Background Paper for Working Group 1:
“Strengthening the Rule of Law: The Right to an Effective Remedy for Victims of Human Rights Violations”

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1. The concept of the rule of law

Pluralist democracy, human rights and the rule of law have been emerging as key concepts of national and international governance especially after World War II. They were recognized as three interrelated pillars when the Council of Europe was founded in 1949. This was a reaction of Western European democracies to the autocratic and totalitarian regimes, in particular against the Nazi tyranny and the remaining European fascist States in Spain and Portugal, but also against the newly emerging communist States in Central and Eastern Europe. In the meantime, all European States, with the exception of Belarus and the Vatican, joined the Council of Europe which has developed the most effective system of individual human rights protection worldwide. Each of the roughly 800 million individuals living in the 47 Council of Europe member States, including the Russian Federation, Turkey and the Caucasus States, has the right, once all available domestic remedies are exhausted, to lodge a complaint about a violation of any of the civil and political rights contained in the European Convention of Human Rights (ECHR) to the independent and full-time European Court of Human Rights in Strasbourg. Thousands of individual complaints are decided upon every year by the Court, whose judgments are legally binding and constitute one of the main sources of international human rights law. Within the system of the Council of Europe, democracy, human rights and the rule of law are mutually reinforcing. The rule of law is an incremental part of the ECHR, as Article 6 provides for the right of access to justice and to a fair and public trial before an independent domestic tribunal in all civil and criminal proceedings, and all limitation clauses in the ECHR require that restrictions of human rights must be stipulated in domestic law and must be necessary in a democratic society. On the other hand, the realization of the right of victims of human rights violations through the individual complaints system before the European Court of Human Rights is considered as the most important achievement of the rule of law in Europe. In the near future, even acts of the EU institutions will be subject to the jurisdiction of the Strasbourg Court through the individual complaints procedure.

The three pillars of the Council of Europe have in the course of years also been recognized as leading principles by other international organizations, including the OSCE, the EU and the UN. At the second World Conference on Human Rights, held in Vienna in June 1993, the international community emphasized in the Vienna Declaration and Programme of Action (VDPA) the close relationship between democracy, development, human rights and the rule of law. In § 34 of the Vienna Declaration, governments, the UN system and other multilateral organizations were urged to “increase considerably the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures which uphold the rule of law and democracy”. In § 69 of the Programme of Action, the establishment of a comprehensive UN programme was strongly
recommended “to help States in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law. Such a programme ... should ... provide ... assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law.”

In the course of the 20 years since the adoption of the VDPA the concept of the rule of law was further developed and implemented by a variety of UN bodies. The Secretary-General created a Rule of Law Unit at the UN Headquarters in New York, and Deputy Secretary-General Jan Eliasson is chair of a Rule of Law Coordination and Resource Group consisting of various UN offices and departments, including DPA, DPKA, OLA, UNDP, the Office of the High Commissioner for Human Rights (OHCHR), UNICEF, UNIFEM, UNHCR and UNODC. Over 40 UN entities deal with issues related to the rule of law and the UN is conducting rule of law operations and programmes in over 110 countries in all regions of the globe, with the largest presence in Africa. The General Assembly, the Security Council, the Peacebuilding Commission and the Human Rights Council have recently adopted a number of resolutions on the rule of law. In his 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, then Secretary-General Kofi Annan defined the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

On 16 March 2012, Secretary-General Ban Ki-Moon presented a programme of action to strengthen the rule of law at the national and international levels called “Delivering Justice”. The rule of law is central to the vision of the Secretary-General for the “management of our future”, and in particular for effectively addressing some of the key challenges of the 21st century, such as environmental degradation, rapid urbanization, conflict, severe income inequalities and exclusion of vulnerable groups. This programme of action was addressed to the “High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels” in September 2012. It includes a variety of measures to strengthen the rule of law: fostering domestic compliance with the UN Charter and international treaty law, strengthening treaty bodies and dispute resolution by the International Court of Justice, holding perpetrators of international crimes and other gross violations of human rights accountable before the International Criminal Court (ICC) and other international and domestic courts, providing victims of such crimes with the right to an effective remedy and adequate reparation for the atrocities committed against them, supporting national and international commissions of inquiry and fact-finding missions, improving cooperation in combating transnational organized crime, corruption and terrorism.
In § 16 of Resolution 19/36 on human rights, democracy and the rule of law, adopted on 23 March 2012 with 43 votes in favour and two abstentions (China and Cuba), the Human Rights Council called upon States to strengthen the rule of law and promote democracy by a variety of measures, such as by upholding the separation of powers, maintaining the independence, impartiality and integrity of the judiciary, ensuring legal certainty and predictability of the application of the law, improving access to justice for all, guaranteeing the right to a fair trial and due process of law without discrimination, providing victims of human rights violations with a right to effective legal remedies and reparation, establishing or strengthening national human rights institutions, guaranteeing equal protection before the courts, bringing perpetrators of human rights crimes to justice, holding government agents accountable for any violation of the law, holding the military accountable before civilian authorities, developing comprehensive anti-corruption strategies, and by training public servants.

On 24 September 2012, the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels adopted a Declaration (Resolution 67/1), in which it approved some of the commitments proposed in the Secretary-General’s report and reaffirmed the solemn commitment of the international community to an international order based on the rule of law as an indispensable foundation for a more peaceful, prosperous and just world. The Heads of State and Government also recognized that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law. They also reaffirmed in § 5 that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations”. In § 24 of a “Study on common challenges facing States in their efforts to secure democracy and the rule of law from a human rights perspective”, presented to the Human Rights Council on 17 December, the High Commissioner for Human Rights, Navi Pillay, emphasized that “the principles of the rule of law, including the supremacy of the law, the independence and impartiality of the judiciary, legal certainty, equality, non-discrimination, the separation of powers, transparency and accountability are inseparable from those of a functioning democratic order.” In § 92 of her study, she recommended to States to “strive to respect the principles of the rule of law, in particular, the separation of powers, the independence of the judiciary, the independence and accountability of Parliament and institutional checks and balances, as guarantors of protection against impunity, corruption and abuse of power”.

Taking all these developments and documents into account, we can conclude that the concept of the rule of law in the United Nations contains the following elements:

- Supremacy of the constitution and publicly promulgated statutory law
- Legal certainty and transparency; predictability of decisions enforcing the law
- Separation between the legislative, executive and judicial power; checks and balances
- Equality before the law, fairness and non-arbitrariness in the application of the law
- Accountability of public and private persons and institutions to the law; accountability of the military to civilian authorities; individual criminal accountability for international
crimes and other gross violations of human rights before national and international criminal courts

- Compatibility of the law with international human rights standards
- Equal protection of the law by an independent, impartial, integer and non-corrupt judiciary
- Equal access to justice and human right to a fair and public trial in civil and criminal matters
- Right of victims of human rights violations to an effective remedy and adequate reparation
- Interrelatedness and interdependence of human rights, democracy, development and the rule of law
- Combat of corruption as one of the main reasons for arbitrariness and discrimination
- Settlement of international disputes by peaceful means through the International Court of Justice and other adjudicative mechanisms.

This UN concept of the rule of law is fairly broad and reflects elements of the Anglo-American tradition of the rule of law and due process, the German notion of the “Rechtsstaat”, both in its procedural and substantive dimensions, as well as of the concept of good governance as it emerged in the practice of international development cooperation. In his recent programme of action, the Secretary-General has even gone beyond this understanding and has presented a kind of a new “Agenda for the Rule of Law”, which is central to his vision for the next five years in how to address the major challenges in our fast-changing world. The Declaration of the High-Level Meeting of the General Assembly on the Rule of Law of 24 September 2012, which is based on two recent reports of the Secretary-General, is so broad and all-encompassing that more or less every activity of the United Nations can be defined as enhancing the rule of law at the international level. It is interesting to compare this broad and vague consensus document of the General Assembly with the comparatively strong and precise Resolution of the Human Rights Council of 19 April 2012 on human rights, democracy and the rule of law, where China and Cuba abstained from the vote. Nevertheless, central elements of pluralist democracy and the rule of law as developed over time, such as the separation of powers, checks and balances, independence of the judiciary as well as criminal accountability for gross violations of human rights, which were for a long time put in question by communist and other States, seem to enjoy universal consensus today.

2. Right of victims of human rights violations to an effective remedy and adequate reparation

The right of victims of human rights violations to an effective domestic remedy is inherent in the very notion of human rights as legal rights. It is already articulated in Article 8 of the Universal Declaration of Human Rights 1948 as the “right to an effective remedy by the competent national tribunals”. Article 13 of the ECHR 1950, however, merely guarantees the right to an “effective remedy before a national authority”, i.e. not necessary a judicial authority. Article 2(3)(b) of the International Covenant on Civil and Political Rights again introduced the development of the “possibilities of judicial remedy”. Only the VDPA of 1993 clearly established the need for judicial remedies. § 27 of the Vienna Declaration reads as
follows: “Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.” In § 36, the Declaration also stresses the importance and constructive role of national human rights institutions in remediably human rights violations. With respect to international remedies against human rights violations, §§ 89 to 92 of the Programme of Action recommended continued work on “the improvement of the functioning, including the monitoring tasks, of the treaty bodies”, acceptance of all available optional communication procedures, support of the efforts to combat impunity of perpetrators of human rights violations and continued work on an international criminal court.

On the basis of various drafts developed by Theo van Boven in the former Sub-Commission on the Promotion and Protection of Human Rights and by Cherif Bassiouni in the former Commission on Human Rights, the General Assembly in Resolution 60/147 of 16 December 2005 finally adopted 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”. As the title already indicates, these Basic Principles and Guidelines constitute a compromise after a long negotiation process. On the one hand, the right to a remedy and reparation applies to both violations of international human rights law and humanitarian law and also includes the criminal investigation and prosecution of individual perpetrators of war crimes and human rights crimes. On the other hand, this important right only applies to victims of gross violations of international human rights law and serious violations of international humanitarian law. These victims enjoy, however, the full right to equal and effective access to justice and an effective judicial remedy before civil or criminal courts, to adequate, effective and prompt reparation for harm suffered, and to access to relevant information. The right to a remedy is the procedural tool of equal access to justice, whereas the right to reparation constitutes the substantive entitlement to a variety of reparation measures, including restitution, compensation for material and moral damages, rehabilitation, satisfaction including the full disclosure of the truth as well as judicial and administrative sanctions against the perpetrators, and guarantees of non-repetition, such as ensuring effective civilian control of military and security forces and strengthening the independence of the judiciary.

The right of victims to an effective remedy and adequate reparation was further developed by various UN bodies, in particular in the field of transitional justice, combating impunity, enforced disappearances as well as gender-based and sexual violence. For example, in Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006, each victim of an enforced disappearance, including family members of the disappeared person, has the explicit right to know the truth, and to obtain reparation in all the forms outlined in the Basic Principles and Guidelines. The Human Rights Council, in Resolution 18/7 of 29 September 2011, created the mandate of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

The most important developments since the Vienna World Conference on Human Rights with respect of access to international remedies were the adoption of the Rome Statute for an
International Criminal Court in 1998, as well as the adoption of individual communication procedures in relation to all nine core human rights treaties of the United Nations. Most importantly, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which was already promoted in § 75 of the Vienna Programme of Action, was finally adopted after long and difficult negotiations on 10 December 2008 and entered into force on 5 May 2013 after its ratification by 10 States, including Mongolia, five Latin American countries (Ecuador, El Salvador, Argentina, Bolivia and Uruguay) and 4 European States (Spain, Bosnia and Herzegovina, Slovakia and Portugal). Most recently, the Optional Protocol to the Convention on the Rights of the Child was adopted on 19 December 2011 and has so far been ratified by four States from four different regions (Gabon, Thailand, Germany and Bolivia). This means that the highly controversial and ideological debate about the justiciability of economic, social and cultural rights is coming to its conclusion. Even children now enjoy the right to submit an individual complaint to an international treaty monitoring body alleging a violation of any civil, political, economic, social and cultural rights contained in the Convention on the Rights of the Child or an Optional Protocol thereto. The weaknesses in the individual complaints procedures under UN human rights treaties, which date back to highly ideological conflicts about the nature of human rights during the Cold War, have however not been resolved, as the respective procedures follow those adopted during the 1960s in the International Convention on the Elimination of All Forms of Racial Discrimination and the first Optional Protocol to the International Covenant on Civil and Political Rights: individual complaints continue to be referred to as “communications”, to be decided in a written and confidential procedure by non-judicial or quasi-judicial treaty bodies consisting of experts with only partial legal backgrounds by means of “final views” rather than legally binding decisions. The Australian proposal dating back to 1947 and many more recent proposals aimed at finally establishing a World Court of Human Rights for the binding adjudication of individual human rights complaints under various UN human rights treaties is still waiting to be taken up by the international community.

3. Treaty body strengthening

The human rights standard setting process which led to the universal agreement on nine core human rights treaties, the establishment of ten treaty monitoring bodies and the adoption of many further treaties, declarations and other non-binding instruments undoubtedly constitutes one of the greatest achievements in the history of the global struggle for human rights. At the same time it is more than obvious that the functioning of the treaty monitoring system in practice is far from perfect. Since the early 1990s many initiatives have analyzed the weaknesses of the treaty monitoring system and developed proposals and recommendations to strengthen it. The suggestion of the former High Commissioner, Louise Arbour, to replace the existing monitoring bodies with one standing committee was not received favourably by the international human rights community. After a long and inclusive consultation process, the current High Commissioner, Navi Pillay, in June 2012 presented a comprehensive report entitled “Strengthening the United Nations human rights treaty body system”.

Her own assessment of the current deplorable state of the treaty monitoring system is very blunt: “The treaty body system is surviving because of the dedication of the experts, who are
unpaid volunteers, the support of staff of the OHCHR and States’ non-compliance with
reporting obligations. However, at a time when human rights claims are increasing in all parts
of the world, it is unacceptable that the system can only function because of non-compliance.
A weak treaty body system has a far-reaching detrimental effect in relation to its immediate
beneficiaries, but it also affects the United Nations human rights machinery as a whole,
including the Human Rights Council’s Universal Periodic Review, as well as the global
human rights movement.”

As a result, the High Commissioner has presented a number of far-reaching proposals to
improve the State reporting procedure, above all establishing a comprehensive reporting
calendar ensuring strict compliance with human rights treaties and equal treatment of all
States parties, and introducing a simplified reporting procedure. Other suggestions include
the strengthening of the election process for Committee members, improving capacity
building for the fulfillment of States parties’ reporting duties and increasing the visibility of the
treaty body system through webcasting and use of other new technologies. If fully
implemented, these joint proposals would have the potential to significantly improve the State
reporting procedure.

With respect to the right of victims to an effective remedy, i.e. the individual complaints
procedures, the report of the High Commissioner is somewhat less innovative. Most
proposals, such as establishing an accessible and more user-friendly database on treaty
body jurisprudence, or “reviewing good practices regarding the application of rules of
procedure and methods of work”, or supporting treaty bodies “in the exploration of
possibilities for friendly settlements” illustrate that there is a lack of innovative ideas as how
to make the individual complaints procedure more attractive to petitioners. An exception
worth mentioning may be the proposal of the Committee on the Elimination of Racial
Discrimination of March 2012 to create a joint treaty body working group on communications.
It would consist of one expert per treaty body (hopefully with legal knowledge) and meet up
to five weeks per year in order to prepare decisions on individual complaints for final
adoption by the respective treaty bodies. Such a working group would probably enhance the
consistency of treaty body jurisprudence. Yet, it is difficult to imagine how such a system
could work in practice. Presently, the decision making process within the Human Rights
Committee, the Committee against Torture or the Racial Discrimination Committee regarding
individual complaints is often highly complex, controversial and leads to “final views” with
many dissenting and concurring opinions. It is therefore hard to see how one representative
of the Human Rights Committee, with the assistance of even the most experienced members
of the other treaty bodies, could draft a decision on any of the more controversial issues
related to the interpretation of the International Covenant on Civil and Political Rights which
would then simply be approved by the full Human Rights Committee. What if the
representative of the Committee on the Elimination of Discrimination against Women is
outvoted by the other members of the joint working group in a gender-discrimination case?
Would she then defend this draft in the full Committee? If the drafts of the working group are,
however, completely revised again by the competent treaty monitoring bodies, not much has
been gained. The consistency among the different treaty body jurisprudence would, in my
opinion, be better and more effectively ensured by a well-functioning and well-resourced
secretariat, similar to the registry of the European Court of Human Rights, than by a joint
working group of one member per treaty body. The only idea presently discussed which
would have a far-reaching effect on the realization of the right of victims to an effective remedy, and which would make the United Nations treaty monitoring system far more attractive to potential victims, is the proposal for establishing a World Court of Human Rights. Unfortunately, this proposal was not included in the June 2012 report of the High Commissioner. The advantages and shortcomings of this reform will nevertheless be discussed in the following section of this paper.

4. The proposal of a World Court of Human Rights

In 1947, Australia proposed in the former UN Commission on Human Rights to establish an International Court of Human Rights to deal with individual and inter-State complaints. During the time of the Cold War, this and similar institutional proposals, such as creating a High Commissioner for Human Rights and an International Criminal Court, had little chance to succeed. But soon after the end of the Cold War, two of the three proposals were realized. In December 1993, the General Assembly, upon explicit recommendation in § 18 of the Vienna Programme of Action, decided to create the Office of the High Commissioner for Human Rights which started to function in April 1994. In July 1998, on the basis of the experience with two ad hoc criminal tribunals for the former Yugoslavia and Rwanda established by the Security Council, the Rome Statute of the International Criminal Court was adopted which entered into force in July 2002. In 2008, on the occasion of the 60th anniversary of the Universal Declaration of Human Rights, the Swiss Government appointed a Panel of Eminent Persons with the task of drafting an Agenda for Human Rights. The World Court of Human Rights constitutes the most visible institutional proposal in this Agenda entitled “Protecting Dignity”. Together with Julia Kozma and Martin Scheinin, I drafted a consolidated statute of the World Court of Human Rights, which we published together with a detailed commentary in December 2010. The following remarks refer to this draft statute which in the meantime gained the support of many academics and NGOs, but only very few States.

The World Court of Human Rights should follow, but not be limited to the model of the European Court of Human Rights consisting of full time judges. In addition it would contain many highly innovative elements, such as holding also inter-governmental organizations and certain non-State actors, such as transnational corporations, accountable for human rights violations. The Court would be able to receive and examine complaints from any person, NGO or group of individuals claiming to be the victim of a violation of any human right in any UN human rights treaty recognized as legally binding by the respective State, inter-governmental organization or non-State actor. The examination of individual complaints is subject to the same admissibility requirements which we find in the UN treaties and in relevant regional treaties. This means, of course, that the World Court would not be competent to decide on complaints which have already been examined by the European or Inter-American Court of Human Rights before. If the Court finds a human rights violation it should also have the power of ordering the respondent party to afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation, guarantees of non-repetition, or any other form of satisfaction. The judgments of the Court shall be final and binding under international law. The execution of these judgments shall be monitored by the High Commissioner for Human Rights and enforced, if necessary, by the Human Rights Council or, as a measure of last resort, by the Security Council. These provisions shall ensure that the respondent parties will comply with the respective judgments,
orders for reparation and interim measures by the Court. In addition to its contentious jurisdiction, the Court shall also issue *advisory opinions* on the request of the Secretary-General and the High Commissioner for Human Rights. The Court shall be established in Geneva, consisting of 21 full time judges.

In principle, every State ratifying the Statute of the World Court of Human Rights would accept the jurisdiction of the Court in relation to all UN human rights treaties to which this State is a party to. This means that the *World Court could be established without creating new substantive obligations of States and without any treaty amendment*. Ratification of the Statute by State A would simply mean that the procedural competence to examine individual complaints would shift in respect of State A from the Human Rights Committee and other relevant treaty bodies to the Court. By a special reservation, State A could even declare that it would exclude certain treaties, which it had ratified before, or certain provisions thereof, from the jurisdiction of the Court. *Inter-governmental organizations*, transnational corporations, international NGOs, organized opposition movements and other *non-State actors* may accept the jurisdiction of the Court by means of a declaration in which they indicate the respective human rights treaties and provisions thereof. Such a possibility of holding inter-governmental organizations, such as the UN and its specialized agencies, the EU or NATO, and certain non-State actors accountable would fill a *major gap in present international law*. The UN, for example, is clearly recognizing that UN human rights treaties are applicable to its actions in transitional administration or similar field operations with executive powers, but individual victims of human rights violations committed by UN personnel which are clearly attributable to the UN have no procedural remedy to hold the UN accountable and to sue for adequate reparation. Under the *Ruggie* framework and the Guiding Principles on Business and Human Rights, transnational corporations have certain obligations to respect international human rights, such as the prohibition of forced labour and the worst forms of child labour or the right of employees to form and join trade unions. In reality, the lack of effective remedies in the home or host State of the companies makes it almost impossible for victims to litigate against business enterprises and other powerful non-State actors.

The *creation of the World Court of Human Rights would provide an opportunity to solve a number of shortcomings of the international human rights system*. By gradually shifting the competence of examining individual complaints from the existing treaty bodies to the Court, it would *reduce the work load of the treaty bodies*, which could then fully devote their limited meeting time to the examination of State reports. The inter-disciplinary composition of the Committee on Economic, Social and Cultural Rights, the Committee against Torture or the Committee on the Rights of the Child is definitely an asset in the State reporting procedure, but certainly not in the complaints procedure, which requires a specific legal expertise. The legally binding nature of judgments of the Court and their supervision and enforcement by the High Commissioner, the Human Rights Council (above all by the Universal Periodic Review procedure) and, if need be, by the Security Council should lead to a much *higher compliance rate with international human rights treaties* and thereby reduce the enormous implementation gap. As a judicial institution, the World Court of Human Rights would help to implement an effective *access of victims to justice*, which constitutes one of the main elements of the present *rule of law agenda of the UN Secretary-General and the General Assembly*. The legally binding nature of *orders for reparation* and interim measures would
constitute a major step in the implementation of the Basic Principles and Guidelines on the Right to a Remedy and Reparation adopted by the General Assembly in 2005. Finally, the possibility of holding inter-governmental organizations, transnational corporations and other non-State actors accountable under international human rights law constitutes the most innovative aspect of the World Court of Human Rights. The creation of the World Court would be a major step in the development of a global human rights architecture, which would require political courage of States and substantial financial resources. In § 68 of his first report to the Human Rights Council of August 2012, the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, supported the establishment of a World Court of Human Rights and explicitly referred to the aforementioned draft statute.

5. International criminal justice and human rights

One of the major developments after the 1993 World Conference on Human Rights was the process of linking human rights to the emerging system of international criminal justice. The notion that major human rights violations also constitute crimes is not new. Already the Genocide Convention of 1948 defined genocide as a crime under international law and envisaged in Article VI the creation of an “international penal tribunal”. In the Convention against Torture of 1984, States parties were obliged to establish the crime of torture with appropriate penalties in their respective domestic criminal codes and make it subject to a broad spectrum of jurisdiction, including universal jurisdiction.

With the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, a new dynamic emerged. Since ICTY had been established by the UN Security Council, a certain link between the crimes subject to the jurisdiction of ICTY and the armed conflicts in the territory of the former Yugoslavia was created. This link not only applied to war crimes but also to crimes against humanity. When the Security Council established the International Criminal Tribunal for Rwanda (ICTR) in 1994, no such link between crimes against humanity and an armed conflict was maintained. This means that international criminal law no longer serves as its main purpose enforcing international humanitarian law applicable in international and non-international armed conflicts. It has become equally important as a means of enforcing international human rights law. Of course, many of the most serious and brutal human rights violations committed in recent years were the result of armed conflicts. International criminal justice is, however, also being applied in relation to similar atrocities committed by ruthless dictators against their own people. Fighting impunity for gross and systematic human rights violations has been one of the major concerns of the international human rights community since the time of the national security dictatorships in Latin America.

Article 7 of the Rome Statute of the International Criminal Court (ICC) defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The following enumeration contains some of the most serious human rights violations, such as murder, enslavement, torture, rape and other forms of sexual violence, enforced disappearance, apartheid and similar inhumane acts. The criminal law term “crimes against humanity” hence largely corresponds to the human rights terminology of “gross and systematic human rights
violations” known from the 1235 and 1503 procedures in the former Commission on Human Rights. Since the jurisdiction of the ICC is complementary to national criminal jurisdictions, the ratification of the Rome Statute shall also serve as an incentive for States to codify crimes against humanity in domestic criminal law, to thoroughly investigate gross and systematic human rights violations and to bring the perpetrators of such crimes to justice before ordinary domestic criminal courts. According to Article 17(1)(a) of the Rome Statute, the ICC shall exercise jurisdiction in a particular case only if the respective State “is unwilling or unable genuinely to carry out the investigation or prosecution”.

In reality, only very few individuals responsible for gross and systematic violations of human rights around the globe, whether political leaders, military or security officials, guerilla fighters or terrorists, have been brought to justice for crimes against humanity before domestic criminal courts or international tribunals. The reasons for this failure of criminal justice are manifold and shall be addressed in the context of the present UN rule of law agenda which explicitly refers to a “new age of criminal accountability”.

6. Human rights defenders

In § 94 of the Vienna Programme of Action, the World Conference on Human Rights recommended the speedy completion and adoption of the “draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms”. Such a declaration, which is usually referred to as “Declaration on Human Rights Defenders”, was adopted on 9 December 1998 by General Assembly Resolution 53/144. Three human rights experts, who are renowned women human rights defenders themselves in the Asian and African regions, Rhadika Coomaraswamy, Hina Jilani and Margaret Sekkagya, have served since as Special Rapporteurs of the Commission on Human Rights and the Human Rights Council on the situation of human rights defenders. In addition to sending numerous urgent appeals and other communications on behalf of individual human rights defenders to governments, the three Special Rapporteurs carried out various fact-finding missions and submitted thematic reports to the Commission, the Council and the General Assembly, in which they describe the risks to which human rights defenders in many countries of the world are exposed, and in which they advocate for stronger protection of human rights defenders against reprisals. Often, these reports deal with specific groups of human rights defenders. In her report to the Council of December 2010, Margaret Sekaggya concluded that she was “dismayed at the extraordinary risks that women human rights defenders and those working on women’s right or gender issued face due to their work”. According to her report, women human rights defenders “seem to be more at risk of being threatened, including death threats, and being killed in the Americas region than in other parts of the world”. In the other regions, the main threats and reprisals, to which women human rights defenders are exposed, are arbitrary arrests, judicial harassment and criminalization of the work, torture, mistreatment, sexual harassment, sexual violence and rape. In her report of December 2011, the Special Rapporteur stressed the particular risks faced by journalists and media workers, human rights defenders working on land and environmental issues, as well as youth and student defenders.
In her latest report to the General Assembly of August 2012, Margaret Sekaggya focused on the use of legislation to regulate and restrict the activities of human rights defenders, including anti-terrorism and other legislation relating to national security, legislation relating to public morals, legislation governing the registration, functioning and funding of associations, access to information legislation and official-secret legislation, defamation and blasphemy legislation, and legislation regulating Internet access. The emphasis of the latest report to the Council of 16 January 2013 is the role of national human rights institutions in the promotion and protection of human rights, highlighting the fact that they can be considered as human rights defenders. This report brings me to the last issue of my background paper to be considered during the deliberations of Working Group 1.

7. National human rights institutions

The Vienna World Conference on Human Rights and the VDPA played a decisive role in advocating for the establishment of national human rights institutions (NHRIs) in accordance with the Paris Principles, which were originally formulated at a conference convened by the Commission on Human Rights 1991 in Paris, and which were formally endorsed by the General Assembly in 1993. In § 36 of the Vienna Declaration, the World Conference reaffirmed “the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights”. The Vienna Programme of Action contains various references aimed at encouraging States to establish and strengthen NHRIs. The Paris Principles emphasize six main principles which States shall take into account when establishing a NHRI: It should be based in the constitution or a legislative act with a mandate as broad as possible, being independent from government, pluralistic in its composition, with adequate powers of investigation and adequate human and financial resources. In the meantime, 103 States in all world regions have established NHRIs, but only 67% have been recognized by the International Coordination Committee and its Sub-Committee on Accreditation as being in full compliance with the Paris Principles (Status A). Only A-status NHRIs are granted special rights of speaking at sessions of the Human Rights Council, actively participating in the Universal Periodic Review, interacting with special procedures and human rights treaty monitoring bodies etc.

In principle, States are free to decide which type of NHRIs they wish to establish, as long as they comply with the Paris Principles. In practice, different types of NHRIs emerged. Most important and widespread are national human rights commissions, usually also entrusted with full powers of investigating individual human rights complaints, which we find in many countries of the British Commonwealth, in particular in Africa and the Asia-Pacific region. The French type of advisory commissions, which usually have little investigating powers, are primarily found in French speaking countries of Africa and Europe. In Latin America and certain European countries, the Ombudsperson institution (or public defender) is most popular. The fourth type of human rights institutes (Danish model) can only be found in a few European countries. The Ombudsperson and institute type NHRIs often face problems of compliance with the requirement of pluralism.
Since NHRIs are non-judicial institutions and should in fact supplement rather than duplicate judicial institutions for the protection of human rights, the Paris Principles do not explicitly require NHRIs to receive and examine individual complaints. On the other hand, victims of human rights violations often face serious financial and other difficulties to have access to courts. NHRIs, which are much easier to access, therefore do play an important role in receiving and considering individual complaints about human rights violations. In §§ 119(h) and (j) of her report of 16 January 2013, the Special Rapporteur on the situation of human rights defenders, therefore strongly recommends that there “should not be any limitations to the jurisdiction of national institutions and they should be able to investigate all allegations of violations by all branches of the State and all types of actors, including armed forces and private business”. NHRIs should be entrusted “with adequate powers of investigation, including authorization to visit detention centres, to allow them to conduct prompt and impartial investigations into all allegations of violations and provide remedy to victims”.

8. Conclusions

Dealing with the rule of law in a broader sense, as the new UN concept and agenda on the rule of law indicates, would require the Working Group to look into a broad variety of issues. I would, therefore, suggest that the discussions of the Working Group will focus on the right of victims of human rights violations to an effective remedy and reparation at the national and international level. Topics for discussion might be chosen from among the following:

- Does the emerging rule of law concept of the UN aim at strengthening access of victims of human rights violations to justice at the national, regional and international level?
- What needs to be done to strengthen the judicial mechanisms for the protection of human rights at the national, regional and international level?
- Would the establishment of a World Court of Human Rights strengthen the access of victims of human rights violations to international justice?
- If so, why has the proposal for a World Court of Human Rights not yet been included in the UN concept and agenda for strengthening the rule of law?
- Would a global fund for the strengthening of national judicial systems for the protection of human rights, similar to the global fund on health, as suggested in the Swiss Agenda for Human Rights, provide an effective remedy aimed at the legal empowerment of the poor?
- Should national human rights institutions play a more active role in the examination of individual human rights complaints, as suggested by the Special Rapporteur on the situation of human rights defenders?
- What could the UN do to encourage States to establish and strengthen national human rights institutions, to broaden their mandate and to entrust them with providing an effective remedy for victims of human rights violations which includes adequate reparation for the harm suffered?
- What other measures should the UN take for the protection of human rights defenders against reprisals?
- How could the individual complaints procedure before UN treaty monitoring bodies be further strengthened and made better known throughout the world?
• What should be done to convince governments, the UN High Commissioner for Human Rights and other relevant stakeholders about the need to establish a World Court of Human Rights?
• How does the international criminal justice system interact with the human rights system?
• Does resort to domestic criminal justice constitute an effective remedy which victims of gross violations of human rights must exhaust before lodging an individual complaint before a regional court or an international treaty monitoring body?
• Do which extent do international criminal tribunals provide adequate reparation for victims of crimes against humanity and other forms of gross violations of human rights?
• How could the rights of victims of human rights violations be strengthened before domestic and international criminal courts?
• What support can the UN and other international actors provide at the national and international level to bring perpetrators of gross violations of human rights to justice?