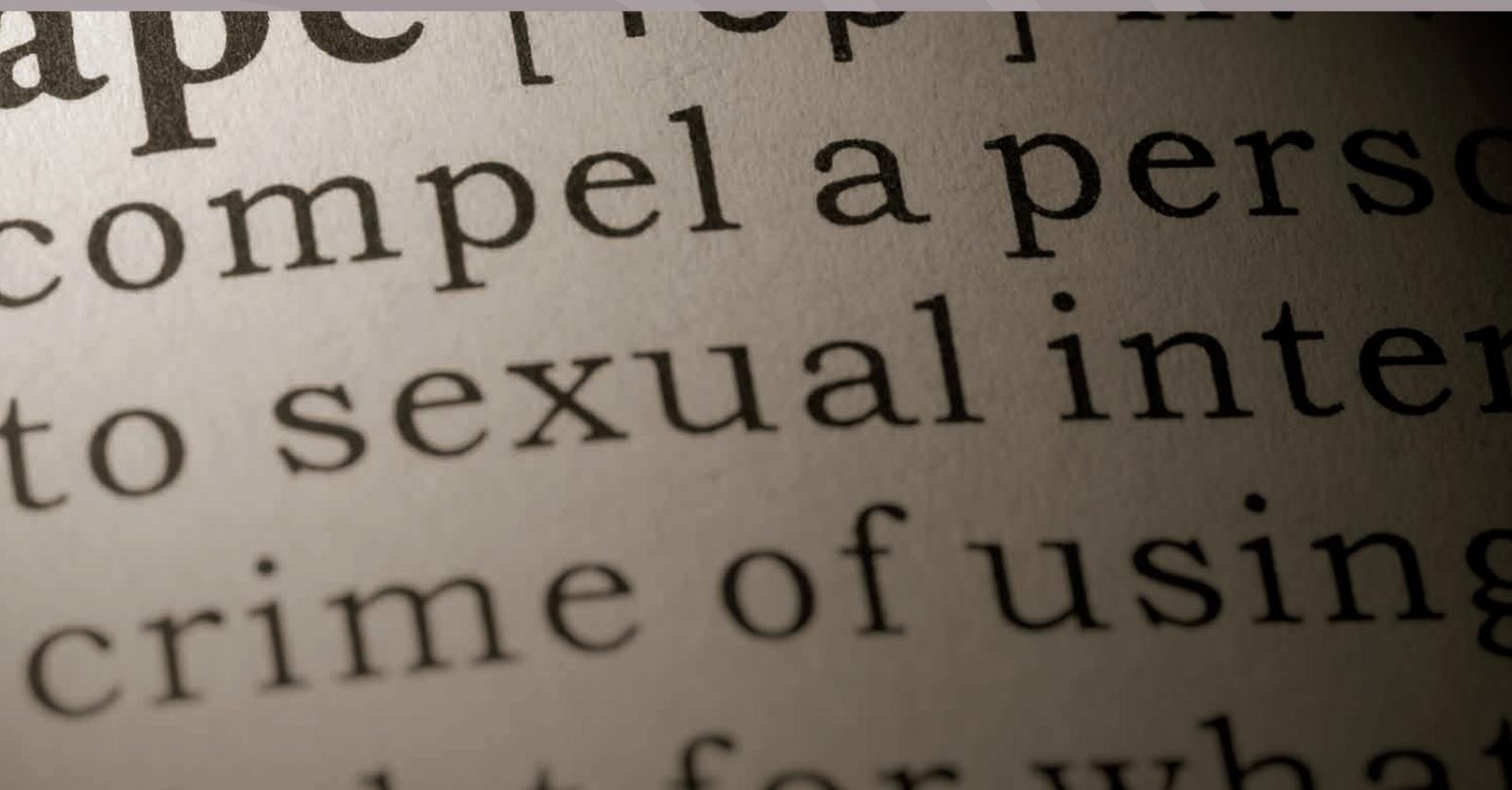




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Cooperation between Civil Society Actors and Judicial Mechanisms in the Prosecution of Conflict- Related Sexual Violence: Guiding Principles and Recommendations

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About the International Nuremberg Principles Academy

The mission of the Nuremberg Academy is to promote knowledge about international criminal law and related areas of international human rights law and to support worldwide compliance with their norms and principles. The strategic goals of the Academy are to promote universality, acceptance and global implementation of the Nuremberg Principles and international criminal law, as well as to contribute to the fight against impunity for the most serious crimes of concern to the international community as a whole. The Academy does this through training of practitioners, education and specific research. Furthermore, the Academy is a forum for the discussion of contemporary issues in international criminal law and related areas. The Nuremberg Academy was founded by the German Foreign Office, the Free State of Bavaria and the City of Nuremberg.

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List of Abbreviations

BiH	Bosnia and Herzegovina
CAJAR	European Center for Constitutional and Human Rights and the Collective of Lawyers Jose Alvear Restrepo
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CICC	Coalition for the International Criminal Court
CMN	Case Matrix Network
CRSV	Conflict-Related Sexual Violence
CSA	Civil Society Actor
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
FIDH	Federation International des Ligue des Droits de l'Homme
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
LCDH	Ligue Centrafricain pour la Defence des Droits de l'Homme
MTM	Mujeres Transformando el Mundo
NAWJ	National Association of Women Judges
NGO	Non-Governmental Organization
OCDH	Observatoire Centrafricain des Droits de l'Homme
OTP	Office of the Prosecutor
PHR	Physicians for Human Rights
RSCSL	Residual Special Court for Sierra Leone
SIASIC	Strathmore Institute for Advanced Studies in International Criminal Justice
STER	Stand To End Rape Initiative
VSS	Victim Support Section
WIGJ	Women's Initiative for Gender Justice
WOPI-U	Women Peace Initiatives-Uganda
WVS	Witness and Victim Section
UNJHRO	United Nations Joint Human Rights Office

Executive Summary

The mass and wide-spread perpetration of sexual violence is a depressingly common feature of conflict. Sexual violence against women, girls, boys and men can have devastating, long-term physical, psychological and societal consequences for survivors, and may serve to exacerbate ethnic divisions within affected communities, perpetuating cycles of violence and undermining peace-building efforts. Despite this, however, the vast majority of survivors never achieve justice, recognition or assistance in rebuilding their lives. At the same time, impunity for perpetrators threatens to escalate, rather than to diminish the commission of sexual crimes.

These Guiding Principles and Recommendations seek to support the investigation and prosecution of conflict-related sexual violence by exploring the potential for effective cooperation between judicial mechanisms, both national and international, and civil society actors. Recognizing that the prosecution of such crimes is not without its challenges, the Guiding Principles and Recommendations focus on the building of cooperative relationships with civil society actors as a significant means of surmounting many of the difficulties faced. However, as the formal processes by which those relationships are developed, informed and governed are in their relative infancy, are inconsistently applied, and in many cases, still emerging, the potential for cooperation to be truly effective is presently hampered.

This publication seeks to respond to this problem by offering guidance on cooperation approaches and practices, obtained from experts within the field during two focused workshops, and based upon an extensive literature review. To this end, it (1) identifies examples of best practice in effective cooperation, and (2) highlights specific areas where further work and development is needed to support the prospect for effective cooperation.

1. Introduction

1.1 Background

The International Nuremberg Principles Academy (Nuremberg Academy) is a foundation dedicated to the advancement of international criminal law. It is located in Nuremberg, the birthplace of modern international criminal law, and is conceived as a forum for the discussion of contemporary issues in the field. The Nuremberg Academy promotes sustainable peace through justice, the Nuremberg Principles and the rule of law, by supporting worldwide enforcement of international criminal law, furthering knowledge, and building capacities at the national level to investigate and prosecute these crimes. Founded by the German Foreign Office, the Free State of Bavaria and the City of Nuremberg, it also places a special focus on cooperation with countries and societies currently facing challenges related to international criminal law. In furtherance of its mission, the Nuremberg Academy has undertaken efforts to improve cooperation in the prosecution of conflict-related sexual violence (CRSV) by organizing fora for knowledge exchange, which has ultimately led to the creation of these Guiding Principles and Recommendations (Principles).

The importance of cooperation between judicial mechanisms and civil society actors (CSAs) emanates from the substantial activity of CSAs during, and in the aftermath of conflict at a local, national and international level. Such actors are often seen, for example, as able to bridge the gap between courts and local communities, and may be in a better position to educate communities on the work of the court, about the nature and severity of sexual violence crimes (including tackling the stigma often attached to victims), and the prosecution's role in investigating those crimes. They also have the power to voice concerns or reservations on unpopular subjects, provide investigators with a broad picture of the context in which violations take place, often have direct knowledge of violations and/or contacts with victims and communities, and may be able to compile information regarding patterns of violence. Others still may be able to help investigators to understand local and cultural practices, and/or offer psychosocial care to victims.

Sexual violence has devastating physical, psychological and social consequences for survivors and their communities and societies. Yet social taboos and the sensitive nature of sexual violence offences make them some of the most underreported crimes in conflict. Moreover, where reported and pursued, challenges of effectively investigating and prosecuting CRSV are manifest. These challenges are outlined in Section 2 of these Principles, and can be context specific, but also general and experienced by all parties involved in the investigation and prosecution process. For instance, delays in initiating an investigation, together with ongoing security concerns for both international and national investigators, may mean that evidence of sexual violence is lost or damaged, and victims and witnesses to crimes may disperse to other areas of the country or overseas. In addition, sexual violence can take a myriad of forms, and may not leave behind visual marks. Even where healthcare services are able to continue operation during a conflict, opportunities for the medical documentation of any

physical signs of sexual violence are short-lived.¹ It must be noted however, that at the international level at least, physical evidence of sexual violence is not a prerequisite in proving the offence, though most national jurisdictions do still require this.

From a victim's perspective, underreporting of CRSV may not only be due to the subsequent stigma and shame attached to the crimes, but could also be the product of a lack of trust in the legal system. The prospect for victim participation and/or the award of reparations may also be a factor here, as this may influence a victim's decision to participate in proceedings. Accordingly, effective cooperation between judicial mechanisms and CSAs could result in better-informed victims and decreased skepticism in trial proceedings.

At the same time, international courts, such as the International Criminal Court (ICC), that do not have a permanent ground presence in terms of a local police force and investigators, may face difficulties in achieving and maintaining meaningful interactions with victims, communities and the public. International investigators may encounter suspicion from local actors and community members, who may be unfamiliar with the role of the court, opposed to the conduct of criminal proceedings or otherwise object to the specific investigation and focus of an action on crimes of sexual violence.

National courts, on the other hand, may face other challenges, such as a lack of capacity and expertise in working with victims of sexual violence, and a lack of prioritization or will, whether this be political or a reluctance stemming from court officials to deal with CRSV. Other challenges may be the absence of an impartial judiciary, a lack of trust in law enforcement personnel, the absence of equipment and technologies that enable the collection and preservation of forensic evidence, poor or non-existent witness protection strategies and the absence of adequate reparations programs.

Addressing these multiple challenges that exist in the investigation and prosecution of CRSV requires a robust and coordinated approach by all those involved, namely, between judicial mechanisms (where "judicial mechanisms" is understood to encompass both courts themselves and, where appropriate, Prosecutor's Offices) and CSAs. Recognizing that cooperation needs will differ depending upon the context in which the investigation and prosecution of CRSV takes place, the creation of these Principles serves to provide guidance in aligning the work of these actors whilst placing the victim's interests at the heart of the cooperative relationship.

1.2 Methodology

In August 2016, the Nuremberg Academy, in partnership with Strathmore Institute for Advanced Studies in International Criminal Justice (SIASIC), Strathmore University, Nairobi, conducted training on sexual and gender-based violence for national prosecutors in East Africa. The training preceded a two-day conference that took place between 4th – 5th August 2016, hosted by SIASIC and supported by the Nuremberg Academy entitled, "Prosecuting Sexual and Gender Based Violence both During Peacetime and During Conflict" (Nairobi Conference). During the conference, the Nuremberg Academy chaired a panel discussion on the specific topic of improving cooperation between legal justice actors and members of civil society, whereby delegates and speakers from both sides acknowledged the pressing need to further discussions on this issue.

Based on the conclusions of the Nairobi Conference, between 12th – 13th September 2016, the Academy then hosted a two-day workshop in Nuremberg entitled "Workshop on Improving Cooperation in the Prosecution of Conflict-Related Sexual Violence" (September Workshop). The workshop brought together representatives from international and national judicial mechanisms, non-governmental organizations (NGOs) and academics to consider the merits of cooperation in the investigation and prosecution of CRSV as an international crime. Inter alia, the workshop identified challenges and limitations, strategies and mechanisms of cooperation, best practices, recommendations and emerging policy considerations.

¹ Notably, while the physical signs of sexual violence may soon disappear, psychological evidence typically endures for much longer, and can be obtained by an appropriately qualified clinician.

Following the September Workshop, a draft of the Principles was produced, based upon a detailed review of academic and expert practitioner literature, together with the discussions that took place during the Nairobi Conference and the September Workshop. This draft was presented to experts during a further workshop organized by the Nuremberg Academy on 10th – 11th April 2017 (April Workshop), whereby expert feedback on the draft Principles was invited. The Principles were finalized in light of these additional expert comments and amendments, and following further individual expert consultations during May and June 2017.

1.3 Purpose of these Principles: *the Need for Cooperation*

The purpose of these Principles is to enhance the potential for effective cooperation between international and national justice mechanisms on the one hand, and CSAs on the other in the investigation and prosecution of CRSV as an international crime. In particular, these Principles provide guidance on the deliberations and steps to be taken towards formulating, structuring and governing an effective cooperative relationship.

To this end, these Principles provide practitioners with:

- General principles that should serve as the basis for guiding and informing decisions taken by the relevant stakeholders during any cooperative relationship;
- Best practices as examples where cooperation has had a positive impact on the investigation and prosecution of CRSV;
- References to other instruments which provide guidance on specific issues identified.

1.4 Scope and Application of the Principles

These Principles are intended for use primarily by investigators and prosecutors from international and national justice mechanisms, as well as by a wide array of CSAs who engage with or otherwise come into contact both with victims of CRSV and representatives of judicial mechanisms.

The focus of these Principles is upon those judicial mechanisms and authorities directly engaged in the investigation and prosecution of offences of CRSV as international crimes. In addition to the ICC and the international criminal tribunals, this project also seeks to encompass the practices of hybrid or internationalized courts,² as well as of those national courts specifically involved in prosecuting sexual violence crimes as international criminal offences.³

Women, men, girls and boys are all affected by sexual violence during conflict. Perpetrators of sexual violence can also be women, men, girls and boys. These Principles apply to victims and perpetrators of conflict-related sexual violence irrespective of their gender.

While the specific focus of these Principles is on the pursuit of justice through criminal law mechanisms, it is recognized that there may be other possible justice avenues available to victims of CRSV, including, for example, through human rights litigation at a national and regional level, civil litigation, traditional mechanisms and reparations claims. In addition, while the particular focus of these Principles is on cooperation between courts and CSAs, it is also recognized that in situations where multiple CSAs are engaging with victims and witnesses in the aftermath of conflict, cooperation between CSAs may be needed in order to ensure that interventions do not duplicate activities.

1.5 Definitions

Civil Society Actor (CSA)

For the purpose of these Principles, a broad definition of CSA is employed, encompassing any non-state actor that has either a formal⁴ or non-formal role in the legal justice process. Such a broad approach is appropriate to the consideration of the interaction and cooperation between judicial mechanisms on the one hand, and those present on the ground on the other. This includes first responders, who may either engage with the victim in various capacities – for instance, as journalists, medical professionals, psychologists, human rights activists, victims' associations or neighbors – or who otherwise come into contact with or in possession of evidence of an international crime.

² For example, the War Crimes Chamber of the Court of Bosnia and Herzegovina, which began its work in 2005.

³ For example, the International Crimes Division of the High Court of Uganda, which began its work in 2008.

⁴ While the majority of CSAs might not have a formal role in the legal justice process, other might have a more formalized role by being called to give evidence in court on the number of complaints they have received or victims they have identified, for instance.

Cooperation

The term is used here in a broad sense to encompass both a wide array of interactions between judicial mechanisms and CSAs, as well as interventions or actions by one party that impact upon the other. This may include, for example, lobbying for changes to court policy or procedures, or bringing specific instances to the attention of prosecutors in order to trigger an investigation, where those interventions might affect the successful investigation and prosecution of CRSV as an international crime. The definition here also encompasses interactions that are likely to have a direct impact on investigations – for example, the collection of evidence and the identification of victims and witnesses – as well as actions which, while they may have the effect of helping in the investigation and prosecution of sexual violence, were not undertaken primarily for that purpose – such as the provision of social and/or psycho-therapeutic care and support to victims.

Effective Cooperation

While the focus of these Principles is on the investigation and prosecution of sexual violence by a criminal court, the positive impact of cooperation, including on the victim and society more widely, has the potential to go beyond simply the number of cases brought or convictions achieved. As a result, a purely results-driven approach to cooperation is inappropriate, and may be detrimental to the survivor where it is conducted without care or respect for the autonomy of the victim. Accordingly, “effective cooperation” between judicial mechanisms and CSAs is understood broadly here as any form of cooperation that may achieve or contribute towards any or a combination of the following: facilitating the identification and successful prosecution of CRSV perpetrators; a greater awareness in the public consciousness of the need for justice for survivors and the absence of impunity for perpetrators; the production of a reparative benefit for victims; an empowering experience for the victim and enhanced prospects for positive transition in the aftermath of conflict. Quantitatively, this could, inter alia, be reflected in an increase in the number of charges of CRSV being brought, the number of charges that are sustained during the trial process, and the number of convictions for CRSV as an international crime.

Sexual violence as an international crime

For the purposes of these Principles, the understanding and interpretation of sexual violence as an international crime is based upon the provisions of the Rome Statute of the ICC (Rome Statute). As many States ratify the Rome Statute, its provisions, including those relating to CRSV, have already been reflected in numerous national legislations and this trend is likely to continue. As a result, those provisions will be common to the ICC at least, as well as to the many national courts that seek to prosecute CRSV as an international crime. Further details of what comprises sexual violence under the Rome Statute is contained in Annex A. Additional information is also available in Chapter 4 of the Second Edition of the International Protocol on the Documentation and Investigation of Crimes of Sexual Violence in Conflict (International Protocol).

1.6 Structure

Section 1 provides background information on cooperation between judicial mechanisms and CSAs. It further explains the methodology, purpose, scope and application of these Principles, as well as definitions for the utilized concepts.

Section 2 outlines challenges to the realization of effective cooperation.

Section 3 identifies overarching general principles that should inform and guide the process by which judicial mechanisms and CSAs interact.

Section 4 addresses the specific challenges identified by outlining a number of best practice examples, which concern various aspects of effective cooperation between judicial mechanisms and CSAs – divided into the pre-investigation, investigation, trial and post-trial stage – together with recommendations on how to proceed in specific instances.

2. Understanding the challenges to effective cooperation

While there are obvious potential advantages to cooperation between judicial mechanisms and CSAs in the investigation and prosecution of CRSV, cooperation itself is not without its challenges. In some cases, cooperation may be difficult to achieve, detrimental to the investigative and prosecutorial process, or damaging for the CSA or court concerned. Exposing these challenges therefore seeks to alert practitioners to the potential problems that unmanaged cooperation can entail. This will allow for a better understanding of, and provide context to, the best practice examples and recommendations provided.

Security

Significantly, cooperation with an investigation can raise real and serious security concerns for CSA staff members, particularly where there is a lack of local or political support for the prosecution. Investigations can also create major security risks for vulnerable victims and witnesses, their families and associates. These risks are likely to be a leading concern for CSAs, and a factor in their decision of whether or not to introduce or otherwise enable access of investigators to victims. Moreover, CSAs may well be unable to provide the required levels of protection for victims and witnesses, and the availability of protection from external agencies such as the United Nations (UN) may vary, depending upon the circumstances.

Impartiality

The physical operation of a CSA within a State might depend upon their continuing independence and neutrality, such that they cannot, for example, be seen to adopt or support one side over another in a conflict or post-conflict justice context. For a humanitarian CSA providing aid to affected post-conflict communities, for example, cooperation with an international justice mechanism in the investigation of international crimes might jeopardize the continued ability of the organization to provide aid, and potentially, risk their ability to remain within the territory of the State.

Confidentiality

Where the continued practical operation of a CSA depends upon its ability to retain confidential relationships with victims or witnesses, requests from prosecutors to provide them with witness statements that include victims' names, or with research outputs that identify victims, could prove problematic. In some cases, CSAs may not be able to return to the victim concerned to seek consent to their details being passed on to court investigators, and in the case of international CSAs, revealing sources could have resource, operational and security implications for local CSA partners.

Collection of Evidence

A number of particular challenges can arise where CSAs have been involved in interviewing witnesses and survivors of CRSV in the conduct of their own activities. Most CSAs are not trained criminal investigators, and even where they do have training, their role as, for example, human rights documenters, clinicians or journalists, is very different to that of a court investigator, and will inevitably dictate the form, nature and content of the evidence collected and provided by them. This may mean that evidence collected by CSAs is not of the exacting standard required for use in a criminal investigation and trial. It may, for example, lack sufficient detail or inadequately respond to the specific elements of international crimes. In other cases, the methodology by which it was gathered may not be apparent, and where it is, may not be sufficiently robust for use in a court.

Evidentiary issues may also arise as a result of the custody and/or retention of physical evidence by CSAs, including photographs, original documents, recordings or computer records. CSAs may not be aware of how best such evidence should be preserved or how to document a chain of custody in respect of physical evidence, and this can jeopardize the probative value of such evidence for criminal prosecution purposes.

Multiple Witness Statements

Specific challenges can also arise for judicial investigators arriving later on the scene where multiple statements have already been taken from a single witness by different CSAs. The existence of a number of different statements from a victim raises the prospect of inconsistencies between statements, which may adversely affect the witness's credibility. In addition, witnesses and victims might experience interview fatigue, by which they simply become tired of being interviewed, or frustrated at the lack of change in their situation, despite repeated interviews. Allied to this problem is the potential for the generation of a testimony that can sound rehearsed or lacking in emotional content and spontaneity, where it has already been repeated several times by the witness. A similar problem may arise for investigators and prosecutors with victims who have benefited from the provision of therapeutic, psychosocial services often provided by CSAs, whereby the trauma account is repeatedly relayed during the rehabilitative process. Finally, in some cases, victims may have found the process of giving a statement to a CSA distressing or re-traumatizing, and so are reluctant to repeat the experience by providing a statement to court investigators.

Disclosure Obligations

Attempts by CSAs to seek guarantees of confidentiality or anonymity from investigators may prove challenging where, for example, the court in question is required by its own procedures to disclose all evidence. This may include disclosing any exonerating material to the defense; a situation which the CSA may not have envisaged and which may risk its own relationships of trust with the victim community. At the same time, judicial mechanisms may be reluctant to explain to CSAs the potential risks and impacts of cooperation, where they fear that CSAs might not otherwise engage with them. Similarly, victims and witnesses may be more reluctant to approach CSAs if they believe their information will be disclosed to a judicial mechanism without their consent.

Capacity and Resources

At a more pragmatic level, a CSA's mandate may not enable cooperation, or the CSA may simply lack the capacity – in terms of skill, expertise or staff numbers – to undertake the kind of cooperation or activity that a court is seeking. In addition, information concerning court procedures for the format and submission of evidence by CSAs may be unclear, and channels of communication between judicial mechanisms and CSAs may be limited or non-existent. This will hinder not only the ability of CSAs to submit evidence, but also, at a more fundamental level, affect dialogue between judicial mechanisms and CSAs on cooperative needs and the initiation, development and ongoing conduct of cooperation initiatives. Importantly, it must also be recognized that while some CSAs may be adequately trained in the collection and preservation of evidence, this may be rendered futile if they lack the resources and materials to do so, such as specific equipment for the collection of forensic medical evidence. This potential gap between knowledge and practice must therefore also be borne in mind when addressing this challenge.

Finally, reliance by a court on civil society for protection, outreach and investigative functions has the potential to appear as a delegation or abdication of responsibilities that rest ultimately with the tribunal concerned, and can also be resource-intensive and costly for CSAs. This is particularly important for local, smaller NGOs for instance, who may face increased difficulties securing funding to undertake broader functions. Furthermore, misunderstandings and assumptions on who ought to undertake protective roles can have grave consequences on those involved in the investigation and prosecution process. Cooperative relationships between CSAs and court investigators therefore arise and operate within an often complex, fragile, changing and sometimes volatile situation which in turn is likely to be context-specific. For cooperation to be truly effective, these complex challenges must be carefully considered and successfully navigated. Bearing in mind these challenges, the remainder of these Principles provides specific instances and practical examples of how cooperation can be approached, effective cooperative relations developed, and activities successfully conducted.

3. General Principles of Cooperation

There are a number of overarching principles that should operate to inform and guide the process(es) by which judicial mechanisms and CSAs interact and cooperate. These overarching principles apply at all stages of the cooperative relationship, to all actors, and at both the international and national levels. While the various principles are dealt with separately below, they are interrelated in practice, and should not be employed in isolation. They are also not displayed in any hierarchical order of importance.

General Principles of Cooperation	
✓	Be Safe and Keep Others Safe
✓	Do No Harm
✓	Respect Confidentiality
✓	Communicate
✓	Be Impartial and Independent
✓	Be Transparent
✓	Be Inclusive and Diverse
✓	Be Realistic and Reasonable

Be Safe and Keep Others Safe

The physical and emotional safety of court and CSA staff, victims and witnesses must be a prime concern when deciding whether to pursue a cooperative relationship, the nature of the cooperation sought, and its extent and conduct. Any protection protocols should be made publicly available, so that the decision to cooperate is an informed one. In this respect, all parties should be aware of, and helped to fully understand, where appropriate, the potential of different protection strategies and activities, including the limits of any protection regimes. The issue of safety for all actors should be kept under constant review by all parties.

Do No Harm

Do not lose sight of the victim. The safety, dignity, respect and wellbeing of survivors of sexual violence should remain a constant guiding presence and central concern for all actors. This can include activities aimed at keeping victims informed of the investigation and trial, providing the information necessary

to enable survivors to make fully informed and voluntary decisions, protecting victims' emotional, physical and social health, treating vulnerable survivors with care, respecting their autonomy and making appropriate referrals.⁵

Respect Confidentiality

Confidentiality is critical in building trust with victims, provides them protection and serves to respect and enforce their autonomy. Where information is confidential, it should remain confidential unless and until the party it relates to decides otherwise. This might include details of victims, witnesses and CSAs who are cooperating with an investigation, together with documents such as medical records or reports that reveal the identities of victims. Breaches of confidentiality can put the security of others at risk, expose victims to stigma, emotional distress and hardship, jeopardize relationships between CSAs and survivors, and lead to a lack of trust and engagement between judicial mechanisms and CSAs. Accordingly, confidentiality procedures and information protection measures must be established, understood and applied by all parties. Survivors and witnesses should be made aware of the terms and limits of confidentiality from the outset so that they are able to give informed consent to how information about them is used. For instance, where prosecutors have a duty to disclose information to the defense, CSAs, victims and witnesses must be informed of this so that they can decide whether to cooperate with an investigation or trial.

Communicate

Early and ongoing communication and consultation between courts and CSAs is integral to the development of goodwill and trust between the parties, which serves as the basis for the delivery of effective cooperation. It provides the platform for transparency throughout the judicial process, assists in the development and conduct of outreach activities, and helps to keep all parties invested in the cooperative relationship. Communication must be bi-directional and include regular updates on continually changing situations.

Be Impartial and Independent

Courts (and prosecutors, where they operate independently of courts) and CSAs must not only operate impartially and independently, but they must be seen to do so. The identification by the court of which CSA(s) to approach, and the decision by CSAs as to whether cooperation is in their best interest, are therefore important. Relevant factors to be considered might include: whether the court is perceived as being subject to political bias or control (including where, for example, charges are brought against high-level political figures, the judiciary reflects a particular political, ethnic or religious bias or is otherwise susceptible to external influence), and whether a CSA pursues a particular political agenda or mandate that is inconsistent with the need for impartiality. Where CSAs decide to cooperate with prosecutors or a court, officials should not interpret cooperation as a sign of unwavering loyalty to the court. CSAs remain independent, and may still, for example, be critical of the court or its processes. This is particularly important when considering CSAs' relationships with victims, to ensure they are not perceived as one and the same with courts. Clear communication with victims regarding the parameters of this independent relationship is essential in retaining their trust.

⁵ Several instruments provide further guidance on this concept, such as: Chapter 7 of the International Protocol; Chapter 5 "Prosecuting Conflict-Related Sexual Violence at the ICTY" (Eds. S. Brammertz and M. Jarvis); and the UN Secretary General Report on Sexual violence in Conflict, 14 March 2013, para. 116.

Be Transparent

Judicial mechanisms and CSAs should be as transparent as possible – with each other and publicly – in the formation and conduct of any cooperative relationship. More transparent procedures enable each party to understand the benefits the other may bring to the investigation and prosecution process. It also allows stakeholders to highlight the particular issues they personally face as CSAs and courts working with victims and witnesses. This will assist each party in making an informed decision about whether a cooperative relationship is appropriate, and will also enable public scrutiny of the nature and basis for the relationship. Transparency can also serve to decrease tension between CSAs themselves, as they will be better informed of each other's mandates and relationships with courts. Nevertheless, the extent to which cooperation is publicly transparent will depend upon the need for CSAs working with victims to maintain confidentiality, and the overriding need to ensure the safety of all actors involved.

Be Inclusive and Diverse

There may be a tendency for courts to target large, international, English-speaking CSAs with more resources and a ready ability to build relationships. Local CSAs, however, are likely to have vast, direct and relevant experience, as well as context- and culturally-specific knowledge and insights of the situation, and so should not be overlooked. Cooperation with local CSAs would also enable up-skilling and training of local actors that will help support successful prosecution at both the national and international levels. Tying in with the need to be transparent, a court that is well informed about a CSA's mandate and work will be better equipped to operate with inclusivity and diversity.

Be Realistic and Reasonable

Forms of cooperation sought by courts should be realistic and sensitive to the limited financial resources and capacities of CSAs, should not be unfairly burdensome, and should not amount to the effective delegation or abdication of court responsibilities. CSAs should also be realistic about what cooperation could achieve – both for victims and themselves – as well as their own capacity to deliver what is being asked of them. In both cases, actors should avoid making commitments to survivors or witnesses that they may not be able to keep. Once again, communication and transparency from the outset can help manage expectations from all sides and determine what may realistically be achieved in any given situation.

4. Best Practices in Effective Cooperation

The following section seeks to address the challenges illustrated in Section 2 by:

- Identifying specific forms of cooperation;
- Providing, where available, examples of best practice from both international and national contexts; and
- Providing, where appropriate, recommendations concerning the next steps that need to be taken to further and enhance the prospects for effective cooperation.

The identified examples emerge from (academic and gray) literature, practice and jurisprudence of judicial mechanisms and CSAs, as well as discussions that took place between expert delegates and speakers during the Nairobi conference and April and September workshops. In some instances, the practice or suggestion referred to may be case- or context-specific. Such examples are included here where they may prove instructive for the development of best practice within alternative contexts, and where possible, illustrate capacity for the application of creative solutions to case-specific issues. Where guidelines to regulate and standardize court interactions with CSAs have already been produced, such as with the ICC⁶, these are referred to where appropriate to the extent they inform on the best practice examples identified.

In some cases, it is difficult to clearly and incontrovertibly establish a causal effect between a particular form of cooperation and the successful investigation or prosecution of CRSV as an international crime. This may be, for example, where forms of cooperation – such as the provision of psychological care to victims – are indirect, and so no direct causal link is readily discernible. Examples are included here where they have the potential to prove effective, or to contribute towards effective investigative and prosecutorial activities.

Forms of cooperation are considered here in the context of pre-investigation, investigation, trial/appeal and post-trial phases of the criminal trial life cycle. Notably, while cooperative forms are largely included here in the context of a specific phase of the judicial process, in a number of cases the form identified may arise at more than one juncture, or may be an ongoing factor that requires regular attention.

4.1 Pre-Investigation

4.1.1 Lobbying to Prompt and/or Prioritize the Investigation and Prosecution of CRSV

CSAs can utilize their role to raise the profile of CRSV, highlight the impacts of sexual violence and lobby for the prioritization of sexual violence prosecutions. Where public and political will is lacking, this may be generated through the conduct of various advocacy and awareness-raising initiatives, including media work, and the production of human rights reports and shadow reports for UN mechanisms. Such activities can also lead to the development of relevant national actors and institutions to prosecute CRSV as an international crime. Impacts may also be maximized by the conduct of coordinated transnational advocacy campaigns.⁷

⁶ ICC, Guidelines Governing the Relations between the Court and Intermediaries, March 2014.

⁷ Transnational Advocacy Networks are “actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services”. (Haddad, Heidi Nichols. 2011. “Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunal”. *Human Rights Review* 12:109-132, p. 120). These networks may include NGOs, international NGOs, advocacy groups, foundations, the media, and local social movements.

Example 1:
Transnational Advocacy

International Criminal Tribunal for the former Yugoslavia (ICTY) – women’s and human rights groups engaged in letter writing campaigns, media work, protests, and conferences to pressure the ICTY to address sexual crimes. This placed immediate pressure on the prosecution to become more sensitive, concerned and determined to properly investigate allegations of mass rape.

International Criminal Tribunal for Rwanda (ICTR) – the recognition of the attention and prioritization of sexual assault at the ICTY did not carry over to the ICTR, which prompted transnational advocacy networks to react in two ways: (i) the Coalition for Women’s Human Rights in Conflict Situations, a group of sixty organizations, organically formed to pressure the ICTR to enact gender-sensitive policies; and (ii) external advocacy led by the International Centre for Human Rights and Democratic Development submitted an amicus brief to the ICTR pressuring the tribunal to amend the indictment of *Akayesu* to include a rape charge (in addition to pressure by the judge to re-examine the case again after a victim testified about CRSV in court).

For more information and examples on the effect of transnational advocacy in generating the necessary political will to prosecute crimes of sexual violence at the ICTY and ICTR, see [Haddad, 2011](#).

Example 2:
Advocacy by Civil Party Lawyers

At the Extraordinary Chambers in the Courts of Cambodia (ECCC), continuous efforts and advocacy by Civil Party lawyers of the Civil Peace Service program resulted in the inclusion of the crime of forced marriage and the rapes that occurred in the context of those marriages into the indictment. NGO lawyers also filed requests for investigations of these crimes.

Example 3:
Shadow Reports

International conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture (CAT), invite direct civil society input in the form of independent or “shadow” reports and informal presentations to bring real concerns to national and international attention. These also serve as a means of independently assessing government efforts in complying with the relevant international obligations.

For instance, REDRESS has issued a [submission](#) to the CEDAW Committee in the form of an examination of the reports sent by the DRC delegation bringing to light the prevalence of rape and other forms of sexual violence in the context of pervasive impunity. This is followed by recommendations of action to be taken on a series of priority concerns.

Example 4:
General Allegations

TRIAL International, together with 12 local associations dealing with women victims of sexual violence, submitted a [general allegation](#) to the Special Rapporteur on Violence against Women highlighting the existing obstacles in the fulfilment of fundamental rights of these victims during the war. Such lobbying also triggered a [state visit](#) by the Special Rapporteur, which allowed representatives of civil society to raise international concern on the ongoing impunity of perpetrators of CRSV, and which was subsequently included in the Special Rapporteur’s [report](#) to the Human Rights Council.

Other efforts may include the organization of round table discussions inviting experts and addressing specific issues, and writing letters on behalf of victims to Prosecutor’s Offices.

Example 5:
CSA Communications to the ICC

On the basis of Article 15 of the ICC Statute, Sisma Mujer – together with the European Center for Constitutional and Human Rights and the Collective of Lawyers Jose Alvear Restrepo (CAJAR) – in 2014 filed a [communication](#) to the ICC, calling for it to include CRSV in its assessment of the Colombian conflict and proceed with the investigation into the situation. The three human rights organizations (local, national and international) examined 36 representative cases to show a reasonable basis to believe that sexual assaults carried out by state armed forces between 2002 and 2011 constitute crimes against humanity. In particular, the communication outlined the existing national proceedings (or the absence thereof) for these crimes, established the context of the acts of sexual violence as part of state military strategy and links between them and addressed admissibility issues.

Further advice on how to file communications to the ICC can be found [here](#).

4.1.2 Advocacy for Reform of Law and Practice

Before any formal investigation takes place or is announced, CSAs can still lobby for the inclusion of domestic legal provisions that reflect the status of sexual violence as an international crime, or for existing definitions of sexual violence to be brought in line with international standards. Even where legislative provisions are in place, advocacy may be needed to highlight and counter judicial practices and cultures that prevent or hinder the prioritization or successful prosecution of CRSV crimes. Advocacy is particularly needed where there is political hostility to criminal prosecution, or entrenched views on CRSV that simply render it as an inevitable consequence of war. Advocacy activities should be context-specific and responsive to the particular dynamics and religious mores of the State concerned.

Example 1:
Advocacy Screenings

Women’s Initiatives for Gender Justice partnered with six local Democratic Republic of the Congo (DRC) organizations in collaboration with WITNESS, to produce the video [Our Voices Matter](#); a call to action to the Congolese Government to, *inter alia*, ensure domestic accountability for perpetrators, and to increase their cooperation with the ICC. These advocacy screenings target strategic decision-makers (provincial political leaders, cultural and traditional leaders, judicial and military leaders), and combined with the use of documentation data, have contributed to new laws expanding protection for additional forms of violence against women.

Example 2:
Engaging Government Officials

With a collective effort of the [Legislative Advocacy Coalition on Violence Against Women](#) and CSAs, the Stand to End Rape Initiative (STER) joined a coalition in engaging the government to recognize sexual violence as an international crime by law, as stated in CEDAW to which Nigeria is a signatory state. It also focused on expanding the context of sexual violence in Nigeria to ensure cases of rape during conflicts can be duly prosecuted under its provisions, as both the Criminal and Penal Codes were limited in their capacity. This led to the establishment of the Violence against Persons Prohibition Act 2015.

Strategies to achieve this included engaging those government agencies that possessed the mandate on issues of women’s affairs in Nigeria. In this respect, the consistent commitment of the Ministry of Justice, National Bureau of Statistics and Federal Ministry of Women Affairs, particularly Directors of Women’s Affairs, also helped in the passage of the Act. The campaign for this legislation also escalated due to the involvement of the media, especially in 2009 during the 16 days activism on violence against women. The media were trained by CSAs on reporting violence against women cases, where the improved media propelled public interest and pushed towards the passage of the Act.

4.1.3 Strategic Litigation

Strategic litigation is a method which can bring about significant changes in law, practice or public awareness by taking carefully-selected cases to court. CSAs with specific legal expertise can undertake strategic litigation with a view to affecting such a change that may enhance the potential for the successful prosecution of CRSV as an international crime. This might be done through, for example, the creation of progressive jurisprudence and the initiation of the reform of national laws. Strategic litigation might also serve to raise public awareness of an issue, generate political will to prosecute crimes in the future, and mobilize CSAs to engage with and support specific cases or prosecution initiatives more broadly. A typical feature of strategic litigation is that cases are brought by individuals/CSAs to test a legal point, policy or practice that also applies to cases other than just their own, to maximize the impact such a process might have.

It is useful to highlight here the potential effect of donors and cooperation agencies in supporting CSAs with their strategic litigation activities as a means to improving accountability for CRSV. A lot of cooperation funding is spent towards trainings, which, though useful, may not have as durable an impact as funding the litigation of select cases which may contribute to the development of jurisprudence surrounding CRSV.

Example 1: Strategic Litigation to Secure Compensation for Victims

TRIAL International includes strategic litigation in its approach to bring about broader social change. To provide an example, [strategic litigation](#) was used to trigger the award of compensation claims in criminal proceedings, with the first ruling of its kind by the Court of Bosnia and Herzegovina (BiH) in 2015. Prior to this ruling, not a single wartime victim had ever obtained compensation through criminal proceedings for the harm suffered.

The NGO provided a victim of wartime rape with legal support, coordinated with other organizations to offer psychological support and pushed legal institutions to take action. With the landmark decision to provide compensation, such a ruling will put additional pressure on prosecutors and courts to implement this decision and enforce the already established legal provisions protecting this right.

Example 2: Strategic Litigation to Promote Accountability

The Women's Initiative for Gender Justice (WIGJ) has strategically focused its work in countries with situations under ICC investigation in order to leverage the international efforts with simultaneous work for domestic responses to CRSV. The [South Kivu Strategic Accountability Project](#) in the DRC supports greater accountability through training and support for key actors in the justice process – police, prosecutors and judges – in pre-selected courts and territories.

Between 2014-2016, WIGJ undertook an extensive mapping and consultation process with local partners and women's rights organizations to identify courts to focus on during this pilot project. These courts were selected based on a number of criteria, such as: location in areas with a high prevalence of CRSV; accessibility for WIGJ partners to conduct documentation missions; areas with health clinics for referrals of victims/survivors; and locations with sufficient security to facilitate visits.

By focusing on key personnel in selected courts, WIGJ aims to develop a model responsive to the context and specific challenges in the selected territories.

Example 3: Manual for Litigation Strategies for Sexual Violence in Africa

This [Manual](#), produced by REDRESS, examines the different legal options available to a victim/survivor of sexual violence or a rights group on their behalf. It aims to provide an overview of these legal options and discusses the legal strategies that influence the choice of any given option.

Specifically, the Manual studies the possibilities and limitations of justice at the national level, the decisions of regional and international human rights mechanisms and the judgments of the regional and international courts and tribunals. In doing so, it explores and identifies possible legal strategies that could be employed for justice victim/survivors of sexual violence and outlines the applicability, advantages and limitations of the legal strategies. It also discusses advocacy options where employing legal strategies is not an option.

While the Manual focuses its efforts in Africa, its analysis of international human rights mechanisms, for instance, and particular litigation strategies, may in fact be applicable in wider contexts.

4.1.4. Consultation during Preliminary Stages

The conduct of a consultative process paves the way for the early formation of cooperative relationships between judicial mechanisms and CSAs, enables the incorporation of CSA experience and expertise into court policy and practice, and helps to ensure that all parties remain invested in the cooperative relationship. Appropriate consultative processes might include, for example, the drafting, development and adoption of judicial rules of procedure and evidence. Where a process is not consultative, CSAs can still influence the content of rules, policies and practices through the production of commentaries and the submission of memoranda to the drafting body.

Example 1: Submitting Suggestions for Rules of Procedure and Evidence

At the ICTY, the open process of rule-making, in which NGOs and states were invited to make suggestions, enabled feminist groups to focus attention on particular problems. The women's human rights movement mobilized to support the adoption of, as part of the initial rules of evidence and procedure, evidentiary rules such as Rule 96. This prevents harassment of and discrimination against victims and witnesses through admitting evidence of prior sexual conduct or permitting unexamined consent defenses in sexual violence cases. The rules appeared to be largely derived from a draft submitted by a group led by the International Women's Human Rights Law Clinic of City University of New York Law School and staff and students at the Harvard Law School Human Rights Program.

Example 2: Participating in Court- led Consultations

In the case of the ICC, the Office of the Prosecutor (OTP) adopted a [Policy Paper](#) on Sexual and Gender-Based Crimes in June 2014. The Policy Paper was promulgated following a process of extensive consultations, gathering input from staff in the Office, the Prosecutor's Special Gender Advisor, as well States Parties, international organizations, civil society, academic and individual experts. This inclusive approach helped shape the development of the policy, which is the fruit of joint labor and the responsibility to realize its full potential, a joint undertaking.

4.1.5. Lobbying for Gender-Sensitive Policies and Practices

CSAs may also lobby for the adoption of gender-sensitive policies and practices, including the election of female judges to the bench of a court with a view to providing a more gender-sensitive approach to the conduct and oversight of judicial proceedings. Notably, having more female judges does not by definition guarantee greater sensitivity or success in the prosecution of sexual violence, and CSAs should seek to manage the expectations of victims. At the very least, however, this form of lobbying enables the early establishment of links between members of the judiciary and CSAs, and hence a possible future channel for highlighting and promoting gender issues within the justice process. Forming such links may also increase the possibility of organizing sensitization training for judges.⁸

Example 1: Lobbying for the Inclusion of Female Judges

Women's groups actively lobbied for the election of two female judges, Gabrielle Kirk McDonald and Elizabeth Odio Benito, with their presence being critical at the ICTY. In the start-up period, the ICTY judges, under the tutelage of the two female judges, introduced gender-sensitive articles into the rules of procedure and evidence, authorizing, *inter alia*, the protection of victims and witnesses.

Example 2: Lobbying for Gender Focal Persons in Court

At the ECCC, NGOs together with the Victim Support Section (VSS) successfully applied for a joint grant by the UN Trust Fund to End Violence Against Women. One component of this joint project was to improve gender policies at the ECCC which led to the establishment of a gender focal person at the Court. The VSS then initiated the internal nomination process and set up this position.

Example 3: Coalition of National, Regional and International CSAs Lobbying for Law and Policy Review

On the International Day for the Elimination of Sexual Violence in Conflict, 24 CSAs with similar mandates issued a joint statement calling on the Sudanese government to, *inter alia*, undertake a review of all laws and policies, together with independent civil society groups, to ensure effective criminal justice responses to all forms of sexual and gender based violence, including marital rape, domestic violence, and female genital mutilation.

Example 4: Dialogue with National Actors in Absence of Governmental Support for the Implementation of Practical Measures

The Women Peace Initiatives-Uganda (WOPI-U), together with other CSAs, is involved in mediation and counseling with clan leaders, religious leaders and police personnel in Northern Uganda to seek solutions for return of women abducted by rebels during the conflict, in absence of governmental support. WOPI-U also coordinates the Lira District Women Task Force that monitors the implementation of the Peace, Recovery and Development Plan, launched by the Government in Uganda in a top-down manner in 2007 to help Northern Uganda transition from war to peace, in order to ensure it is addressing the needs of the women.

⁸ Transnational Advocacy Networks are "actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services". (Haddad, Heidi Nichols. 2011. "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunal". Human Rights Review 12:109-132, p. 120). These networks may include NGOs, international NGOs, advocacy groups, foundations, the media, and local social movements.

4.1.6. Court Strategies for Identifying and Communicating with CSAs

Early, unambiguous and specific communication and outreach from courts with CSAs is essential to the establishment and development of effective cooperative arrangements. In the case of international mechanisms, this would include the early establishment of a base within the affected territory. Courts should consider their strategy for communicating with CSAs as part of their decision to launch an investigation into instances of CRSV, and map the existence and profile of CSAs within the area. Communications should include clear information concerning current cooperation needs. These needs are likely to vary between international and national mechanisms, as well as by context, and so must be tailored to the case under consideration.

Example 1: Court Policy on Vetting

According to the ICC Guidelines on Intermediaries, the following criteria should be considered during the vetting procedure:

- A. **Adherence to confidentiality and respect for dignity**
 - Willingness and ability to respect the confidentiality of confidential information to which the intermediary might be exposed; and
 - Willingness and ability to act with integrity and demonstrate respect for diversity and for the dignity, well-being and privacy of victims/witnesses/accused.
- B. **Credibility and reliability**
 - Willingness and ability to adhere to the policies of and conduct practices in accordance with Court decisions and the applicable law;
 - Willingness and ability to adhere to and conduct practices in accordance with the terms agreed as per the contract and with instructions from the relevant organ or unit of the Court or Counsel; and
 - Lack of reason to believe that associating with the potential intermediary could have negative repercussions for the Court or its activities.
- C. **Risk assessment resulting from interaction with the Court or Counsel**
 - Ability of both the organ or unit of the Court or Counsel and the intermediary to contact each other in accordance with and subject to the Court-wide standards and procedures for protection of persons at risk on account of the activities of the Court described in Section 5 of this document;
 - Willingness and ability of the intermediary to perform the assigned function in a manner which prevents or minimizes risks to any persons, and especially to those with whom the intermediary interacts on behalf of an organ or unit of the Court or Counsel; and
 - Balance between the benefit of using a particular intermediary and the need to protect that intermediary from risks resulting from his or her interaction with the Court.
- D. **Capacity, knowledge and experience**

Appropriate capacity, knowledge and experience requirements are dependent on the activities to be carried out by the intermediary. As required, the following should be taken into consideration when selecting an intermediary:

 - Competence and availability;
 - Necessary skills, competencies and psycho-social status to undertake the functions contemplated;
 - Competency to produce expected results; and
 - Potential for engagement for the required term.

Cultural, social and linguistic proximity to affected communities:

- Knowledge and understanding of regional, national or local socio-political context;
- Network and associates within affected communities;
- Knowledge of particular society members who may be selected or potential witnesses;
- Knowledge of other potential sources of relevant information;
- Geographic or social (via established trust) proximity to the affected population and/or specific groups;
- Linguistic proximity to affected population and/or specific groups;
- Capacity for ethical interaction with the affected population and/or specific groups; and
- Ability to ensure gender-specific strategies.

Access to/accessibility in (remote) affected geographical areas:

- Access (direct or indirect) to, located in, or has operations in parts of the country where potential victims are located;
- Accessible by potential victims/witnesses, including those in remote affected geographical areas;
- Established relationships of trust and confidence with victims or potential witnesses to facilitate contact; and
- Relevant partnerships, networks or links, within the country or internationally.

Legal/judicial knowledge/experience:

- Relevant legal knowledge/experience;
- Ability to access legal assistance;
- If an organisation, ability to draw upon lawyers from among its membership; and
- Awareness of the Court and international legal standards.

Experience in working with victims:

- Experience in working respectfully with victims, including traumatised and other vulnerable individuals (women, children); and
- Experience in applying gender-specific strategies.

Resources (staff, financial, infrastructural, logistical, equipment):

- Ability to appoint specific persons to the activities to be carried out, particularly in cases where confidentiality is important; and
- Access to a private office and a secure place (lockable safe, office cabinet or room) in which to store confidential information.

**Example 2:
Guidelines for Assessing
Eligibility of Potential
Contributors**

The Trust Fund for Victims of the ICC has established a set of [Guidelines for Accepting Private Contributions](#). While aiming to expand its pool of potential contributors, the Fund's Guidelines aim to ensure, *inter alia*, that such entities advance the Fund's goals, share its values, maintain its independence and are transparent in the nature and scope of their dealings. It also bases its selection process on the UN Global Compact's Ten Principles (see Annex I of the Fund's Guidelines) which enact a set of values within their sphere of influence in the area of human rights, labor standards, the environment and anti-corruption.

Recommendation: Court Policy on Vetting

The process by which a court determines the CSAs it would like to work with should be communicated prior to the initiation of the investigation. Where they have not already done so, courts should develop and make public an objective policy to guide and govern its vetting process. This will enable an objective and policy-based understanding of why, for example, one or more CSAs were selected while others were not. In addition, a policy-based selection process will enable the development of consistent approaches and the emergence of best practices that in turn can help to build trust in the court.

Where capacity permits, the court should consider giving feedback to those CSAs it chooses not to cooperate with by indicating the reasons for its decision. Finally, the vetting process may take some time, particularly where it involves an international justice mechanism not otherwise familiar with the affected State, and as a result, there is likely to be a delay between the announcement that a situation is due to be investigated and CSAs first being contacted by court investigators. Clear information should be provided by the relevant court, available in all appropriate languages, explaining the reasons for the delay.

**Example 3:
Court Strategy for
Communication**

The ongoing [ReVision Project](#) of the ICC Registry has offered CSAs an invaluable opportunity to participate in the process of reorganizing and streamlining the work of the Registry. In light of this, the Team on Communications of the Coalition for the International Criminal Court (CICC) has provided the Public Information and Documentation Section with input on its strategies and activities with a view to maximizing their impact. The Team has welcomed the opportunity to provide some informal comments to the ReVision team based on its observations, lessons learned exercises and best practices from other tribunals.

Such comments recommend that the ICC should:

- Strengthen its public information and outreach capacity;
- Ensuring that it presents itself to a greater extent as a cohesive body through the Registry;
- Be equipped to respond to criticism;
- Establish early outreach conditions;
- Establish an overarching communications strategy where lessons-learned can be pooled and fed-back to field offices across different situations;
- Communicate directly with audiences allowing it to address misrepresentations and misconceptions and explain its mandate;
- Integrate communication strategies that are tailored to national and local contexts;
- Move beyond communicating about proceedings;
- Conduct outreach and communicate with victims and affected communications.

4.1.7. Formalizing, Structuring and Governing the Relationship

Cooperative relationships between CSAs and organs of the court (and prosecutors, where they are independent of the court) are likely to be formed in particular during the pre-investigation and investigation phases of the criminal process. The nature and extent of the cooperative relationship between courts and CSAs, together with a clear understanding of the respective roles of each party within the relationship, should be clearly articulated and formalized. In this respect, CSAs are best in a position to provide positive and effective cooperative support for a judicial investigation or prosecution when they know precisely what is needed of them, what their anticipated roles are within the relationship and how their

cooperation fits within the broader picture of the investigation and prosecution. Where they have not already done so, clear descriptions which delimit the roles of both the court and CSAs within the cooperative relationship are needed.

Example 1:
ICC Guidelines Governing the Relations between the Court and Intermediaries

The Guidelines elaborate upon the Court's strategy in selecting intermediaries, formalizing intermediary relationships, supporting intermediary duties, and providing security and protection. Bearing in mind that such guidelines must be sufficiently context-sensitive, they provide a framework with common standards and procedures in areas where it is possible to standardize the Court's relationship with intermediaries. Within this framework, the organs or units of the Court or Counsel could then adopt specialized policies in accordance with any specific legal obligations under the Rome Statute. While the Guidelines may not be fully applicable in particular contexts, they can nonetheless be seen as a basis for consultation and reference in the development of guidelines for other mechanisms.

Example 2:
Institutionalization of Cooperation between Authorities and CSAs Through Networks and Protocols

In BiH, *Medica Zenica* initiated several networks to formalize cooperation between the relevant national authorities and CSAs on cantonal and municipal level. With the purpose of providing support to victims and witnesses in war crimes and sexual violence cases, and integrating Medica Zenica into the psychosocial and health system within the community, a number of protocols and agreements on cooperation and service delivery were signed through these networks. For instance, the "*Protocol on mutual cooperation of relevant ministries, institutions and NGOs in providing support to victims/witnesses in war crimes, sexual violence and other crimes through established network in Central Bosnia Canton*" connects all relevant cantonal ministries, cantonal and municipal courts, lawyers' organization, associations of detainees and CSAs that come in contact with such victims and witnesses at different stages of the criminal process.

Recommendation 1:
Developing Guidelines to Govern the Cooperative Relationship

Guidelines should ideally be developed collaboratively by all stakeholders, nationally and internationally. Such a collaborative approach would allow the resulting policy to better reflect the realities of cooperation from the perspective of both courts and CSAs, and would also serve to bolster CSA knowledge of and support for the policy, whilst potentially provide initial points of contact in the development of effective cooperative relationships. Guidelines should therefore serve not only as a guide to interactions for court staff, but for CSAs also. To this end, guidelines should recognize CSAs as stakeholders in the judicial process with a clear interest in the achievement of justice in the affected country, rather than, for example, simply as assets of the court that require management. By the same token, recognition of CSAs as partners that are working with, as opposed to for the court, will better enable the establishment and development of effective cooperative relationships.

In concluding agreements with CSAs, courts should be conscious of the need to ensure that CSAs do not effectively become substitutes for court staff or operate core functions of the court. In relation to the development of cooperative arrangements, guidelines should indicate, at a minimum, the need for cooperative agreements to include:

- a clear delineation of the form and nature of cooperation that is envisaged;
- clarity as to the specific roles and responsibilities of court and CSAs respectively;
- an indication of the limits of the arrangement;

- a provision indicating the need for CSAs to uphold confidentiality and to avoid acting in a way that would prejudice the conduct of a fair trial;
- the need for two-way information sharing;
- the need for CSAs cooperating with the court to benefit from protection measures in certain situations;
- clarity on what "witness protection" covers in different contexts to ensure victims and witnesses are provided with adequate information and expectations can be managed prior to the commencement of the trial;
- a provision to the effect that CSAs will seek to adhere to court policy and procedures, which will likely entail supporting the provision of information, guidelines and capacity building of local CSAs on the part of the court;
- provisions relating to the potential liability of the court in the event of death, loss or injury;
- provisions concerning any agreements between the court and CSAs relating to payment for services or the reimbursement of identified costs and expenses; and
- provisions to govern termination of the agreement.

Where the court chooses to amend or end its relationship with a CSA, it should give particular consideration to the organization's ongoing relationships within the affected victim community and the impact that such a decision may have upon them. Consideration should also be given to the monitoring of guidelines to ensure their consistent application, as well as to enable the identification of areas for improvement.

Guidance on the form and content of guidelines can also be found in Section 3 of the ICC's Guidelines on Intermediaries.

Example 3:
Section 5 of the ICC Guidelines on Intermediaries

Section 5 of the Guidelines specifies the nature and extent of the Court's duty to prevent or manage security risks to intermediaries. The Guidelines provide details on risk assessment, prevention and limitation, confidentiality measures, and protective measures and security arrangements. Information relevant for the intermediaries is outlined below.

Risk assessment: The need for and level of protection will be determined on a case-by-case basis as a result of an individual risk assessment (IRA). Intermediaries have to be informed about the risks and implications of their relationship with the Court. If no adequate protection tools are available to treat an identified risk, the Court should not engage with an intermediary. Monitoring of risks should continue throughout the entire period of the relationship.

Prevention and limitation of risks: The Court must always employ best practices when interacting with intermediaries, as well as provide the intermediary with the contact details of the focal point to contact immediately when they feel at risk. Intermediaries equally shall be required to employ best practices. The Court shall make available to intermediaries a document on Good Practices on Risk Prevention and Management, which includes a set of consolidated guidelines that will facilitate intermediaries conducting their activities in a manner that limits their own risk and avoids or limits a transfer of the risk to persons with whom they come into contact. The Court may also provide training on these good practices. Risks to intermediaries may also be prevented or minimized by preventing or limiting public knowledge of intermediaries' cooperation with the Court and/or publication of their identities. Intermediaries shall be asked to sign a document to acknowledge that they are aware of this fact.

Confidentiality measures: For those intermediaries who have a formal contractual arrangement with the Court, the duties shall be stipulated in the contract. All other intermediaries shall, where possible, be asked to sign a confidentiality agreement, setting out in detail what kind of information is confidential, the restrictions of its use and the manner in which confidential information is to be stored and safeguarded.

Protective measures and security arrangements: In the event that the performance of the functions of an intermediary creates security risks to the intermediary, the Court must take measures to manage those risks. Protective measures shall not be prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial. In addition, protective measures shall be proportional to an identified risk and the least intrusive option with regard to the lives of intermediaries and/or of other persons. In discharging its duty of protection, the Court may cooperate with a trustworthy security network of national and/or international actors.

Example 4:
Chapter 8 of the
International Protocol

This chapter in the International Protocol addresses safety and security concerns of practitioners, who should be aware of the risks which may arise for themselves as well as for victims and witnesses and their families and communities. The chapter outlines security and safety key points, potential risks and ways in which such risks (to both practitioners and information) can be mitigated.

Recommendation 2: Security Concerns for CSAs and Staff

Courts should evaluate and, where necessary, improve their security protocols for the protection of CSAs and their staff. Courts may, for example, consider identifying appropriate security mechanisms prior to the initiation of an investigation, and identify targets for protection at an early stage to better enable CSAs to come forward and assist the court. Any initial evaluation of who to cooperate with should also encompass an assessment of the security risks that cooperation might engender for the CSA concerned. Where courts do not feel able to adequately meet any identified security risk, cooperation should not be sought. All cooperative interaction should proceed on the assumption of confidentiality between the court and the CSA. Consideration should also be given to the potential protection functions that may be provided on a context-specific case by International Governmental Organizations such as the various UN mechanisms and agencies.

4.1.8. Building Capacity and Training

Where resources and capacity permit, judicial mechanisms should consider conducting multisectoral training for stakeholders in conflict and post-conflict situations to bring actors together from the judicial and CSA contexts as a means of forming and developing cooperative relationships. Such approaches may enable not only the forging of personal relationships of trust and respect, but also foster a better understanding of the respective roles, responsibilities, concerns and limitations of each party to enhance the potential for effective cooperation.

CSAs can also provide training to national investigators in their areas of expertise, such as interviewing skills when working with vulnerable survivors of sexual crimes, psycho-social support, and sensitivities when dealing with child survivors of sexual violence.

Example 1:
Training of Local
Medical Staff in
Effective Forensic
Documentation
of Sexual Violence

In the DRC and Kenya, Physicians for Human Rights (PHR) has been involved with health professionals as first responders for sexual violence responders since 2011 as part of their efforts to support legal redress for survivors of mass rape in Central and East Africa within the [Program on Sexual Violence in Conflict Zones](#). With a view to improving the capacity for national investigations and prosecutions, PHR trained local doctors, nurses and psycho-social trauma and recovery counsellors in the effective forensic documentation of court-admissible evidence of sexual violence. This included documentation of health consequences, assurance of appropriate treatment and support of legal assistance and advocacy.

Example 2:
Lexicon of Medical
Terms as a Resource
for Judges

PHR worked with local partners to develop a lexicon/glossary of medical terms to accompany forensic medical evidence. This pocket lexicon defines key medical and technical terms to assist legal and law enforcement professionals as they read, interpret and submit forensic medical evidence as probative evidence in court. For use in the DRC, the lexicon also provided translations of the terms found in the booklet into French, Swahili, and Lingala for wider circulation and use by multi-lingual professionals.

Example 3:
Capacity-Building
of Police, Lawyers
and Human Rights
Defenders in Evidence
Gathering

TRIAL International has been involved in the capacity-building of 50 members of local police specialized in combating violence against women, lawyers and human rights defenders in the DRC within its project "[Fighting Against Impunity for Crimes of Sexual Violence](#)". As a result of the training given, 20 documentation missions have been conducted to gather evidence on sexual violence cases committed in the East of the DRC. The training included sessions on the implementation of the International Protocol.

Example 4:
Chapter 11 and Annex 7
of the International
Protocol

These sections provide useful information on interviewing victims and witnesses of CRSV to ensure that any information obtained is not improperly influenced or modified by the manner in which the interview is conducted. As interviews are the most common method of collecting information and evidence in relation to CRSV, these must be conducted properly, sensitively and professionally, in order to potentially empower victims and witnesses. Utilizing International Protocol standards to perform interviews in a consistent and well-informed fashion can further result in increased reliability and credibility of statements, and improve prospects of cooperation between CSAs and judicial mechanisms in the context of evidence admissibility.

Training can also be provided by CSAs to judges and investigators on issues such as the background and context of a conflict, cultural norms, attitudes and practices, local euphemisms for sex or sexual violence and gender sensitivity. Additionally, they may also be in a position to train court staff to better interpret, understand and use forensic evidence in their judgments.

Example 5:
Training of Court Officials
on Gender Sensitivity and
Sexual Violence Issues

ECCC – With the support of an internal court official who facilitated access to other ECCC staff, a CSA organized training for court staff on gender and sexual and gender-based violence. The training was supplemented by public conferences and advocacy hearings for court officials, such as the [International Gender Justice Conference](#) in 2010.

National Association of Women Judges in Uganda – The [NAWJ](#) has been engaged in building the capacity of judicial officers to use international instruments when deciding cases involving discrimination or violence against women. Judicial officers who have attended the training have observed that it has improved their ability to detect gender bias and deliver gender sensitive judgments.

WIGJ – The organization has focused on ensuring that the ICC advances gender justice through its operations. It therefore conducted a series of gender training for ICC judges, prosecutors and staff and published handbooks which contextualize violence within a gendered perspective, discuss the ramifications of sexual violence and provide relevant legal background in regard to gendered violence. The [handbook](#) assists in understanding the aspects of sex role stereotyping; developing effective and gender competent investigations; ensuring an atmosphere of trust and consistency; understanding the diverse elements that influence the psychosocial settings of these crimes; enhances the understanding of the physical and psychological consequences of sexual violence on victims and witnesses; ensures that the appropriate support and protection is given and trains on the expansion on the current characterization of sexual violence in international humanitarian law.

4.1.9. An Informed Approach to Evidence Collection

The collection of evidence, including the form in which evidence is obtained, can present specific challenges for courts in the successful prosecution of CRSV. However, where collection is based on an informed approach, this can be beneficial in supporting the court's investigative activities. In this respect, it is important for all those responsible for the collection of evidence, whether this be court staff or CSAs, to be adequately trained to handle victims and witnesses and to document crimes.

Example 1:
Resources for
Documentation and
Analysis of CRSV

Free and open-source tools for documentation of sexual violence – The Case Matrix Network (CMN) developed free and open-source [Investigation Documentation System \(I-DOC\)](#) that supports national actors, including CSAs, to catalogue, verify, summarize, link and analyze facts and evidence in relation to categories such as victims, suspects, witnesses, incidents and context in sexual violence crimes.

International Means of Proof Charts: Sexual and Gender-Based Violence Crimes – The CMN [International Means of Proof Charts: Sexual and Gender-Based Violence Crimes](#) that are freely available in English, Spanish and French. The Charts provide examples of concrete factual findings used to establish each of the legal requirements of sexual violence crimes in leading international sexual violence cases and, as such, can inform evidence collection strategies by CSAs.

An example of the practical use of the above sources has been exemplified in Annex I of the International Protocol, which provides an example of an Evidence Workbook for Documentation of Crimes of Sexual Violence, as a tool to assist investigators in filling evidentiary gaps.

Example 2:
Documentation
by CSAs as
Complementary
to the Work of
Investigators

The [Humanitarian Law Documentation Project](#) in Kosovo, a project of the International Crisis Group, in 1999 sought to identify and record evidence of violations of international humanitarian law with a view to providing basic background information about witnesses, crimes perpetrated and patterns of violations to the ICTY. The project accumulated 4,700 records and documents from victims and witnesses, which were later handed to prosecutors. Documents included answers to a list of questions rather than signed statements from victims and witnesses, and the data was recorded on an electronic database. Notably, the systematized data produced by the project was in a form that could be used by the tribunal. Moreover, the approach of the project in compiling basic data rather than complete witness statements complemented rather than duplicated the work of ICTY investigators.

Example 3:
Collection and
Archiving of Original
Documents in
Collaboration with
Academic Institutions

The Documentation Centre of Cambodia [collected and archived information](#) from many original documents from the Khmer Rouge era prior to the establishment of the ECCC. These were documented in biographic, bibliographic, photographic and geographic databases that are authorized copies of the [Cambodian Genocide Databases](#) of the Yale University's Cambodian Genocide Program. This initiative saved time for ECCC officials in finding evidence themselves and preserved historical documents for use by prosecutors during trials.

Example 4:
Informed Approach
to the Chain of
Custody of Evidence

Chapter 12 of the International Protocol sets out principles on chain of custody, which refers to the process of keeping a chronological paper trail documenting the collection, custody and transfer of evidence in order to demonstrate its integrity from the time it is collected to the time it is presented before a judicial mechanism.

Chapter 13 provides further guidance on how to safely store and handle evidence from the very beginning of documentation. Practitioners who decide to collect such information have an obligation to maintain the security and confidentiality of the evidence and store it in a manner which protects the safety of victims and witnesses, their families/communities and those collecting the information.

Sample medical certificates for use by medical practitioners engaging with victims of sexual violence are also available in Annex 10 of the International Protocol.

Recommendation: Creation of Guidelines on CSA Evidence Collection

The abovementioned examples may serve as a strong basis for discussions of the development of basic standards of evidence collection by CSAs. However, the documentation of evidence is always context-specific and thus would benefit from guidelines between CSAs and judicial mechanisms, reflecting the evidentiary needs and standards of the particular legal justice process and mechanism in question. These guidelines should be developed as part of a collaborative effort between CSAs and judicial mechanisms to allow opportunity for the concerns of both parties to be shared, challenges identified and to ensure that the agreement is understood and can be implemented by all those involved. Accompanied training by court staff and/or CSAs would assist in this process. Moreover, establishing guidelines as early as possible (preferably pre-investigation) can harmonize approaches to evidence collection from the start, ensure that vital information is not mishandled, and reduce the need to re-collect evidence where it was not previously collected in accordance to required standards.

At the broadest level, guidelines should:

- identify who is responsible for collecting particular types of evidence as some may be collected by a wide variety of actors, while other evidence (e.g. forensic medical evidence) may only be collected by specific sectors;
- indicate the standards used for handling and storing physical evidence, including the clear documentation of the chain of custody;
- indicate the level of detail required for a criminal prosecution of CRSV as an international crime;
- be responsive to the elements of crimes contained in the Rome Statute;
- include the need to collect adequate personal information about the victim or witness;
- include the need to identify, where possible, the perpetrator(s) of the crime(s) and/or responsible group, such as the uniform worn, language or dialect;
- include unambiguous indicators of the prosecutors' disclosure obligations;
- include provisions concerning the need to examine and share exonerating, as well as incriminating, evidence with the defense; and
- include information pertaining to issues of confidentiality.

4.2 Investigation Stage

4.2.1. Responsiveness by Courts to CSA Communication and Activism

Court prosecutors should respond to requests from CSAs for the investigation of offences, including in instances where a decision has been reached not to investigate a situation or case. Communications from the prosecutor's office or investigative authorities (where separate) should be transparent and, where it has been decided not to launch an investigation, give detailed reasons for this decision. The involvement and engagement of CSAs at this early stage – in petitioning the court and in sending evidence of abuses – can improve the investigative context for prosecutors or criminal investigators when they act upon the communications received, as well as help in the early formation of collaborative relationships between court officers and CSAs. Responsiveness can also encourage CSAs to cooperate with the court when they are aware that their requests will be considered, and can utilize any feedback received in their subsequent work.

Example: Communications to the ICC

In the aftermath of the violence of the October 2002 coup attempt in the Central African Republic, two local human rights organizations – the Ligue Centrafricain pour la Defence des Droits de l'Homme (LCDH) and the Observatoire Centrafricain des Droits de l'Homme (OCDH), both members of the Federation International des Ligue des Droits de l'Homme (FIDH) – began to collect victims' statements. The organizations were convinced that the violence fell within the remit of the ICC, and a subsequent FIDH mission agreed with their conclusion. Their evidence was sent to the ICC's OTP, and was supplemented in the light of further violence in March 2003, but met with no response at the time. The organizations were then able to secure a referral to the OTP by the State itself, and after an unsuccessful domestic prosecution, the ICC prosecutor announced that an investigation would be launched. ICC investigators were able to conduct their investigation within a relatively receptive context because their presence in the country had largely been instigated by NGO activism and had some level of public support. For further information, see [Gladius](#).

4.2.2. Management of Expectations and Dialogue on Case Selection and Prioritization

Where CSAs, victims/witnesses and the general public have a clear understanding of a court's mandate and work processes, their expectations are likely to be better managed and more realistic. Similarly, any outreach activities by CSAs about the court and its practices will be better informed and more accurate. Accordingly, courts should provide CSAs with information that clearly explains their competencies and limitations. This should include issues such as case selection and prioritization or explaining why, in some instances, specific cases may not have succeeded to trial.

Example 1: Management of Expectations as Part of Courts' Outreach Strategy

Expectation management is one of the most important elements of the ICC [Strategic Plan for Outreach of the International Criminal Court](#). Situation-specific strategies include clearly stating the mandate of the Court and its limitations with regard to jurisdiction, as well as managing expectations of the affected communities in relation to the number and type of perpetrators in the region that might be brought to justice and the number and type of reparations that might be awarded for the crimes committed.

Example 2: External Consultations for the ICC Policy Paper on Case Selection and Prioritization

In 2016, the ICC released their [Policy Paper on Case Selection and Prioritization](#) to formally clarify criteria used by the OTP to select and prioritize cases after a decision has been made to open an investigation into a situation. Prior to its release, the draft Policy Paper has been published on the ICC's website for external consultation. A number of CSAs published their comments, including [HRW](#) and the [CMN](#).

4.2.3. Collaboration with CSAs in Outreach Activities

Victims and witnesses should be informed about the investigation procedure and their potential role within it, including any possible risks that engagement with the investigation might have for them and how those risks could be managed. They should be told when an indictment has been issued, and should be kept informed of the process of the case as it progresses to and through the court.

While the conduct of outreach activities is primarily the responsibility of the court, collaboration with CSAs can help in informing victims, potential witnesses and the affected community about the role of investigators, prosecutors and the court, as well as their procedures and limitations. Discussion between courts and CSAs about specific outreach issues and needs will help to ensure that messages are accurate, relevant and targeted to the appropriate community, enhance understanding of and support for the court and, potentially, enable more witnesses and victims to approach the court. Local CSAs in particular, with specialist knowledge of the affected community, may be best placed to assist courts in the identification of appropriate outreach strategies and approaches. Furthermore, given the often-lengthy international trials and the remote location of some courts, CSAs can play an important role in helping keep witnesses and affected communities informed and engaged during this process.

Example 1:
Collaboration with CSAs
in Outreach Activities

ECCC – The International Center for Transitional Justice (ICTJ), working in collaboration with the Public Affairs Section of the ECCC, organized a three-day expert workshop to create a space for discussing and exchanging ideas to assist in the development of the ECCC’s outreach programs. The workshop was attended by ECCC staff from the Public Affairs Section, the VSS, the OTP, the Office of Co-Investigating Judges, the Defence Support Section, the Office of the Administration and the Witness and Expert Support Unit. Representatives of three local CSAs – the Centre for Justice and Reconciliation, Khmer Institute for Democracy and Transcultural Psycho-social Organisation – attended, and were joined by ICTJ staff and three international experts with experience of working in other transitional contexts. For further information, see [ICTJ report](#).

Special Court for Sierra Leone – The Court established a means of liaising with CSAs through the creation of the “Special Court Interaction Forum”. The Forum entailed monthly meetings between court officers and CSAs during which Court representatives would answer questions and receive feedback.

A number of CSAs also organized themselves to form the Special Court Working Group, working out of Freetown, to coordinate the activities of other CSAs around the country in the absence of traditional infrastructure that had been destroyed in the conflict. Mobilization by CSAs in this way paved the way for other transitional justice developments, as CSAs collaborated on outreach, monitoring and reparations activities. Organizations also promoted and enabled the inclusion of victims within the processes.

War Crimes Chamber, BiH – The Court developed a “Court Support Network” to disseminate information and receive feedback from CSAs. A CSA from each of the five regions of BiH was selected for the group to serve as the focal point for the dissemination of information locally to other organizations, based upon specific community interests. The five organizations were given specific training and had access to the court. They also operated phone lines to give information to victims and witnesses about testifying and to provide support.

Example 2:
Outreach Activities in the
Affected Communities

In order to extend international criminal justice directly to affected victims and witnesses, the ICC, as part of its outreach activities, organized live broadcast of the proceedings in *Ongwen* case in several villages and the capital of Uganda. Furthermore, prior to the confirmation of charges hearing, the ICC launched eight series of radio talk shows presented in local languages by members of the various communities, including lawyers, human rights activists and media practitioners, to discuss the ICC mandate and judicial aspects of its work in the *Ongwen* and *Kony* cases. These activities were completed with meetings with concerned populations in town hall sessions, information campaigns organized with partners of civil society and community-based organizations at universities, schools and legal associations.

Example 3:
Ongoing Collaboration
in Outreach Activities

During the conduct of the Lubanga trial at the ICC, the Court’s Public Information and Outreach Unit [engaged](#) in a wide range of outreach activities aimed at a range of CSAs, including video screenings for child soldier groups, human rights defenders and the media, multiple press briefings, radio interviews and round table forums. Topics included a basic introduction to the Court, discussions concerning the format of the Court, the role of witnesses and their level of involvement in the trial, as well as updates of proceedings and information on particular issues as they arose within the case. Outreach from the Court also included accelerated training for CSAs on how to convey information to the grassroots, as well as how to design programs with direct relevance and interest to the community.

4.2.4. Collaborative Approach to Assessment of Witness Protection Needs

While courts remain responsible for the protection of victims and witnesses engaging with them, CSAs that are familiar with particular victims and/or national and community contexts may be able to assist the court in the assessment of witness protection needs during the investigation stage and in advance of a trial. It is essential that victims and witnesses fully appreciate any risks that engagement involves, together with the extent and limitations of any protection that the court is offering in order to make informed decisions. CSAs may also have a role in relaying and discussing that information with affected communities and individuals, as well as closely observe that the courts respect their own witness protection rules.

Example 1:
Measures to Ensure
the Safety and
Confidentiality
of Victims and
Witnesses

HRW, with some suggestions taken from the work of [Amnesty International](#) and the [Council for the Development of Social Science Research in Africa](#), outlined a range of measures that NGOs can take to ensure safety and confidentiality of victims and witnesses. Such measures include for instance:

- regularly carry out risk assessments
- join national and international human rights networks
- build channels with security officers
- ensure security of the office premises and control the flow of visitors
- recruit people you can trust

Example 2:
Joint Implementation
of a Victim and
Witness Protection
Program by the
UN and a Network
of Local CSAs

The United Nations Joint Human Rights Office (UNJHRO) together with the national protection officers based in each province and protection network consisting of NGOs, in particular in South Kivu (VIWINE network), provided for the adoption of victim and witness protection measures (that range from simple security advice and monitoring to temporary or definitive relocation within the country). The NGOs of this network relay information to the UNJHRO and often intervene when it is time to implement the protection measures decided by the protection officer (housing, travel, telephone service, etc.). As an example, at the beginning of 2011, during the Fizi-Baraka trial held in a mobile court, which led to the conviction of Lieutenant-Colonel Kibibi Mutware in particular for crimes against humanity, both the UNJHRO and NGOs mobilized in a coordination effort to provide protection for victims and witnesses involved in these proceedings.

4.2.5. Provision of Psychosocial Counseling and Support

CSAs may be able to provide support for investigations into CRSV through the provision of psychosocial counseling and support for victims before they meet with investigators and prosecutors. In addition, where CSAs are local and know the victim or witness well, they may be able to accompany victims when they meet with investigators, essentially providing a bridge between the affected community and the court, as well as the moral and social support that victims may need to enable them to come forward to engage with court officials. CSA support in this respect will also benefit from prior dialogue with court officials, so that they are in a position to provide victims and witnesses with clarifications on what to expect when meeting with investigators and prosecutors.

Example:
Therapeutic Services
to Victims Prior to
Meeting Investigators

Within the context of investigations into the rape of women and girls by military personnel in Minova, DRC, the Centre d’Assistance Medico-Psychosociale, a local organization in the DRC providing therapeutic services, provided two psychologists to counsel rape victims prior to their meeting with investigators from the State’s military court. More broadly, there are many CSAs providing therapeutic support for victims of sexual violence and other international crimes, often before any decision to launch an investigation has been announced. Some (but by no means all) are members of the umbrella organization, the International Rehabilitation Council for Torture Victims. A list of its members and their activities is available [here](#).

4.3 Trial Stage

4.3.1. Inform Witnesses about Court Procedures

Victims and witnesses who are to testify in court should be informed about the purpose and process of testifying, including what it will entail, the layout and composition of the court and any risks to them that testifying might give rise to. They should be offered emotional and practical support to enable them to testify, and be provided with help and support for any emotional difficulties or distress they might experience in the aftermath of testifying. Responsibility for witness familiarization and support rests primarily with the court⁹, but can be achieved through cooperation with CSAs.

Example: Provision of Psychological Support

While psychological support for individuals giving testimony before the ECCC is theoretically provided through the Witness and Experts Support Unit, the service is under-resourced. In practice, the Court provides psychological support via agreements with clinical NGOs, including the Transcultural Psychosocial Organization, who provide psychological support for participating victims before, during and after the trial. Support provided by this organization included on-site psychological support for Civil Parties and witnesses, phone counselling, psychological support during outreach activities, training, radio programs, testimonial therapy and a full range of psychological services.

4.3.2. Provide Advice and Assistance to Victims Seeking to Participate in Proceedings

Where the mandate of the court permits, victims may seek to engage with the court as a participating victim or civil party. CSAs can help victims through the provision of legal advice and assistance in the completion of application forms.

Example: Assistance in Filling out Application Forms

At the ECCC, the Victims Support Section – the last unit of the Court to become fully operative – is responsible for enabling victims to participate in Court proceedings, including helping victims to complete applications for civil party status. Because the Unit was not immediately operational, however, and due to both limited resources and a heightened interest amongst victims in participating in proceedings, ADHOC, The Cambodian Human Rights and Development Association (French acronym), has acted as intermediary for over 1,700 of the civil parties admitted in Case 002. The organization has widely publicized the possibility of applying to the Cambodian population, and has provided assistance to victims in the completion of application forms.

4.3.3. Submission of Amicus Curiae

Amicus curiae have been used by CSAs to influence trial proceedings and enhance the chances for the successful prosecution of sexual violence crimes. This intervention has in the past resulted in the amendment of indictments that did not, up to that point, contain sexual violence charges,¹⁰ to support the introduction and provision of witness support and protection measures,¹¹ and to counter claims that post-traumatic stress disorder suffered by a rape survivor rendered her testimony unreliable.¹²

⁹ See, for example, the responsibilities and practices of the ICC's Victims and Witnesses Unit in familiarising victims with the judicial setting, described in https://www.icc-cpi.int/CourtRecords/CR2007_01245.PDF [Note: the Court's position on witness proofing, also contained in the decision, has since been reversed].

¹⁰ International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998.

¹¹ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-T ICTY, Judgment, May 7, 1997.

¹² International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, December 10, 1998.

In some jurisdictions, expert reports are given more weight by judges than amicus curiae. However, courts should consider calling CSA members as experts on cases, for example, on issues such as the impact of the crimes on the victims and their communities, and the prevalence of CRSV in a given conflict, or other relevant areas to their work. Related to this, it is important to highlight that donors should consider funding projects for the drafting of amicus curiae and expert reports as a strategy to improve accountability for CRSV.

Example 1: Amicus Curiae

ICTR – A group of women's human rights legal scholars and NGOs submitted a joint **amicus brief** in the case of Akayesu in support of the Prosecutor's successful motion to amend the indictment to encompass rape and other forms of sexual violence. The Amici based their argument upon the testimony of sexual violence heard during the trial, together with evidence of rape collected widely by human rights organizations active within the area.

ICTY – In the Tadić case, two separate amicus briefs, submitted by academic Professor Christine Chinkin and a consortium of US-based human rights organizations respectively, **contributed to the decision-making process** of the Tribunal in the awarding or otherwise of protective measures for victims and witnesses of sexual violence crimes.

In the *Furundžija* case, a collective of legal scholars and human rights organization from Rwanda, Canada, Kenya and the US filed an amicus that was intended, in part, to inform the Court about the effects of PTSD on memory and the consequent reliability of witness testimony. Having considered the amicus brief, in conjunction with other evidence including witness testimony, the Tribunal **agreed** that the fact that a survivor of rape suffered from PTSD did not mean that her testimony could not be credible.

Extraordinary African Chambers – in the trial of *Hissan Habré* an **Amicus brief** was filed by the Sexual Violence Program of the Human Rights Center, University of California, Berkeley, School of Law, on behalf of a group of international experts in sexual and gender-based violence, seeking the requalification of charges to fully reflect the perpetration of sexual violence. The amicus itself was not formally admitted to proceedings, as amicus are not common in Senegalese courts, but its circulation raised awareness of the issues and enabled prosecuting lawyers to use the arguments contained within it to have the charges amended. For further information, see also **article** by the International Association of Prosecutors.

ECCC – a **brief** submitted by a group of academics addressed the issue of forced marriage as a crime against humanity. The applicants requested for the legal characterization of forced marriage as a crime against humanity in relation to the acts that occurred from 1975-1979 in Cambodia; and the evolution of forced marriage as a crime as well as the legal and factual distinction between arranged marriage in peace time and forced marriage under oppressive regimes or in conflict situations.

Example 2: Conditions for the Participation of NGOs as Amici Curiae in Proceedings

Rule 103 of the ICC Rules of Procedure and Evidence provides the legal basis for NGOs to act as Amici Curiae:

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defense shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defense. The Chamber shall determine what time limits shall apply to the filing of such observations.

In addition to a similar rule in the ICTY Rules of Procedure and Evidence (Rule 74), the ICTY has also set out the conditions for the admission of an amicus curiae, which also apply to NGOs. Namely, that they:

- a. Must be an actor that can guarantee objectivity and independence;
- b. Must intervene to uphold the general interest of the international community and not a particular interest;
- c. Must intervene on being granted leave by a judge or at his request by virtue of its technical expertise and with a view to solving a question.

4.3.4. Monitoring Trial Proceedings

CSAs can play a part in monitoring the proceedings of national and international justice mechanisms during the prosecution of CRSV as an international crime. CSAs can analyze and comment upon specific areas of practice, together with areas where further progress or action is needed with a view to informing and enhancing national and international accountability efforts. The provision of commentaries can also incorporate suggestions as to how situations might be improved, offer tangible solutions to specific problems, raise awareness of specific issues and provide courts with the opportunity to respond to areas of concern.

Example 1: International and National Trial Monitoring

The [International Justice Monitor](#) produces reports and regular updates of a number of significant international and national court proceedings against those charged with international crimes perpetrated on a mass scale.

Example 2: Evaluating a Specific Trial or Mechanism

Human Rights Watch conducted a detailed review of the success and shortcomings of Uganda's International Crimes Division, created under the auspices of its national courts in 2011 to try offences of war crimes, crimes against humanity and genocide, human trafficking, terrorism and piracy. Through an analysis of its case-law, structure and domestic provisions, the resulting [report](#) identifies specific challenges faced by the court, as well as clear support needs, including in relation to training in investigation techniques and forensic documentation.

Example 3: Monitoring How CRSV is Addressed in a Court

At the ECCC, a group of CSAs produced a [documentary film](#) to document the problem and scale of forced marriage and sexual violence under the Khmer regime, and to show how the issues were dealt with in proceedings before the Court. The film contains interviews from a wide range of actors, including experts and survivors, and includes both courtroom testimony and archival footage.

4.4 Post-Trial Stage

4.4.1. Inform Victims of Judgments, Decisions and their Consequences

Victims must be informed of the results of court proceedings, the consequences of any judgments or decisions and the options that are then available to them. This should be done by Prosecutors in conjunction with CSAs, as a vital aspect of Court outreach activities.

Example: Strategic Plan for Outreach of the ICC

Para 44: During the appeal and implementation phases, outreach activities will generally focus on publicizing judgments and reparations decisions and making information available regarding sentences and future detention in a format understandable to the communities involved. As is the case during the trial phase, additional efforts will be directed to providing victims with information regarding reparation.

4.4.2. Continuing Protection Needs

Victims' and witnesses' protection needs are unlikely to end with the conclusion of the trial. Courts must continue to provide these and to liaise with CSAs to identify those at risk, as well as appropriate protection strategies.

Example: Working with Residual Mechanisms

The [Witness and Victim Section \(WVS\)](#) at the Residual Special Court for Sierra Leone (RSCSL) regularly monitored witnesses in Sierra Leone and Liberia to assess the continuing issues confronting them. A final support and security assessment of each witness was carried out in 2013, and the complete records, including addresses and contact information, were made available to the RSCSL.

As the Court wound up its operations, increasing concerns both for security and support were brought forward by witnesses, who feared that the Court's completion would leave its witnesses unprotected. A critical function of the RSCSL is to continue to protect the Court's witnesses. All witnesses were individually informed of the arrangements that were put in place, including contacts of those who will continue to be responsible for their security and support. The WVS made very satisfactory arrangements for the transition of witness responsibilities to the WVS of the RSCSL, much to the satisfaction of the witnesses.

4.4.3. Coordination of Victims and Technical Support for Reparations Awards

In the aftermath of a trial, CSAs can coordinate victims for the pursuit of reparations, and provide help with the technical formulation of reparations awards. Cooperation here can be especially valuable to ensure that reparations are appropriate to the context and forms of abuse suffered and sensitive to victims' context and culture. The extent to which reparations are appropriate and responsive may affect victims' perceptions of the judicial process itself, as well as the views of the affected community on the competence and legitimacy of the court as an institution. Chapter 6 of the International Protocol provides additional information on the principles and forms of reparations.

Example 1: Joint Development of Reparations Projects

The VSS of the ECCC liaises with governmental and non-governmental actors in the development design, fund-raising for, and implementation of reparation programmes. In respect of Case 002/02, following consultations with CSAs, 23 reparations projects were identified.

Example 2: Submitting Observations on Reparations

In May 2015, the Redress Trust submitted [observations](#) to the International Criminal Court, pursuant to Article 75 of the Rome Statute, to inform and provide technical expertise for the award of reparations in the Katanga case. The observations addressed the issue of combined individual and collective reparations, as well as factors such as how to reach and identify victims. Chamber II's reparations award was the first to elaborate on and award both individual and collective reparations at the ICC, and provides a framework for future reparations awards. The observations provided by Redress influenced the Court in its determination to award individual reparations, alongside collective reparations.

4.4.4. Continuing Provision of Psychosocial and Medical Care

The psychological and medical needs of victims do not end when a trial ends. CSAs can play an ongoing role in the provision of psychological and medical care and support to affected victims, and in doing so, help to ensure that victims do not feel abandoned by the court once their engagement with it has ceased.

Example: Continued Provision of Psychological Support

The WVS of the RSCSL has responded to the individual needs of all the Court's witnesses, providing protection and relevant support, counseling, and other appropriate assistance. This included medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault, and crimes against children. The provision of psychological support continued in the post-trial phase, especially the programs for former child soldiers and victims of gender-based violence. These responsibilities were taken over by the RSCSL.

4.4.5. Monitoring the Implementation of Judicial Mechanisms

An important challenge faced by CSAs at the domestic level is how to ensure that judicial decisions are effectively implemented. For example, in some domestic jurisdictions, trial decisions may include reparations for victims, but the relevant authorities may not implement these measures. Judicial mechanisms and CSAs should agree to undertake strategic measures, in cooperation with each other, to ensure the effective implementation of decisions.

Example 1: Lobbying for the Implementation of Reparation Provisions

A Guatemalan CSA, Mujeres Transformando el Mundo (MTM), who acted as a complainant in the Sepur Zarco case, has continued to accompany victims, their families and communities following the end of the proceedings to ensure that the reparation provisions in the trial judgment are implemented as ordered by the Guatemala's High Risk Tribunal A. The MTM has [coordinated a number of inter-agency meetings](#) with the Attorney General's Office and different government departments to continue with the progress in the area. As a result of these meetings, a mobile health clinic was inaugurated in the community of Sepur Zarco as an interim measure until the construction of the permanent health center set out in the judgment is concluded. Furthermore, the Public Ministry carried out an inspection as a pre-condition to subsequent exhumations, which comply with the reparation measure that prescribes the continuation of investigation with the objective of determining the whereabouts of the missing persons in Sepur Zarco and neighboring communities. Furthermore, the relevant ministry is implementing a culture of complaints in Sepur Zarco and the surrounding communities, with a particular emphasis on sexual violations against women.

Example 2: Operational Engagement and Guidance for Reparation Awards

["Reparations for Conflict-Related Sexual Violence"](#) is a guidance note from the UN Secretary General which aims to provide policy and operational guidance in the area of reparations for victims of CRSV. The focus on sexual violence in this note is intended to recognize the need for approaches to reparation that are specifically tailored to the consequences, sensitivity and stigmas attached to these harms in societies globally, and to the specific needs of CRSV survivors.

Principles for operational engagement include, for example:

- Adequate reparation for victims of CRSV entails a combination of different forms of reparations;
- Individual and collective reparations should complement and reinforce each other;
- Reparations should strive to be transformative, including in design, implementation and impact;
- Meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured;
- Adequate procedural rules for proceedings involving sexual violence and reparations should be in place.

Recommendation

The award of reparations must be a carefully considered and coordinated effort which engages both CSAs and victims with the court. The creation of guidelines which stipulate conditions for the award of reparations is recommended to govern this relationship, with input from CSAs to address the difficulties and tensions that may arise within communities. This may include instances where some victims are participants in a trial and others are not, and where some victims receive reparations and others do not. In this respect, reparations could have a potentially negative impact on victims' lives in their communities. Accordingly, consultations with victims are particularly important in order to hear their views on the specific nature of reparation.

Annex A

According to the Rome Statute, the following acts of sexual violence will constitute war crimes when committed within the context of an international (Article 8(2)(b)) or internal (Article 8(2)(c)-(e)) armed conflict:

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.

Where those acts were committed as part of a widespread or systematic attack directed against any civilian population, where the accused had knowledge of the attack, Article 7 of the Rome Statute provides that they may constitute crimes against humanity. The inclusion of a reference to “other forms of sexual violence” in both cases as a residual clause would potentially facilitate the exercise of jurisdiction over other, un-enumerated offences of comparable gravity to those listed, such as sexual mutilation, forced conjugation, forced abortion and forced nudity.

Where committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, Article 6 of the Rome Statute provides that the following acts, which can entail or wholly comprise sexual components, may constitute genocide:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group; and
- Forcibly transferring children of the group to another group.

In addition, other international crimes included within the Rome Statute, whilst not on their face of a sexual nature, could incorporate a sexual component, including, for example, torture, outrages upon personal dignity, murder, conscripting or enlisting children, imprisonment, extermination and “other inhumane acts” (Articles 7–8).

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