaint, while in the Inter-American and African systems for the protection of human rights, the claim is included in the main complaint [Abashidze, Keburia, Solntsev 2016:1–10].

The strength of the Inter-American human rights bodies is in their flexibility and readiness to respond promptly to violations, including in the development of a plan of measures for the violating State in each case to provide the most effective redress.

When determining one or another measure of reparation, the IACHR and IACtHR consider not only reasonableness and fairness, but also the circumstances of each case, including the nature of the victim’s life and the possible benefits missed by him/her due to the violation<sup>57</sup>.

<sup>51</sup> European Court of Human Rights: Case of Zontul v. Greece. Application No.12294/07. Judgment. January 17, 2012. URL: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3809121-4366096&filename=Arr%EA%20de%20chambre%20Zontul%20c.%20Gr%E8ce%2017.01.2012.pdf> (accessed 15.03.2021); Inter-American Court of Human Rights: Case of Garrido and Baigorria v. Argentina. Judgment of August 27, 1998 (Reparations and Costs). URL: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_39\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_39_ing.pdf) (accessed 15.03.2021); African Commission on Human and Peoples’ Rights: Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt. Communication No. 334/06. March 1, 2011. URL: [https://www.achpr.org/public/Document/file/English/achpreos9\\_334\\_06\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpreos9_334_06_eng.pdf) (accessed 15.03.2021). See also: *Regional'nye sistemy zashchity prav cheloveka : uchebnyk dlya bakalavriata i magistratury*. Pod red. A. Kh. Abashidze [Regional systems for the protection of human rights: a textbook for bachelor’s and master’s]. Moscow: Yurayt Publ. 2017. P. 174. (In Russ.).

<sup>52</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. URL: <http://www.echr.ru/documents/doc/2440800/2440800-001.htm> (accessed 15.03.2021).

<sup>53</sup> American Convention on Human Rights of 22 November 1969. URL: <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf> (accessed 15.03.2021).

<sup>54</sup> African Charter on Human and Peoples’ Rights of 26 June 1981. URL: <https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf> (accessed 15.03.2021).

<sup>55</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. 2003. URL: <https://www.achpr.org/legalinstruments/detail?id=38> (accessed 15.03.2021).

<sup>56</sup> European Court of Human Rights: Case of Elci and others v. Turkey: the official text. Applications No. 23145/93 and No. 25091/94. Judgment. November 13, 2003. URL: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-61442%22> (accessed 15.03.2021).

<sup>57</sup> For example: Inter-American Court of Human Rights: Case of Bámaca-Velásquez v. Guatemala. Judgment of February 22, 2002 (Reparations and Costs). URL: [https://www.corteidh.or.cr/corteidh/docs/casos/articulos/Seriec\\_91\\_ing.pdf](https://www.corteidh.or.cr/corteidh/docs/casos/articulos/Seriec_91_ing.pdf) (accessed 15.03.2021); Inter-American Court of Human Rights: Case of Velásquez-Rodríguez v. Honduras. Judgment of July 21, 1989 (Reparations and Costs). URL: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_07\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf) (accessed 15.03.2021); American Court of Human Rights: Case of Trujillo-Oroza v. Bolivia. Judgment of February 27, 2002 (Reparations and Costs). URL: [https://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_92\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf) (accessed 15.03.2021).

As mentioned above, none of the regional systems for the protection of human rights has developed a uniform approach to the calculating the amount of compensation. However, the only precedent in which the ACHPR departed from the practice of not determining a specific amount of compensation is the case of the *Egyptian Initiative for Personal Rights and Interights v. Egypt*, when decided the exact amount of compensation. However, the ACHPR did not explain the method of calculation used<sup>58</sup>.

Similar unanimity is found in the approaches of the human rights treaty bodies within the UN human rights protection system, as well as in the Special Procedures of the UN Human Rights Council, as evidenced by the documents they adopt, including general comments, decisions on individual reports of human rights violations or materials of the field missions<sup>59</sup>. In this regard, we should also note *the Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights*, developed by the UN Human Rights Committee in 2016, perfectly in line with the Basic Principles and Guidelines<sup>60</sup>.

One of the objectives of the HRC Guidelines is to harmonize the Committee's practice in relation to the right to reparation, as well as to establish criteria for the most effective consideration of individual communications. According to the position of the

Human Rights Committee (further – the HRC), only full reparation for damage (in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) meets the international obligations of States and requirements of the human rights protection system.

The procedure for including a claim for reparation in individual communications is also enshrined in the HRC Guidelines. Thus, persons reporting facts of human rights violations by State bodies and officials should include their claims on the forms of reparation in communications that are brought to the attention of the State. States, in turn, also have the right to comment on the stated claims, which, however, does not affect the final decision of the HRC (para. 4).

According to the HRC, not only direct victims of human rights violations have the right to reparation, but also indirect ones, first, family members and relatives. The Committee proceeds from an understanding of the link between direct and indirect victims, who, although not equally, may still suffer from the consequences of the same violation<sup>61</sup>.

Recognizing in its general comment No. 3 (2012) "Implementation of article 14 by States parties"<sup>62</sup> that a violation of the provisions of the Convention against Torture requires States to take immediate measures to remedy the situation, the UN Committee against

<sup>58</sup> African Commission on Human and Peoples' Rights: *Egyptian Initiative for Personal Rights and Interights v. Egypt*. Communication No. 323/06. December 12-16, 2011. URL: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2011/85> (accessed 15.03.2021).

<sup>59</sup> UN Committee Against Torture (CAT): *Case of Gerasimov v. Kazakhstan*. Communication No. 433/2010. July 10, 2012. URL: [https://digitallibrary.un.org/record/730578/files/CAT\\_C\\_48\\_D\\_433\\_2010-EN.pdf](https://digitallibrary.un.org/record/730578/files/CAT_C_48_D_433_2010-EN.pdf) (accessed 15.03.2021); Human Rights Committee: *Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights* dated November 30, 2016. URL: <https://undocs.org/en/CCPR/C/158> (accessed 15.03.2021); UN Human Rights Committee: *General Comment No. 31 "The Nature of the General Legal Obligation Imposed on States-Parties to the Covenant"*. May 26, 2004. URL: <https://undocs.org/CCPR/C/21/Rev.1/Add.13> (accessed 15.03.2021); UN Committee Against Torture (CAT): *General comment No. 3 "Implementation of article 14 by States parties"*. December 13, 2012. URL: <https://undocs.org/CAT/C/GC/3> (accessed 15.03.2021). See also: Abashidze A.Kh., Koneva A.E. *Dogovornye organy po pravam cheloveka: uchebnoe posobie* [Human rights treaty bodies: a textbook]. Moscow: RUDN Publ. 2015. P. 115 (In Russ.).

<sup>60</sup> UN Human Rights Committee: *Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights* dated November 30, 2016. URL: <https://undocs.org/en/CCPR/C/158> (accessed 15.03.2021).

<sup>61</sup> UN Human Rights Committee: *Case of Coronel et al v. Colombia*. Communication No. 778/1997 November 29, 2002. Para. 10. URL: <https://undocs.org/en/CCPR/C/76/D/778/1997> (accessed 15.03.2021). Thus, in the case "Coronel v. Colombia" the HRC did not find an obvious violation of Art. 7 of the ICCPR in relation to the relatives of the direct victim, nevertheless recommended to provide them with compensation, referring to the mental suffering of the victim's relatives.

<sup>62</sup> UN Committee Against Torture (CAT): *General comment No. 3 (2012) "Implementation of article 14 by States parties"*. December 13, 2012. URL: <https://www.refworld.org/docid/5437cc274.html> (accessed 15.03.2021).

<sup>63</sup> Comprehensive reparation generally requires a combination of different forms of reparation. The CAT, having examined the case of "Ali Ben Salem v. Tunisia", made it clear "that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations". See: UN Committee Against Torture (CAT): *Case of Ali Ben Salem v. Tunisia*. Communication No. 269/2005. Decision of 7 November 2007. Para. 16.8. URL: [http://www.worldcourts.com/cat/eng/decisions/2007.11.07\\_Ali\\_Ben\\_Salem\\_v\\_Tunisia.htm](http://www.worldcourts.com/cat/eng/decisions/2007.11.07_Ali_Ben_Salem_v_Tunisia.htm) (accessed 15.03.2021).

Torture (CAT) recommends for the States to take measures to prevent future human rights violations. If a person applies to the court with a complaint about the use of torture or other cruel, inhuman, or degrading treatment or punishment against him or another person or group of persons, the State shall investigate the case through independent procedures.

The Basic Principles and Guidelines and the CAT's general comment No. 3 may have developed the most thorough and holistic approach to understanding the right to reparation. General comment No. 3 clearly defines the inextricable link between the procedure for claiming reparation and the reparation itself, as well as the broad concept of reparation, which includes effective remedies and the right to reparation (para. 2). General comment No. 3 also emphasizes that the State's duty to provide reparation also extends to cases of torture or ill-treatment by private individuals where States have failed to exercise "due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors" (para. 7). CAT in its general comment No. 3 relied mostly on the provisions on reparations for victims of human rights violations enshrined in the Basic Principles and Guidelines. Thus, for example, general comment No. 3 identifies five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (para. 6).<sup>63</sup>

The UN Committee on the Rights of the Child in its general comment No. 21 (2017) "On Children in Street Situations" also pointed to the right of children who have become victims of human rights violations to reparation in the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition of rights violations" (para. 22)<sup>64</sup>.

According to the UN Committee on the Elimination of Racial Discrimination, a victim's claim for

compensation should be considered in every case, including in cases where there was no physical harm for the victim, but violation of his dignity and reputation (para. 6.2)<sup>65</sup>.

In accordance with recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 of the UN Committee on the Elimination of Discrimination against Women, States are required to provide "effective reparations to victims/survivors of gender-based violence against women. Reparations should include different measures, such as monetary compensation, the provision of legal, social and health services, including sexual, reproductive and mental health services for a complete recovery, and satisfaction and guarantees of non-repetition" (para. 22 a)<sup>66</sup>.

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families in its general comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, also confirmed the duty of States to ensure victims and their families the right to reparation for damage" (para. 21 d)<sup>67</sup>.

As it was mentioned before, even though the 1966 International Covenant on Economic, Social and Cultural Rights does not contain provisions on reparations for victims of human rights violations, however, the UN Committee on Economic, Social and Cultural Rights considered the right to reparation in its different general comments. Thus, the Committee's general comment No. 23 includes in the concept of appropriate remedies "adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition" (para. 57)<sup>68</sup>. In general comment No. 22, the interpretation of the right to effective remedies and reparation fully coincides with the idea of the Basic Principles and Guidelines (para. 64)<sup>69</sup>.

<sup>64</sup> UN Committee on the Rights of the Child: General comment No. 21 (2017) on children in street situations. June 21, 2017. URL: [https://digitallibrary.un.org/record/1304490/files/CRC\\_C\\_GC\\_21-EN.pdf](https://digitallibrary.un.org/record/1304490/files/CRC_C_GC_21-EN.pdf) (accessed 15.03.2021).

<sup>65</sup> UN Committee on the Elimination of Racial Discrimination (CERD): Case of B.J. v. Denmark. Views of 17 March 2000. URL: <https://www.refworld.org/cases,CERD,3f588f01c.html> (accessed 15.03.2021).

<sup>66</sup> UN Committee on the Elimination of Discrimination against Women: General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. July 14, 2017. URL: [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf) (accessed 14.03.2021).

<sup>67</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families. August 28, 2013. URL: [https://www2.ohchr.org/english/bodies/cmwr/docs/CMW\\_C\\_GC\\_2\\_ENG.PDF](https://www2.ohchr.org/english/bodies/cmwr/docs/CMW_C_GC_2_ENG.PDF) (accessed 15.03.2021).

<sup>68</sup> UN Economic and Social Council: General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights). April 27, 2016. URL: <https://www.refworld.org/docid/5550a0b14.html> (accessed 15.03.2021).

<sup>69</sup> UN Economic and Social Council: General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). May 2, 2016. URL: <http://docstore.ohchr.org/SelfSer>

While recognizing all five forms of reparations identified in the Basic Principles and Guidelines, the treaty bodies emphasize the guarantees of non-repetition, i.e., measures to be taken by States to create a legal situation and the inadmissibility of systemic violations. Thus, States must bring their national legislation in strict accordance with international law.

Meanwhile, despite the recommendatory nature of decisions made by treaty bodies, including those on a remedy and reparations, it seems useful for all other human rights mechanisms, including the judiciary, to refer to the practice of treaty bodies, as well as to the developed theoretical database of mechanisms.

## 6. Conclusion

The protection of human rights is one of the most important areas of current international law, but it is impossible without ensuring every human being with the right to a remedy and reparation in cases when the rights are violated. This concerns not only violations of the human rights, but the crimes committed during the armed conflicts.

The right of victims to a remedy and reparation is one of the most well-established human rights enshrined in universal and regional international treaties as well as at the national level. This cannot be doubted, since without the ability of a person or group of persons to claim remedies for the damage suffered, including restoration of violated rights, the system of human rights protection would not only be ineffective, but would not make sense at all.

The right to reparation, on the one hand, can be viewed as an element of the right to a remedy but, on the other hand, as an independent human right. At the same time, without respecting the right to a remedy, it is not possible to consider issues of reparation. However, while recognizing such a connection between these human rights, it is nevertheless necessary not to equate them.

Based on the said above, we should highlight the following. The Basic Principles and Guidelines are a document that codifies the best practice of States of different legal systems, but it does not create new rules in the field of the right to a remedy and reparation. This document found wide and unanimous support already at the stage of adoption. And subsequently, its high significance, even without mandatory element, was demonstrated by almost all international bodies as they refer to this document when making recommendations or decisions related to ensuring victims of violations of human rights and norms of international humanitarian law with a remedy and reparation.

Therefore, the Basic Principles and Guidelines serve to unify law enforcement practice in relation to the right to a remedy and reparation for harm suffered as well as common understanding of this right by all international actors. Consequently, this document makes a significant contribution to strengthening and enhancing the efficiency of international law in general. In addition, it is especially important to emphasize the focus of this document, aimed primarily not at the position of the State, but at the needs of the victims of violations, which gives them a human-oriented nature.

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