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Standard-setting: Lessons Learned for the Future

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**DRAFT PRINCIPLES AND GUIDELINES ON THE RIGHT  
TO A REMEDY AND REPARATION**

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**BACKGROUND**

1. The years marking the end of the Cold War (late eighties and early nineties) opened up new potentials and new perspectives. Democratic structures were introduced or re-introduced in various continents, notably in Central and Eastern Europe and in Latin-America. In many countries institutions and mechanisms were established with the purpose to set out a process of truth and reconciliation, prominently also in South Africa. It was in the same period that the struggle against impunity and the call for reparational justice took shape. It was also in this climate that claims for criminal and reparational justice, having their origin in World War II, became more visible and vocal. The victim's perspective, often overlooked and ignored, was taken out of the stalemate of the Cold War. Thus, civil society groups in East Asia, Australia and Europe demanded reparations for the comfort women (sex slaves of the Japanese Imperial Army) and for the victims of Japanese forced labour schemes. Their demands had for long received hardly any resonance. In the same climate the right to reparation for victims of brutal repression by Latin American dictatorships became a persistent claim.
2. It was against this background, stressing the importance of criminal and reparational justice as a condition for reconciliation and democracy, that the Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted in 1989 one of its members with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms --- with a view to exploring the possibility of developing some basic principles and guidelines in this respect. The study had to take into account relevant existing international human rights norms on compensation and relevant decisions of international human rights bodies. The study and the draft principles and guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political and that a new instrument was not supposed to entail

new international or domestic legal obligations but rather to identify mechanisms, modalities, procedures and methods for the *implementation* of existing legal obligations.

### **DESCRIPTION OF THE PROCESS AND ITS FORM AND NATURE**

3. The Special Rapporteur of the Sub-Commission included in his 1993 final report a set of proposed basic principles and guidelines which he drew up with the assistance of non-governmental experts from various continents, notably from countries that had been facing and living through gross violations of human rights. The UN Secretariat was hardly involved in the process, except for editorial and translation work. On the basis of comments and as a result of deliberations in a workshop, co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights, the former Special Rapporteur made the draft basic principles subject to several revisions. The revised text reached the Commission on Human Rights in 1997. From thereon the process moved from the expert and non-governmental sphere to the inter-governmental arena, with considerable involvement, though, of non-governmental and independent expertise but also with input of the views of Governments. At the Commission level the process stretched over a considerable number of years, with repeated requests for comments but with little substantive discussion in the Commission itself. The process received, however, new impetus with the appointment of an Independent Expert of the Commission who, after consultation with governmental and non-governmental experts, added new dimensions to the draft principles and guidelines in particular with reference to international humanitarian law. The process was also advanced by the organisation, on the basis of Commission resolutions, of a series of open-ended consultations under the leadership of the delegation of Chile (Chile being an early proponent of the draft principles and guidelines), with the assistance of the former Special Rapporteur of the Sub-Commission and the former Independent Expert of the Commission, and with the participation of governmental representatives and non-governmental experts. As a result, the draft principles underwent a series of revisions and clarifications with the aim of reaching consensus without reducing the text to the lowest common denominator level. This process under the Commission's authority and stretching over quite a number of years is important for political and psychological reasons. It signifies the indispensable element of inter-governmental ownership and interest in the process, without however losing close links with essential quarters of civil society. It should be mentioned that the process was not following a pre-conceived plan. The process was rather made up of an evolving pattern, implicating non-governmental expertise and, progressively, inter-governmental participation and input.

### **ACTORS OF THE PROCESS**

4. As was already outlined above, the initial actors were expert members of the Sub-Commission, joined by a number of active human rights NGOs, such as the International Commission of Jurists, Amnesty International, Redress Trust, and a good number of governmental representatives and experts. The political backing in the process has largely been coming from a number of Latin American countries, with Chile in a leadership role, and to a lesser extent from West European countries. In the consultative process organised under the authority of the Commission on Human Rights, delegates acted not so much as members of regional groups but rather individually. As a result the discussions had an open character and were not fixed in advance. These discussions reflected by and large a willingness to reach acceptable solutions. This was also understood and appreciated by participating non-governmental experts.

## **OTHER INFLUENCES**

5. The process – and this is a common feature of many projects on the UN human rights agenda – was in competition with many other items and sub-items of an overloaded agenda. As a result the Commission on Human Rights and even its Sub-Commission provided little substantive guidance and feedback. The human rights policy bodies were mainly involved in taking procedural decisions so as to advance the process (with moderate speed). In this connection it must be noted that the subject matter of redress and reparation enjoyed a broad sympathy – the procedural resolutions of the Commission received wide sponsorship – but by and large the political interest was not strong among the membership of the United Nations. This limited political interest may also be explained by the reticence of many States to accept and implement at the domestic level the consequences of victim-oriented policies of reparational justice.
6. In the course of the proceedings relating to the substance, a number of politico-legal issues came up that complicated the process and that may be difficult to solve by way of consensus. One such issue is whether the document under preparation should only deal with gross violations of international human rights law or in addition with serious violations of international humanitarian law. Another such issue is whether the principles and guidelines should extend, in addition to violations committed by States, to violations committed by non-state actors and the duty of the latter to provide compensation. Further, disagreement still exists on the question whether the notion of victims applies to individual human beings or also to collectivities. These issues constitute matters of principle and may at the end of the day only be settled by formal decision-making.
7. During the process, in the years 2000 and 2001, there was glimmering at the background, as part of another process leading to the World Conference on Racism at Durban, a highly politicised issue that deeply divided States and that was relevant to the substance of the basic principles and guidelines, viz. the duty to repair historical wrongs connected with practices of slavery and colonialism. If this issue would have been introduced in the standard-setting process, it could have destroyed the process. This did not happen. Apparently no delegation wished to pursue such a destructive course. At the same time, and for good reasons, the process was continued in those years with minimal speed in order to avoid disruptive influences. One can learn from this experience that optimal timing for standard-setting work does not always mean moving ahead rapidly today or tomorrow, but may sometimes imply waiting for the day after tomorrow and beyond (“reculer pour mieux sauter”).

## **ASSESSMENT OF OUTCOME**

8. As is known, the draft principles and guidelines have been the subject of many revisions and it is the hope of the proponents of this instrument that the Commission on Human Rights will at its forthcoming session take a decision to forward the text to the General Assembly for endorsement. However, there remain many uncertainties about which I do not venture to speculate. When the process started, the scope of the envisaged instrument was more limited – the focus was on reparations for gross violations of human rights – but in the course of the process it was widely felt that the scope should be extended to serious violations of international humanitarian law. The widening of the scope reflected the growing opinion, recently reaffirmed by the International Court of Justice, that both branches of international law are complementary and partly overlapping. It was also the victim’s perspective that served as an important argument to broaden the scope.

## IMPLEMENTATION

9. Since the standard-setting process of the basic principles and guidelines has not yet reached its completion, the implementation phase has not commenced. Nevertheless, it is interesting to note that the draft as it has been emerging over the years had already a certain influence on national law and practice, on international jurisprudence and on other standard-setting activities. One could consider these developments as implementation “avant la lettre”. Thus, several Latin American countries, in drawing up legislation on reparation for victims, have taken the draft principles and guidelines into account. The Inter-American Court on Human Rights referred in its jurisprudence several times to the draft principles and guidelines. Last but not least, the Statute of the International Criminal Court, notably article 75 dealing with reparation to victims, bears in its intent and wording, the imprint of the draft principles and guidelines.